REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

BY SIMON GREENLEAF,
COUNSELLOR AT LAW.

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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. NATHAN WESTON, JR. L.L. D. } *Justices.*
The Hon. ALBION K. PARRIS, }

Attorney General, ERASTUS FOOTE, ESQUIRE.

A TABLE

OF THE CASES REPORTED IN THIS VOLUME.

ERRATA.

Page 171, after *Stat.* 1786, *ch.* 10, add—" so far as it regards parish taxes."
Page 455, for 1821, *ch.* 282, read 1824, *ch.* 281. Page 456, for 282, read 281.
Vol. 5, page 149, lines 26 and 33, for *rests* read *vests.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF CUMBERLAND, MAY TERM, 1829.

WARREN & AL. *vs.* PIERCE.

It is presumed, where the lots of land in each range in a new township are numbered in a regular arithmetical series, that they were originally located contiguous to each other; and that the lot numbered two includes all the land lying between one and three in the same range; and so of the others.

Therefore, where the proprietors of *B.* ordered a location of their township into hundred-acre lots, it was *held* that the lot numbered eight included all the land between seven and nine, though it amounted to two hundred acres; and that the party claiming a different location, was bound to repel this presumption by positive proof.

THIS was an action of trespass *quare clausum fregit*, tried before *Weston J.* upon the general issue. The plaintiffs made title to the lot numbered eight in the first range east, in *Baldwin*. The range lines, and the actual location of the lots numbered seven and nine in that range, were proved or admitted. The proprietors of that township ordered all the lots to be laid out as nearly as practicable in hundred-acre lots; and they were usually called hundred-acre lots; though some of them did not exceed eighty acres, while others, as actually located, contained an hundred and twenty. The space between the lots numbered seven and nine, in the range in question, contained about two hundred acres; and the defendant contended

that it composed two lots, to one of which, if there were two, he made title under a grant from the proprietors. The original plan of the township was lost. The judge instructed the jury that the lot numbered eight must be presumed to extend from seven to nine, whatever quantity of land it might thus include; and that if the defendant would restrict it, the burden of proof was on him to show that by the original survey and location it did not extend so far. And a verdict was taken for the plaintiffs, subject to the opinion of the Court upon the correctness of those instructions.

Longfellow and *Greenleaf*, for the defendant, argued that as it appeared that the proprietors ordered that the township should be surveyed and laid out into hundred-acre lots; and the evidence was that it was surveyed and laid out into lots; the presumption is that the survey and location were made, in conformity with the order, into lots of that size; and that if the plaintiffs would insist on the contrary, the burden of proof was on them to show a different location. *Williams v. The East India Co.* 3 *East* 192.

N. Emery, *Shepley* and *Deblois* for the plaintiffs.

The opinion of the Court, the Chief Justice not sitting in the cause, was delivered at the following *June* term in *Kennebec*, by

Weston J. It is the well known practice of proprietors of townships in this State, to have them surveyed and laid out in ranges and lots, causing both to be numbered in regular sequence. They then sell by the number of the lot and the range, without a more particular description. And the purchaser is entitled to his lot according to its actual location, as made by the survey, if that can be ascertained; if not, it is to be located from the plan by actual admeasurement.

The plaintiffs are the owners of number eight, in the first range east in *Baldwin*. The plan of the town is lost. There is no question about the range lines, between which number eight lies. The plaintiffs show where numbers seven and nine are; and these lots are located beyond controversy. The judge instructed the jury that number eight must be presumed to extend from seven to nine; and that the burden of proof was upon the party, interested to show

a different location, to do so by satisfactory evidence. He would have been justified in using a stronger language; and in stating that eight did and must extend from seven to nine, unless a different original location could be shown. The burden of proof is doubtless upon the plaintiffs to make out their case; but when they show the range lines between which their lot is bounded, and the side lines of the lots next below and next above theirs in number, they have located their lot, and made out their case; if it be not successfully controverted by opposing testimony.

The proprietors voted, it seems, to lay out their town in one hundred-acre lots. But it is of no consequence what they proposed or intended to do; the question is, what have they done, by their surveyors or other agents duly authorised. Their intention, as manifested by their vote, was very inaccurately executed; some of the lots exceeding the quantity, which is not unusual, from the liberal admeasurement formerly made; and some falling short of the number of acres proposed, which has less frequently happened. It is conceded that eight ought to adjoin seven, because the surveyor must have begun at one and progressed onwards; but it is urged that it would not conclusively follow that it would extend to nine; especially in the present instance, where the plaintiffs claim two hundred acres, instead of one hundred, to which, it is insisted, his lot should be restricted; and that it ought the rather to be presumed that the surveyor dropped or omitted a lot in his numbering. But it must be considered that there is precisely the same reason for presuming that nine adjoins eight, as that eight adjoins seven. The line therefore adjoining seven is no better established than that which adjoins nine. If the defendant could have shown original corners, or a line dividing the space between seven and nine, the case would have been differently presented. But the burden of proof was upon him to do this; and as he failed to do it, eight must be located as it stands numerically, adjoining seven on one side, and nine on the other. Selling, as the proprietors do, by the number of the lot and of the range, the range and lot lines are referred to as monuments, and when found, will govern and control courses, distances and quantities.

Judgment on the verdict.

CAMPBELL *vs.* PROCTER

Where a tenant at will assented to an extent upon the land as his property, pointing it out to the creditor, assisting the surveyor, and not giving notice that the land belonged to another; this was held to be a determination of his tenancy at will.

In such a case, the landlord may have trespass against the judgment creditor, for his entry on the land and treading down the grass.

Whether a writ of trespass for treading down the grass, brought by the owner of land in the possession of a tenant at will, can be amended by alleging a usurpation of the fee;—*quære.*

THIS was an action of trespass *quare clausum fregit*, brought by *Elizabeth Campbell*, who made title to a farm, including the *locus in quo*, under a deed from *William Campbell*, her father. The defendant was a judgment creditor of the father; and derived his title under the extent of an execution upon the land as the property of the father, subsequent to his deed to the plaintiff, which the defendant impeached as fraudulent and void. The only act of trespass proved was the entry by the defendant, with the deputy sheriff and appraisers, to set off the land. And it appeared that the father, ever since his deed to the plaintiff, and up to the time of the extent, had occupied the land under the plaintiff, as her tenant at will; and that at the time of the extent he was present, and pointed out the place where he wished the land to be set off, saying it would be better for *him*, and for the defendant; and that he assisted in preparing the stakes to mark the limits of the parcel set off.

It was insisted by the counsel for the defendant that the trespass, being merely the treading down of the grass, was an injury not to the plaintiff, but to her tenant at will, who alone was entitled to the remedy. Whereupon the plaintiff moved to amend her writ by charging the defendant with usurping the fee; and this amendment, though resisted, was allowed by the Chief Justice, before whom the cause was tried.

The jury were instructed that if the tenancy at will was determined before the entry by the defendant, the action was maintainable;

and that, if the father consented to the extent of the execution on the *locus in quo*, in preference to any other part of the farm, it was a waiver of his rights as tenant at will, as to that parcel, and so far a determination of the tenancy. And they returned a verdict for the plaintiff, which was taken subject to the opinion of the Court upon the points raised at the trial, and the instructions of the Judge.

N. Emery and *Greenleaf*, for the defendant, maintained that the amendment essentially changed the character of the suit, by conveying to the plaintiff a right of action she had not before; and that therefore it was inadmissible. *Little v. Palister*, 3 *Greenl.* 6. 6. *Dane's Abr.* 265. 267. *Doug.* 63.

And as to the tenancy at will, they argued that it was not determined by the tenant's consent to the levy, because that consent was in no wise necessary to give validity to the act. Though his own title, if he had any, was thereby divested, yet this required no act of his own. It was by operation of law, *in invitum;* and could not affect his tenancy, which was forfeited by nothing short of a deed, or other voluntary invasion of the rights of his lessor. Here the tenant chose no appraiser, and took no necessary part in the proceedings; but merely indicated, in case he must be deprived of a part of the land, which, of two evils, would afflict him the least.—Without his consent, it was a trespass on him; with his consent, it was no trespass on his landlord.

Daveis and *Deblois*, for the plaintiff.

Weston J. delivered the opinion of the Court.

The principal question presented in this case is, whether the tenancy at will in *William Campbell* was determined at the time of the alleged trespass. In the relation of landlord and tenant, fidelity is required on the part of the tenant. The authorities, cited for the plaintiff, maintain the position that any act of desertion, or which is inconsistent with an estate at will, done by the tenant, will determine the estate. The tenant, in the case before us, who was the judgment debtor, pointed out the land, which he held at will, to be levied on as his property, and otherwise assisted at the levy. In-

stead of notifying the officer and the judgment creditor, that it was the property of another, and that he held it only at will, as his duty required; by this act he claimed the land as his own, and thus disclaimed his tenure. This was an unequivocal desertion of his duty as tenant, and an act clearly inconsistent with an estate at will. We are all of opinion that the tenancy at will was thereby determined.

This view of the case removes the objection to the amendment admitted by the judge; who presided at the trial.

Judgment on the verdict.

POTTER, Judge, &c. *vs.* WEBB & ALS.

A feme sole, being one of two joint administrators, gave a mortgage to her sureties, conditioned to save them harmless from the official bond given by her and her colleague to the Judge of Probate; and afterwards took husband.—It was *held* that this condition did not necessarily extend to any unfaithfulness but her own;—but that if it might apply to the acts of both, it included only their joint acts, and not those of her colleague, done after her own authority had ceased by the intermarriage.

At the trial of an issue impeaching a decree of the Judge of Probate as obtained by fraud and collusion, the general character of the parties accused of the fraud is not examinable.

Whether interest can be computed beyond the penalty of a bond given for official good conduct, *quære.*

Whether interest can be computed on a judgment, where *scire facias* is brought to revive it, or to have farther execution, *quære.*

This was a second *scire facias* to have further execution of a judgment of this Court rendered at *May* term, 1814, for 10,000 dollars, being the penalty of a bond given by *Susanna Webb* and *Joshua Webb* as principals, and *Archelaus Lewis* and *John Gordon* as sureties, for the due administration of the estate of *Jonathan Webb.*

After the former pleadings in this case were adjudged bad, see 5. *Greenl.* 330, and a repleader awarded on motion, the defendants having oyer of the record, pleaded—*first*, the settlement of various accounts at the Probate office, both by the two administrators jointly,

and by each separately, and various decrees of distribution of assets to the widow and heirs, by which it appeared that assets, to a much larger amount than the penalty of the bond, had been paid under decrees and orders of the Judge of Probate, and accounted for to him. *Secondly*, in bar of execution against the sureties, that the latter had paid, under some of the same decrees and for debts allowed in the same accounts, setting them forth, the sum of $10,266, 73. A *third* and *fourth* plea, shewing the same facts, were pleaded by the sureties only. It appeared from the record that *Susanna Webb's* office of administratrix was terminated by her marriage to *Nathaniel Patridge*, her second husband, between *April* 10, 1816, the time of the settlement of her last account, and *April* 28, 1819, when the last allowance was decreed of her share as widow.

The plaintiff, to each of these pleas, replied in the same manner; setting forth divers conveyances of real estate, partly in fee and partly in mortgage, from the administrators to their sureties; and a valuable estate in mortgage from *Joshua* to *Susanna Webb*, conditioned to save her harmless from the bond, he having most of the assets in his hands; and a further indenture between *Susanna Webb* and *Josiah Pierce*, by which it appeared that the latter had taken conveyances of all the property assigned by *Joshua* to her, and of all which he and she had assigned to the sureties; in consideration whereof he covenanted, among other things, to save her and the sureties harmless against all their liabilities under the administration bond, &c.

To each of these replications the defendants, protesting that they never had possession of the lands mortgaged to them, and were not indemnified thereby, demurred in law; because, 1st, the replication was a departure from the writ;—2d, it neither traversed nor avoided the bar;—3d, it was double, argumentative and informal;—4th, it put in issue facts which were immaterial, and irrelevant to the matter of the action.

The defendants, in a *fifth* plea, alleged that the decree of distribution passed *April* 28, 1819, in the Probate Court, of which execution was sought in the present suit, and by which 1750 dollars were ordered to be paid to the widow, and 500 dollars to each of the heirs, was

procured by fraud and collusion between *Patridge* and *Joshua Webb*; and in a *sixth* plea the same decree was impeached for fraud between *Joshua Webb* and "the other heirs at law of said *Jonathan*." These pleas were traversed, and issues joined thereon to the country.

At the trial of these last issues, before the Chief Justice, the plaintiff's counsel offered in evidence a deed of mortgage given *July* 29, 1812, by *Susanna Webb* to *Lewis* and *Gordon*, conditioned to save them harmless from the bond given by them for the faithful performance, by *Susanna* and *Joshua Webb*, of the trust of administrators, &c. This was rejected as irrelevant to either of the issues. The plaintiff's counsel also asked one of the witnesses of the defendants "whether it was the character of *Patridge* to deal in fraud?" which being objected to, the question was overruled. After the introduction of other testimony, the jury were instructed that the decree was not impeachable except on the ground of fraud and collusion, to establish which the burden was on the defendants. And they found both issues for the defendants. The plaintiff thereupon took exceptions to the opinion of the Chief Justice excluding the deed and the testimony sought from the witness; and also moved the Court to set aside the verdict, as being manifestly against the weight of evidence.

Longfellow and *Greenleaf*, for the defendants, upon the questions presented by the demurrers, argued that as the pleadings disclosed compulsory payments beyond the penalty of the bond, their liability was determined. No interest is chargeable on a bond for good conduct, the penalty being merely an absolute stipulation, of the nature of liquidated damages. The cases in which interest is computed beyond the penalty, are where the bond is conditioned to pay a sum of money, or to deliver a specific article. It is never given where the damages are uncertain, and do not depend on calculation; where there can be no tender of the sum actually due. Thus, it is not computed against bail; *Koppel v. King*, 7 *D. & E.* 370; *Stevens v. Cameron*, 8 *D. & E.* 28; *Mitchell v. Gibbons*, 1 *H. Bl.* 96.— Nor against sureties; *White v. Sealey*, *Doug.* 49; 5 *Dane's Abr.* 244. Nor, in chancery, in favor of bond creditors; *Gibson v. Egerton*, *Dickens* 409; *Kettleby v. Kettleby*, *ib.* 514. Nor on old bonds; *Tew v. E. of Winterton*, 3 *Bro. C. C.* 489; *Knight v.*

Maclean, *ib.* 496. Nor against the assets of a deceased debtor; 1 *Ball & Beatty*, 239. Nor in any case, except under special circumstances; *Clark v. Seton*, 6 *Ves.* 411. Nor is it given on any bond, till the penalty is forfeited by a breach of the condition. *Carter v. Carter*, 4 *Day* 30, 36.

But in a *scire facias*, interest is never computed at all; it being only a judicial writ, to execute a subsisting judgment, not to obtain a new one. *Obrian v. Ram*, 3 *Mod.* 187; *Knox v. Costellow*, 3 *Burr.* 1789; *Henriquez v. Dutch W. I. Co.* 2 *Stra.* 807; 2 *Ld. Raym.* 1532; *How v. Codman*, 4 *Greenl.* 79.

N. Emery and *Adams*, for the plaintiff, contended that however the point of interest may have been held in England, in this State the practice has been to compute it on the penalty of every bond, where it was necessary to make the indemnity of the obligee complete. And this rule best comports with the reason of the common law, and with natural justice and equity. *Harris v. Clap*, 1 *Mass.* 308; *Pitts v. Tilden*, 2 *Mass.* 118; *Warner v. Thurlo*, 15 *Mass.* 154; *Bigelow v. Bridge*, 8 *Mass.* 275; 2 *Fonbl. Eq.* 388, 441.

The rule applies in all its force, as well to a *scire facias* for further execution of a judgment, as to debt on the judgment, or the bond. The judgment, by our statutes, is merely constituted a security against farther breaches; and by force of these statutes, its common law attributes, as a judgment, are essentially changed. *Ancient Charters* 409, 608, 5 *Bin.* 56, 61. It draws interest like any other security; and this, too, against the sureties, who appear to have been fully indemnified, and therefore stand in the place of principals.

The pleas, they further contended, were bad, being several pleas by joint obligors. *Brazier v. Clark*, 5 *Pick.* 96; *Jackson v. Stetson*, 15 *Mass.* 54; *Tappan v. Bruen*, 5 *Mass.* 196. Nor do they allege that any part of the penalty, *eo nomine*, has been paid; nor that any part has been paid of the sum decreed to be paid to the heir, for whose benefit this suit has been brought. Yet the bond is, in its nature, a several stipulation with each creditor and each heir to the estate; and payment of the amount due to one is no discharge

of the debt of another. 5 *Dane's Abr.* 265, *sec.* 2. If there is not enough for all, they must abate *pro rata* their several demands. *Lovelass on Wills*, 234.

As to the exceptions taken, they argued that the plea of fraud was, in its effects, similar to an indictment for cheating; and hence, upon cross examination, the character of *Patridge* for integrity was in issue. Even the character of the deceased witness to a will is in issue, and examinable, upon a suggestion of fraud in its execution. 2 *Stark. Ev.* 241; 3 *Esp. Rep.* 284; *Commonwealth v. Hardy*, 2 *Mass.* 303; *M'Nally*, 248. Upon a principle somewhat similar the deed ought to have been admitted, as showing the motives and causes operating to restrain him from the commission of fraud. It was a specific appropriation of so much property to protect sureties; and whatever might be its strict legal construction, no common man would venture on a measure evidently putting so great an amount in jeopardy.

Mellen C. J. delivered the opinion of the Court at the ensuing *June* term in *Kennebec.*

There can be no possible doubt as to the correctness of the judge's decision in refusing to permit the witness to answer the question mentioned in the exceptions. In a criminal trial, a defendant may offer evidence of his good character and conduct, as having a tendency, in cases of presumptive proof, in some measure to repel the presumption; but in civil actions, the *allegata* must be proved or disproved by particular facts, and not by general reputation.

As to the other point, it is equally clear that evidence which is irrelevant is not admissible: or at least a judge, in the exercise of his legal judgment, may decide whether it is of that character; and if so, may exclude it; and the most proper course is to exclude it, so that a cause may not be burdened with useless facts. In the case before us, the *first* plea is, that the decree was procured by fraud and collusion between *Patridge* and *Joshua Webb*. And the *second* plea is, that it was procured by fraud and collusion between *Joshua Webb* and the *other heirs* of *Jonathan Webb*. By the verdict, *both* issues were found in favor of the defendants. The deed

which was offered, was rejected on the ground of irrelevancy; because it was considered as having no bearing on the questions in issue; as having no tendency to disprove or repel the allegations of fraud and collusion averred in the two pleas. The deed was executed in 1812, which, it is admitted, was several years before the grantor was married to *Patridge*. It shows a disposition, on her part, to protect *Lewis* and *Gordon*, the sureties, against the administration bond, as far as the life estate, expressed to be conveyed, would protect them; but her character and correctness of conduct were not in issue, nor even impeached or suspected; neither does the case present any proof that she was conusant of the intentions of her husband in procuring the decree, or any of the transactions in relation to the settlement of the account. It is contended that it is improbable that *Patridge* would aid in the accomplishment of any measure which would be prejudicial to his own interest; that to subject *Lewis* and *Gordon* to injury and loss, would give them a claim on the lands conveyed by said deed for a complete indemnity; and that his interest in those lands in her right, would be ultimately affected by any losses which the sureties might sustain by means of the success of the alleged fraudulent arrangement. Upon inspection of the condition of the mortgage deed, we are by no means satisfied that such a consequence would follow, upon a fair construction of it. The language is this, "If the said *Lewis* and *Gordon* shall be saved and kept harmless from a certain bond, given by said *Susannah* and *Joshua Webb*, and the said *Lewis* and *Gordon*, to the Hon. *Samuel Freeman*, Judge of Probate for said county, for the faithful performance, by said *Susannah* and *Joshua*, of the trust of administrators to the estate of *Jonathan Webb*, late of said Falmouth, in which bond said *Lewis* and *Gordon* are sureties, then this deed shall be void." All the language of the condition which follows the words "a certain bond," is merely descriptive of the bond, and does not necessarily import that the deed was intended as an indemnity against any unfaithfulness but her own, or such as she might stand accountable for, in her capacity, to the Judge of Probate, or liable for to the sureties, had no mortgage deed been given. But should the condition be construed as an indemnity against the official

unfaithfulness of both the administrators, we apprehend it must have been intended to relate to acts for which they would be liable jointly. Now it appears that for some years before the settlement of the account, and date of the decree thereon, the said *Susannah* had intermarried with *Patridge;* by which marriage she ceased to be administratrix; all her rights and liabilities were terminated as such; and the whole authority devolved on *Joshua Webb* to complete the administration on the estate, according to our laws. The sureties, therefore, could not be prejudiced by any of her acts after the intermarriage, and therefore could never be entitled to indemnity from her for such acts. But if, on the grounds suggested, the deed would have had any tendency to repel the defendants' evidence as to the fraud and collusion, and so should have been admitted, still there is no good reason for granting a new trial on that account; because, as before stated, both issues have been found for the defendants; and the second plea does not allege any fraud or collusion on the part of *Patridge*, but between *Joshua Webb* and the other heirs of the intestate; and with the facts thus stated, the deed of *Susannah Webb* had not the least connexion. The fraud and collusion alleged in either plea, and being found by the jury, are as fatal to the decree, in this cause, as a finding of the truth of both pleas. In the view we have taken of the exceptions, we are all of opinion that they must be overruled.

The motion for a new trial on the ground that the verdict is against evidence is not sustained. Being a question of fraud, it was pecularly proper for the final decision of the jury; and we see no reason for doubting the correctness of their conclusions from the evidence, a statement of which seems unimportant.

These two questions being thus disposed of and decided in favor of the defendants, it has become altogether unnecessary for us to decide upon, or even examine, the points which have been discussed in the argument upon the demurrers.

Judgment on the verdict.

The inhabitants of NORTH YARMOUTH *vs. The inhabitants of* CUMBERLAND.

An award of arbitrators at common law, is not examinable, except on the ground of corruption, gross partiality, or evident excess of power.

Awards of referees, appointed under the statute, or under a rule of court, are open to other objections, such as mistakes of law, or fact, and the like; for which the court to which the award is returned, will either reject or recommit it, at discretion.

Where, upon a division of the town of N. and the incorporation of a part into the new town of C., commissioners were appointed by the act of separation, with power to consider its terms and conditions, and award what sum of money one town should pay to the other in order to do justice between them; and an action of the case was given to recover the sum thus awarded;—it was *held* that this award was not examinable for excess of power, nor for mistake either of law or fact.

THIS action was *assumpsit*, brought by the town of *North Yarmouth*, to recover 1975 dollars, awarded by commissioners appointed by the special statute of 1821, *ch.* 78, *sec.* 9, dividing that town, and incorporating the part set off into a new town by the name of *Cumberland*. See 4 *Greenl.* 459. The commissioners were empowered "to consider the terms and conditions of the act," and award what sum of money one town should pay to the other, "in order to do justice between them."

At the trial of this cause, before the Chief Justice, the defendants offered to prove, by the testimony of the commissioners themselves, that they had exceeded their jurisdiction in acting on matters not referred to them by the statute; that is,—that as the basis of their decision they assumed the supposition that had the towns been separated ten years before, *North Yarmouth* would have paid 136 dollars per annum, on account of paupers, more than when united to *Cumberland;* to meet which would require a fund of about $2266; and that *Cumberland* ought to pay *North Yarmouth* for the support of bridges 800 dollars; making in all 3066 dollars: That they proceeded to allow *Cumberland* various sums for the balance of personal property belonging to the two towns; for the disadvantage

of the residence of part of its population on the islands; and for the anticipated inconvenient operation of the new statute respecting paupers; and awarded the difference between these sums, to *North Yarmouth*:—That before the making of this award the selectmen of the two towns had already divided the paupers then on expense, by *Cumberland* taking one third of them, estimated at the cost of their support; to make up which proportion they included not only all who had a settlement in *Cumberland*, but four others chargeable to *North Yarmouth*, including one having no settlement in the State; all of whom were still supported by *Cumberland*:—That the commissioners supposed these four as still charged upon and supported by *North Yarmouth*, with its other poor; and calculated what this town would be obliged to pay, more than *Cumberland*, during the ten succeeding years, upon the assumption that these four paupers would still be supported by *North Yarmouth*; and awarded against *Cumberland* accordingly:—That had they known these facts, it would have materially altered the result, in favor of *Cumberland*:—That the expense of supporting these four paupers was about 96 dollars per annum; which sum *Cumberland* will annually be obliged to pay, more than it would have paid, upon the principle assumed by the commissioners, had no error been committed:—And that all questions respecting the terms and conditions mentioned in the second, third, fourth and sixth sections of the act, had been amicably adjusted by the two towns, prior to the hearing before the commissioners.

This evidence the Chief Justice rejected; and a verdict was taken for the plaintiffs, subject to the opinion of the Court upon the admissibility of the testimony.

N. Emery and *Greenleaf*, for the defendants, argued in support of these positions.

1. The commissioners exceeded their jurisdiction. The statute had already fixed the proportions by which all the joint property should be divided, and the paupers supported by the two towns; and they had divided them accordingly. It left nothing uncertain, except the accuracy of this rule of division, to be determined by the line of territory, as it might be changed within ninety days after the passage of the act, by the election reserved to persons adjoining the

line, to belong to either town they might prefer. In reference to this contingency, the commissioners were to consider only the terms and conditions mentioned in the act, not including any speculations upon the future, either in roads, bridges or paupers; and to correct any inequality in the proportions assumed in the statute, by the award of a sum of money. And this excess of jurisdiction was clearly examinable, even in an award of referees;—*Morgan v. Mather*, 2 *Ves.* 15; *Sessions v. Fairfield*, 2 *Bay* 94; *Mulder v. Cravat*, *ib.* 370; *Towne v. Jaquith*, 6 *Mass.* 48; *Tudor v. Peck*, 4 *Mass.* 242; or of commissioners appointed by the legislature. *Jackson v. Ambler*, 14 *Johns.* 96.

2. If the agents of *Cumberland* assented to this assumption of power, it would not render their proceedings valid; the agents not having been appointed for that purpose. Consent cannot confer jurisdiction. *Carrol v. Richardson*, 9 *Mass.* 331.

3. But if there was no such excess of jurisdiction, yet there was a gross mistake in fact, in charging *Cumberland* with a sum of money equal to the perpetual support of four paupers, whom she was actually maintaining. And mistake of fact is good ground to set aside an award, even at law. *Dublin School v. Paul*, 1 *Bin.* 59; *Pringle v. McClenachan*, 1 *Dal.* 486; *Sumpter v. Murrell*, 2 *Bay* 450; 1 *Dane's Abr.* 280, *sec.* 5; *Jones v. Boston Mill-Corp.* 6 *Pick.* 154. Lord *Thurlow* admitted such to be the law; but said it ought to appear by the testimony of the arbitrators themselves; as it does here. *Anderson v. Darcy*, 18 *Ves.* 447; *Caldw.* 490; *Davis v. Canal Comp.* 4 *Bin.* 296. Or, if this be a mixed error, both of law and fact, still either is sufficient to vacate the award. *Kent v. Elstob* 3 *East* 18; 2 *Com. Dig. Chancery*, 2 *K.* 2, 5; 1 *Vin. Abr. Arbitrement I. a.* 39; *Cornforth v. Geer*, 2 *Vern.* 705; *Caldw.* 64, 66; *Williams v. Craig*, 1 *Dal.* 315.

4. But the commissioners were not referees, because not appointed by the parties, but by the legislature, before the defendants had a being. Nor is their report to be taken as part of the act. For nothing can be so taken which has not gone through the forms of legislation. The legislature, by giving a remedy by action of the case upon the award, instead of directing a warrant of distress, has

plainly indicated its intention that the defendants should be admitted to any equitable and proper defence against the award.

Longfellow and *Deblois* for the plaintiffs.

MELLEN C. J. delivered the opinion of the Court at the ensuing *June* term in *Penobscot.*

The rejection of the evidence offered by the counsel for the defendants to prove that all questions respecting the terms and conditions mentioned in the second, third, fourth and sixth sections of the act incorporating the town of *Cumberland*, had been amicably arranged and adjusted to the mutual satisfaction of said towns, before the hearing was had before the committee, (as they are termed in the act,) seems scarcely to have been alluded to in the argument, or considered as of any importance. It can furnish no ground for disturbing the verdict. The admission of it could have had no bearing on the cause, the decision of which depends upon the construction of the *ninth* section and the proceedings which have been had under it. The proof offered as to the above mentioned arrangement was irrelevant ; for if the terms and conditions contained in the specified sections have not been complied with, the parties are bound to comply with them ; and legal principles will readily furnish proper remedies, if any delinquencies exist. The main, and in fact the only question in the case, demanding our attention, is whether the residue of the evidence offered was properly rejected. The award of the committee, on which the present action is founded, is alleged to be essentially wrong ; predicated on mistaken principles and erroneous views ; and that in forming it they have far exceeded their jurisdiction. The excluded proof was to support these objections. At the same time it is fairly and frankly acknowledged by the counsel, that the committee are not chargeable with fraud, partiality or misconduct, in any part of their proceedings. The interesting inquiry then is, whether the award is impeachable on the grounds and principles which have been stated ?

Submissions to referees and arbitrators are of several kinds, and in some respects they are subject to different laws and regulations,

in many stages of the proceedings. Under our statute, parties may submit a controversy by agreement, signed and acknowledged before a justice of the peace, and the report of the referees is to be returned to the next Court of Common Pleas, for acceptance. When, also, a cause is pending in that court, or in this, the parties may refer it; in which case the report is to be returned to the court in which the reference was entered, for acceptance. In both those cases the court are often called upon either to reject or re-commit the report, for reasons alleged. In what particular cases they ought to exercise this power, is frequently a litigated question. Newly discovered evidence may be a good reason for a re-commitment. So, a mistake as to notice of the time or place of hearing; and in many instances mistakes, in calculation or some other way, especially when made known to the court by the referees themselves, would be good reasons why a court should not accept a report. As to cases of fraud or partiality on the part of referees, it is very clear that, on proof of it to the satisfaction of the court, the report would at once be rejected. In those cases where the acceptance of the report is opposed on the ground of excess of jurisdiction, the court will so far examine into the merits of the case as to ascertain whether such is the fact; and if so found to be, the court will reject or recommit the report. In all the beforementioned instances, the proper course seems to be plain. But when the objection to the acceptance of a report is, that the referees have not decided the cause on proper principles, or on legal evidence, or according to law, nor done justice between the parties; courts have often pursued different courses, and sanctioned different rules of proceeding. In 1 *Burr.* 277, Lord *Mansfield* says that awards are not to be scanned with critical nicety, as they are made by judges of the parties' own choosing; they are to be construed liberally and favorably, so that they may take their effect, rather than be defeated. It is no objection to an award that it is against law. *Kyd* 185, 237, 238; *Sheppard v. Watrous*, 3 *Caines* 167. The case of *Kleine v. Catara*, 2 *Gall.* 61, was one in which the parties, under a rule of court, submitted the action and all demands to certain referees, whose report was attempted to be impeached as against law, and for some other reasons. Mr. Justice

Story, in giving his opinion, says, the clear result from all the authorities is, that the judgment of the referees is conclusive upon all matters of *fact*; and he expresses a strong opinion that it is equally conclusive upon all matters of law; and that "under a general submission, therefore, the arbitrators have rightfully a power to decide on the law and the fact; and an error in either respect ought not to be the subject of complaint by either party; for it is their own choice to be concluded by the judgment of the arbitrators." See also *Chase v. Wetmore*, 13 *East* 358; 1 *Vesey Jr.* 369; *Kyd* 341, and *Parsons v. Hall, ex'r.* 3 *Greenl.* 60. Many, if not most, of the principles above stated are applicable to those cases where the report is by law to be accepted by the court, and judgment thereon is to be rendered, before it becomes conclusive as to the rights of the parties. It is doubtful whether the courts of Massachusetts or of this State have ever extended the doctrine as to the conclusiveness of awards and reports, so far as it is laid down in *Kleine v. Catara*; at least in practice; and it may be a subject worthy of consideration whether it ought to be extended so far, especially in those cases where the report is made by referees and presented for acceptance to the court to which by law it is returnable. On these points, however, we need not give any opinion, and we do not mean to express any on this occasion. There is no question that in case of a submission of all demands, if a particular demand was not laid before the arbitrators, nor considered and acted upon by them, an action may be sustained upon it afterwards; and should the submission be relied on by way of defence, the plaintiff, by a special replication, may avoid the plea. *Webster v. Lee*, 5 *Mass.* 334; *Hodges v. Hodges*, 9 *Mass.* 320; *Ravee v. Farmer* 4 *D. & E.* 146; *Bixby v. Whitney*, 5 *Greenl.* 192. And so also in case of such submission, if one of the parties exhibits a claim for allowance, and the arbitrators refuse to receive or consider it, such refusal is a good objection at law to the award, and may be shewn by way of impeachment of it. *Randall v. Randall*, 7 *East* 81. Submissions of causes to arbitrators, either by parol or in writing, are of a character different from those references which we have been considering. In these cases the parties, either by parol or by bond, bind themselves to abide by the

award when made and published; and when so made and published, if it is a good and valid award, it needs no judicial sanctions, but is in full force, and an action lies on the bond, or the award, to compel performance of it. Such are the usual submissions to arbitrators at common law, and such the mode of enforcing the award, where the submission is not made a rule of court before the trial, or by order of *nisi prius* after it had commenced; and by the statute of 9 and 10 of *Wm.* 3, *ch.* 15, *sec.* 1, persons having controversies may enjoy the same privilege before any action is commenced; and thereupon, on proper proof by affidavits, a rule of court is made that the parties shall submit to and be finally concluded by the award of the arbitrators. This statute, in its provisions, in some measure resembles ours respecting references before justices; except that the award is not enforced by judgment and execution, but by process of attachment against the delinquent, if found necessary. In *Morgan v. Mather*, 2 *Ves.* 15, Lord *Loughborough* lays it down as clear that corruption, misbehavior, or excess of power, are the only grounds of setting aside awards. In *Newland v. Douglas*, 2 *Johns.* 62, it was decided that proof of a mistake by arbitrators was not admissible in a court of law; it could be corrected in a court of Chancery only; and in *Barlow v. Todd*, 3 *Johns.* 363, the court say, "Arbitrators are judges chosen by the parties themselves; and their awards are not examinable in a court of law, unless the condition is to be made a rule of court; and then only for corruption, or gross partiality." As to these rules, the practice in New York is believed to be similar to the practice in England. According to the last decision, as we have no such practice in this State, an award of arbitrators is not examinable, except on the ground of corruption, or gross partiality. The cases cited by the counsel for the defendants to show that an award is void in whole or in part for excess of power, cannot, and seem not to be contested; and many of the others are cases of reference under rules of court, in virtue of which, reports are set aside on motion, or summarily enforced. As before stated, such is not our practice. In *Long v. Stanton*, 9 *Johns.* 38, which was covenant on bond conditioned for performance of an award, the submission was general, including all demands in law and equity; parol

evidence was not admitted to limit the extent of the submission to certain facts. In *Wills v. Maccarmick*, 2 *Wils.* 148, it was decided that in an action of debt on an award, the corruption and partiality of the arbitrators could never constitute a defence at law; and in *Braddick v. Thompson*, 8 *East* 344, the same principle was distinctly recognized and confirmed; and the court declared that the only mode in which the defendant could avail himself of the objection to the award on the ground of corruption and partiality, was by applying to the equitable jurisdiction of the court for the purpose of setting aside the award. The case of *Jackson v. Ambler*, 14 *Johns.* 96, has some strong features resembling those in the case before us. By consent of parties interested, certain persons were appointed by the legislature to settle the boundaries of a large patent. The commissioners were not to submit their report to any tribunal for their sanction. They made their report; and one objection made to its validity, in that trial, was, that in settling the boundary line, they had proceeded contrary to law. *Spencer J.* in delivering the opinion of the court says, "It is a novel objection that an award is against law, when it decides upon a complicated question of boundary, and when that very question was the principal matter submitted."—Again he says, "In deciding the questions raised, we ought to give a fair and liberal interpretation to the award of the commissioners; we can take no notice of the original merits of the case; these the parties have seen fit to submit to the commissioners. When an arbitrament takes place by the mere act of the parties, it cannot be made an objection to the award that it is against law,—much less can we do it when, to the act of the parties is superadded an act of the legislature." This objection to the award was overruled. See also *Cranston & al. ex'r v. Kenny*, 9 *Johns.* 212.

But without further consideration of the general principles of law applicable to awards and reports of referees, of a common and ordinary character, as reduced to practice in England, and in Massachusetts, and this State, and not meaning to place the decision of this cause upon those principles, it is perhaps of more importance to examine, with some particularity, the act of incorporation, and several

of its provisions. It is a matter of notoriety that when large towns are divided, numerous circumstances are to be taken into consideration, and numerous interests to be examined and secured; that divisions of towns are not made by the legislature, except on the application of some portion of the inhabitants; and that no measures are adopted for the purpose, till after due notice to the towns interested. As the legislature cannot be presumed to know any thing of those numerous interests which are to be affected by the division of one town into two, there must, from the nature of the thing, be a consultation among those who have such interests. Every town is supposed to have, and generally has, property to be apportioned and divided; and privileges and burdens to be regarded, and become the subjects of legislative provisions in an act dividing the town, and incorporating the new town. The object which the legislature has in view, in giving notice to a town when a petition is presented for its division, is that all interested may be heard, and that the act of incorporation, which is in contemplation, may contain all such provisions as are either agreed upon by those who are interested, or such as are acquiesced in, as the most conducive to the peace and convenience of the whole. All the sections of the act, excepting the ninth, seem to have been the effect of consultation, estimates and arrangements, while the subject was under the consideration of the legislature; and they are generally of the same character as those found in other acts dividing towns. Some are more and some are less particular. By those provisions, proportions of property on hand, and of monies assessed, or due, are settled, and a variety of arrangements are made, so far as known facts enabled the legislature, and those interested, to make them, fixing permanently the rights and liabilities of both towns respectively. All this is done without any aid from the ninth section; and that appears to have had a special and superadded office assigned to it. It is not pretended that it was designed, by any language used in this section, to repeal or disturb any of those provisions which are contained in the preceding sections. The inquiry then is, and it must be rationally answered, for what purpose was the ninth section enacted, and what powers were thereby given to the

committee therein appointed? Whatever those powers were, both towns have assented to their exercise, and are subject to the decisions of the committee as far, to say the least, as though they had been expressly chosen by them; for *North Yarmouth* is claiming a sum of money as due upon their award; and *Cumberland* has accepted the act of incorporation, and is now enjoying the benefits of all the special provisions, of a specific character, which the act contains. This ninth section differs from all the preceding, inasmuch as it does not profess to define, prescribe, establish or settle any thing; but presupposes that there were some things unsettled and undefined; some contested claims not then capable of definition and settlement by mere legislative enactment; and for these reasons this section, with its special provisions, was added, whereby a power was delegated to three persons by name, to do and complete something, connected with and growing out of the division of *North Yarmouth*, which had not been done and completed by any or all of the preceding eight sections. This seems evidently, and is not denied to have been, the object which the legislature had in view, in the appointment of the committee. Not being then able to ascertain and decide what sum, if any, either town ought to pay to the other, to do justice to the injured town, by compensating for losses it might sustain in consequence of the division, and therefore not being able to insert the same definitively in the act itself, the legislature constituted the committee, and gave them their powers, for the express purpose of ascertaining such sum, and reporting it to the indebted town. As to such sum, the ninth section may be fairly viewed, at least in an equitable consideration of the subject, as a species of provisional legislation; and the sum being ascertained in the mode prescribed, and by the consent of both parties, there seems no solid objection, why, in such equitable view, it should not be considered as binding as though it had been named in the act itself; though it is true that in legal contemplation, such a provisional arrangement cannot be considered in the light of legislation, in respect to the sum ascertained by the award in question.

The next question is, what power was given to the committee? The words are, "appointed and empowered to consider the terms

and conditions mentioned in this act, and to determine what sum of money, if any, shall be paid by either of said towns, to the other, in order to do justice between them." It is difficult to assign any good reason why the ninth section was added, if justice had been done by the provisions contained in the preceding sections; in fact, it seems to be an admission, by all concerned, that justice required some further investigation of facts, not embraced in the previous section, and an estimate of the consequences resulting from them, considered in an equitable point of view. It is contended by the counsel for the defendants, that the power of the committee ought to be considered as having relation merely to those changes which might take place in virtue of the provisions of the seventh section; that as by that section, the people adjoining the line of division as established by the first section, might, within the limited term of ninety days, by their election, essentially vary the ultimate line of division, and proportion of territory and property belonging to the towns respectively, justice would require that such changes, as to amount of territory and property, should be a fair basis on which the committee might and ought to award compensation, to be made by one town to the other. If their powers were intended to be thus restricted, why was not the language of the section confined to that subject? Instead of that, however, it is general, and has immediate relation to all the terms and conditions of the act. Why then should construction confine that language to one of those terms and conditions? The legislature proceeded on the ground that a division of property, rights and liabilities, in the proportion of one third to two thirds, was considered a fair one; yet it must have been in some degree conjectural; and might well be considered as a legitimate subject of revision by the committee, who were empowered to consider all the terms and conditions, so far as to enable them to do justice between the towns, by awarding the payment of a sum of money, by one to the other, though they had no authority to annul or change any of the provisions of the preceding sections; and it is not contended that they had such power. When an award is objected to, upon the principle of an excess of jurisdiction on the part of the arbitrators, such excess should manifestly appear from

facts, and not be a mere inference, drawn from language of doubtful construction, which has been employed in the grant of powers to the arbitrators; more especially in a case where the language is general, and the object in view is to grant powers wholly of an equitable character, to enable the arbitrators, under given circumstances, to do justice between the parties who have selected them as judges to accomplish so desirable an object. When such general language is used as that in the ninth section, it is not easy to perceive how the committee could exceed their authority, when acting with purity of heart, and honestly endeavouring to ascertain what was justice between the contending parties, and then in making an award for that sum, which they allowed, for the very purpose of doing that justice. The committee were clothed with the powers of a court of equity, under the limitations specified; they were constituted, according to the terms of the section in question, the exclusive and final judges, as to what amounted to justice between the two towns, as much as the commissioners in the case of *Jackson v. Ambler*, before mentioned, were as to settling the line of the patent. In the cases of *Harlow v. French*, 9 *Mass.* 192, and *Lambert & al. v. Carr & al.*, *ib.* 185, the decisions of the committee on Eastern lands were adjudged to be conclusive as to the rights and boundaries of the lands of settlers; such committee having acted under resolves of the legislature. In the three cases last named, the doings of the committees were not required to be accepted and sanctioned by any superior power; and in the section we are examining, the award of the committee is not made subject to the examination and approval of any other tribunal or body; on the contrary, the provision is that if the town against which the award should be made, should not, after notice, within six months "pay the monies awarded, according to the tenor of such award," an action might be had therefor by the town in whose favor the award should be made. Instead of an action of debt brought on an award, as in common cases, or on the bond of submission, to enforce payment of the award, the act, in the case before us, provides for the recovery of the amount of the award by an action on the case. Now, could the legislature have intended that the town having claim to the sum awarded might,

as the act expresses it, "have an action of the case therefor in any court proper to try the same," and yet not have a right to maintain the action and recover judgment for the sum awarded? Could they have intended that in such action the delinquent town should have a legal right to go into an examination of the original merits, and impeach the award on the ground of excess of authority in the committee, or for any of the other reasons disclosed in the report of the evidence? Could they, after having prescribed the mode of trial by a committee, for ascertaining the amount to be paid by one town to the other, to do justice between them, have intended that this very question should be re-examined and finally decided by a judicial court and jury, contrary to the terms of the law and the agreement of the parties? An affirmative reply to these questions would not only be disrespectful to the legislature, but an imputation upon them as men of understanding and fairness. In such circumstances as these, how can this court pronounce that the committee exceeded their powers? and if they have not, what right have the defendants to examine the principles on which they formed their decision? The objections to this course of proceeding are certainly stronger than in cases of common references or submissions. If there had been fraud and corruption in the committee, it might and would render the award a nullity; for even a judgment of court may be impeached and the effect of it destroyed, in this manner.

As to the mistake which the defendants offered to prove to have been made by the committee, in relation to the four paupers, who had, before the time of trial, been assigned to *Cumberland*, and were then supported by that town, and were yet estimated in the computation of the committee, as though they were then supported by *North Yarmouth;* and as to the alleged difference which this fact would have made in the result, in favor of *Cumberland*, had the committee then known those facts; we would observe, in addition to the general answer which we have given to the objections urged against the ruling of the judge, excluding all the offered evidence, that the alleged mistake was not the mistake of the committee, but of the agent of *Cumberland*, whose duty it was to have disclosed to the committee the facts as to the assignment and situation of the

paupers in question, as well as all other facts essential in the defence, or so deemed to be. The town of *Cumberland* must not complain of their own omission and avail themselves of it, by calling it an error of the committee. An award is not to be impeached for alleged errors which would not have existed, had proper information been given to the committee by those now making the objection. Surely it would be no impeachment of a verdict as erroneous, that the party against whom it is returned neglected to offer proof to the jury of partial payment of the sum demanded, when the verdict was correct on the evidence before them.

It is not denied, by the counsel for the defendants, that some hundreds of dollars of the sum awarded may possibly be due; yet on what principle can this be, if the committee's powers were not of the general and equitable kind which has been mentioned? Still the award is contested. The control which this court has over the award, extends no further than the enforcement of the collection of the sum awarded; we have no authority to pronounce it good in part and bad in part, for the reasons which have been fully given in the course of this opinion. Knowing, as we do, that this is a cause in which the parties have for several years felt a strong interest, and which has been a subject of critical and labored and persevering investigation, in different forms, both by the counsel and the court; we have been led to a more particular and extensive discussion of its merits than might otherwise have been deemed necessary; and we have all arrived satisfactorily to the conclusion, that the motion for a new trial cannot be sustained; and accordingly we order

Judgment on the verdict.

RICHARDSON *vs.* FIELD.

The party giving a usurious security is in all cases entitled, at some time, to avoid it by showing the usury, unless he has waived the right by his own act, or forfeited it by his own neglect.

Therefore, where a right in equity of redemption had been sold at a sheriff's sale, and become absolute in the purchaser by the expiration of a year, and the purchaser took an assignment of the mortgage, thus uniting the whole title in himself; and then brought a writ of entry against the mortgagor, who had always remained in possession; it was held that the latter might set up the defence of usury in the notes, to defeat the demandant's title.

THIS was a writ of entry, in which the demandant counted on his own seisin; and it was tried before the Chief Justice, upon the general issue, with a reservation of liberty to give special matter in evidence. The writ was sued out *Feb.* 5, 1827.

The demandant showed a mortgage deed of the premises, dated *March* 22, 1821, made by the tenant to one *Bracket*, to secure the payment of 2998 dollars and interest, viz. $107 26 in one year, and the residue in two years; and deduced title to himself under a sheriff's sale of the right in equity of redemption, *Sept.* 3, 1825. He also showed an assignment of the mortgage from *Bracket* to him, *Oct.* 16, 1825; and it appeared that on the same day the demandant had mortgaged the same premises to *Bracket*, to secure the payment of $1900 05.

The tenant proved that *Bracket*, at the time of making the mortgage, promised to pay his debts as they should become due; but that he had paid only about a thousand dollars. He also offered to prove that the notes secured by the mortgage were given without consideration, and were usurious; but the Chief Justice rejected the testimony; and a verdict was returned for the demandant, subject to the opinion of the court upon the admissibility of the evidence offered.

Longfellow and *Greenleaf* argued for the demandant, that the proof of usury was not open to the tenant, as the title was out of

him by the sale of his right in equity, and the lapse of a year. By *Stat.* 1821, *ch.* 60, *sec.* 18, the sheriff's deed is to have the same effect as if the conveyance had been made by the debtor himself. It is therefore a new contract, made between the tenant and the demandant, who is an innocent party, against whom usury cannot be set up. *Bearce v. Barstow,* 9 *Mass.* 48; 5 *Dane's Abr.* 356; *Stewart v. Eden;* 2 *Caines,* 150; *Ord on Usury,* 103; *b. c;* 1 *Campb.* 165; *note.*

But if this defence could at any time be set up against an innocent purchaser of the equity, it is not admissible after the title of the latter has become absolute by the lapse of time. *Flint v. Sheldon,* 13 *Mass.* 443. Such a doctrine would be open to gross abuses. If one must suffer, let it be him who has remained silent, while the purchaser was unwittingly acquiring a defective title. Upon this principle no injustice will be done, since the mortgagor can have all his equitable rights, upon a bill brought to redeem.

Fessenden and *Deblois* for the tenant.

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

By the report of the Judge it appears that the tenant offered to prove that the notes, mentioned in the mortgage deed from him to *Bracket,* were given without consideration, and also that they were given upon a usurious consideration. The evidence thus offered was excluded by the Judge who presided at the trial; and the question reserved for the consideration of the whole court is, whether it was properly excluded; if so, judgment is to be rendered on the verdict; otherwise a new trial is to be granted. The first objection, relating to the consideration of the note has been very prudently abandoned by the tenant's counsel, as one which could not, on any legal grounds, be sustained. We therefore pass it over, and proceed to the consideration of the question of usury.

In the first place we may here remark that the tenant has not, and does not pretend to have, any title to the demanded premises, other than his possession. The demandant, as the assignee of the mortgage, under the conveyance of *Bracket,* and as purchaser of

the tenant's equity of redemption, has completely united the two parts of the estate, and become absolute owner of the same, at least in respect to the tenant; because the mortgage by the demandant to *Bracket* is a fact which does not concern third persons; as to them, the demandant is considered the owner. The question then is, whether it is competent for the tenant to avail himself of the evidence of usury in the notes described in the mortgage deed, for the purpose of defeating the demandant's estate? It has been decided in *Boardman v. Roe & trustee*, 13 *Mass.* 104, and *Flint v. Sheldon*, *ib.* 443, that an absolute conveyance of land cannot be avoided by evidence of usury; the same not being "an assurance for the payment of money lent." And it has also been decided in *Green v. Kemp*, *ib.* 515, that "a mortgage made upon a usurious consideration is void only as against the mortgagor and those who lawfully claim the estate under him; and that a purchaser of the mere equity of redemption cannot avoid the mortgage by plea or proof of usury." The tenant, when this action was commenced, had no right to redeem the mortgage; the whole of the interest that remained in him, after making the mortgage, having been purchased by and conveyed to the demandant; in fact, the tenant, if he has no right to make this defence, is a mere stranger and a disseisor. Another principle is laid down by *Jackson J.* in delivering the opinion of the court in the above case of *Flint v. Sheldon*. It was a writ of entry, in which the demandant counted on his own seisin, and in support of his title read an absolute deed of the demanded premises from the tenant to himself. The tenant offered to prove by parol that the deed, though absolute in form, was made as collateral security for the payment of a sum of money loaned to him by the demandant on usurious interest. This proof was rejected. The court confirmed the opinion of the presiding judge; and *Jackson J.* after having observed upon the impropriety of allowing the admission of parol evidence to contradict the language and change the character of the deed, proceeds and says, "If, in the present case, the conveyance to the demandant had been in form a mortgage, he would, after a judgment, or an entry in pursuance of the statute, and a peaceable possession for three years, have held the land, without any possibility

of having his title impeached, upon an allegation of usury in the original conveyance." The reason is, the mortgagor by his own neglect, and lapse of time, would have permitted the conditional estate of the mortgagee to become absolute, and the two parts of the title, which had been separated by the mortgage, to be re-united in him or his assignee. Now it is true that, in the case at bar, there has been no judgment on the mortgage, nor entry, pursuant to the statute, for the breach of the condition, followed by peaceable possession for three years, which would have vested the absolute title in *Bracket* or the demandant, his assignee; yet those facts have taken place, which have produced the same result, because the demandant has, by purchase, united in himself the title of the mortgagee and the right of redemption which belonged to the tenant, the mortgagor; and he, by lapse of time, has lost the right of redeeming the equity of redemption. Thus the whole and absolute title, if not impeachable, is vested in the demandant. The question then is, whether the manner in which the title has become so acquired, has placed it beyond the possibility of impeachment, before the present action was commenced, as effectually as a foreclosure by judgment of court, or entry for the breach of condition, pursuant to the provisions of the statute, by the mortgagee or his assignee, and his continuance of a peaceable possession for three years, as stated by *Jackson, J.* in the case of *Flint v. Sheldon.* We apprehend there is in one respect an important distinction between the cases, which seems not to have been noticed by the judge presiding at the trial. In the case of a foreclosure by judgment, the mortgagor, or his legal representatives, must be deemed to have waived the opportunity of proving the usury, for instance, on trial, and thus defeating the mortgage, and the asserted title under it; and in case of an entry for breach of condition, and peaceable possession continued for three years, the mortgagor, or his representatives, must also be considered as having waived the privilege and opportunity of defeating the conveyance on that ground; because such peaceable entry and continued peaceable possession might easily have been prevented by the mortgagor; and the mortgagee or his assignee have been compelled to resort to his writ of entry to obtain possession. His

omission to object to and prevent such peaceable entry and possession, may fairly and properly be considered as an assent to such entry and possession, similar to that implied by a default in a suit on mortgage. In both cases the mortgagor, or those claiming under him, had an opportunity to contest the deed on any legal ground; but, for reasons satisfactory to themselves, did not deem it expedient to make use of it. In the case before us, the counsel for the tenant has urged that until the present action was commenced against him, he never had it in his power to shew the usury, and thereby avoid the mortgage; that as there was never any entry for condition broken, he could oppose none; that he could not prevent the assignment of the mortgage, nor the sale of the equity of redemption, without paying a sum of money, which, by law, he was not bound to pay; that usury is a legal defence, which he has, and always had a right to make, in the present action; and that he has not, by any act on his part, or any omission, consented to relinquish or waive it; and he now insists that he may be admitted to the enjoyment of his right in the present action. To this course of reasoning the counsel for the demandant has given several answers, and cited several authorities, which deserve examination. In *Bearce v. Barstow*, 9 *Mass.* 45, the defendant was decided not to have a right, on the ground of usury, to defeat the action, because of the change of securities. So also in *Chadbourn v. Watts*, 10 *Mass.* 121; and in several similar cases. In all of them, the voluntary act of the defendant had taken away the defence of usury. So in *Thatcher & al. Ex'rs. v Gammon*, 12 *Mass.* 268, a judgment had been rendered on default on a usurious note; and afterwards a mortgage was made to secure the payment of the amount of the judgment; and the court held it not impeachable on the ground of the usury in the note. The Chief Justice, in giving the opinion of the court, observed that the authorities cited by the defendant's counsel were principally cases of judgments, confessed upon warrants of attorney, which were totally different from those rendered in the ordinary course of law, between party and party; and that in the former cases there was no opportunity to plead. This is precisely what the tenant in the present action complains of. *Gammon* lost his defence against the note by his

default; that is, by his own consent. The principle in 5 *Dane's Abr.* 356; and 2 *Caines* 150; and 1 *Campb.* 165, have reference to the course of proceedings in courts of equity. The argument founded on the right of the tenant to have filed his bill in equity, and sought relief from the excess of interest, cannot be a satisfactory answer to a man who had a right to a trial at law; in which trial he would be relieved from the whole debt, on proving the usury; whereas in a court of equity he would only be relieved from the excess, by paying the whole debt and all lawful interest. The difference is too important to be disregarded. With respect to the language of the statute, as to the effect of the deed of an equity of redemption given by the officer, we apprehend it has reference merely to its operation as a conveyance; not to those principles of law which would be applicable, where, on a trial, the title might be impeached. In a word, the tenant, by his counsel, contends that he can prove that the notes, to secure the payment of which the mortgage was given, were given on a usurious consideration; that no one act has been done, or attempted to be done, by the mortgagee, or his assignee, or any one else, in relation to the mortgage, which he, the tenant, ever had an opportunity of resisting or contesting; that being in possession of the premises which are demanded in this suit, he claims the right to prove the usury, defeat the mortgage and all supposed title in the demandant arising from it, and thereby protect his own possession and title; that if he might have resorted to a bill in equity, it would not have afforded him what he now claims, a complete discharge from the mortgage, and consequent reinstatement in his perfect title to the premises.

After much consideration of this case, the arguments of the counsel, and the authorities and principles which have been examined and discussed, we have all of us come to the conclusion that the decision of the judge, who tried the cause, excluding the evidence which was offered to prove the alleged usury, is incorrect and cannot be sustained on any legal ground.

Verdict set aside and new trial granted.

PARKER *vs.* MERRILL & ALS.

The declarations of one copartner, made after the dissolution of the copartnership, concerning facts which transpired previous to that event, are admissible evidence for the plaintiff, in an action against all the members of the copartnership.

IN an action of *assumpsit* for monies advanced, and for the amount of certain bills accepted by the plaintiff for the defendants' benefit, it appeared that at the time of dealing, the defendants were copartners in trade, and that since the commencement of this action the copartnership had been dissolved. At the trial, the plaintiff offered in evidence a letter addressed to him by *Andrew Scott*, one of the late partners, since the dissolution of the copartnership; containing admissions of certain facts relative to the subjects in controversy. The defendants objected to this evidence, but the Chief Justice admitted it, and reserved the point for the consideration of the court, a verdict being returned for the plaintiff.

Longfellow, for the defendants, argued against the admission of the letter, from the great mischiefs resulting to the commercial world, if one partner, after the connexion was dissolved, should be permitted to create a right of action against the company. For such, he said, was the amount of the principle contended for. The distinction attempted to be made, between admitting facts, and making a new promise, is merely a difference of words. The effect of both is the same; since it is as easy to admit the existence of facts which give a right of action, as to make an express promise in words. The cases on this subject are somewhat contradictory, but the weight of authority is with the defendants. *Hackley v. Patrick*, 3 *Johns.* 536; *Walden v. Sherburne*, 15 *Johns.* 409; 3 *Kent's Com.* 25; *Bell v. Morrison*, 1 *Pet.* 351; *Walker & al. v. Duberry*, 1 *Marsh.* 189; *Wood v. Braddick*, 1 *Taunt.* 104. Here also, the contract having been made in New York, where the plaintiff resides, it is to be governed by the *lex loci contractus*.

Greenleaf, *Adams*, and *Cummings*, for the plaintiff.

PARRIS J. delivered the opinion of the Court.

During the continuance of a copartnership, each individual member, so far as it relates to the subject matter of the partnership concern, is the authorised agent of the rest, clothed with authority to dispose of the common property, to pledge the credit of the company, and to contract for his associates in affairs essential to the general object. The acts and admissions of each member, with reference to the common object of association, are considered in law as the acts and admissions of all. But upon the dissolution of the company, the power of the several members to bind the copartners in new contracts, is at an end. So far as it regards future contracts they stand in no other relation to each other than if the copartnership had never existed.

The very act of dissolution implies a discharge from all liabilities growing out of subsequent transactions, inasmuch as the parties have become distinct persons, and are no longer members of the association.

So it has been decided, that after the dissolution, one of the persons who composed the firm cannot put the partnership name on any negotiable security, even though it existed prior to the dissolution, and was for the purpose of liquidating the partnership debts, because it created a new liability. Indeed, the whole range of decisions both in the American and English books, upon this point, concur that whenever a new debt or a new cause of action is to be created after the expiration of the partnership, it can only be done by the individual act of each copartner.

This case is *assumpsit*, as charged in the general counts for money had and received, and lent and accommodated; and arose out of certain transactions between the parties in the acceptance of sundry drafts on the plaintiff, as an advance on, and on account of sales of cargoes consigned to him by the defendants. Now, if there be any ground of action, when, in the language of the decisions, was the debt created, and by what was it created;—when and from what did the contract arise? Was it by the acceptance of the defendants' drafts, or was it by the transmission of the letter offered in evidence?

If, as was unquestionably the case, the legal liability arose at the time of the acceptance or payment of the drafts, then the letter did not create any cause of action, nor is it evidence of any arising subsequent to the dissolution. The facts existing during the copartnership, to wit, the acceptance or payment of the drafts, form whatever foundation there may be for this suit; the consideration of the alleged promise, whether express or implied.

The letter is not offered as evidence of the acceptance of the defendants' drafts, nor as evidence of any new promise; neither does it purport to bind the late copartners in any new contract, for no contract is attempted to be created by it. It is a naked statement, by *Scott*, of facts which existed previous to the dissolution, and of which he, from his situation in the copartnership, may be presumed to have been more particularly acquainted than either of the other copartners. If then, the transactions on which this suit is brought took place with the copartnership, and during its continuance, as was proved by testimony other than *Scott's* letter, how is the liability of the partners, arising therefrom, affected by a dissolution?—So far as regards their relation to the creditor, they are equally bound after as before; each answerable to the creditor *in solido*; each answerable as well in his individual as in his partnership capacity. His private property is liable now, it was liable before; his person is liable now, it was so before; the partnership property is liable now as it was before. So far then, as it respects the debtor's liabilities to the creditor, they are in no wise changed by a termination of the general partnership. There is a community of interest in relation to all partnership transactions, which will continue so long as they remain unadjusted, and from the liabilities of which, neither partner can escape by dissolution. A community of interest or design, will frequently make the declaration of one the declaration of all. As in the case of co-trespassers, if they be proved to be such by competent evidence, the declaration of one, as to the circumstances of the trespass, will be evidence against all, who are proved to have been engaged in the common object. And wherein is the difference, in the application of the principle to cases of *tort* or contract? If it be first shewn, as it should be, that the defendants have a community of

interest in the subject matter to which the declaration relates, whether they be *tortfeasors* or co-defendants in *assumpsit*, why may not their several declarations, touching the common interest, be given in evidence against all. Of the weight of such testimony the jury will be the proper judges. If the admission proceed from an associate, who had been an active member of the company; if it be of a fact, with which, from the usual mode of transacting the company business, he would be likely to have a particular knowledge;—if, by such admission, he would himself be charged, and, being able to meet his proportion of the liability, there appear no circumstances of suspicion as to the purity of his motives, it might well have influence with a jury. We do not say that it should be considered as evidence against all the associates, of as high a character as against the individual by whom the admission is made; but that it may be safely received and weighed according to its just value. There may, indeed, be cases of fraud, in which the plaintiff may attempt to support a doubtful cause by false admissions of a worthless and dishonest co-defendant. Such cases, when they arise, may also be safely left to the discernment of a jury, who will take into consideration all the circumstances of the admission, the situation of the individual by whom it was made, and the motives by which he might have been influenced.

Such a course seems best to comport with the liberality of modern practice, in all doubtful cases to admit, especially as rejection is peremptory and absolute; to open wide the avenues of information to the jury, that this co-ordinate branch, which is particularly charged with finding the facts, may have the advantage of every circumstance conducive to a correct decision. But to let in the declarations or admissions of a co-defendant, it should be first clearly shown that he has a common interest with the other defendants in the event of the suit, and that the declarations are against, and not in relief of his individual interest. As in the case at bar, the admissibility of the letter as evidence depends very much upon the purposes for which it is offered, and the facts supposed to be proved by it.

If the point in controversy be, whether the original promise was binding upon the partnership, or upon *Scott* individually, and the letter be offered for the purpose of fixing the liability on the part-

nership, and consequently relieving him from a portion of a demand for which he might otherwise be holden; or if its tendency be to throw upon the partnership what might otherwise rest exclusively on him, or at all to diminish his liability, at the expense of the company, we should hesitate long before assenting to its admission. It would be violating the spirit of one of the plainest and soundest maxims of the law, that a party shall not make evidence for himself. If, on the other hand, the joint liability of the late copartners, whatever it might be, having been proved or admitted, the question in controversy be one in which the defendants, as former partners, are clearly interested, all being liable if either, liable as copartners if liable at all, and the letter be offered merely to show the extent of that liability, or the existence of a fact upon which it depended, we think it may be safely admitted, as coming from a party whose opposing interest precludes all inducement to fabricate. The decisions in the American courts have been contradictory upon this point. The cases of *Hackley v. Patrick & Hastie*, 3 *Johns.* 528, and *Walden v. Sherburne*, 15 *Johns.* 424, cited in the defence, are high authority, as are all the decisions of that learned court. But the principle decided in the former seems to go no farther than that the acknowledgement is not conclucive upon the copartners; for the court say, the plaintiff ought to have produced further evidence of the debt; the acknowledgement of *Hastie* alone was not sufficient to charge *Patrick*.

That, it will be found, was a case of a hypothetical admission, by one partner, of a large balance due from the partnership concern, more than three years subsequent to its dissolution; and the plaintiff relied solely upon this general conditional admission to support his action. Well might the court say, he ought to have produced further evidence, and that such an acknowledgement was not alone sufficient. The decision in *Walden v. Sherburne* is a mere recognition of that in *Hackley v. Patrick*.

In *Martin v. Root & Hunt*, 17 *Mass.* 227, the court say "*Hunt* and *Root* being joint contractors, the confession of one operates upon both; as in the case of the statute of limitations, a confession that payment has not been made; or in the case of joint drawers or en-

dorsers of promissory notes and bills of exchange, a confession of demand made or notice given. It is the confession of a party. The objection to *Hunt's* statement, that it is the confession of a partner after the copartnership, cannot prevail. For it is the confession of facts which took place before the dissolution; and it may be doubted whether the joint interest is dissolved until the note is paid." See also *Hunt v. Bridgham*, 2 *Pick.* 583; *White v. Hale*, 3 *Pick.* 291.

In *Geddes v. Simpson & Morrison*, 2 *Bay*, 533, the plaintiff's counsel produced a letter from *Simpson*, one of the copartners and defendants, acknowledging the receipt of an account current from the plaintiff, and, that the balance was justly due to the plaintiff as stated. To this evidence the other defendant, *Morrison*, took an exception, that the letter did not bind him, as it was written since the dissolution of the copartnership, and without his knowledge or approbation.— The court overruled the objection, inasmuch as this was no new contract or undertaking since the partnership was dissolved. It was not like a new contract, made since the dissolution, but only evidence of one made and fully due while the copartnership existed. See also, *Bulkley v. Landon*, 3 *Conn.* 79.

The decisions of the English courts bearing upon this question, since the case of *Bland v. Hasselrig*, 2 *Vent.* 151, have been uniform. In *Rex v. Hardwick*, 11 *East* 588, it is said by *Le Blanc, J.* and acquiesced in by the court, that when a suit is pending against a number of persons who have a common interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is evidence against him and all the others, parties with him to the suit. That such a person not being liable to be called upon to give evidence upon oath of the facts, as being a party to the suit, his declaration of it must be evidence for the opposite party. In *Wood v. Braddick*, 1 *Taunt.* 104, *C. J. Mansfield* said, the power of partners with respect to rights created pending the partnership, remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it that from the moment when it is dissolved his account of their joint contracts should cease to be evidence; and that those, who are to day as one person in interest, should tomorrow

become entirely distinct in interest with regard to past transactions, which occurred while they were so united? and *Heath, J.* said—"is it not a clear proposition, that when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future? With regard to things past, the partnership continues, and always must continue."

In *Van Reimsdyk v. Kane*, 1 *Gall.* 635, *Story J.* says, "in cases of partnership, the confession of one partner, in relation to a partnership concern, is in general admissible in an action against the other. It is admissible to take a case out of the statute of limitations, and to establish not merely the amount, but the existence of a joint demand *even when made after a dissolution of the partnership.*"

We are aware that in the recent case of *Bell v. Morrison*, in the Supreme Court of the United States, 1 *Peters*, 371, it has been decided, that, after the dissolution of a partnership, one partner cannot, by his sole act, revive against all the partners an action barred by the statute of limitations. The doctrine laid down in that case is this, that the acknowledgement is not to be deemed a mere continuation of the original promise, but a new contract, a new cause of action; and as no partner can, subsequent to the dissolution, create a new contract binding upon the others, he cannot remove the bar created by statute. The distinction between the principles involved in that case, and the one at bar, is obvious. In this there is no pretence of a new contract growing out of *Scott's* letter.

That was written since the commencement of the suit; consequently, the suit cannot be predicated upon any contract or cause of action created by it. The suit was commenced previous to the dissolution of the partnership, and, of course, whatever cause of action the plaintiff is now endeavoring to enforce against these defendants, accrued during its continuance.

Admitting the full force of the decision of *Bell v. Morrison*, it does not touch the case before us. But it is by no means certain what would have been the decision in that case, had it originated here. It is apparent, as the court say, that their reasoning has been principally influenced by the course of decisions on that subject in the courts of *Kentucky*, where the suit was originated, and that the

court, in conformity with its general practice, follows the local law, and administers the same justice which the State courts would administer between the same parties.

It is also objected by the defendant's counsel, that inasmuch as the plaintiff is an inhabitant of the State of *New York*, and the courts of that State do not admit the declarations of a partner, made subsequent to the dissolution, to be given in evidence against a former copartner, the same principle ought to be applied to the plaintiff, while pursuing his remedy in the courts of this State. It is a settled principle of law, that contracts are to be construed by the laws of the country where they are made and to be performed, and that the respective rights and duties of the parties are to be defended and enforced accordingly. But courts have never gone so far as to permit their forms of proceeding to be controlled by the laws or judicial decisions of another State. The construction of a contract, or its nature or validity may be thus affected; but the form of action, the mode of proof, and the course of judicial proceedings, must depend entirely on the laws of the State in whose courts the contract is attempted to be enforced. Upon a view of the whole case, we are all satisfied that the letter of *Scott* was properly admitted, and that there must be judgment on the verdict.

CROFTON, *Executor v.* ILSLEY.

Where judgment for costs was entered against an administrator respondent in an appeal from a decree of the Judge of Probate, without mention of his office, and debt was brought to recover the sum *de bonis propriis;* the court ordered the record to be amended, on terms, to stand as a judgment against the goods of the deceased in his hands.

Costs, reasonably incurred in a suit at law, are a proper charge for an administrator, against the estate in his hands.

THIS was an action of debt upon a judgment of this court for costs awarded to the plaintiff, on an appeal made by him from a decree of the Judge of Probate, who had refused probate of a will offered by

Crofton, the executor, purporting to be the will of *James Dunn*, on whose estate the defendant was administrator. See 4 *Greenl.* 134. After the final decree establishing the will, and thereby repealing the administration, the defendant settled his last account in the Probate office; in which he claimed no allowance for the costs awarded against him, they being left by statute in the discretion of the court, and he having had in fact no notice of the judgment. The entry of judgment was only "that the appellant recover his costs," taxed at a certain sum, no mention being made of the defendant's official capacity.

Greenleaf, for the defendant, now moved that the record be amended, by entering the judgment against the goods and estate of *Dunn* in his hands; on the ground that the costs, having been prudently incurred, were a proper charge against the estate.

Daveis and *Deblois*, *e contra*, denied the propriety of the charge; *Drinkwater v. Drinkwater*, 4 *Mass.* 354; and insisted that the court had already exercised its direction, by awarding costs; that here was nothing to amend by; and that the administration itself was merely void. 6 *Co.* 19; 1 *Dane's Abr.* 559, 561.

Mellen C. J. Our opinion is that under the circumstances of this case there was good reason for the defendant to contest the claims of the present plaintiff before the Judge of Probate, and on the appeal; and that he ought not to be held responsible for the costs in his private capacity, or rather, out of his own estate. The court gave no special directions to the clerk as to the form of entering the judgment. As it now stands, he is liable; and should he be compelled to pay these costs, we think they would be a fair charge against *Dunn's* estate. At the same time, it is evident that if we order the entry of judgment to be corrected, according to the motion, there will be no judgment comporting with that on which the plaintiff has declared, and his action will thus be defeated, though it was properly commenced; and the defendant will be entitled to his costs. We have concluded, to avoid circuity of proceedings, and trouble and expense, to amend the record as proposed, provided the defendant will consent to a dismissal of the present action from the

docket. He will then be relieved from all danger from the judgment; and the plaintiff may charge all his costs, incurred in the prosecution of the appeal, and of this action, in his probate account.

Action dismissed.

COLLEY *vs.* MERRILL & ALS.

A bill of exceptions under the statute of *Westm.* 2, *ch.* 31, is examinable only after judgment; nor then, but upon a writ of error.

The statute of *Westm.* 2, *ch.* 31, it seems, is no longer in force in this State, so far as it regards the Supreme Judicial Court; it being virtually superseded by our statute, providing for exceptions in a more summary manner.

In the argument upon a bill of exceptions, whether under our statute, in the summary mode, or under the statute of *Westm.* 2, *ch.* 31, followed by a writ of error, the party excepting is confined to the objections taken at the trial, and stated on the face of the bill.

The consignee of goods for sale, is at liberty to incur upon them all such expenses as a prudent man would find necessary, in the discreet management of his own affairs.

Thus, where the owner of a vessel conveyed her to his creditor, to be sold by him to the best advantage, and after payment of the debt, the surplus to be paid over to himself; and the creditor caused her to be sold by a ship-broker;—it was held that the broker's commissions were a reasonable charge upon the gross proceeds of sale, which the owner was bound to allow.

IN this case, which was *assumpsit*, in addition to the general counts, the plaintiff, in his third count, declared that on the fourth day of *May*, 1827, in consideration that he would give the defendants a bill of sale of a certain vessel, to be built on *Presumpscot* river, the defendants promised to pay him therefor at the rate of twenty one dollars per ton; and averred that on the tenth day of *June* following, he gave them a bill of sale of the vessel, whereby and by reason of their promise, they became liable to pay, &c. The writ bore date January 1, 1828.

At the trial, which was upon the general issue, the plaintiff produced a written contract between himself and the defendants, who

were retail grocers and traders in *Portland*, by which it appeared that on *May 4th*, 1827, they agreed to furnish him, from time to time, with such quantities of goods as should be necessary to build a vessel of about 160 tons, and he engaged that when the keel should be laid, and the vessel raised, he would make and execute to them, a good and sufficient bill of sale of said vessel, to secure the payment for whatever goods they might furnish; "and after the sale of said vessel to the best advantage, and payment of said *Merrills*, "the surplus proceeds to be refunded to said *Colley*." On the back of the paper was this further memorandum, signed by the parties;—"It is understood by the within agreement that the said *Colley* is to have a credit of four months on the goods, after which interest is to be charged, until the debt is paid from the proceeds of the vessel when sold."

The plaintiff also produced the bill of sale given to him by the defendants, *July* 13, 1827, pursuant to the agreement; also the carpenter's certificate to the collector of the customs, dated *December* 5, 1827, stating the admeasurement of the vessel, which was launched in *November* preceding; on the back of which certificate was a conveyance of the vessel by the defendants to *Eleazer Greeley & Son*, ship-brokers and commission merchants, dated *December* 7, 1827; and another from the brokers to *Reuben Mitchell*, dated *January* 2, 1828.

The defendants proved that before and after the vessel was launched, the plaintiff, at several times, requested them to sell her as soon as convenient; that they asked his advice about the employment of some merchant for that purpose, and named the Messrs. *Greeleys*, to which the plaintiff assented. They also proved that at the time of the conveyance to *Greeley & Son*, the latter gave them a counter writing, stating that they were to sell the vessel on commissions, and pay to the defendants, or their order, the net proceeds of sales, after deducting all expenses, and all sums of money they had advanced to the defendants, or might become accountable for, on their account. These advances, made between *October* 30, and *December* 22, amounted to 900 dollars; and the broker's commissions on the sales, were $50 90. The defendants also proved that

the sale of the vessel was not hastened nor retarded by their having had advances of money from the *Greeleys*; and that the sale to *Mitchell* was on the usual credit of four, six and nine months, in equal payments, with interest after. None of these transactions between the defendants and the brokers were known to the plaintiff.

The Chief Justice instructed the jury that in ascertaining the amount for which the defendants were chargeable as the proceeds of the vessel, they should take the sum for which she was actually sold by the brokers, if that was her fair value; or otherwise, her true value in the market; but that the charge for the brokers' commissions was not, by law, allowable. And a verdict being returned for the plaintiff, the defendants tendered a bill of exceptions to the decision of the Chief Justice, respecting the commissions, which was sealed and allowed.

The defendants also moved in arrest of judgment, because, 1st, the plaintiff had declared on a parol contract, made *May* 4, 1827, to pay twenty-one dollars per ton for the vessel, upon delivery of the bill of sale; but had proved a written contract of the same day, of a different tenor and effect; yet the jury had found a general verdict for the plaintiff:—2d. By the written contract, the defendants were not chargeable for the value or proceeds of the vessel, till she was sold and payment received by them therefor; but the plaintiff had commenced this action before either of those events had happened:—3d. The plaintiff's third count contained no legal cause of action against the defendants:—4th. Upon the whole record the plaintiff was not entitled by law to recover in this action.

Greenleaf, for the defendants, said that the whole case being now before the court by the bill of exceptions, it was competent for them to show in this court, in arrest of judgment, any thing apparent on the record, which went to the right of the plaintiff to recover. And he contended that having shown a special contract in writing, the plaintiff could not recover on the general counts, while that contract remained in force. 1 *Dane's Abr.* 223, 224, 226, 227, 229. *Harris v. Oke*, *Bull. N. P.* 139, 140.

And the action was prematurely brought. The conveyance to *Greeley & Son* was in fact merely a mortgage, with power to sell;

and their advancements to the defendants were but loans, reimbursable out of the actual sales. Hence the plaintiff had no right of action till after the actual sale to *Mitchell*, and this was not till after this suit was commenced. Nor did the conveyance to *Greeley & Son* give any new right of action to the plaintiff; since a pawnee may always mortgage or sell his interest in the thing pleged, without giving the owner any greater rights than before. *Moses v. Conham Owen*, 123. *Montagu on lien, app.* 170, 171. *Jarvis v. Rogers*, 15 *Mass.* 408; and if this is not admitted in general, yet where goods are deposited by way of security for a loan of money, the lender's rights are far more extensive than such as accrue under an ordinary lien in the way of trade. *Pothonier v. Dawson*, 1 *Holt*, 383.

As to the charge of commissions, it results necessarily from the employment of a broker, to which the plaintiff assented.

Longfellow and *Deblois* for the plaintiff.

WESTON J. delivered the opinion of the Court at the ensuing term in *Kennebec.*

Before we proceed to other points made in this cause, it may be proper to consider the character of the bill of exceptions, which has been allowed under the seal of the Chief Justice.

Prior to the statute of *Westminster* the second, 13 *Ed.* 1. *cap.* 31, there was no mode of revising or correcting the direction or opinion of the presiding judge in the trial of a cause, in any matter of law, not apparent upon the record. By this statute, exceptions might be made to such opinion or direction, which it was made the duty of the judge to allow and seal, and thereupon such matter became part of the record, and as such was examinable upon writ of error. Sir *Edward Coke*, in his commentary upon this statute, 2 *Inst.* 427, says, "albeit the letter of this branch seemeth to extend to the justices of the Common Pleas only, by reason of these words, *et si forte ad querimoniam de facto justitiariorum venire faciat dominus rex recordum coram eo*, [and if the King, upon complaint made of the justices, cause the record to come before him,] which is by writ of error into the King's bench; yet that is put but for an example; and this

act extendeth not only to all other courts of record; for upon judgments given in them, a writ of error lieth in the King's bench; but to the county court, the hundred, and the court baron, for therein the judges were more likely to err; and albeit of judgments given in them a writ of error lieth not, but a writ of false judgment in the court of Common Pleas, yet the case being in the same, or greater mischief, the purview of the statute doth extend to those inferior courts." *Blackstone* states, 3 *Com.* 372, "This bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below." And in this opinion, he is fully supported by the practice of the English courts. *Kensington*, plaintiff in error, v. *Inglis & al.* 8 *East* 276, is a case in point. That was an action originally brought in the Common Pleas by the defendants in error. A verdict was found for the plaintiff below, under the direction of the Lord Chief Justice of the Common Pleas, before whom the cause was tried, to whom a bill of exceptions was tendered, which was allowed and sealed by him. These exceptions were not considered by the court of Common Pleas, who were in the possession of the record, although they must have been made a part of the *postea*, but were, after judgment, according to the course of judicial proceedings there, made the subject of examination by the King's bench, upon a writ of error. *Buller*, in his *Nisi Prius*, 316, says, a bill of exceptions can be used only on a writ of error; and therefore where a writ of error will not lie, there cannot be a bill of exceptions. The same opinion is recognized in 3 *Dane*, *ch.* 100 *art.* 1, *sec.* 7. And in accordance with this principle, Mr. *Dane* further states in *sec.* 19 of the same article, that when allowed, the party cannot move in arrest of judgment on the point in the bill of exceptions; his proper remedy is a writ of error; and for this he cites 3 *Lev.* 297, and 2 *Jones*, 217. And we are satisfied that the bill of exceptions, under the statute of *Westminster* the second, is examinable only after judgment, and that upon writ of error. With regard to the writ of false judgment, which Sir *Edward Coke* thinks would lie in certain cases

upon exceptions, no such process is known in our practice, nor have we any courts, to which it might properly be directed.

The counsel for the defendants contends that the exceptions before us were tendered and allowed, under the statute of *Westminster* the second. They are allowed under the seal of the Chief Justice; and in point of form may comport with what that statute required. It may however be worthy of grave consideration, whether this statute can be held any longer applicable to proceedings in this court; since a more simple, summary, and less expensive mode of revising questions, which may be presented by bills of exceptions, has been provided by our own statute. The constitution of this State, *art.* 10, *sec.* 3, provides that all laws, in force at the time of its adoption, should remain and be in force, until altered or repealed by the legislature. The statute of *Westminster* made exceptions under it the basis of revision by a superior court. As this court is supreme in its judicial capacity, its errors cannot be corrected by any other tribunal. But as in our practice, writs of error are brought returnable to this court, for the revisal of its own judgments, if we had no statute provision on the subject of exceptions, it might be strongly contended that they might be tendered under the statute of *Westminster*. But the legislature having made special provision for exceptions in the progress of trials in this court, and the mode by them prescribed being manifestly an improvement upon that of *Westminster*, avoiding expense and delay which are altogether unnecessary; so far as that statute applied to this court, it may be held to be revised and altered by the legislature. It is true a new statute remedy does not usually abrogate a remedy at common law, and English statutes adopted here have been regarded as a part of our common law; yet when any of the provisions in English statutes have become the subject of legislation here, our own enactments, although not excluding their operation in terms, as far as their purview extends, have been regarded as superseding those adopted from the mother country. However, upon this point we give no decisive opinion; as if the English statute is still in force as it respects this court, and the bill in this case is considered as tendered under that statute, it cannot be made use of to arrest or delay the judgment claimed by the plaintiff.

From the course of the argument, it seems to have been understood that, on a bill under the English statute, any objection which might be raised from the evidence stated, although not taken at the trial, is open to the party excepting; and that he is not confined to the point there raised, as he would be in exceptions under our statute. We do not find that this distinction is warranted by the authorities. In the argument of the case before cited from *East*, the counsel for the plaintiff in error attempted to urge a point not taken at the trial; but the whole court agreed that he was precluded from doing so, inasmuch as the point arose, if at all, out of the evidence stated in the bill of exceptions; in arguing which the plaintiff in error was confined to the objections taken at the trial, and stated on the face of the bill, as had been decided in the house of Lords in the case of *Rowe v. Power*, 2 *New Rep.* 36, on a bill of exceptions from Ireland. The same opinion was held in *Van Gordon v. Jackson*, 5 *Johns.* 467, and *Frier v. Jackson*, 8 *Johns.* 507, the statute of *New York* using nearly the same words with the statute of *Westminster*. All questions in relation to the competency and effect of evidence must be raised at the trial, and before verdict. It is too late afterwards. *Lanuse v. Barker*, 10 *Johns.* 312. *Jones v. Insurance Company of North America*, 4 *Dall.* 249.

Upon this view of the exceptions, under whatever statute tendered, the only point open to examination is in relation to the direction of the Chief Justice, touching the commissions paid to *Greeley*, and claimed as a fair charge against the plaintiff. The defendants are therefore precluded from many of the objections, which have been elaborately discussed in argument; whether taken on writ of error, or in the mode prescribed by our statute.

The defendants have had a continuance, which the statute allows upon exceptions, and their counsel has moved the court to grant a new trial, or such other relief, as to law and justice may appertain. Instead of suffering judgment to go against them, and bringing a writ of error, which is the remedy provided by the statute of *Westminster*, they have claimed the benefit of the statute summary mode. We shall proceed therefore to consider the exceptions, which we are warranted in doing, as having been tendered and allowed under our statute.

In regard to the commissions, whether they ought to be allowed or not, we think, must depend upon facts which the jury have not settled by their verdict. The defendants were bound to sell the vessel, or cause her to be sold, to the best advantage. In doing this, they were not at liberty to incur any more expense than a prudent man would find necessary, in the discreet management of his own concerns. For such expense, if there be no usage in *Portland* or its neighborhood establishing a different rule, to which the parties may be presumed to have had reference in the contract, we are of opinion the defendants have a just claim to be reimbursed. As the jury have not passed upon the prudence or necessity of this expense, or upon the usage, if any exists, by which it may be adjusted, the verdict must be set aside and a new trial granted, unless the plaintiff will release to the defendants the amount of the commissions; in which case judgment may be rendered on the verdict.

Richardson *vs.* Freeman & al.

The members of a family or society of shakers are competent witnesses, without releases, in any suit, in which the deacons are parties, not directly concerning the common property.

In *assumpsit* by the indorsee of a promissory note signed by the defendants *Freeman* and *Bracket*, who were members and deacons of the family or society of shakers in *Alfred*, they offered in evidence the depositions of several persons, who were members of that family, but had released to the deacons all their right to the subject matter of this suit, and had been released by them from all liability to contribute to the loss, or to the expenses of the defence. The note was signed by the defendants, as the sureties of one *Mary Octavia Tilton*, who then boarded with the same family of shakers; and it was payable to her father *Nathaniel Tilton*, for a debt alleged by him to be due from her. She did not enter any appearance in this suit, but was defaulted. The depositions went to

prove that the note was obtained by a series of frauds; and their admission was objected to by the plaintiff; but the Chief Justice, before whom the cause was tried, admitted the depositions, and reserved the point for the consideration of the Court, a verdict being returned for the defendants.

N. Emery and *Longfellow*, for the plaintiff, argued against the admissibility of the depositions, notwithstanding the releases; contending that the witnesses were still interested in the common fund, out of which the debt and costs must be paid if the plaintiff should recover. The very principle of their association and community of goods and estate was such, that every shaker, as long as he was a member of the society, was a joint owner of the property, and interested to preserve it entire. And this interest was left untouched by the releases.

Greenleaf for the defendants.

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

The defendants are deacons of the society of shakers in the town of *Alfred*, in the county of York, and the property of the society was conveyed to them and vested in them subsequently to the act of Massachusetts of 1785, *ch.* 51; and prior to our act of 1821. The form of conveyance is by deed to the deacons; and it was decided by this court in the case of *Anderson v. Brock*, 3 *Greenl.* 243, that the above mentioned statute extended to the society of shakers; and that the deacons of all such societies were, in virtue of it, constituted a corporation for the purposes specified. Our statute of 1821, *ch.* 42, on the same subject, is almost an exact transcript of the act of Massachusetts. By law, then, the deacons hold the legal estate in trust for the society. On all these points the counsel perfectly agree. And it is also admitted, though the report of the judge does not particularly state the fact, that the present action is founded on a promissory note, which was signed by the defendants as sureties for a young woman, then residing with the society, though not a member of it, for a debt claimed to be due from her to the promissee; though it appears that the verdict was against the plaintiff.

Such being the facts, it manifestly appears that the note in question, must be considered as given, not for any consideration connected with the society, whose estate is held by them in trust; and it is certainly wholly foreign from their duty, and not within their legitimate powers, to subject the property holden by them in trust, to the payment of their own private debts, much less when those debts were in appearance contracted in the character of sureties, for an asserted debt of another. Such a misappropriation of the funds can never be sanctioned, without a violation of the principles of law, and those on which the association is founded. In this view of the case, it is very clear that the witnesses who were admitted, had no interest in the event of the cause which, on any legal ground, could exclude them, whether any releases were exchanged or not. And therefore we do not enter into an examination of the terms of either of the releases, but lay them out of the case. The case of *Wells v. Lane*, 8 *Johns.* 462, was a penal action against a member of a society called shakers. And there it was held that a member of the society was a competent witness. No releases were given in that case. For the reasons above stated, we are all of opinion that the motion cannot be sustained. There must be

Judgment on the verdict.

SEAVER *vs.* BRADLEY.

Where the plaintiff had declared that he was indebted to one offered as a witness, to whom the money sued for, when recovered, was by agreement to be paid over; it was held that this agreement was no assignment of the debt, and therefore did not go to the competency of the witness, but only to his credibility.

B. gave to S. a collateral guaranty containing these principal words—"I have consented, and now hereby promise to you, that I will be ultimately accountable to you for the sum of one hundred and fifty dollars, if the said H. shall purchase goods of you, and should fail to pay you for them." On the same day S. sold to H. goods to that amount, on a credit of six months. No notice was given by S. to B. of the acceptance of the guaranty, or the sale of the goods; but about five months afterwards H. was summoned as the trustee of S. by one of his creditors, and employed B. to prepare his disclosure, in which it was stated that he owed S. 110 dollars for goods sold. After the lapse of about sixteen months more, S. and his creditor entered into a compromise, by which the debt was paid, but the trustee-process was kept on foot for the benefit of S. who was to receive, to his own use, the money which might be obtained from the trustees. Judgment was accordingly rendered against S. and his trustees, of whom H. was one, and of whom the money was regularly demanded by the officer holding the execution; but nothing was paid by H. nor had any change taken place in his circumstances. Afterwards the execution was discharged. It was held that the guaranty was not absolute, but contingent;—that B. had sufficient notice;—and that as the judgment in the trustee-process had been assigned to S. and could therefore no longer endanger H. in making payment to him, it was no bar to an action by S. against B. on the guaranty.

THIS was an action of *assumpsit* on a stipulation of the defendant, by way of letter addressed to the plaintiff in the following terms:—"Sir, *Stephen Heald*, Esq. of *Lovel*, wishes to purchase a few goods, with a view, as he informs me, to retail them from the store he now occupies, lately occupied by *Philip C. Johnson*, Esq. at *Lovel* corner. I have no connexion whatever with said *Heald*, or interest in his business; but am disposed to aid him, at least so far as I can do it without involving myself in his concerns. With a view therefore to encourage him, and to try his skill and talent in trade, and to test his judgment, as well as his integrity and punctuality as a trader, I have consented, and now hereby promise to you, that I will be ultimately accountable to you for the sum of one hundred and fifty dollars, if

the said *Heald* shall purchase goods of you, and should fail to pay you for them; provided however, and you are distinctly to understand, if said *Heald* should open an account with, or continue, after the goods you may now entrust to him, to purchase goods of you, that the first hundred and fifty dollars, which shall be paid to you by said *Heald*, shall discharge me of this promise, and of the responsibility hereby assumed; as I will not be responsible for this hundred and fifty dollars beyond the period when the said *Heald* shall have paid you that amount, whether he continues to purchase goods hereafter of you or not; and whenever you shall have received of the said *Heald* to the amount of the said one hundred and fifty dollars, it is to be hereby understood that I am to be discharged from my responsibility on this promise. *Portland, Aug.* 4, 1825." On the back of this letter was this indorsement made by the plaintiff;—"*Portland, Jan.* 27, 1826. Received of *Stephen Heald*, Esq. forty dollars cash on the within."

On the day of the date of the letter, the plaintiff sold goods to *Heald*, to the amount of $150 61, on a credit of six months; which he had ever since been of sufficient ability to pay. The earliest notice which the defendant had of the acceptance of his guaranty, and of the sale of the goods, or of any thing concerning the subject, was on the 19th day of *June*, 1826; and the only proof of such notice was derived from the fact that on that day the defendant, in the course of his business as a counsellor at law, drew up a disclosure made by *Heald* in a suit in which he was summoned as the trustee of the plaintiff, containing this statement. "On the day of the service of the plaintiff's writ upon him in the said suit, he was indebted to the said *Seaver* on a balance of account for goods sold by said *Seaver* to him, in the sum of one hundred and ten dollars and sixty one cents; which he is ready to pay over to the said *Seaver*, or otherwise, as the court shall direct."

That trustee process was commenced by *Titcomb & Sumner*; and on the 17th day of *Oct.* 1827, the action was settled, agreeably to the tenor of the following agreement between *Titcomb* and *Seaver*; of the contents of which the defendant had notice before the commencement of the present suit:—"*Portland, Oct.* 16, 1827. It is

hereby agreed by the undersigned *Moses Titcomb* and *Horace Seaver*, that in consequence of said *Seaver's* securing to said *Titcomb* the sum of one hundred and seventy two dollars, that said *Titcomb* will, and hereby does relinquish and discharge said *Seaver* from all claim and demand by reason of said *Seaver's* note to *Titcomb & Sumner*, on which an action is now pending in the Supreme Judical Court, together with said action; and said *Titcomb* agrees to pay the cost in said action. But it is agreed that the action shall stand in court till a final adjudication upon the question there depending upon trustee process, and that judgment may be entered upon said action, which is, however, to be prosecuted for his benefit; and the judgment, and the execution which may be issued thereon, are hereby transferred to said *Seaver*, as well as whatever may be received of *Bradley & Warren*, *Burbank & Hanson*, and *Stephen Heald*, trustees therein named." Accordingly judgment was entered against *Seaver*, and some of the trustees, of whom *Heald* was one; and the execution issued thereon was fully discharged on the day preceding the trial of this action; but nothing was paid by *Heald* on the execution, though duly demanded by the officer, on the 1st of *Jan.* 1828.

At the trial the plaintiff offered *William Willis*, Esq. as a witness, to whom the defendant objected on the ground of interest; and proved that the plaintiff had said that he was indebted to Mr. *Willis*, to whom the sum sued for, when recovered, was to be paid over, on account of the debt due to him. But the Chief Justice, before whom the cause was tried, admitted the witness, and directed a verdict to be returned for the plaintiff, subject to the opinion of the court upon his competency, and upon the question whether, upon the whole case, the action was maintainable.

N. Emery, for the defendant, argued that the witness had a direct interest in the suit, because the money, when recovered, was to be paid over to him, in part of his demand against the plaintiff. The contract between them was in equity an assignment of the debt, sufficient, in the event of *Seaver's* death, to prevent its distribution as assets among his creditors. And wherever the legal operation of the testimony is to create or increase a fund on which the witness

has a direct claim, he is excluded. *Pierce v. Chase*, 8 *Mass.* 487; *Powel v. Gordon*, 2 *Esp.* 735; 2 *New Rep.* 231; 5 *Taunt.* 183; *Peyton v. Hallet*, 1 *Caines*, 303.

The contract, he contended, was in its nature collateral and contingent; the liability of the defendant not being absolute, till legal process had been resorted to against *Heald*, without effect. But here was no proof of any diligence used to enforce the demand against the original debtor.

Nor had any notice been given to the defendant that his offered guaranty was accepted, nor of the amount of the debt for which he was held liable. It was only for the original investment that the defendant stipulated at all; nor for this, but upon the contingency of *Heald's* commencing trade, in a particular town and store. Before the defendant could be bound, it was the duty of the plaintiff to have given him seasonable notice that all the events had happened upon which his engagement depended, and of the amount of the original purchase made upon his credit. 2 *Stark. Ev.* 649; *Tyler v. Binney*, 7 *Mass.* 479; *Sage v. Wilcox*, 6 *Conn. Rep.* 81.

And he urged strongly that the proceedings in the foreign attachment at the suit of *Titcomb & Sumner*, had bound *Heald* to them, with the plaintiff's assent, wholly changing the relations between them; and that this operated to absolve the defendant from the contract; as, after that, he could not be protected in any payment he might make to *Seaver*, nor avail himself of any transactions between the attaching creditors and *Heald*. 10 *Johns.* 587.

Longfellow and *Willis* for the plaintiff.

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

The objection to *Mr. Willis*, as a witness, seems not to be sustained by the authorities. In *Powel v. Gordon*, the witness offered was examined on the *voir dire*, and in that mode the objection was supported. The witness was acting under a power of attorney; and on his examination, he stated that he expected and intended to pay himself out of the money when recovered, and expressly refused

to consent that any other person should receive it; and he was accordingly rejected. In *Peyton v. Hallet*, 1 *Caines*, 363; *White*, the witness offered, held an order drawn by the plaintiff on his agent for the amount of his debt, to be paid out of the monies sued for. This order, the court said, amounted to an assignment of the property. We have decided the same principle in *Robbins v. Bacon*, 3 *Greenl.* 346. In that case it was observed that a bond or note might be assigned for a valuable consideration by mere delivery. But in the present case there is no proof of any act on the part of the plaintiff, amounting to an assignment, by means of which the rights of *Seaver* could be controlled by *Willis*. The other two cases cited, as to this point, seem not to be applicable to it. Mr. *Willis*, in this cause, having no vested right to the sum demanded, stands in a very different situation from a creditor of a bankrupt, or of one who has died insolvent. There, his rights to a dividend are by law established. In such a case, if *Willis* was a creditor, he could not be a witness to increase the fund. He does not appear to have any vested interest in the sum demanded, as before stated. If recovered, he is to receive it, and apply it towards payment of the debt due to him from the plaintiff. If not recovered, the witness must endeavor to obtain payment in some other way. The objection goes only to the credit of the witness and not to his competency. We accordingly overrule it, and proceed to the examination of the cause on the facts reported.

The defendant's guaranty is in these words: "I will be ultimately accountable to you for the sum of one hundred and fifty dollars, if the said *Heald* shall purchase goods of you, and shall fail to pay you for them." We are not prepared to decide that the word "ultimately" must receive the construction given to it by the defendant's counsel. It does not mean that he would pay at some indefinite period; but we consider the fair meaning to be that if *Heald* should not comply with the terms of his engagement, as to the payment for the goods purchased, then, on due notice of the advances made on the faith of the guaranty, he would be accountable and pay for such advances, not exceeding the limited amount. It appears that the goods were sold and delivered to *Heald* on the 4th of

Aug. 1825, on a credit of six months; which term of credit expired on the 4th of *Feb.* 1826; and the trustee process was not served on him till the 20th of *March* following; so that during six weeks and more, he failed to pay according to his contract, before he was barred from paying by means of the service of the process. On this ground, therefore, the case is brought within the terms and legal meaning of the guaranty. But even upon the defendant's hypothesis, it appears that some months before the commencement of this action, namely on the 1st of *Jan.* 1828, the plaintiff caused a demand to be made on *Heald* for the money due for the goods sold. This demand was made by virtue of the execution which was issued on the judgment in the trustee process; which judgment and execution were then the property of *Seaver*, as appears by the agreement of the 16th of *Oct.* 1827, between him and *Titcomb & Sumner*. Notwithstanding this demand, no payment was made. We are not able to perceive any thing substantial in this part of the defence. We therefore pass on to consider the question of notice.

We have decided in the case of *Norton v. Eastman*, 4 *Greenl.* 521, that in cases of antecedent guaranty, the guarantor is only conditionally liable; and that to render his liability absolute, he must have notice, in a reasonable time, of the acceptance of the guaranty, and of the advances made on the strength of it. It has been contended that the guaranty in the case before us is an absolute one; we think it is not; and by comparing it with the case put by way of illustration in *Norton v. Eastman*, in the opinion of the court, this will manifestly appear. In the present case the guaranty to the specified amount was given by the defendant before any goods were purchased by *Heald;* the words are, "if *Heald* shall purchase goods of you, and shall fail to pay you for them." In such a case the guarantor must have reasonable notice that the expected advances have been made, so that he may seasonably take all prudent or necessary measures for his own security against eventual loss. What amounts to reasonable notice, depends on the circumstances of each case, and is therefore partly a question of fact, and partly a question of law. When the facts are found or agreed, it is then a question of law. Such is the case before us. The first notice which the defendant

was proved to have had, was on the 19th of *June*, 1826. The report states that *Heald*, at the time of the trial, was, and ever since the goods were delivered, has been possessed of property more than sufficient to pay the amount due from him to *Seaver*; so that the want of earlier notice to the defendant has in no degree operated to the prejudice of his interests or his rights; nor does it appear that he ever was desirous of obtaining security of *Heald*, after he had notice as abovementioned. In *Creamer & al. v. Higginson & al.* 1 *Mason*, 324, Mr. Justice *Story* states the law in these words: "If notice was not given in a reasonable time, nor until after a material change in the circumstances of the debtors, such *laches* discharges the defendants." In that case no notice was given till after the lapse of more than three years; and in the meantime those to whom the credit had been given became insolvent. In *Russel v. Perkins*, 1 *Mason*, 371, the notice was delayed for twelve years. In both instances it was held insufficient. It has been urged that notice must, in these cases of guaranty, be immediately given. That word is used by *Marshall C. J.* in the case of *Russell v. Clark's* executors, 7 *Cranch* 69; but it was no point in the cause; for in the same sentence he had declared that there was no proof of any guaranty. In a note in 2 *Starkie*, 649, stating the point settled in *Beekman v. Hale*, 17 *Johns.* 134, the American Editor says—"it is the duty of the person giving credit to another on the responsibility or undertaking of a third person, to give notice immediately to the latter of the extent of his engagements." But the meaning of the word, as there used, may be learned by the fact that in that case notice had not been given, till after the lapse of more than two years, and an intervening insolvency. The case at bar is therefore very different from all those we have mentioned, in every material respect. The particulars of the variance need not be repeated. Viewing all the features of this case, we do not feel at liberty to decide that the defendant had not reasonable notice of those facts necessary to give an absolute obligation to his guaranty.

The last point for our consideration is the question whether the trustee process, pending and conducted as stated in the report, furnishes a defence to this action. While it was pending, as the suit

and for the benefit of *Titcomb & Sumner*, *Heald* was not authorised to pay the debt to *Seaver*, though he might and ought to have paid it before the process was served on him; and the rendition of the judgment in that case against *Seaver* and the trustees, would, according to the case of *Perkins v. Parker*, 1 *Mass.* 117, and *Wood v. Partridge*, 11 *Mass.* 488, have been a bar to an action by *Seaver* against *Heald*; and for the same reason, perhaps might have been a bar to the present action; provided the settlement and agreement made and entered into on the 16th of *Oct.* 1827, between *Titcomb & Sumner* and *Seaver*, had not changed the rights and liabilities of the parties in that and the present suit. By that agreement, of the contents of which the defendant had notice before the commencement of this action, it appears that from the time of its execution, *Titcomb & Sumner* ceased to have any demand against *Seaver*, or control over the action; which, however, was to proceed to judgment against both principal and trustees; so that *Seaver* might, in that form, avail himself of all the benefits of the process, as it respected the property in the hands of the trustees. This could not be any injury to *Heald;* nor do the facts furnish any evidence of fraud or collusion, as suggested in the argument of the defendant's counsel. The whole interest in the judgment, and control over it, being thus transferred to and vested in *Seaver*, by the agreement of *Oct.* 1827, the reason of the principle established in the cases of *Perkins v. Parker*, and *Wood v. Partridge*, had ceased in respect to *Heald*, the trustee; for he never could be injured by paying the amount of the debt to *Seaver*, as no one, but he, could enforce the payment of the judgment in the trustee process. When this action was commenced, that process was as though it had never existed, in respect to *Heald's* original liabilities, because *Titcomb & Sumner* and *Seaver* had become identified by the agreement. This case resembles that of *Fowler v. Parker & Stearns*, 3 *Mason*, 247. In that case it appears that judgment had been rendered against them as the trustees of *Fowler*, in a former suit which was commenced by *Tarbel & Eveleth.* The judgment was rendered on default after a continuance for two years, *Fowler* being out of the State. But as no bond had been given, as by law required, no execution had

ever issued; and as none could be obtained on *scire facias*, it was decided that the action by *Fowler*, the principal in the former action, was maintainable, because they were in no danger from the judgment in that process; and the court considered the principle of the two cases last mentioned as not applying. As the judgment in the trustee process, in the circumstances of this case, would not bar a suit against *Heald*, for the same reason it will not bar the present action. Our opinion is that a new trial ought not to be granted, on either of the grounds suggested.

Judgment on the verdict.

Freeman *vs.* Walker.

Smuggling, by the master of a vessel, when it is not gross and attended with serious damage or loss to the owner, is not visited with the penalty of forfeiture of wages; but the damage actually sustained by the owner may be deducted from the wages due to the master, by way of diminished compensation.

Thus, where a vessel was libelled as forfeited for a violation of the revenue laws, in the importation of gin by the master, without fraud on his part, and the vessel was therefore liberated by the Secretary of the Treasury on payment of costs; an action was held to be maintainable by the master for his wages, the jury being directed to deduct the costs and expenses thus incurred by the owner, from the amount of wages due to the master.

Whether the owner of a vessel, having sworn, in a petition for a *remittitur*, that the act of the master by which she was forfeited, was done ignorantly and without fraud, can be admitted afterwards to gainsay it, in an action by the master against him for wages, by showing that the proof of the fraud had subsequently come to his knowledge;—*dubitatur*.

This was an action of *assumpsit* for services performed and monies paid; including the plaintiff's wages and commissions, as master of the defendant's vessel, on a voyage from *Portland* to the *West Indies* and back. The defendant resisted the claim for wages and commissions, on the ground that they were forfeited by the misconduct of the plaintiff. On this point the facts were these: The plaintiff brought home, for himself, several cases of gin, being a prohibited article, in consequence of which, the vessel was seized and

libelled. The defendant presented to the District Judge, a petition for remission of the forfeiture, which was signed and sworn to by him, in the usual form; therein stating that the gin was imported by the plaintiff ignorantly, and that the forfeiture of the vessel was incurred without any wilful negligence or intention of fraud. A summary inquiry was had before the judge, and on his statement the Secretary of the Treasury remitted the forfeiture on payment of costs. The defendant offered to prove that the plaintiff did knowingly and fraudulently import the gin, and this without the knowledge of the defendant; and that the proof of such fraud had come to his knowledge long since the petition for a *remittitur* was preferred and sworn to. This offered testimony, the Chief Justice, before whom the cause was tried, rejected, because it contradicted the facts stated and sworn to in the petition, and the proceedings thereon, by means of which the vessel had been restored to the defendant on payment of costs; and because it was not alleged that the defendant had sustained any other injury than the payment of the costs, which the plaintiff offered to deduct from his demand in this action. And a verdict was returned for the plaintiff, the jury having, by direction of the Chief Justice, deducted those costs from the amount found due to the plaintiff; which was taken subject to the opinion of the court upon the admissibility of the testimony rejected.

Deblois argued for the defendant, that the testimony ought to have been received. The general principle is very clear that if the master do any act incurring a forfeiture of the vessel, it is a forfeiture of his wages and emoluments for the voyage. It is a breach of his contract with the owners; *Moor v. Jones*, 15 *Mass.* 424; *Abbot on Ship.* 160 *note*; 1 *Dal.* 180; by which he is bound to reasonable care, prudence, fidelity and skill; *Cheviot v. Brooks*, 1 *Johns.* 368; and if not fulfilled with good faith, there are no legal results from it. 2 *Pet. Adm. app.* 74. So, if he is grossly ignorant of his duty. *Chitty on Contr.* 166; *Peake's Ca.* 59; 1 *Wash. C. C. Rep.* 142; *Abbot on Ship.* 99, 182, *notes.* In the present case, the conduct of the master was an act of barratry; and it is against the policy of the law that his wages should be paid. *Earl v. Rowcroft*, 8 *East*, 126; *Richardson v. Maine Ins. Co.* 6 *Mass.* 117; 1 *Stra.* 581; 1 *D.*

& E. 127; *Moss v. Byram*, 6 *D. & E.* 179; 3 *D. & E.* 277; *Hoit v. Wildfire*, 3 *Johns.* 520.

The oath of the defendant to the petition to the District Judge, forms no objection to the defence, since it was made on the statement of the master himself; for the defendant could have derived his information from no other; and the master knew it was false, but the defendant did not. To make admissions binding, they must be obtained without fraud; 2 *Stark. Ev.* 32; or mistake; 2 *D. & E.* 366; and with a full knowledge of all the facts. 1 *Esp. Ca.* 372. And even then, their force and effect must depend upon circumstances. 1 *Phil. Ev.* 83. They stand on no better ground than an answer in Chancery; where, if there has been a further answer, that also shall be taken to expound the first. 3 *Dane's Abr.* 380; 1 *Phil. Ev.* 84, 283; *Rankin v. Homer*, 16 *East*, 191.

Greenleaf and *Neal* for the plaintiff.

Weston J. delivered the opinion of the Court.

This is an action brought by the master of a vessel against the owners for the voyage, for wages and commissions. His claim is resisted, upon the ground of forfeiture for misconduct. By the act complained of, the vessel was by law forfeited; but a representation having been made by the defendant, that the act was ignorantly done; and having been able to satisfy the District Judge, by his own oath and by other proof, that this was the fact; upon a statement to this effect from the judge, the Secretary of the Treasury remitted the forfeiture, upon payment of costs. It is certainly with a very ill grace that the defendant, having sought and obtained the clemency of the government, now refuses to extend it to the master, even if he was in his power. Upon the question, whether the master acted wilfully or ignorantly, the admission of the defendant, when not under oath, would be evidence. If deliberately made, and under the sanction of an oath; but more especially, if made in a judicial proceeding, where that very point was under investigation, it is evidence not easily repelled, if not conclusive as to the defendant. Considering further that the defendant established the fact, he would now con-

trovert, that he succeded in purging the act from all imputation of fraud or wilful misconduct, and thus relieved himself from the injurious consequences to which he was exposed, it would seem not to be going too far to hold him concluded upon this question. But we do not give a decisive opinion upon this point; as we are satisfied the verdict ought to be sustained upon other grounds. The master is holden to the utmost fidelity in the discharge of his duties; and he is responsible for any failure in this respect, arising either from negligence or fraud.

It is not true that every illegal act of the master, as for instance an act of smuggling, subjects him, by the marine law, to a forfeiture of his wages and commissions, as a matter of course; whether it has been followed by damage or not. The marine law looks to the fact of injury. In a gross and aggravated case, or where there has been serious injury and loss, the misconduct of the master may subject him to the forfeiture of his wages. In other cases it may require such equitable reduction from them, as may indemnify the owners for the injury they may have sustained. The case before us could not have been gross; otherwise the penalty imposed by law, would have been enforced. The damage sustained by the defendant has been ascertained; and complete justice is done him, by holding the master responsible to that extent, whether he is liable upon the ground of negligence or fraud.

In *Willard v. Dorr*, 3 *Mason*, 161, which was brought by the administratrix of the master of a ship for his wages, it was, among other grounds of defence, objected that at *Sydney* cove, or *Port Jackson*, in *New South Wales*, the master was engaged in smuggling spirits, for which illegal proceeding the ship was seized and detained, and though finally released, expenses were incurred to a considerable amount. *Story J.* in delivering the opinion of the court, says, "Smuggling, on the part of a master, is a criminal departure from duty, and a rank offence, calling upon the court for its most decided reprobation. Where it is gross in its circumstances, and attended with serious damage or loss to the owner, it is such a violation of the master's contract, as may be justly visited with the penalty of forfeiture of wages. And under the most venial and favorable cir-

cumstances, the damages actually sustained by the owner, may be charged upon the wages of the master, and deducted by way of diminished compensation therefrom." In that case, the wages were not held to be forfeited.

It being the opinion of the court that, if the evidence rejected had been received, it would have entitled the defendant to a reduction from the plaintiff's claim only to the amount of the damage he had actually sustained, and that having been allowed him by the jury, there must be *Judgment on the verdict.*

HAWKS *vs.* BAKER.

It is the duty of the party calling a witness, to see that he is duly sworn. Therefore where a witness testified, believing that he had been sworn, but by some oversight the oath had been omitted, and this was not discovered by either party till after the trial; yet the verdict was set aside.

IN this case it appeared that at the trial of the issue of fact, before the Chief Justice, one *Leonard* being called among the witnesses on the part of the plaintiff, did not come forward to be sworn with the others, being ignorant of the course of judicial proceedings; but that the counsel for the plaintiff, supposing that he had been sworn with the others, called him to the stand as a witness, where he testified in chief, and was cross examined. He supposed that he had been sworn, and remained under that belief till after his testimony was closed; and the parties and their counsel remained unacquainted with the omission, till after the verdict, which was for the plaintiff, was returned. The witness made affidavit that his statement, thus made to the jury, was true; but the defendant moved the court to set aside the verdict, for this irregularity.

Deblois, for the plaintiff, resisted the motion, arguing that as the witness testified, as he supposed, under the sanction of an oath, and had stated the truth, the defendant had all the hold on his conscience, and all the protection in fact, which the form of an oath could have given him. The objection should have been taken on the spot; as

it related to the forms of conducting the trial; and it stands on the same footing with all other objections to testimony, or to the qualifications of jurors, which, if not taken during the trial, are considered as waived. *Turner & al. v. Peate*, 1 *D. & E.* 717, *Runn. Ejectm.* 397; *Commonwealth v. Green*, 17 *Mass.* 513; *Ford v. Tilley*, *Salk.* 653; *King v. Burdett*, *Salk.* 645; *Amherst v. Hadley*, 1 *Pick.* 34; *Waite v. Maxwell*, 5 *Pick.* 217; *How v. Low*, 2 *Johns.* 378; *Callender v. March*, 1 *Pick.* 418; 7 *Cranch*, 290; *Hollingworth v. Duane*, 4 *Dal.* 354; 6 *Bac. Abr.* 660, *Trial, L. Claxton's case*, 12 *Mod.* 567; *Vernon v. Hawkey*, 2 *D. & E.* 120; 6 *Dane's Abr.* 249, *sec.* 8; *Robinson v. Cook*, 6 *Taunt.* 335; *Gist v. Mason*, 5 *Johns.* 248; 1 *D. & E.* 84; *Bond v. Cutler*, 7 *Mass.* 205; *Walker v. Green*, 3 *Greenl.* 215; *Keen v. Sprague*, 3 *Greenl.* 77.

But whether the defendant knew of the omission or not, is not material. This is one of those things which the law will presume, for the termination of disputes, and will not suffer to be controverted by affidavits. The defendant is bound by his cross examination.

Longfellow and *Eveleth*, for the defendant.

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

The facts on which the motion for a new trial are founded are certainly peculiar, and we have not found any case very nearly resembling it. Under the circumstances disclosed in the report, ought a new trial to be granted? Motions of this kind are addressed to the discretion of the court; and for that very reason it is often difficult to decide them, on account of those doubts which exist as to the course which a sound discretion seems to require us to pursue. It is a well settled principle of law that no evidence can be permitted to go to the jury, unless under oath, without express or implied consent. This principle is recognized and stated in the case of *Ross v. Gould*, 5 *Greenl.* 204. In this case it is proved that there was no consent; so that the statements of *Leonard*, which were received by the jury as evidence, were wholly improper and illegal. Shall the verdict be set aside, merely that on another trial *Leonard* may be sworn, and then testify to those facts which a former jury

have probably believed, though he stated them when not on oath? It is the duty of the counsel offering a witness, to move that he may be sworn, and thus be qualified to testify. It is then the duty of the court to cause the oath to be administered to him, if no legal objection appears to his competency. Thus far the counsel for the opposite party has no concern with the transaction; he has a right to presume that the person taking the stand in the character of a witness has been duly sworn. Of course his omission to inquire and ascertain the fact cannot be considered as any waiver of his right to object to the incorrectness of the proceeding, if the person supposed to be sworn was in fact never sworn. No man can be considered as waiving a right which he is unconscious of possessing; the supposition is as unreasonable as it is inconsistent with good sense. Presumption is good till the contrary appears on proof. This is a legal maxim. But proof flatly contradicting presumption destroys it. In the case at bar there is such proof. The defendant has not had a trial of his cause on legal evidence, but partly on that which is illegal. And according to the facts, this was not owing to any fault on his part, but the plaintiff's omission of duty; and he now claims the right of a trial, on those principles of law of which his fellow citizens enjoy the benefit and protection.

The counsel for the plaintiff has opposed the motion on several grounds, and has cited cases of different classes to support his objections. Some of the cases establish the principle that a new trial ought not to be granted because, after the trial, the incompetency of one or more witnesses who had testified in the cause had been discovered. Some of them were read to shew that the omission of counsel, as to the examination of some of the evidence in the cause, or a misrecollection or forgetfulness of certain particulars, can furnish no ground for a new trial. Some have been cited to shew that when objectionable evidence was offered, and not opposed, it must be considered as admitted by consent implied, and that this is no ground for a new trial, when the inadmissibility of the evidence was discovered. It was the duty of the party complaining to examine and object in season and thus preserve his rights. One case was read to shew that, on *certiorari* to a justice's court, where the record sta-

ted that certain facts were proved, but it did not appear that the witnesses were sworn, the court sustained the proceedings, saying they would intend that they were sworn, because it was a part of the duty of the justice to swear them. In the case before us we are not at liberty to presume and intend what we know is not a fact.

None of the cases to which we have thus alluded are similar to the one before us; they were decided on principles which need not be examined on this occasion; and which we have therefore passed over by merely observing upon their import. Cases of another class have also been urged as decisive of the present motion. These are cases of objections to the legal qualification of jurors; and these were overruled, because not made in due season; that is, when the jury were called. Several cases of this kind have been decided where the party making the objection had no actual knowledge of the disqualification, till after the trial. In some of them the motion for a new trial has been overruled; in others, it has prevailed. But where it has been denied, it will generally be found that the party objecting might have ascertained the fact on which he relies, before or at the trial, had he strictly guarded his own rights with watchfulness, as the law requires that he should have done. Generally speaking, it is the duty of both parties to look to the qualification of jurors and attend to their challenges; but it is the duty of each party, to attend to the qualifications of his own witnesses, by procuring them to be duly sworn before they are examined in the cause. It should be remarked that in all the above cases the juror was duly sworn. If it be inquired, what can be the advantage of another trial; it may be replied that *Leonard* may not again testify in the cause; that he may be beyond the reach of the process of this court; that he may not be living at the time of another trial; or, should he attend the trial, that his testimony may be less direct or less distinct, or less favorable to the interests of the plaintiff. All these are circumstances on which a party may make his own calculations as to probabilities, and draw his own conclusions; and as illegal evidence has been submitted to the jury, though unintentionally, the defendant now insists on his claim to a new trial, to be conducted in all respects according to law. In this view of the case, so peculiar in its nature,

we incline to the opinion that the claim ought not to be disregarded by the court; and accordingly the verdict is set aside and a new trial granted.

HARDING *vs.* FOXCROFT, Sheriff, &c.

Where two, being joint owners of a vessel, agreed to send her on a foreign voyage for their mutual benefit; and part of the outward cargo was purchased by each, separately, and part by both, jointly;—it was held that they were still but tenants in common of the property, and not partners; and that therefore a creditor of both owners, for cordage for the vessel, was not entitled to priority in payment, out of the vessel and cargo, against the separate creditors of either.

THIS was an action of the case against the sheriff, for the default of his deputy, in not giving a priority of satisfaction to the plaintiff's execution against *Webster* and *Minchin & Willis*, out of the proceeds of their vessel and cargo.

At the trial, before the Chief Justice, it appeared that the plaintiff's demand was for cordage furnished to the vessel; that *Webster* owned one half of her, and *Minchin & Willis*, who were general partners in trade, owned the other; that the cargo was purchased partly by *Webster*, on his own account, partly by *Minchin & Willis*, on theirs, and partly by all the three on their joint account and credit; but that *Webster* had no right to bind the others, nor they to bind him, they not being partners in trade. And it further appeared that the officer had applied the proceeds of the sales of the vessel and cargo to the satisfaction of executions against the owners, *severally*, in cases where the attachments were of an earlier date than the plaintiff's.

The plaintiff claimed the right to a priority of satisfaction, contending that his was a claim against all the owners, *quasi* partners, and for materials found for the vessel. But the Chief Justice ordered a nonsuit, reserving the point for the consideration of the Court.

Greenleaf and *Deblois*, for the plaintiff, would have maintained the action on the ground that here was a special partnership among

the owners, for the particular voyage, both in the vessel and cargo; necessarily incident to the method of the trade; and that as to all debts growing out of this particular adventure, and created on the joint credit of all the owners, the creditors had the same right of priority in payment, as the partnership creditors of general partners in trade. *Ensign v. Ward*, 1 *Johns. Ca.* 171; *Dwight v. Brewster*, 1 *Pick.* 54; *De Bukom v. Smith*, 1 *Esp.* 29; *Doddington v. Hallet*, 1 *Ves.* 497; *Watson on Partn.* 139, 142; *Mumford v. Nichol*, 20 *Johns.* 611, *note*; *Hesketh v. Blanchard*, 4 *East* 143.

Longfellow, for the defendant.

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

The only question presented in this case is, whether the property in the vessel and cargo, was of such a character, and so holden by *Minchin & Willis* and *Webster*, as that it was liable to pay their joint debts in preference to debts due from them severally. If not so liable, this action cannot be maintained; because it appears by the report that the plaintiff's attachment was not made till after those of all the other creditors, on whose executions the vessel and cargo were sold within thirty days after judgment. The deputy of the defendant, for whose alleged neglect the suit is brought, has accounted for all the property; and has done it legally, provided he has accounted to those legally entitled to receive it. The plaintiff founds his claim on the assumed fact, that *Minchin*, *Willis* and *Webster*, were, in respect to the vessel and cargo, joint tenants and partners; and that the property in question, was subject to the payment of their joint debts, upon the same principle as all partnership property is liable. If the fact assumed is correct and true, the authorities are very clear that the action is well maintained, on the established ground that partnership debts must be paid, before the debts due from either of the partners, out of the joint fund. There may be a partnership, as well as a cotenancy, in a vessel. When a person is to be considered as a part-owner, and when as a partner, in a ship, depends on circumstances. The former is the general relation between ship owners; and the latter the exception; and it is requir-

ed to be shown specially. Instead of being so shown in the present case, the proof is that *Minchin*, *Willis* and *Webster* were not partners; that *Minchin & Willis* had no right to bind *Webster*, nor *Webster* any right to bind them. As to the vessel, then, there can be no question. The firm of *Minchin & Willis* own their part of the vessel as tenants in common with *Webster*. 3 *Kent's Commentaries*, 114, 117, and cases there cited. *Lamb v. Durant*, 12 *Mass.* 65.

As to the cargo, the idea of a partnership is expressly negatived by the plaintiff's own testimony, as abovementioned. It is true, some parts of the cargo were purchased by the owners severally, and put on board, and some parts were purchased on joint account; but to constitute a partnership, persons must not only be jointly concerned in the purchase, but jointly concerned in the future sale. 1 *H. Bl.* 48; *Hoare v. Dawes*, 1 *Dougl.* 371; *Watson*, 1.—5; 2 *Johns. Cases*, 327; *Holms v. U. Ins. Company.* 3 *Kent*, 3, 4, and cases there cited; and *Rice v. Austin*, 17 *Mass.* 197. In *Jackson v. Robinson*, 3 *Mason*, 138; four persons were part owners of a ship in certain proportions, and purchased a cargo by an agreement, on their account, in like proportions. The bill of lading purported to be a shipment on account and risk of the owners of the vessel. It was decided that the cargo was owned in common by them, and not in partnership. The facts in that case bear a strong resemblance to those in the case at bar. See also the case of *Thorndike v. DeWolf*, 6 *Pick.* 120.

We do not perceive that any importance can be attached to the circumstance that the plaintiff's claim, for which he recovered his judgment, was for cordage supplied to the owners of the vessel. The owners of a vessel are analogous to partners, and liable as such for necessary repairs and stores ordered by one of themselves; and this is the principle and limit of the liability of part owners. See 3 *Kent's Com.* 117; *Wright v. Hunter*, 1 *East*, 20; *Scott v. Stanley*, 1 *Dall.* 129. The owners became jointly liable for the price of the cordage to the plaintiff who furnished it; yet it became a part of the vessel, and was then owned by them in common, in the same manner as the vessel was owned.

We do not perceive any reasons for disturbing the nonsuit.

Judgment for the defendant.

INGALLS *vs.* DENNETT.

A surety has no right of action against his principal merely because the debt is not paid as soon as it is due; nor until he has either paid it, or procured the discharge of the principal by assuming the payment himself.

Therefore where one, having effects of another in his hands, and being also his surety in a note over-due, was summoned as his trustee in a foreign attachment, and then was compelled by suit to pay the note;—it was held that the effects in his hands were still bound by the foreign attachment, and that he could not retain them by way of indemnity against the note he had paid.

THIS was a *scire facias* against the defendant, as trustee of the goods of one *Richardson*. It appeared from his examination that he had property of *Richardson's* in his hands, to the value of about twenty-eight dollars; but that he was surety for *Richardson* in a note over-due to a third person for more than a hundred dollars; for which he was sued, after the service of the trustee process in this case; and which, to relieve his property from attachment, he had since paid; without indemnity from the debtor, except the above balance of twenty-eight dollars, which, by agreement with *Richardson*, he had indorsed on the note he had taken up.

Greenleaf, for the defendant, contended that he was not chargable as trustee. He was a creditor of *Richardson*, from the moment of becoming his surety; the promise of indemnity, which the law presumes every principal makes to his surety, being in effect a promise that he will take up the note at its maturity, and thus save the surety harmless. *How v. Ward*, 4 *Greenl.* 195. For upon any other construction the indemnity would be incomplete, the surety being left to sustain the discredit of having his notes over-due, by reason of the neglect of the real debtor to pay them at their maturity. Hence he ought to have a right of action as soon as this promise is broken; though his damages may be but small, till he has paid the debt. Such is the doctrine of the civil law; 1 *Poth. Obl.* 252; and such is our own practice in actions of covenant against incumbrances on land. If the incumbrance existed in fact, and so the covenant was

broken, the action is sustained ; and if it has been actually removed by the plaintiff, though after action brought, he is entitled to full damages.

Now if the original suit of the present plaintiff had been a suit by *Richardson* against this defendant, to recover the twenty-eight dollars, the defendant might have protected himself against the demand, by opposing the suretyship, the indemnity broken, and his subsequent payment of the whole debt. And the trustee-process cannot change the rights of the parties; it only puts one creditor in the place of another, leaving the legal relations of the garnishee unimpaired.

Deblois for the plaintiff.

Mellen C. J. delivered the opinion of the Court in the ensuing *June* term in *Lincoln ;* observing that the question must be decided on the facts as they existed at the time the process was served ; and that at that time *Dennett* had no right of action against *Richardson* ; for he had not then either paid the note for which he was surety, nor absolutely assumed the debt himself, by giving a new security, and discharging *Richardson* from his liability. Neither of these things having been done, the court must, according to settled principles, consider him as trustee, though the case seems to be a hard one for the defendant.

Trustee charged.

CASES

IN THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF OXFORD, MAY TERM, 1829.

WESTON J. was not present at this term.

PEASE & AL. *vs.* GIBSON.

Where the owner of land sold, by deed, all the timber trees standing thereon, and in the same deed gave to the vendee two years within which to take off the timber; it was held that this was a sale of only so much of the timber as the vendee might take off in the two years; and that an entry by him after that period was a trespass.

And although, after the expiration of the two years, the land was sold to a stranger, with a reservation in the deed of whatever rights the vendee of the timber might have; yet this reservation, it was held, neither gave any new effect to the contract, nor any new license to the vendee.

Whether a license to cut timber on the land of the grantor is assignable,—*quære.*

IN this case, which was trespass for breaking and entering the plaintiff's close in *Brownfield*, and cutting his timber trees, the defendant pleaded the general issue; and a license, given *Dec.* 7, 1819, by one *James Osgood*, who was then seised in fee of the close, to one *Joseph Howard;* and a conveyance *Nov.* 24, 1824, by *Howard*, of all his interest therein, to one *Jackson Wood*; and alleged that *Joseph Howard* and one *Moses Howard*, *Oct.* 11, 1825, being seised in fee of the premises, conveyed them to the plaintiffs, who, on

the same day, gave license to *Wood*, under whom the defendant justified as his servant. Which was traversed, and issue was joined thereon.

To prove the issue on their part, the plaintiffs introduced a deed with general warranty, dated *Oct.* 11, 1825, from *Joseph* and *Moses Howard*, conveying to the plaintiffs the *locus in quo*, "reserving all the privileges to *Jackson Wood* for the timber sold him, as per *James Osgood's* obligation to me in *Wood's* possession." And they proved the cutting of the timber as late as the year 1826, as alleged in the writ.

The defendant relied wholly on the obligation alluded to in the plaintiff's deed, which was under seal, and in the following terms: "I hereby agree to let *Joseph Howard* Esq. have all the pine trees fit for mill-logs on my land in *Brownfield*, beginning at Capt. *Abner Sawyer's* corner, on *Brownfield* line, thence running on *Sawyer's* line, and by said line to the county road, thence on said road to the ten-mile-brook, thence up the ten-mile-brook to the town line of *Brownfield*. Said *Howard* to have the timber on the north side of said brook, and on the southwest side of the *Kezer*-hills. Said *Howard* not to cut any timber on said *Kezer*-hills, nor on the side of said hills, the same being reserved by the subscriber. Said *Howard* to have two years from date to take off said timber. I acknowledge one hundred and fifty dollars for the same. *Brownfield*, *Dec.* 7, 1819. *James Osgood.*" It was assigned to *Wood* by the following indorsement.—"This may certify that I have sold to *Jackson Wood* all my right and interest in and to the within obligation, to have the same privilege of cutting and hauling the pine trees that I have. *Nov.* 24, 1824. *Joseph Howard.*"

The defence was overruled by *Parris J.* before whom the cause was tried; and a verdict was taken for the plaintiffs, subject to the opinion of the court upon the effect of the instrument adduced.

Holmes and *Chase*, for the defendant, argued that it was an absolute sale, of all the timber on the land, and not merely of such as the vendee could get off in two years; and that the limitation of that term of time was only an indication of the period within which he might enter and carry away timber without the payment of damages.

After its expiration, they contended, he might still take away his timber, subject to any reasonable claim of the owner of the soil, for damages thereby occasioned. And such was the construction given to the instrument by *Howard*, in the deed to the plaintiffs. The reservation in this deed was the creation of a new lease, and operated for the benefit of the party in whose favor it was created. *Emery v. Chase*, 5 *Greenl.* 232.

Greenleaf and *Deblois* for the plaintiffs.

MELLEN C. J. delivered the opinion of the Court at the ensuing *May* term in *Lincoln*.

In this case the defendant has pleaded the general issue and also a license. Under the general issue he has not offered any proof of title to the *locus in quo*, as he might have done by law; and the trespass alleged having been proved, we need not take any further notice of the first plea. Under the special plea in bar, no proof can avail the defendant but proof of a license. *Johnson v. Carter*, 16 *Mass.* 443. The very design of special pleading is to bring the question for trial to a point, and direct the evidence to that point. We need not, therefore, inquire whether there is any legal evidence of a sale, as has been contended in the argument. The only evidence of the license, offered by the defendant, was the written license to *Howard;* but that was only a license to enter and cut timber within two years from the date; and of course it expired, by its own limitation, on the 7th of *Dec.* 1821; and it is admitted that the trespass alleged and proved in this action was committed as late as the year 1826. It cannot therefore justify the trespass, even if a license of this kind was by law assignable, which is by no means admitted as a sound principle. The counsel for the defendant has, however, relied upon another piece of evidence, which was introduced by the plaintiffs, as being proof of the alleged license. It is a clause in the deed from *Joseph* and *Moses Howard* abovementioned, dated *Oct.* 11, 1825, in these words: "reserving all the privileges to *Jackson Wood* for the timber sold him as per *James Osgood's* obligation to me in *Wood's* possession." It is contended that this

clause amounts to a new license, which justifies the trespass alleged; but the license pleaded is one from the plaintiffs and not from the *Howards*. But it is contended farther, that the acceptance of this deed from the *Howards*, containing the above clause, amounts to a license from the plaintiffs themselves, and thus supports the plea. All this may be ingenious reasoning, but it is in our opinion by no means conclusive. If at the time the deed was made, *Jackson Wood* had no existing rights under the assignment of the limited license given by *Osgood* to *Howard*, then there was nothing reserved by the beforementioned clause, and there was nothing on which it could have any legal operation; and we are well satisfied that there was not. The license had expired almost four years before. If the parties to that deed entertained erroneous ideas on the subject of the license, that circumstance cannot affect their legal rights, nor the rights of other persons. The clause might have been inserted by way of caution; at any rate, it did not produce any change in the existing legal relations of all concerned. But if we were at liberty to consider a sale of the timber as proof of the license pleaded, still our opinion would be that it was only a conditional sale; that is, a sale of the timber that *Howard* or his assignee should cut and carry away within the two years mentioned in the license. To admit the construction given by the defendant's counsel, and consider such a permission as a sale of the trees, to be cut and carried away at the good pleasure of the purchaser, and without any reference to the limitation, in point of time, specified in the permit, would be highly injurious in its consequences. It would deprive the owner of the land of the privilege of cultivating it and rendering it productive, thus occasioning public inconvenience and injury; and in fact, it would amount to an indefinite permission. The purchaser, on this principle, might, by gradually cutting the trees and clearing them away, make room for a succeeding growth, and before he would have removed the trees standing on the land at the time of receiving such a license or sale, others would grow to a sufficient size to be useful and valuable; and thus the owner of the land would be completely deprived of all use of it. Principles leading to such consequences as we have mentioned, cannot receive the sanction of this

court. We are all of opinion that the instructions of the judge were correct; and accordingly there must be

Judgment on the verdict.

Bolster, Executor, *vs.* Cummings.

In trover for certain promissory notes, where the title, and not the value, was the only subject of controversy, the jury, being sent out late in the evening, with permission to separate after agreeing and sealing up their verdict, did so, and returned a verdict the next morning for the plaintiff, with the amount of damages in blank; the foreman observing that they had some doubt as to the time from which interest should be computed, and that some supposed this would be done by the court; whereupon, by direction of the Judge, they retired again, and returned a new verdict for the amount of the notes and interest; and it was held well.

This was an action of trover for certain promissory notes, which had been delivered to the defendant by the plaintiff's testator, who was the grandfather of the defendant's wife. At the trial no question was raised respecting the value of the notes, most of which were signed by the defendant himself, as surety for the principal debtor; but the point in controversy to the jury, was, whether they were delivered to him as a gift, or were deposited with him for collection, he having been the favorite agent of the testator. To this point there was much evidence on both sides. The cause was committed to the jury at a late hour in the evening, by *Parris J.* who instructed them, with the consent of the parties, that after having agreed upon their verdict they might seal it up, and separate for the night, bringing it in at the opening of the court the next morning. This having been done, it appeared, on opening the verdict in court, that they had found for the plaintiff, but had left a blank for the amount of damages; and the foreman, being asked by the Judge, said that "they were all of opinion that the defendant was answerable for the amount of the notes and interest; but that as there was some doubt respecting the form, and the time from which interest was to be cast on the notes, they not being certain of the time to which interest was last

paid, they concluded to omit the calculation of damages, and separate; some of the jury thinking that the court would cast the interest, and give them the form of a verdict." The judge thereupon directed them to retire and ascertain the damages, which they did; returning a verdict for the plaintiff for the amount of the notes and interest; and the question whether judgment ought to be rendered on this verdict, was reserved for the consideration of the court, the defendant having moved that it should be set aside.

J. Holmes and *N. Emery*, for the defendant, contended that no verdict was found till after the jury had separated and assembled again; for the first paper did not conatin all that was in issue, the most material part, the damages, being omitted. *Co. Lit.* 227; *Cro. Eliz.* 133. It is a defect which cannot be supplied. 10. *Co.* 118, 119; *Rol. Abr.* 272; *Jackson v. Wilkinson*, 2 *D. & E.* 281. It was the duty of the court to have kept the jury together till they had agreed in finding the whole matter in issue; or to have discharged them from the cause, for inability to agree. But here they separated without such leave; and afterwards found the damages. Yet it was not upon a new panel; nor upon a rehearing. It was another jury, to all legal intents, without evidence, or hearing of parties.

They further strongly insisted that the court had no right to inquire at this time how this irregularity happened; that the panel was dissolved before the foreman was interrogated; that so far from having considered the damages, some of the jury did not know it was their duty to ascertain them; that the principles on which the damages should be computed were not settled before they separated; and that to admit the principle advocated on the side of the plaintiff would destroy the purity and of course the value of trials by jury, and produce innumerable mischiefs.

Greenleaf and *Deblois* for the plaintiff.

Mellen C. J. delivered the opinion of the Court at the ensuing *May* term in *Lincoln*.

By the report of the judge it appears that the jury, before their separation, agreed that the plaintiff was entitled to recover the amount

of the notes in question, and the interest due upon them; and such was the statement made by their foreman before the verdict was affirmed, though the verdict which was signed and returned, specified nothing in respect to the amount of damages. From the language of that verdict nothing appears to have been decided but the plaintiff's right to recover some amount in damages; and the question before us is whether the proceedings of the judge, in the inquiries made of the jury, and the foreman's explanations, and the consequent affirmance of the verdict, were erroneous or correct. The real intentions of the jury are not to be mistaken; and the reasons why the verdict was not completed in the usual form, were frankly given. No improper motives are imputed to any one. The only question agitated before the jury was a question of property; or, in other words, the inquiry, to which both parties directed their testimony and arguments, was whether the defendant was the owner of the notes described in the writ; or whether they were the property of the testator at the time of his decease; and this important question the jury decided against the defendant. Had the defendant considered that there was any other fact requiring the decision of the jury, he had ample opportunity to present it to them, and direct his proofs and arguments accordingly; but not having done or requested any thing of this nature, it is a tacit acknowledgment that there was no such fact, and the amount of damages was a consequence of the finding of the question of property in favor of the plaintiff. In this view of the subject, the argument of the defendant's counsel respecting the importance and sacredness of a trial by jury and the danger of jeoparding or destroying that right by overruling the present motion for a new trial, seems to lose much of its force, if not all of it. Suppose that in an action on a promissory note the only defence relied on is, that the defendant never signed the note; and the jury should return a verdict in these words, "the jury find for the plaintiff;" would it be deemed an encroachment upon the province of the jury, for the court to direct their clerk to calculate the interest on the note and prepare a verdict in form, with damages equal to the amount due on the note? We apprehend not. Such a course is often adopted and no one thinks of objecting. Indeed the circumstances under

which verdicts are affirmed, are considered as in a measure within the sound discretion of the court, in cases where the estimate of damages is, as it were, a matter of course. It is true that in actions sounding in damages, and where the amount of damages is the principal subject of consideration for the jury, as in actions of trespass of various kinds, actions for libels, or for the speaking of defamatory words; or monies had and received, or on account, or actions of covenant, the omission to calculate and agree on the damages before the jury separate, would be considered as fatal to the verdict; this point is not contested by any one. The case before us we consider of a very different character. It was admitted in the argument that all the notes, but one small one, were signed by the defendant as surety, and that he is a man of property; of course, the question of value was not mentioned at the trial; and, for this reason, we are to conclude that the damages which the plaintiff would be entitled to recover, if any thing, was understood, and admitted to be, the amount of principal and interest due on the notes. And for such sum the verdict was affirmed. Substantial justice has been done; contested facts have been settled; and the assessment of damages was therefore a mere matter of course. The cause of truth and justice can never be advanced by giving more importance to form than substance. We are all of opinion that there ought to be

Judgment on the verdict.

DANA & AL. *vs.* COOMBS.

Where an infant purchased land which was under a mortgage previously made by the grantor to a stranger, and agreed to pay part of the purchase-money by procuring the discharge of this debt and mortgage; which was accordingly done by substituting his own notes and a new mortgage to the creditor of the grantor; and the deeds were prepared and executed on different days, but were delivered at one and the same time;—it was held that the transaction was one and entire, though the deeds were between different parties; and that the infant, by retaining the land after he was of full age, ratified the mortgage.

THIS was a writ of entry, in which the demandants counted on their own seisin as mortgagees, against the mortgagor. In a case stated for the opinion of the court, it appeared that one *Cushman*, who formerly owned the land, had mortgaged it to the demandants to secure a debt of six hundred dollars, which he owed them. Afterwards, in *August*, 1825, he agreed with *Coombs* to sell the land to him for something more than seven hundred dollars; of which he was to pay six hundred by procuring a discharge of *Cushman's* debt and mortgage given to the demandants. *Coombs* accordingly applied to the demandants, who consented to discharge *Cushman* on receiving a similar mortgage and notes from *Coombs*; and agreed that *Cushman* should make a deed of general warranty of the land to *Coombs*, and deposit it in the hands of *W. B. Norton* their agent, until a new mortgage should be given by *Coombs* to the demandants, and the former mortgage be discharged. And on *Sept.* 27, 1825, a deed was made by *Cushman* and lodged with *Norton*, to be kept till the negotiation should be completed. The mortgage from *Coombs* to the demandants was prepared and acknowledged *Oct.* 3, 1825, and on the 22d of the same month both these deeds were delivered at the same time, and the former mortgage given by *Cushman* was discharged. During all this time *Coombs* was a minor; but he had previously declared to *Norton*, the agent of the demandants, that he was of full age, and they knew not to the contrary. After his arrival at full age, *Coombs* conveyed the premises by deed to one *Edwards*.

L. Whitman, for the tenant, hereupon contended that this case stood upon the general principle that the deed of an infant was voidable, and that he had elected to hold it void, by conveying to *Edwards* in fee. And he distinguished it from the case of *Hubbard v. Cummings*, 1 *Greenl.* 11, because there both the deeds were between the same parties, and made at the same time; but here they were between different parties, and executed at different times. The tenant's false affirmation to *Norton*, he insisted, could not affect this action, however it might form the basis of another. *Conroe v. Birdsall*, 1 *Johns. Ca.* 127; *Taylor v. Croker*, 4 *Esp.* 137; *Boston Bank v. Chamberlain & al.* 15 *Mass.* 220.

Greenleaf and *Keith* for the demandants.

Weston J. delivered the opinion of the court.

Certain deeds made by a minor are void; others are voidable only at his election. There has been some obscurity in the books, as to the principle, upon which this distinction is made. By some cases, those seem to have been considered voidable which were beneficial, or carried a semblance of benefit, to the infant. The law upon this point, as laid down in *Perkins, sec.* 12, is, that all gifts, grants, or deeds, made by infants, which do not take effect by delivery of his hand are void; but all gifts, grants, or deeds, which do take effect by delivery of his hand, are voidable. This was adopted as sound law in *Zouch v. Parsons*, 3 *Burr.* 1794, and in subsequent cases. Letters of attorney, or deeds which delegate a mere power, and convey no interest, are put as examples of the former class; and deeds of land, or which convey an interest, of the latter. The deed of an infant, therefore, conveying his land, whether absolutely or on condition, is not void but voidable. The deed under which the demandants claim, is of this description. On the one hand, it is insisted that it has been avoided by the grantor, after he arrived at full age; on the other, that it has been affirmed.

In the case of *Zouch v. Parsons*, Lord *Mansfield* discusses the privilege of infants, which he says was given as a shield, and not as a sword; and that it ought never to be turned into an offensive

weapon of fraud or injustice; that the end of the privilege is to protect infants; and that to this object all the rules and their exceptions must be directed. If an infant, when he arrives at full age, affirms a deed made to himself, he affirms the whole contract. It is not competent for him to claim to hold the land, and to avoid payment of the consideration he stipulated to give for it. Where his securities are given to the vendor, this would probably not be controverted, and it is fully recognized in *Hubbard & al. v. Cummings*, cited in the argument. But the circumstance, to whom the consideration is made payable, does not change the character of the transaction. To the infant it is of no importance to whom he is to make payment, whether to the person of whom he purchases, or to any other person whom he may appoint. If the vendor receives negotiable notes, and indorses them over, they are as valid in the hands of the indorsee, as of the payee. So is a mortgage, taken as collateral security, in the hands of an assignee. The protection of the infant, which is the ground upon which his privilege turns, does not require any difference or discrimination in these cases. The vendor chooses to have the notes given as the consideration, and the mortgage by which they are secured, made directly to his creditor. The creditor is willing to receive them. Shall the minor when he arrives at full age, elect to hold the land, and yet avoid the payment of the notes thus given, and the mortgage by which they are secured? It would be gross injustice so to adjudge; and it is not necessary for his protection. That object is fully answered, by leaving it to his election to determine, when arrived at an age at which he is by law deemed competent to manage his own concerns, whether he had made an improvident bargain, and whether, upon the whole, it was most for his interest to affirm or avoid it. What was the consideration, which the tenant argued to give *Cushman* for the land in question? The land being of the value of seven hundred dollars, he was to pay one hundred to *Cushman*, and the remaining six hundred he was to pay to the demandants, his creditors. This arrangement was more beneficial to the tenant, than if the whole consideration had been made payable to *Cushman*. For after he had paid *Cushman*, the latter might not have extinguished the mortgage, and the

demandants might have held the land, upon which they had a lien for their debt. It is not denied that if notes to the whole amount had been given to *Cushman*, secured by a mortgage to him, and the tenant had affirmed the contract, by conveying the land at full age, the incumbrance created by him would have attached. And yet that would have left the land incumbered also by the demandants' claim. How much more provident and prudent it was for the tenant to take the course he did, by which his purchase was relieved from all incumbrance, except that created by his own debt, which he was bound upon every principle to pay, if he thought proper to retain the land. The whole arrangement was one transaction; as much as if all concerned had been present, and the instruments had been executed on the same day. They all took effect at the same time; *Cushman's* deed remaining an escrow in the hands of *Norton*, until the negotiation between the tenant and the demandants was completed. Suppose the demandants, instead of suing the mortgage, had sued the tenant upon his notes. If he had set up the defence of infancy, it might well have been answered that they were given as part of the consideration for the purchase of land, which the tenant at full age chose to retain. And this act of his is equivalent to an express promise to pay the notes. If the notes would be good, the mortgage is good, by which they are secured. They all stand upon the same principle. By discharging their mortgage from *Cushman*, the demandants virtually united with him in assuring the land to the tenant. There was a privity between all concerned, by which what was done may and ought to be considered as parts of the same contract. If the tenant would affirm, he must affirm the whole. He cannot adopt part and reject part. Nor is injustice, from this view of the case, done to *Edwards*, the tenant's grantee. He took the land, as every other grantee does, subject to all prior lawful incumbrances. If he has not retained a part of the purchase money, to be applied to their extinguishment, he is, or might have been, secured by the covenants of his grantor. Upon the facts agreed, the opinion of the court is, that the tenant must be called. *Tenant defaulted.*

CASES

IN THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF LINCOLN, MAY TERM, 1829.

WELD *vs.* THE PROPRIETORS OF THE SIDE-BOOMS IN ANDROSCOGGIN RIVER.

Under the statute incorporating the proprietors of the side-booms in *Androscoggin* river, and the acts in addition thereto, it is the duty of the proprietors frequently to examine their piers and booms, to ascertain whether they are firm and sound, and capable of securing the property contained in them; and the corporation is responsible for all losses occasioned by the want of ordinary care.

THIS was an action of trespass on the case, in which the plaintiff sought to recover damages for the loss of a large quantity of pine logs, by the breaking of the defendant's boom in a time of flood, in consequence of its having become rotten and defective through their negligence. The general question of the liability of the defendants was submitted to the court, upon a statement of facts drawn up by a commissioner agreed upon by the parties for that purpose.

It appeared from his report, that the private statutes of *March* 15, 1805, *Feb.* 29, 1812, and *Jan.* 31, 1820, incorporating the proprietors, and regulating their tolls, were passed at the instance of the defendants; in pursuance of which they proceeded to erect three

side-booms in *Androscoggin* river, within the limits prescribed in their act of incorporation. The principal boom, called " the Great-carrying-place-boom," was capable of containing more than twenty thousand logs; and was extended from the west or *Brunswick* side of the river, across the channel, to within about ten or twelve rods of the *Topsham*-shore, and thence up the river, and nearly parallel to the bank, about seventy rods, forming a *cul de sac* of about twenty acres, the opening at the top being from forty to fifty rods wide.— The passage left open next to the *Topsham*-shore was closed in the year 1824 and ever afterwards, by a boom, erected by private persons owning logs in the river and usually dealing in lumber, among whom were the plaintiff and some of the defendants, which was called " the log-owners' boom." Between one and two miles farther up the river, the defendants erected another boom on the *Topsham*-side, called " the *Merrill*-boom;" and another on the *Brunswick*-side, called " the *Twitchell*-boom;" each capable of containing ten thousand logs. The Great-carrying-place-boom was supported by nine piers, lying in two ranges, erected at various times between the years 1818 and 1827; and composed of an exterior wall of timbers dove-tailed together, with chambers seven or eight feet apart, ballasted with stones. Some of these piers were not built in a workmanlike manner, nor of suitable timber; and were somewhat decayed; and in most of them there was no ballast within several feet of the surface of the water in the time of the highest freshets. These decays were known only to some individuals of the corporation.

The defendants occasionally used the log-owners-boom for the delivery of logs from their own; and exacted toll for all logs detained in the river by either of them. The place of delivery for all logs, contained in either of the defendant's booms, was below the lower-boom; and when the logs in the upper booms could not be floated to this place, by reason of the great number of others obstructing the passage, the defendants paid the expense of hauling them by land.

The *Twitchel*-boom was secured to a tree on the bank, by a yoke, composed of two pieces of timber lying parallel to each other, with a cross-piece of oak, called a sword-piece, passing through each of

their ends; all which, as well as the boom-pieces, were, after the disaster, found to be rotten. But these defects, which were wholly internal, were not previously known to the defendants. The *Merrill*-boom was strong and unbroken.

At the time of the disaster, which took place on the night of the 26th of *April*, 1827, all the booms were full of logs; with which also the surface of the river was covered for a large distance above the log-owners-boom. The flood was not quite as high as the freshet of 1820, nor as those of several previous years; nor as high by three feet as that of 1814; and the quantity of logs in the river was uncommonly large, many having been detained above, for want of water, in the two preceding years. This had been the case also in 1820 and 1824, each of which years had been preceded by low freshets. In the former of these years, the quantity of logs in the Great-carrying-place-boom had been as great as in 1827, if not greater; but the pressure would have been much less at the time of the disaster, had the passage closed by the log-owners'-boom, been left open.

The loss was occasioned by the breaking of the *Twitchell*-boom, and the Great-carrying-place boom; by which accident the plaintiffs logs, and all others in those booms, were precipitated over the falls, and drifted into Merry-meeting bay. But which boom was first broken did not appear. The latter was broken by the pressure of logs against the pier nearest to the *Brunswick*-shore, which was the oldest, the force being so great as to carry off the upper part of the pier, as far down as the upper tier of ballast, which was several feet below the surface of the water. The timbers of this pier, between the high and low water marks, were very much decayed. Two other piers, inside the boom, to which it was fastened, and which were built in the same manner, and were equally defective, were also carried away.

After the accident in *April*, the Great-carrying-place-boom was again stretched from one of the remaining piers to the *Brunswick* shore, being about twenty-four rods, secured only by the fastening of each end; and thus remained till *November* following; the defendants during that time, detaining logs within it, and exacting tolls

as before. However this kind of security might suffice for the summer months, when the water was low, it was clearly insufficient against the autumnal floods; and this through the want of seasonable care on the part of the defendants. In *November*, therefore, it was broken by the flood; and the plaintiff's logs were swept off and lost, to the value of a hundred dollars. But before this time, the owners of the logs, in expectation of the usual autumnal freshets, ought to have rafted out their logs from the boom.

One of the directors of the corporation, and some of the members, knew the situation of the Great-carrying-place boom before the disaster, and deemed it insufficient; but this was unknown to the boom-master, and all the other officers, except that director. But the commissioner certified his opinion that competent skill and discernment would have pronounced the piers deficient; but that gross negligence was not imputable to the corporation, unless it legally resulted from the knowledge of the director.

As to the *Twitchell* boom, he was of opinion that considering the latent character of its defects, a prudent and diligent owner might well be presumed to be ignorant of them.

And he was also of opinion, that, had the passage closed by the log-owners' boom been always open, then the Great-carrying-place boom would probably have withstood any pressure which would have been brought against it; and that in such case the defendants would not have been liable.

Greenleaf and *Mitchell*, upon the facts thus found, argued against the liability of the defendants. The form of the action being in *tort*, the plaintiff evidently founds his claim on the violation, by the defendants, of some duty created by the statutes of incorporation. But no such duty is created. The defendants are merely authorized to "stop, raft, and properly secure" the logs for the owners. The statutes constitute them bailees for hire; and leave the measure of their liability, and the mode of remedy, to be determined by the rules of the common law. It is plain therefore that the remedy should have been in *assumpsit*, and not in *tort*.

But even as bailees, they are not liable. The benefits of the bailment being mutual and reciprocal, the defendants are bound only

for ordinary care; and this care they appear to have taken. They were not bound perpetually to maintain booms, but only allowed to erect them; and the toll is granted for the custody of logs; not as a premium for insuring their safety.

The damage was occasioned by the erection of the log-owners' boom, which closed up the passage which the defendants had left open. This act was an illegal obstruction; and against the authors of it, and those only, the plaintiff has his remedy.

But if the defendants were liable as bailees, for the loss of logs from their boom, yet here they are not responsible, the loss in *April* having been occasioned by an extraordinary casualty. And as to the loss in *November*, it was the fault of the plaintiff not to have rafted out his logs before the autumnal floods.

Allen and *Packard*, for the plaintiff.

The opinion of the court was read at the ensuing *September* term as drawn up by

Mellen C. J. In the examination of this cause, the first inquiry is, "What are the powers and liabilities of the defendants in their corporate capacity, created by the several statutes which make a part of this case, or resulting from the principles of the common law. The act of *March* 15, 1805, incorporating the defendants, is the principal basis of the plaintiff's claim against them. By the first section they were incorporated "for making, laying and maintaining side booms, in suitable and convenient places in *Androscoggin* river, from *Androscoggin* bridge to the narrows of said river, in *Brunswick* and *Topsham*." By the fourth section the corporation are authorised to receive of the "respective owner or owners of logs and other lumber by them stopped in said river, rafted and properly secured for the owner, the following fees, &c." By the fifth section it is declared that "it shall be lawful for the said corporation, by their several agents and servants, to be appointed as aforesaid, to hold and retain any logs or other lumber, by them stopped in said river, rafted and properly secured for the owner as aforesaid, until payment or tender of the fees respectively which shall have thereby become

due to the said corporation." The acts of *February* 29, 1812, *January* 31, 1820, and *March* 15, 1821, either authorise an extension of the booms under certain limitations as to distance, or increase the fees claimable by the corporation; but they do not vary the rights and liabilities of the defendants in any other respects; these remain as established by the act of incorporation. The case finds that all the foregoing acts were passed on the application of the defendants, and that they have accepted them, and enjoyed the privileges granted thereby. Prior to the act of incorporation, we must understand that the owners of logs and other lumber in *Androscoggin* river took charge of the same themselves, and secured them in such a manner as they thought proper; with or without any expense to themselves, according to existing circumstances. But by the provisions of the act that privilege is taken away, and transferred to the corporation, who have a right to hold and detain all logs and lumber, stopped, rafted and secured, until the established fees are paid. This view of the character of the law and of the powers it has granted will aid in its construction, as to the nature and extent of the duties and liabilities on the part of the corporation.

It has been contended that the act imposes no liabilities, except the loss of toll in cases where the owners lose their logs. But we apprehend this to be clearly a mistaken construction. The right to demand and receive toll or fees is given only for logs and other lumber, "stopped, rafted and secured." The duty to secure the property and the right to compensation for securing it, are both created *uno flatu;* and the acceptance of the act, with the privileges it confers, is an engagement to perform the duties it enjoins. The question then is, what are those duties? and what is the extent of the responsibility of the defendants? It is said that the law was never intended to subject them to damages for loss of logs and other lumber, occasioned by an unusual or extraordinary rise and swell of the river. The preamble to the act states that it would be of great public as well as private advantage, by side booms, to stop and secure "masts, logs and other lumber which are drifted down said river." It would seem that the defendants and the legislature must have had reference to those freshets in the river which are annually, and sometimes oftener, ex-

perienced, whereby property is drifted down to, and over the falls at *Brunswick*, and totally lost. It must be presumed that the proprietors were acquainted with the character of the river and the peculiar danger to which logs and lumber were exposed in a sudden swell of its waters; and, besides, it must be remembered that the design of the booms in question was to secure property from these very dangers. This the defendants were willing to undertake for a certain established compensation, calculating upon a profit to themselves; and considering the vast number of logs which the booms often contain, as appears from the facts, the compensation allowed by law seems to be an ample one. The counsel for the plaintiff has considered him in the light of an involuntary bailor, and the defendants as bailees for reward. It is well known that the extent of a bailee's liability, depends on the nature of the bailment. If the bailor only receives the benefit of the bailment, the bailee is answerable only for gross neglect. When the bailment is mutually beneficial, the bailee is answerable for no more than ordinary neglect; which is the omission of that care which every man of common prudence takes of his own concerns. And when the bailee only is benefited by the contract or bailment, he is responsible for slight neglect; which is the omission of that diligence and care which every circumspect and thoughtful person uses in securing his own property. *Jones* on bailment, 14, 15, 106. Upon these principles, it is contended, as the defendants were bailees of the logs of the plaintiff for a purpose profitable to them, and without any consent on the part of the plaintiff, they are responsible to him in damages, provided, upon the evidence before us, his property has been lost by even their slight neglect. In *Riddle v. Proprietors of the locks and canals on Merrimack river*, 7 *Mass.* 169, the plaintiff's boat got aground in the canal for want of sufficient depth of water. The judge instructed the jury that it was the duty of the proprietors to keep their canal in proper order; and that the receiving of toll amounted to an undertaking that the canal was passable. The whole court sanctioned the instructions and entered judgment on the verdict. Upon the question as to the extent of liability, the counsel for the defendants has cited the case of *Townsend v. President, &c. of the Susquehanna Turnpike Company*, 6 *Johns.*

90, and *Harris & ux. v. Baker*, 4 *Maull & Selw.* 27. In the former case an injury was sustained by the breaking of the most essential timber in a bridge, by means of which other parts gave way and fell. It appeared that there was a latent defect in the heart of the stick of timber which had destroyed its strength. The jury gave a verdict for the plaintiff, which the court refused to set aside; saying, however, that the defendants were answerable only for ordinary neglect. The latter case seems to have no bearing on this. The defendant was not the immediate cause of the injury, nor under special obligations to diligence and care by reason of any pecuniary consideration, as in the present case.

On the whole, we do not consider the defendants as liable to the same extent as a common carrier, whose accountability is avowedly placed on reasons of policy, which do not seem applicable to a case like the one at bar. The line of distinction between slight and ordinary neglect, it is sometimes difficult to draw; and taking all circumstances into view, we are inclined to adopt the opinion that the defendants, under their act of incorporation, and the influence of common law principles in its construction, are holden for all losses occasioned by the want of ordinary care, attention and diligence. In common cases this is a question submitted to the jury as the proper tribunal. In the present case, however, the parties have agreed on a commissioner to ascertain and report all the facts in relation to the subject in controversy; and his report is now before us; and on this we are to decide whether the defendants are answerable to the plaintiff for the damages assessed by the commissioner, or any part of them. As the parties authorised him to collect and report facts only, we are not at liberty to regard any of his opinions, calculations or reasoning, upon any part of the facts.

The prominent facts relied on by the plaintiffs to shew the alleged negligence, are—

1. The insufficient ballasting of the piers to which the Great-carrying-place boom was fastened; the ballast having been placed in chambers in the piers, instead of forming a solid body of stones from the bottom to the top, which would have given them sufficient firmness and stability to resist any probable pressure and violence,

even after the timbers were in some degree weakened by their age. The fact is, that this boom gave way, by means of the top of the piers, above the ballast, having been carried away; or at least several of them. The freshet in 1814, was three feet higher than in *April* 1827; and in 1820 there were as many logs in the boom as in 1827, and still it withstood the pressure; probably because the timbers were then much more firm, being comparatively new. The height of the water in 1814 was a notice to all concerned, what height and solidity of piers would be necessary to secure logs and timber for the owners.

2. The top of one of the piers was found hanging to the boom the morning after the disaster, and this was old and defective; and some of the timbers, between wind and water, were almost entirely decayed.

3. The *Twitchell*-boom had a serious defect in it; the sword pieces, connecting the logs composing the yoke, were entirely rotten, and this occasioned the boom to give way. The logs also composing this yoke, were found so rotten after the freshet, as to be unfit for further service. It is true these sword pieces, to a casual observer, had the appearance of being sound. These were the principal defects in piers and booms, on the strength of which so much property was annually depending for security from loss. For a more particular account of these deficiences, we refer to the statement of the commissioner; merely observing that a man of respectability and one of the directors, who was admitted a witness by consent of parties, testified that before the disaster, he considered the piers insufficient for the reasons before stated, viz. the badness of the construction, the unsuitableness of the timber, and insufficiency of the ballasting, with the deterioration arising from decay in the part where the water rose and fell. And the commissioner concludes by saying that he considered "the weight of testimony as establishing it as a fact, that competent skill and discernment would have pronounced them insufficient." It is stated that there is no reason to believe that the defendants, as a corporation, were sensible of the fact: but it is also expressly stated that *Nahum Perkins*, one of their directors, was aware of the fact. How is a corporation to know a fact but

through some of the members of it? They may see the fact, or it may be communicated to them. Whatever the defects were, here is abundant proof of a *scienter*, whether necessary or not, to the maintenance of this action. Taking the foregoing facts into consideration, respecting the nature and extent of the defects which have been described, there can be no hesitation in pronouncing them such as clearly to prove the insufficiency of the piers and booms, for the important purpose for which they were intended. And as the defendants were receiving toll for securing the logs, year after year, it was their duty frequently to examine the piers and booms, to ascertain whether they were firm and sound, and capable of securing the property as the legislature must have contemplated. And yet the report states no facts shewing that this duty was performed. It is not enough that the timbers, or logs, or sword pieces, should appear to a casual observer to be sound, when they are defective, and in some instances totally rotten. Had proper examination been made every year, these dangerous defects must have been discovered. Surely this is ordinary neglect, to give it the mildest name; and when, in addition to all this, it is proved that before the disaster, one or more of the directors were aware of these defects and deficiencies, and yet no measures were taken to repair and strengthen the piers and booms, we cannot but deem the defendants as guilty of even gross neglect, in the instances before mentioned.

The remaining inquiry is whether the unauthorised log-owner's boom, which was placed and continued across the eight-rod passage, was the occasion of the disaster. This boom, it seems, was made by sundry individuals, some years before; the plaintiff was one of them, and some of the members of the corporation also assisted in placing it there. It is contended that if the eight-rod passage had been left open, those logs which came down the river after the Great-carrying-place boom was full, would have passed on and gone over the falls, instead of increasing the pressure on the Great-carrying-place boom; and that such being the case, the defendants are not responsible, even though their piers and booms were defective and insufficient as abovementioned. On this point some other facts must be examined. It appears that the current of the river

sets into the Great-carrying-place boom, and all logs floated down the river, if not obstructed, are carried directly into said boom; of course, when that boom was full, logs coming down the river and passing diagonally to the eight-rod passage, would still, by the power of the current, be forced against the body of logs in the boom, and increase their pressure on the boom; though, as the report states, it would have been much less, if the passage had been kept open, than when closed by the log owner's boom. But though the corporation were not instrumental in placing that boom there, yet the report states that they "uniformly exacted boomage or toll, as provided in said statutes, as well for logs which lay above said log owner's boom and above the logs within their boom, as for those which were within the same;" and this boom was "used by the defendants occasionally to deliver logs which they considered as within their boom, to the mill men below it." The defendants "considered all logs, so situated, however high up river they may have extended in manner aforesaid, as within their boom, and exacted and received toll accordingly." These facts shew that the defendants, so far from objecting to the continuance of the log-owner's boom, as an inconvenient obstruction, or as endangering the piers and boom below, were constantly and uniformly availing themselves of its use and effect as a source of income; and in the exaction and receipt of toll, considering and treating it as a part of their own boom. Under these circumstances we are of opinion that they cannot be permitted to relieve themselves from accountability, by shewing that possibly that boom might have, in some degree, contributed to the disaster. They ought not to complain of that boom, as soon as a loss has happened, and yet uniformly derive advantage from it in the form of toll, until it has happened; *qui sentit commodum, sentire debet et onus.* Connected with this subject, another part of the evidence demands attention. It does not appear which boom first gave way; the Great-carrying-place boom, or *Twitchell's* boom. If the former gave way in consequence of some extraordinary pressure from logs above; might it not have been a pressure from the logs contained in the latter, when it gave way and suddenly permitted ten thousand logs to rush down against the body of logs below? If the

loss was occasioned by the breaking of *Twitchell's* boom, as that was singularly defective, the defendants must be answerable for its effects on the great boom below, and the consequent loss of the plaintiff's logs. The opinion of the commissioner, hypothetically stated, near the close of his report, as to the sufficiency of the piers in case the eight-rod passage had always been kept open, and insufficiency of them in case the liability of the defendants does not depend upon that circumstance, cannot alter the case, in the view we have taken of the cause. The nature and extent of the deficiency, are facts, which opinions cannot change, except as to their legal effect; and of this the court are now the judges.

Our opinion, thus far, has had relation more particularly to the disaster in *April*, 1827. As to the loss in the *November* following, there seems to be no ground whatever for the defence. The report states that the "evidence was satisfactory, that it was owing to want of reasonable care and diligence on the part of the defendants;" and he adds, "the logs might and ought to have been rafted before that time." We are sensible the cause is an important one in itself, and in its character and consequences; and have, therefore, endeavored to examine it in all its bearings and principles. In the same degree that public policy requires the encouragement of booms on account of the valuable and important purposes for which they are designed, and which they generally accomplish, it requires also that those who own and superintend them should carefully guard the property committed to their care, and secure it from loss and injury by the means prescribed by law. Honesty and good faith on their part are not all that are required of them. They must use all reasonable care and diligence that those means shall prove effectual; otherwise the law, under which they have been incorporated, would be productive of more injury than advantage, by depriving the owners of logs and other lumber, of the power of exercising their own care and watchfulness over their own property, and transferring that power to others, who, though amply rewarded for their expense and trouble, by their neglect and want of care, expose it to danger, and occasion its loss.

We are all of opinion that the action is well sustained, and that the

plaintiff is entitled to judgment for the damages assessed by the commissioner, viz. $700, and interest on that sum from the commencement of the action.

The Proprietors of Side-Booms in Androscoggin River *vs.* Weld.

Under the private act of *March* 15, 1805, *sec.* 4, incorporating the proprietors of side-booms in *Androscoggin* river, the corporation is entitled to toll for such logs as have been actually stopped, rafted and properly secured for the owner, though the booms were, at the same time, defective, and insufficient to secure other logs of the same owner, then in the booms, and which consequently were lost.

This action, which was *assumpsit*, was brought to recover toll for certain logs stopped in the plaintiff's booms, which were rafted out and delivered to the defendant, being part of the same quantity of logs of which those mentioned in the preceding case composed the residue.

The opinion of the Court was read at the ensuing *September* term, as drawn up by

Mellen C. J. This action is brought to recover the fees by law established for stopping, rafting and securing certain logs in the plaintiffs' boom, which were afterwards safely turned out and delivered to the defendant, to whom they belonged. The claim is resisted, on the ground that the booms and piers of the plaintiffs were not sufficient, nor faithfully made and kept in good repair, as appears by the facts detailed in the report and opinion of the court, in the case of *Weld* against the same proprietors. But we are all of opinion that the action is maintainable, according to the express language of the fourth section of the act of *March* 15, 1805, incorporating these proprietors. The language of the act is this: "The said corporation shall be entitled to and receive of the respective owner or owners of logs, or other lumber, by them stopped in said river, rafted and

properly secured for the owner, the following respective fees;" &c. The defendant's logs were thus stopped, rafted and secured for the owner, and he has received them. As to those logs, the piers and booms were sufficient to stop and secure them, although they were not sufficient, as they ought to have been, to resist the unusual pressure, which afterwards broke and carried them away, and occasioned the disaster and loss, for which the present defendant has recovered damages in his action against the corporation. The defendant must be called, and judgment be entered for the plaintiffs.

Greenleaf and *Mitchell* for the plaintiffs.

Allen and *Packard* for the defendant.

Howard & al. *vs.* Turner.

Where one made a deed in fee, reserving to himself a life-estate in a part of the premises, and declaring further that "this deed is made, and to have effect, upon the following conditions"—viz.—the payment of money at divers times to other persons;—it was held that the fee passed immediately, on condition subsequent.

If, in the extent of an execution on lands, it nowhere appears that the person, before whom the appraisers were sworn, was a Justice of the peace, the extent is bad.

But this may be amended by stating the fact, even after registry, and pending an action for the land, if the rights of third persons are not thereby affected.

This was a writ of entry, tried before the Chief Justice, upon the general issue. It appeared that the tenant, being owner of the premises in fee, on the 10th day of *September* 1819, made a quit-claim deed of the same, to his son *Nicholas Turner, Jr.* then a minor, for the consideration of love and affection, "and of his performing the conditions hereinafter mentioned." After the *habendum*, the grantor proceeded thus;—"But it is understood that the use and improvement of the southerly one hundred acres of the premises aforesaid, are reserved, and I do hereby reserve to myself, the use and improvement of the same, for and during the term of my

natural life, with full right to take and apply to myself, as I shall choose, all the timber, wood, and other things upon said premises during my life. And this deed is made, and to have effect, upon the following conditions, to wit,—that the said *Nicholas Turner, Jr.* his heirs, executors, administrators or assigns shall pay"—certain sums, at divers times, within eight years, to a creditor and the daughters of the grantor,—"then this deed to be in full force and virtue, otherwise to be null and void." The son entered into possession of the premises under this deed; and the father, being a widower, resided in his family. On the 29th day of *October* 1821, the father and son mutually executed another indenture; by which the father, "for the consideration hereinafter mentioned," viz. the covenants of the son, demised the hundred acres to him, during the life of the father; and the son covenanted on his part, to maintain and support his father during life. The son afterwards, on the 16th day of *July* 1822, sold and conveyed the premises in fee, to *Samuel W. Clark*; from whom they were taken, by extent, by the demandants, who were his judgment-creditors.

In the return of the proceedings on the back of the execution, it appeared that the appraisers were sworn before "*John McLean*;" but it was no where stated or indicated that he was a justice of the peace, or that he acted in that capacity. And for this defect the tenant objected to the admission of this evidence; but the Chief Justice overruled the objection, reserving it for the consideration of the court.

The jury were instructed that if they should find that the tenant had never entered for breach of the conditions in the two deeds made by him to his son; or that, being in possession, he never gave notice that he claimed to hold the premises for condition broken, they ought to find a verdict for the demandants. Which they did. And the verdict was taken subject to the opinion of the court, upon the correctness of those instructions, and the admissibility of the evidence.

Allen and *Child*, for the demandants, and *Sprague* and *Barnard* for the tenant, submitted the question without argument.

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

The question whether covenants are dependent or independent, or whether a condition is precedent or subsequent, is to be answered by ascertaining the intention of the parties from an examination of such covenants or such condition, rather than from any precise collocation of words, or formality of language. 3 *Comyn's Dig.* 88, 92. Now from an inspection of the deed of *September* 10, 1819, from the tenant to his son, it is evident that it was intended to pass the fee of the estate immediately to the grantee, subject, however, to be defeated by breach of the conditions expressed in the deed; or in other words, that the estate was conveyed on a condition subsequent, though the language of the condition seems to be that usually employed in the creation of a condition precedent. It would have been singular and unnecessary for the grantor to reserve to himself, as he has expressed it, a life estate in one hundred acres of the tract conveyed, if no estate was to vest in the grantee until after the expiration of eight years. The only sensible construction is that the fee passed at the time of the conveyance, and that the conditions were subsequent. The second deed, of *October* 29, 1821, conveyed the life estate also to the son; and being thus owner of the whole estate, he had a right to convey the same to *Clark;* and by his deed of *July* 16, 1822, *Clark* became seised thereof, subject to the conditions expressed in the two deeds of conveyance from the tenant.

The only question is whether the estate has been transferred to the demandants by the levy. It is a principle of law perfectly settled by repeated decisions, that every thing that is made necessary by the 27th *sec.* of our revised statute, *ch.* 60, to pass the property in real estate, taken in execution, must appear by the return of the officer to have been done. *Eddy v. Knapp*, 2 *Mass.* 154; *Barnard v. Fisher*, 7 *Mass.* 71; *Whitman v. Tyler*, 8 *Mass.* 284; *Williams v. Amory*, 14 *Mass.* 20. One of the requisites of the statute is that the appraisers shall be sworn by a justice of the peace in the county where the real estate is situate. In the case before us, the return contains no proof whatever that *John McLean* was a justice of the peace. The officer's return refers to

his certificate as to the supposed fact that the appraisers were sworn and how they were sworn; and the certificate of *McLean* proves nothing and asserts nothing as to his acting in any official capacity. We cannot take notice that he was a justice of the peace, if in fact he was one. It has been decided that where the return was silent as to the statute qualifications of the appraisers, parol proof could not be admitted to shew the fact. If a fact could not be proved, it cannot be presumed in support of the levy. As the return now stands we think the objection is a fatal one. But it appearing that the rights of third persons cannot be affected by an amendment of the certificate of *John McLean*, by adding thereto the words "justice of the peace;" or by an amendment of the officer's return, either of which will completely obviate the objection; we are disposed, in support of the proceedings, and for the advancement of justice, to permit the proposed amendment, and leave for that purpose is accordingly granted. After the proceedings shall have been so amended, let judgment be entered on the verdict.

HILT *vs.* CAMPBELL.

A count on a note payable on the occurrence of a certain event, *or in a reasonable time*, is not supported by evidence of a note payable only on the occurrence of the event; though it is proved that the contingency was rendered impossible by the misconduct of the defendant. The plaintiff should have alleged the facts tending to deprive the defendant of any excuse for not paying the money.

CASE upon promises. The declaration contained several counts, the first of which was upon a promissory note made by the defendant, payable to the plaintiff, described as a note for sixty dollars, for one half of the stud horse called the *Paymaster*, payable when the horse should be sold by the defendant, or within a reasonable time. In another count it was alleged, and was proved at the trial, that the defendant undertook to sell the horse, but did not, and in fact abused him, so that he died. The note offered in evidence

under the first count was payable when the horse should be sold, without any mention of reasonable time; for which cause the defendant objected to its admission. But the Chief Justice overruled the objection; and a verdict being returned for the plaintiff, this point, among others, was reserved for the consideration of the court. The other points are omitted, no opinion having been given upon them.

Allen and *E. Smith* for the plaintiff.

Greenleaf and *Ruggles* for the defendant.

Mellen C. J. delivered the opinion of the Court at the ensuing *July* term in *Waldo*.

The first question in this case is whether the note offered in evidence supports the first count. The promise alleged in that count is to pay the sum mentioned in the note declared on, when the horse should be sold, or in a reasonable time. The promise in the note is to pay the sum when the horse should be sold; and the case finds that he never was sold, but died in consequence of the defendant's misconduct. It is admitted by his counsel that the declaration on the note might have been so framed as to entitle the plaintiff to recover upon it; but he contends that the instruction of the judge to the jury on this point was incorrect. It must be remembered that in this count the plaintiff declares on an express contract; and therefore, unless the words made use of in describing the promise, "or in a reasonable time," are a part of the express promise, there is a fatal variance. It is said that those words are no more than the law implies. It is true, when, in a promissory note, no time is mentioned when payment is to be made, the law will give effect to the contract, by construing the promise to be a promise to pay in a reasonable time; *ut res magis valeat quam pereat.* But in the case before us, a time of payment was mentioned in the note; and we are not aware that, in the absence of all proof, the law would imply any other time; for that would be contradicting the language of the note. The counsel for the defendant contended that as the contingency had not happened on which it was to become payable, the plaintiff could not recover on that count; because it did not contain an averment of any

facts shewing that the defendant was liable to pay the note, though the contingency had not happened. And we are of opinion that all such facts should have been stated, as the premises from which the legal inference was to be drawn, that the defendant was bound to pay the contents of the note in a reasonable time. As the first count now stands, the words " or in a reasonable time" are inconsistent with the written promise. Such an inference is a *non sequitur*. It is scarcely necessary to cite authorities to show that a contract must be proved as alleged, and that a variance as to the terms of it is fatal. We merely refer to *Penny v. Porter*, 2 *East* 2; *White v. Wilson*, 2 *Bos. & Pul.* 116; *Robbins v. Otis*, 1 *Pick.* 368.

To shew that the first count as it now stands is not supported by the proof, and that it should have contained an averment that the horse had never been sold, and that having died by means of the defendant's misconduct, he had disabled himself from selling the horse and performing his promise, according to the terms of it as expressed in the note, we subjoin the following authorities. In the case of *Newcomb v. Bracket*, 16 *Mass.* 161, the defendant promised the plaintiff to pay him a certain sum, by transferring to him a mortgage of certain land as soon as the plaintiff should pay him the residue of a debt, not exceeding $100; and the defendant gave a quitclaim deed of the mortgaged premises to another man. It was held that the plaintiff need not aver performance on his part; and that a statement of the promise and the allegation that the defendant had executed the said quitclaim to another man, whereby he had broken his promise and become unable to perform the same, constituted a good declaration. In the above case the court observed that as there was no time fixed in the contract within which the money was to be paid, or the estate conveyed to the plaintiff, he had a reasonable time to perform his part. We notice this part of the case, as illustrative of the principle before stated, that the legal implication as to reasonable time, is applicable only to the cases of contracts where no time is fixed; whereas in the case before us a time or event was fixed upon as the time of payment, viz. the sale of the horse. See also, *Yelv.* 76, and Mr. *Metcalf's* note, where he sums up the law on this subject in these words: " When the consideration of a con-

tract is executory, or its performance depends upon some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver performance of such precedent condition, or shew some excuse for the non-performance." See also, 1 *Chitty's Pl.* 309. An averment of the death of the horse through the fault and mismanagement of the defendant, would have brought the plaintiff's demand upon the note, and his right to recover on the first count, within the reason and spirit of the beforementioned principle, though not the language of it; for by the language of it, the fact to be averred is an excuse for some omission on the part of the plaintiff; whereas in the case at bar, it is one which takes away all excuse on the part of the defendant for not complying substantially with his promise, though not according to the very terms of it; a strict compliance with which had become impossible by the commission of a wrongful act on his part. Such being, in our opinion, the law as to the first count, the instruction of the judge in relation to it was incorrect, and there must be a new trial. It is not necessary to examine the other points discussed in the argument.

Verdict set aside and a new trial granted.

BOWDOINHAM *vs.* RICHMOND.

The legislature having, in the act dividing the town of *Bowdoinham* and incorporating a part of it into a new town by the name of *Richmond*, enacted that the latter town should be holden to pay its proportion towards the support of all paupers then on expense in *Bowdoinham*; which it did for two years; after which, on the petition of *Richmond*, another act was passed, exonerating this town from such liability in future; it was held that the latter act was unconstitutional and void, as it impaired the obligation of the contract created by the original act of division and incorporation.

THIS case was *assumpsit*, brought to recover five thirteenth parts of the expense of supporting certain paupers, under the special provisions of the private *Stat.* 1823, *ch.* 214, *sec.* 5; and it came before the court upon a case stated by the parties, the material facts of

which are sufficiently apparent in the opinion of the Court, which was read at the ensuing *September* term, as drawn up by

MELLEN C. J. On the 10th of *February*, 1823, when the town of *Bowdoinham* was divided, and the northerly part of it erected into a town by the name of *Richmond*, all the paupers, sixteen in number, which were then chargeable as such to *Bowdoinham*, lived in that part of the original town which is now *Bowdoinham*; except one; and she lived in that part of the original town which is now *Richmond*. The act of incorporation, in the 5th section, declares "that the said town of *Richmond* shall be held to support their proportion of all paupers now supported in whole or in part by *Bowdoinham*." And after giving certain rights to each town, the section is concluded in these words, "and if either town shall neglect or refuse to comply with the provisions of this act, the other town may have an action on the case against such delinquent town, to recover what "in equity and good conscience may be due to it." Upon the petition of the town of *Richmond*, the legislature, on the 15th of *February*, 1825, passed another act, declaring "that from and after the first day of *May* next, the town of *Richmond* shall not be holden to support or contribute to the support of any pauper who resided within the limits of the town of *Bowdoinham* on the 10th day of *February*, 1823, but shall be holden to support all paupers who resided on that day within the limits of the town of *Richmond*." On the presentment of the petition by *Richmond* for this second act, the usual notice was ordered, and given; but no notice was taken of it by *Bowdoinham*, or any of its officers.

The question is whether *Bowdoinham* is bound by this second act, to the passage of which they never gave any express or implied assent. It is admitted that the legislature has power to incorporate towns, of such dimensions and form, and by such boundaries as they may judge proper, and alter such boundaries at their pleasure; and that they may, by annexing a part of one town to an adjoining town, materially change the amount and value of taxable property, as well as the number of inhabitants, by enlarging one town and diminishing the other. As we had occasion to observe in *North Yarmouth*

v. Cumberland, [*ante p.* 29,] it is matter of notoriety that when towns are divided, it is done on petition, and after an order of notice; the object of which notice is that the town may be heard, and, if divided, that its interests may be guarded by such provisions in the act, as circumstances may render just and proper; and these are generally matters of arrangement by those immediately to be affected. In such a manner, according to the common course of business, the provisions of the act incorporating *Richmond*, without any question, were prepared. Having been made a part of the act of incorporation, and *Richmond* having complied with the terms of the act, and for two years paid to *Bowdoinham* the proportion of pauper expense due to them according to the above terms, we must consider the arrangements and provisions beforementioned in the nature of a contract, whereby *Bowdoinham* had acquired a vested right to the settled proportion of the expense of supporting the paupers living in *Bowdoinham* at the time the act of incorporation was passed, and a vested right of action to recover such proportion. The act of *Feb.* 15, 1825, professes to absolve the town of *Richmond* from the payment of a large part of the proportion of expense which they were bound by the first act to pay to *Bowdoinham*. Had the legislature a constitutional right to pass the latter act, in its very terms impairing the obligation of the contract on the part of *Richmond*, created by the first act? If it does impair the obligation of a contract, then according to the express language of the constitution of the United States and of this State, the legislature transcended their powers in enacting it, and this court is bound to declare it void; for they are bound to support those constitutions. No law ought to be pronounced unconstitutional and void, unless it appears clearly to be so; but when such is the fact, our duty is plain. It is not however to be supposed that such laws are ever enacted, with a belief or apprehension of their unconstitutionality at the time.

The cases cited by the counsel for the plaintiff seem to establish the principle on which he relies. In *Brunswick v. Litchfield*, 2 *Greenl.* 28, and in *Hampshire v. Franklin*, 16 *Mass.* 88, cited by the defendant's counsel, it is distinctly declared that no act or resolve

of the legislature can of itself create a debt from one corporation or person to another, but only by the consent, express or implied, of the party to be charged. We think no such assent can be implied from the silence of *Bowdoinham*, in respect to the petition for the passage of the second act. The town probably considered that the legislature had no authority to pass such a law, and chose to leave the question of constitutionality, should it become necessary, to judicial decision. The counsel for the defendants has placed the defence of the cause upon the power of the legislature as to the incorporation of towns and change of boundaries, and annexation of particular persons or estates to one town, formerly belonging to another. It is contended that by the exercise of this acknowledged power, the legislature may increase the expenses and taxes of the inhabitants of one town, and in the same degree diminish those of the inhabitants of another town, by increasing its population and property; and that what may be done lawfully in an indirect manner, may be lawfully done in a direct one. We do not perceive the merits of this argument. It does not meet the objection urged by the plaintiff's counsel. It is true that a change of boundaries, or transfer of individuals from one town to another, with their property, may produce the effects stated; but increasing the taxes on the individuals of a town, reduced in numbers and property in the manner mentioned, has no effect whatever upon the contracts of the corporation, and the obligations imposed by those contracts. The claim of one town on another town, is not in any degree impaired by such changes as to boundaries or property or inhabitants. The burdens of the diminished town may be increased on the inhabitants, but a creditor of the town suffers nothing by this circumstance. The latter act, if enforced, would benefit the town of *Richmond*, by relieving them from the payment of a part of the debt they owe to *Bowdoinham;* and would injure that town by divesting them of a part of their property and the right to recover its value. Legitimate legislation cannot produce such effects as these. We therefore, though unwillingly, must pronounce the act of the 15th of *February*, 1825, as repugnant to the constitu-

tion of the United States and of this State, for the reasons assigned in this opinion. According to the agreement of the parties, the defendants must be defaulted.

Greenleaf and *Jewett* for the plaintiffs.

Allen for the defendants.

KILLSA & AL. *vs.* LERMOND.

Where the defendant in a suit, after service of the writ, and before entry of the action, was summoned as the trustee of the plaintiff, in a foreign attachment, in which he disclosed the facts, was adjudged trustee, and paid over to the judgment creditor, on execution, all he owed to the plaintiff; and at a subsequent term pleaded these facts in bar of the original action; to which the plaintiff demurred; it was *held* that the plea was a good bar, and that the defendant was entitled to his costs subsequent to the joinder in demurrer.

IN this action, which was *assumpsit*, the defendant in the court below pleaded in bar that after the service of the writ in this case, and before entry of the action, he had been summoned as the trustee of the plaintiffs in a foreign attachment at the suit of one of their creditors,—that in that action the present plaintiffs were defaulted,—that he appeared and submitted himself to examination under oath, disclosed truly the state of their mutual dealings, and thereupon was adjudged their trustee;—and that he paid the balance due them, to the officer who demanded the same by virtue of the execution issued upon the judgment in that suit. To this the plaintiffs answered by a general demurrer. The original suit was entered at *December* term, 1825; the plea in bar was entitled of *August* term 1826; and at *April* term 1828, the court below gave judgment for the defendant upon the demurrer, but refused to give him judgment for costs; for which cause he appealed to this court.

The point was briefly spoken to, by *Allen* and *Farley* for the

plaintiffs, and *Ruggles* for the defendant; and the opinion of the Court was delivered by

MELLEN C. J. This case presents the single question, whether the defendant is entitled to costs. It is not contended that the plea is not a good bar to the action; but as the action was rightly commenced, and was defeated by the trustee process, the plaintiff insists that he ought not to be subjected to the payment of costs; and in support of his position he has cited the case of *Foster v. Jones*, 15 *Mass.* 185, in which costs were disallowed, though the court very distinctly implied, in the language of their opinion, that the defendant might, perhaps, claim the costs of the term at which the opinion was given; but the question being submitted on a statement of facts, and such costs being trifling, they did not allow any. In the present case the question is presented upon a demurrer to the plea in bar; and therefore we cannot consider it as one addressed to our discretion. In *June* 1826, the defendant paid the amount of the debt to the plaintiff in the trustee process, pursuant to the judgment against himself as the trustee of *Killsa & al.* and at *August* term 1826 the plea in bar was filed, and the demurrer joined. Had the plaintiff then discontinued his suit, or had the court then given judgment on the demurrer, probably no question as to costs would ever been raised. But for some unexplained reason, the plaintiff persisted in the prosecution of the cause, and of course the defendant was justified in resisting him by continuing his defence. He had no other mode of protecting himself; and in this manner he was obliged to guard his rights until *April* term, 1828, when the Court of Common Pleas adjudged the plea in bar good, but refused to allow costs to the defendant. To obtain the decision of this court on the subject, the defendant appealed. We certainly affirm the opinion of the court below, as to the merits of the plea; but, on legal principles, we think costs should have been allowed to the defendant, as the prevailing party, subsequent to the time when the demurrer was joined. And this opinion does not militate with the decision in *Foster v. Jones*.—Accordingly we adjudge the

Plea in bar good, with costs for the defendant.

SEVEY'S CASE.

In the absence of better proof, evidence of long and uninterrupted usage, reputation, the declarations and conduct of the owners of the adjoining land, and the public acts of the town, was properly admitted to prove that an ancient corporation of proprietors, now extinct, had dedicated a certain lot to the public use as a landing place.

THIS was an indictment against *John Sevey & al.* charging them, in the first count, with having erected a nuisance on a public highway in *Wiscasset*; and in the second, with the same nuisance, as erected on a public landing-place. It was tried before *Weston J.* upon the general issue.

The erection of a building and an abutment, since the year 1812, which constituted the alleged nuisance, was not denied.

On the part of the government it was proved that the land was claimed as a landing-place, laid out by the proprietors of the *Wiscasset* company, and known as such more than sixty years ago; and that it had ever since been designated and known as a "town landing." The proprietors of the *Wiscasset* company, it appeared, were formerly owners of a large tract of land including *Wiscasset* point, on which the landing was situated, as appeared by a deed dated Sept. 19, 1733. They purchased this tract of one *George Davy*, who bought it of three of the *Sheepscut* sagamores, by deed dated in 1663. The proprietors, on the 30th day of *June* 1762, conveyed the tract to the proprietors of the *Kennebec* purchase, excepting twelve quarter-acre-lots, which included the premises. On the 29th day of *October* 1785, they conveyed to one *Timothy Parsons* a tract of land on the south side of the premises, bounding it "northerly on the town landing."

The proprietors of *Wiscasset* long since ceased to exist as a corporation; nor could any of them, nor their representatives, nor their records be found, after diligent inquiry. It was proved, however, by *Seth Tinkham*, Esq. that in 1789, when he was town clerk of *Wiscasset*, an ancient plan was in his possession, purporting to

have been taken by order of the proprietors, on which were delineated the several lots, streets and landings in the town, the premises being designated thereon as the "town landing;" but this plan also was now lost.

The selectmen of *Wiscasset*, *May* 10, 1771, laid out the premises as a road, which, after due notice, was in the following year regularly accepted by the town, and recorded. In 1794, it being represented "that the former laying out of several of the streets and landings in *Wiscasset*, was obscure and uncertain, and the bounds of said streets, &c. not certainly to be found;" the selectmen, at the desire of the inhabitants, ascertained by actual survey, the courses and widths of the streets; and in their return thus described the premises;—"also the landing or street between the southern side of Mr. *John Sevey's* wharf, and the northern side of Mr. *Timothy Parsons's* store and wharf, we lay out the whole width between said wharves, and the courses said wharves run to low water mark";—which return, agreeably to due notice to the inhabitants, was regularly accepted by the town, and recorded. And in 1798, 1801 and 1804, articles were inserted in the warrants for town meetings, at the request of *Timothy Parsons*, to see if the town would discontinue the town landing; which articles were uniformly dismissed by the town. One of these warrants was served by *Wyman B. Sevey*, father of one of the defendants.

It further appeared that *John Sevey*, father of said *Wyman*, made his will, which was proved *Feb.* 29, 1796; appointing said *Wyman* his executor; who in that capacity returned an inventory of the estate of his testator, describing part of his real estate as "the land and flats below Water street, from the town landing, by said *Parsons's* wharf," &c. And by a mutual deed of division of their father's estate between said *Wyman* and *Samuel Sevey*, dated *May* 17, 1798, the latter released to the former the lot adjacent to the premises, referring to the town landing as one of the bounds. It also appeared that the defendant *John Sevey*, in a deed of mortgage of *January* 27, 1824, described the estate mortgaged as "bounded southeasterly on the town landing." And it was proved that the place had been constantly used for a common landing for stones,

lumber of all kinds, fish, and produce, ever since the memory of the oldest inhabitants. It had never been repaired or made conveniently passable as a street; the bank being originally very steep, and made more so by the elevation of the street running along the shore; but there were paths leading from the water, by which lumber was drawn up in carts.

On the part of the defendants it was proved that the part of the premises on which the alleged nuisance was erected, was conveyed in 1792, by one *Samuel Barstow* to *John Sevey*, grandfather of one of the defendants, who claimed the same from him by descent. And some witnesses testified that the only passage way for teams from the ancient wharf to the street, was across that part of the premises now covered by the erection complained of; that the testator always used this part of the premises as his own property, and built an abutment across a corner of it for his own convenience, which was under the present abutment, but did not extend out so far; that but little use had ever been made of the landing-place; and any approach to it from the street, except for foot-passengers, was obstructed in 1808, by an embankment erected by the surveyor of highways, to preserve the street from being washed away by the tide.

But to the manner in which the landing had been used, and the extent of the old abutment, there was opposing testimony offered by the government. And it was proved that *John Sevey*, the ancestor, had often declared, after the year 1792, that his land was bounded southerly by the town landing, and extended no farther south than the capsill of his wharf; that when he had taken pay for vessels fastened to his wharf on that side, he had declined to receive dockage, saying that the landing belonged to the town; and that the town, about twenty-seven years since, had passed regulations respecting the use of the lower part of the premises.

Upon this evidence the Judge directed the jury to return a verdict against the defendants; which was taken subject to the opinion of the court upon the facts reported as above.

The case was briefly spoken to by the *Attorney General* for the State, who referred to *Commonwealth v. Newbury*, 2 *Pick.* 51, and

1 *Pick.* 180; and by *Sevey* for the defendants. The opinion of the Court was read at the following *September* term, as drawn up by

WESTON J. It is well known that there exist, and have existed for many years, in this State and in Massachusetts, certain grounds designated as public landing places. Many of them it may be presumed have been used as such, at and from an early period in the settlement of our country. There does not appear to have been provided by law any mode of laying out and setting apart lands for this purpose. Nor has any such authority been exercised for many years, if it ever was, by any court, town or other corporation, over the lands of others. If landing places have been established at any recent period, it must have been by a dedication of them to public use by proprietors or individuals, who were owners of the land. The landing places now in existence had their origin, probably, from the vote and appointment of proprietors of townships or considerable tracts of land, who found it for their interest to establish privileges of this kind for the common benefit. If towns have ever done this in their municipal capacity, it must have been with the assent or acquiescence of the owner of the soil. But whatever may have been their origin, which it might now be difficult in many instances, from the loss or destruction of records or other documents, to ascertain, they have been recognized and protected by law. By the statute of 1785, *ch.* 1, *sec.* 4, it was provided, that all fences or buildings set up and erected on lands then used and improved as public landing places, or such as might thereafter be laid out and appropriated to that use, without lawful permission therefor, should be esteemed nuisances, and be abated as such. The same provision was re-enacted in this State, by *Stat.* 1821, *ch.* 24, *sec.* 5.

From the facts reported, it is very clear that the space between the wharf formerly owned by *John Sevey* and that of *Timothy Parsons*, has been known by the name of the town landing for more than sixty years; and as such has been recognized by the declarations and acts of those, under whom one of the respondents claims, and by himself in his mortgage deed of *January*, 1824. The ancient extent and continued use of the landing place, was proved also by

several witnesses. There is reason to believe that this landing place, which has not been claimed until very recently as private property, was designated as such by the proprietors of the *Wiscasset* company. As these proprietors have long since ceased to exist as a company, and as their records, after diligent search, cannot be found, the regular evidence of this dedication cannot be adduced. But it appears that a plan existed forty years ago, taken by order of the proprietors, in which the premises were delineated and described as a town landing. This evidence, together with the fact that it was before and since known and used as such, may well bring it within the protection of the *Massachusetts* statute of 1785, and of our own of 1821, unless the respondents have made out a title to the premises, or other justification. They rely upon a deed of release from one *Samuel Barstow*, dated *October* 18, 1792 to *John Sevey*, grandfather of one of the respondents; and a claim and possession of the land under it. It does not appear that *Barstow* ever had possession of the land. One witness testified that *John Sevey*, the grandfather, extended an angle of his wharf across the premises, using and claiming them as his property. Other witnesses testified that the angle of the wharf did not extend so far; and that there was a path or passage way to and from the street across the premises to the wharf, which was used by the public. If, however, *Sevey*, the grandfather did extend an angle from his wharf to facilitate access thereto, which, if erected, appears to have been used by the public, it would not be such an exclusive appropriation, as would give him the seisin and property against the public right. He was entitled to use it in common with others, and what was done by him might be for the benefit, rather than the annoyance of the public. But it is in proof from the testimony of a witness, who occupied for several years after 1792 a part of a store on the wharf, that *Sevey*, the grandfather, repeatedly pointed out to him the bounds of his land; admitting that it was bounded southerly by the town landing, and that it extended no farther south than the capsill of his wharf. And in conformity with this claim the estate was inventoried, and conveyances made by those who derived title from the grandfather, bounding this part of his estate southerly on the town landing. The release of *Barstow* therefore, was a mere

nullity; neither party being in possession, and the grantee disclaiming any right or interest under it. The existence of the public landing having been made out, by the best evidence the nature of the case admits; and the respondents failing to make out any title, or to establish any justification, for the erection complained of, the case is brought within the statute of Maine before cited, which declares such erection a nuisance, for which the party erecting or continuing it may be indicted. An indictment for erecting a fence upon a public landing place was sustained in *Massachusetts*, under a statute of the Commonwealth, of which ours is an exact transcript. *Commonwealth v. Tucker*, 2 *Pick.* 44.

If the premises had not been shown to be a public landing, there is in the case, evidence that a town way was duly laid out over them. And any building, erected or continued on any town or private way, is a nuisance. *Stat.* 1821, *ch.* 118, *sec.* 25 and 26. By the thirteenth section of the same statute, it is made the duty of towns to keep in repair town ways, as well as highways, properly so called, and for any failure in this duty, they are liable to an information in behalf of the State. 2 *Pick.* 51. However, as the respondents are clearly liable under the second count; and both counts being for the same offence in different forms; it becomes unnecessary to determine their liability, regarding the premises as a town way.

CASES

IN THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF KENNEBEC, JUNE TERM, 1829.

COOL *vs.* GARDINER.

Where, upon the sale of two contiguous parcels of land, at different rates per acre, the agent of the grantor stipulated in writing that if either of the parcels, on being surveyed, should be found deficient in quantity, the purchaser should have compensation for the deficiency, at the rate at which it was purchased; and one parcel was found to contain less, and the other more than the estimated quantity, but the aggregate value remained about the same;—it was *held* that the purchaser was still entitled to compensation for the part deficient; and that the seller could not claim any allowance for the excess in the other tract, by way of set-off, not having provided for this contingency, in his contract.

THIS was an action of *assumpsit*, upon the common money counts, and was tried before *Weston J.* upon the general issue.

It appeared that the plaintiff, in 1814, purchased of the defendant's father two contiguous parcels of land in *Waterville*, being a front or river-tract, estimated at sixty-three acres, at three dollars the acre, and a rear-tract estimated at sixty-five acres, at five dollars the acre; for which he gave security and a mortgage to the defendant. But he declined accepting the deed, and securing the purchase-money, till the defendant gave him a written stipulation that if *either*

of the parcels, on being surveyed, should be found not to contain the estimated quantity, then an indorsement should be made on the plaintiff's note for the value of the deficiency, at the rate at which it was purchased.

It was afterwards ascertained, upon actual survey, that one of the lots was deficient in quantity, by about three acres and a half; and that in the other there was an excess of somewhat more in quantity, but of about the same value.

Hereupon the jury were instructed that the defendant was answerable for the deficiency; and that he could claim no allowance for the excess in the other lot, by way of set-off, that event not having been provided for in the stipulation. And they found a verdict for the plaintiff, which was taken, subject to the opinion of the court upon the construction of the contract.

Boutelle and *Allen*, for the defendant, argued that by a fair interpretation of the contract it was to be intended that the plaintiff was, on the whole, to suffer no loss by deficiency in the quantity of land purchased; and that if there was land enough, in both parcels, to amount to the sum the plaintiff had agreed to pay, the object of the parties was answered. The words "either of," on this principle, meant the same as "both"; and may well be so construed, to effect the original and just intent of the parties. *Crocker v. Whitney*, 10 *Mass.* 316; *Swift v. Clark*, 15 *Mass.* 173; 2 *Comyn Contr.* 532; *Parkhurst v. Smith, Willes*, 332; *Bristol v. Marblehead*, 1 *Greenl.* 82; 1 *Wils.* 140; 2 *Str.* 1175; 6 *Johns.* 54; *Fairfield v. Morgan*, 2 *New Rep.* 38; 3 *D. & E.* 407; *Johnson v. Read*, 9 *Mass.* 78; *Sumner v. Williams*, 8 *Mass.* 214; *Belmont v. Pittston*, 3 *Greenl.* 453; *Waterhouse v. Dorr*, 4 *Greenl.* 333.

Codman, on the other side, was stopped by the court; whose opinion was afterwards delivered by

WESTON J. It appears that the vendor estimated the contents of each piece of land he sold, at a certain number of acres. He must be presumed to be acquainted with the state and condition of his lands, and it was for him to determine at what price, and by what

estimation as to quantity, he was willing to part with them. If he was under any uncertainty as to the number of acres, and wished to secure to himself an additional sum, if he had underrated them, he might have stipulated for it, by taking an obligation from the plaintiff to that effect; or he might have qualified his contract with the plaintiff, by agreeing to make up to him any deficiency, which might be ascertained in either piece, only upon condition that the plaintiff should pay for any excess, which might be found in the other. But the defendant, to whom the consideration was secured, was satisfied with the quantities stated in the deed, and did not think proper to require the payment of any additional sum in any event. The plaintiff, however, was apprehensive that there was an excess in the estimate; and as the price he paid was fixed according to the number of acres assumed, he was unwilling to complete the purchase, without further assurance upon this point. The contract of the defendant now in controversy determined him to receive the deed, and give the securities required. There being a deficiency in one of the pieces conveyed, he now reclaims a part of the consideration, according to the express terms of the contract. That contract is too plain to be modified by construction, by implying conditions, which might seem to give it a more equitable character. Parties make their own contracts, according to their own sense of their rights and interests; and where this is fairly done without fraud or imposition, the law enforces the performance, or gives damages for the nonperformance, according to the plain and general acceptation of the language used. If it is in any respect apparently inconsistent, repugnant, doubtful, or equivocal, sound rules of construction are then resorted to, to ascertain, if possible, what the parties intended. But if the terms are clear and intelligible, they are presumed to intend what these terms express. To determine otherwise would be making contracts for parties, rather than interpreting them. If the defendant intended to make a contract, such as is suggested by his counsel, it was easy for him to have expressed such intention. It is he alone who speaks, and we must understand him to mean what his language imports. *Judgment on the verdict.*

WEBBER & AL. *vs.* WEBBER.

If a tract of land conveyed is described in the deed as part of a certain lot, being "all the land which on the 28th day of *February* 1814, was without fence, on the northerly side" of a certain brook; this description is sufficiently certain.

Where an administrator recovers judgment in that capacity, which is satisfied by an extent on land, he has a trust estate in the land, continuing till it is rendered certain, by proceedings in the Probate office, or otherwise, that it will not be necessary to resort to this fund for any purposes of administration; after which a writ of entry may be maintained by the heirs at law, counting on their own seisin.

It is not necessary, that, in a deed of conveyance, the heirs of the grantor should be named, in order to give the grantee, after the death of the grantor, the remedy against them on the covenants, which is provided in the *Stat.* 1821, *ch.* 52, *sec.* 28.

J. W. on the 28th day of *December* 1819, conveyed to his brother *G. W.* an undivided moiety of a tract of land, with covenants of seisin and general warranty. Afterwards, in 1820, their father *C. W.* died, seised of the land, and *G. W.* administered on his estate, entered into the premises, and made improvements. *J. W.* died in 1820, after his father. In 1822, *F.*, the administrator on the estate of *J. W.* recovered, in that capacity, a judgment against *G. W.* as administrator on the estate of his father, and extended his execution *September* 27, 1824, on the same land, which was taken at its full value, including the improvements; and afterwards fully administered the estate of *J. W.* and settled his accounts; from which it appeared that the land was not wanted for any purposes of administration. *G. W.* filed no claim against the estate of *J. W.* and pursued no remedy against his heirs; but remained in possession of the land. On the 27th day of *July*, 1827, certain of the heirs of *J. W.* brought a writ of entry against *G. W.* for their proportion of the same land, counting on their own seisin, and a disseisin by him; which he resisted, relying on his deed from *J. W.* their father, by way of estoppel and rebutter, and claiming the value of his improvements.

It was held—that the liability of the heirs on the covenants of their ancestor, is by the operation of our *Stat.* 1821, *ch.* 52, rendered contingent, depending on the inability of the creditor, from the nature of his claim, to have satisfaction during the existence of an administration:—

That in this case, the tenant's remedy, if any, on the covenant of seisin, having accrued as soon as it was made, the right of action against the administrator was barred, by his own laches, by the lapse of four years since the grant of letters of administration:—

That his remedy on the covenants of warranty having accrued upon his ouster in *Sept.* 1824, which was after the lapse of the four years, it should have been pursued against the heirs within one year after it accrued, by the provisions of the statute;

which not having done, he had, by his own neglect, lost his remedy on this covenant also:—

That as here was no circuity of action to be avoided, the remedy by action having been lost by the tenant's own fault, he could not avail himself of the covenants by way of estoppel or rebutter:—

And that, as the value of his improvements had been allowed once to the tenant, as administrator, by including them in the extent, the statute did not require that the demandants should pay the value again;—but as the estate of *C. W.* had thus received the benefit of them, the tenant might well claim the value in his administration account, and have it allowed by the Judge of Probate.

Entry sur disseisin. Plea, *nul disseisin*, and a claim for allowance of the increased value of the improvements made by the tenant.

This action came before the court upon a case stated by the parties, to this effect. In the writ, which was sued out *July* 27, 1827, the demandants claimed "seven eighths of two undivided third parts of the following real estate, viz.—part of a brook running through lot No, 29 in the fifth range of lots in *Vassalborough*, with all the mill-privileges for mills that the said brook contains and the saw-mill and grist-mill now standing thereon, and the privileges and appurtenances thereof, and the mill-house and garden-spot, and four rods of land from said brook on the southerly side thereof, the whole distance across lots No. 29 and 30, and all the land which, on the 28th day of *February* 1814, was without fence, on the northerly side of said brook the whole distance across said lots 29 and 30, and all the privileges and appurtenances to the same belonging;" and counted upon their own seisin within twenty years, and a disseisin by the tenant, who was in possession resisting the entry of the demandants. The demanded premises were part of the estate of which *Charles Webber* died seised. At the *September* term, 1822, of this court, *Wm. Farwell* who, on the ninth day of *May*, 1820, was appointed administrator on the estate of *Jeremiah Webber*, deceased, recovered judgment against the goods and estate of said *Charles Webber*, deceased, in the hands and possession of the tenant *George Webber*, administrator on said *Charles Webber's* estate, for $7807 98 damage, and $60 11 costs. Whereupon an execution was duly issued and extended upon the demanded premises; which, with other parcels of said *Charles Webber's* real estate, were, on the 27th of *Sep-*

tember 1824, duly set off to said *Farwell*, in his capacity of administrator, and the execution was duly returned and recorded. The demandants, with *Wm. J. Webber*, who joined in bringing this suit, but has since deceased, were the only children and heirs at law of *Jeremiah Webber;* who was one of the sons of *Charles Webber*, and died intestate, leaving a widow who still survives; and prior to the commencement of this suit *Farwell* had settled in the Probate Court his final account of administration on *Jeremiah's* estate; and the estates set off to the administrator upon the execution were not wanted for the payment of the debts of *Jeremiah*, nor the charges of administration. No distribution of the real estate set off upon the execution had been made by the Judge of Probate, and the demanded premises were not capable of division, nor of an equal distribution among the widow and children.

On the 28th day of *December* 1819, *Jeremiah Webber* made and delivered to the tenant a deed of one half of the demanded premises, described substantially as in the writ, with the covenants usual in a deed of general warranty, but without mentioning his heirs; by which the tenant claimed to hold one half of the same. *George Webber*, the tenant, being administrator on *Charles Webber's* estate, and having possession of the demanded premises, and of other property of his intestate unadministered, after the date of his deed, made valuable improvements upon the premises; and if he could not hold one half of them in virtue of his deed from *Jeremiah*, he claimed to have the increased value of the premises estimated and allowed him. In setting off the premises upon the execution, the appraisers estimated them at their then value, without regarding by whom the improvements were made.

If upon these facts the court should be of opinion that the demandants could not maintain this action, they agreed to be nonsuited and pay costs.

But if they could by law maintain the action, then it was agreed that the court should determine whether the tenant was by law entitled to hold one half of the premises under his deed from *Jeremiah;* and if so, then the tenant was to be defaulted, and judgment

to be rendered for the demandants for seven sixteenths of the demanded premises, and costs.

If the tenant was not entitled to hold one half of the premises, under his deed, then the court were to determine whether he was or was not entitled to betterments. If he was thus entitled, then the court were to appoint a committee of three persons to view the demanded premises, and report what was their value when viewed, exclusive of any improvements made by the tenant; and also the increased value of the premises by reason of the improvements made by the tenant, over and above the reasonable rents and profits of the same, to the time of appraisement; and upon the report of the committee being returned and accepted by the court, the tenant was to make his offer in open court, to have the demanded premises, without the improvements, estimated at the sum so reported, and the increased value thereof at the sum so reported; whereupon the demandants were to make their election as provided by law, and judgment to be rendered accordingly. But if the court should determine that the tenant was not entitled to hold half of the premises in virtue of his deed from said *Jeremiah*; nor entitled to betterments; then he agreed to be defaulted, and that judgment should be rendered for possession and costs.

Allen and *Emmons* argued for the tenant. 1. The demandants were never seised of the premises, and so could not maintain this action. The administrator, by the extent, became seised, agreeably to the provisions of *Stat.* 1821, *ch.* 52, *sec.* 16, to the use of the widow and heirs; and this use, mentioned in the statute, is interpreted to mean a trust estate. *Boylston & al. v. Carver*, 4 *Mass.* 598; *Langdon v. Potter*, 3 *Mass.* 215; *Gore v. Brazier*, *ib.* 523. Being thus seised in trust, the estate continues vested in him, till it is terminated by a decree of distribution in the Probate office. This provision of the statute for a distribution of estates thus situated, affords a safe and plain rule for the termination of the trust; and the administrator may always be compelled, by bill in equity, to transfer the estate to the heirs. Any other construction involves great uncertainty.

2. As to a moiety of the land, the demandants are estopped by

the deed of warranty of their father to the tenant; the covenants in which descended on them, binding them as privies both in estate and in blood. *Co. Lit.* 265, *b.* 365, *a.* 352, 47 *b*; *Litt. sec.* 58; 4 *Co.* 53; 8 *Co.* 53; *Moor's Cases*, 323; *And.* 121; *Dyer*, 256; *Plowd.* 344; *Shep. Touch.* 53, 181, 182; 3 *Bac. Abr.* 441; 9 *Cranch*, 43; 9 *Wheat*, 454; *Jackson v. Bull*, 1 *Johns. Ca.* 90; 10 *Johns.* 204; 13 *Johns.* 316; 14 *Johns.* 194; 2 *Serg. & Rawle*, 515; 12 *Mass.* 474, 348; 17 *Mass.* 365; 6 *Mass.* 421; *Somes v. Skinner*, 3 *Pick.* 52.

3. The extent is bad, being of a parcel in severalty, by metes and bounds; for if the deed operated by estoppel to work an interest to the tenant in the land, then he held it as a tenant in common, and so the extent should have been made on a portion in common. The description also, is vague and uncertain, and therefore void. *Tate v. Anderson*, 9 *Mass.* 92.

4. Upon these principles the question of increased value is of no importance.

R. Williams for the demandants.

MELLEN C. J. delivered the opinion of the Court at the ensuing *July* term in *Waldo*.

The demanded premises are a part of a large real estate, of which *Charles Webber* died seised; and *Farwell*, the administrator on the estate of *Jeremiah Webber*, one of the sons of *Charles*, having obtained judgment against the tenant, as administrator on the estate of *Charles Webber*, caused the execution issued thereon to be duly extended upon the premises demanded, and other parcels of real estate, on the 27th of *September* 1824; which execution was returned seasonably, and the same, with the proceedings, was also seasonably registered. The demandants are children of said *Jeremiah*; and the extent of the execution is the basis on which their right and title to maintain this action reposes.

Several objections have been urged against the claim of the demandants, independent of that which grows out of the evidence on the part of the tenant. The *first* is that the description of the demanded premises is too vague and uncertain, inasmuch as a part of

the same is described in the following manner;—" and all the land, which, on the 28th day of *February*, 1814, was without fence, on the northerly side of said brook, the whole distance across said lots 29 and 30." Here is no uncertainty on the face of the declaration; certain monuments are referred to, such as the brook, the northerly side of the brook; the lots 29 and 30; and these may be ascertained, as all other monuments are, which are mentioned in a deed. To describe a piece of land so situated in relation to given monuments, by calling it " all the land which, on the 28th day of *February* 1814, was without fence," is as definite and intelligible as to say within fence; for the description in the writ implies that the lands on the northerly side of the brook, and adjoining the demanded premises, were on the specified day within fence. The description is sufficiently certain, and this objection is overruled.

The second is that as the estate of *Charles Webber* has never been divided among his children and heirs, and as the tenant was grantee of an undivided moiety of the premises, *Farwell's* execution should have been extended on a part of the estate in common, and not in severalty. This objection might have been good, had the judgment and execution been against *George*, the tenant, in his private capacity, and the object been to levy on his part of the estate, descended from his father, *Charles Webber*; but such was not the fact. The estate was levied upon, as the property of *Charles Webber*, who owned and died seised of it in severalty; and the title of the demandants, if maintained, is paramount to that of the heirs of *Charles Webber*.

The third objection is, that the heirs of *Jeremiah Webber*, cannot by law maintain this action, but that it should have been brought in the name of *Farwell*, the administrator. The provisions in our *Stat.* 1821, *ch.* 52, respecting the extent of executions by an executor or administrator on real estate, are similar to those which for a long time have existed in Massachusetts. The language is, that when lands or other real estate are set off on execution to an executor or administrator, in satisfaction of a debt due to the testator or intestate, the executor or administrator " shall be seised and possessed of the whole estate in the lands, tenements or hereditaments so set off, to

the sole use and behoof of the widow and heirs of the deceased," &c. Twenty years ago a construction was given to this clause by the Supreme Judicial Court of *Massachusetts*, in the case of *Boylston adm.'r v. Carver*, 4 *Mass.* 598; and they decided that the operation of the statute upon such a levy, was, "to vest a trust estate in the executor or administrator, until certain things required by the statute shall have been performed by him; and that neither the legal estate nor the possession vests in the heirs, until the same has been regularly apportioned and distributed in the Probate office, or at least until the administration has been settled, or other legal measures have been taken by the Judge of Probate, to ascertain whether the land levied upon, will be wanted to discharge debts and legacies, or to satisfy the expenses of the administration." This construction seems to have been founded principally on another provision of the same statute, authorising the executor or administrator, in case of a redemption of the estate by the debtor, within one year, to receive the money; and also empowering and directing him to discharge the premises levied upon, by release or other legal conveyance; which provision seems predicated on the idea that, during the year, the legal estate remains in the executor or administrator. The decision, however, goes further than the reasoning of the court seems to have required, and perhaps further than was necessary; and, had no such decision been given, I, speaking for myself only, should have been strongly inclined to the opinion that the estate levied upon, could not be considered as a trust estate, after the debtor's right of redemption was gone by lapse of time; because, beyond that period, there is no occasion for controling the express language of the statute, and considering the estate as held in trust; and the use may be executed as well and effectually at the expiration of the year, as after those events have taken place which are specially mentioned in the opinion of the court in *Boylston adm.'r v. Carver*, above quoted. But in existing circumstances we think there would be an impropriety in doubting the correctness of the decision, if we were inclined so to do; and proceeding on this principle, the question is whether upon the facts agreed by the parties, the demandants are, or are not *recti in curia*. The case of *Lang-*

don v. Potter, cited by the counsel for the tenant, only proves the effect of seisin and possesion delivered to a creditor on execution, in his own right and private capacity; it therefore does not apply to the present case. The case of *Smith & al. v. Dyer*, 16 *Mass.* 18, only decides that the heirs of a mortgagee, as such, have not such an interest in the mortgage as entitles them to enter, or to maintain an action for condition broken. By statute, an executor or administrator is the proper person to bring such an action. By the agreed statement, it appears that, before the commencement of this action, *Farwell* had settled his final account of administration, and that the estates set off to him on execution as administrator, were not, and are not, wanted for the payment of the debts of the said *Jeremiah*, the intestate, or the charges of administration. It further appears that the property levied upon has not been divided by the Judge of Probate; and that the demanded premises are not capable of division and equal distribution among the widow and heirs.

These facts seem to bring the present case not only within the spirit, but the very language of the court, in the opinion in *Boylston adm'r v. Carver;* and clearly to present the heirs as entitled to count on their own seisin, for their proportion of the property, as they have done in this action; there being no reason or legal necessity for considering the estate as a trust estate, still remaining in the administrator, when no claims to the property exist on the part of any one, paramount to those of the heirs at law. If when all such claims have ceased to exist, by having been satisfied or extinguished, the legal estate does not vest in the widow and such heirs immediately, it would seem impossible to fix on any period when their rights to demand and possess their inheritance shall be perfected. It is said by the counsel for the tenant, that the heirs may, by a bill in equity, compel the administrator to convey. Supposing they have this remedy, why are they to incur the expense of it, when the fee may vest in them without it, as the court clearly considered, in the above case of *Boylston adm.'r v. Carver*, that it does, when the events, specified in their opinion, have taken place? A use need not always be executed the instant the conveyance is made; the operation of the statute may wait till the use shall arise from some future

contingency. 2 *Bl. Com.* 333. So where lands were devised to trustees and their heirs, to pay legacies and annuities, and then pay the surplus of rents and profits to a married woman; and after her decease that the trustees should stand seised, to the use of the heirs of her body; it was decreed that this was a use, executed in the trustees and their heirs, during the life of the married woman, who had only a trust estate; but that after her death, the legal estate vested in her heirs. 1 *Cruise's Dig.* 465, and cases there cited. In this case the trustees were considered as holding the fee as long as it was necessary; and then they were considered as seised to the use of the heirs. The circumstance that the estate in question, if it had been divisible, has not been divided among all the heirs, is of no importance. If the demandants are disposed to demand and recover their proportion against the tenant, who is in possession resisting their entry, and enjoy it in common, it is a subject which concerns themselves as a matter of conveniency and expediency, but does not affect the question, as to the right of property, and their seisin of the premises demanded. Our opinion is, that upon the facts before us, the demandants are entitled to maintain this action, according to the law of the case as settled in *Boylston adm.'r v. Carver*, unless the facts introduced by the tenant, and relied on by him, constitute a legal defence.

We proceed in the fourth place to examine the title of the tenant. He claims to hold one undivided moiety of the premises demanded, in virtue of the deed made to him by *Jeremiah*, the intestate, on the 28th day of *December*, 1819, and the covenants therein contained. It is agreed that *Charles Webber* died seised of the premises demanded, and it does not appear that *Jeremiah* had any title thereto, except as one of the children and heirs of *Charles Webber*; and of course that descended to him, subject to the payment of the debts of the deceased; and the levy of *Farwell's* execution has completely divested whatever rights the tenant had under the deed, unless they are secured to him by the principle of estoppel and rebutter, founded on the covenants in *Jeremiah's* deed to the tenant. This deed contains the usual covenants of seisin and warranty, excepting that the covenantor professes to bind himself only, and not his heirs, execu-

tors or administrators; and the counsel for the demandants has contended that the heirs, therefore, are not bound. So is the law of England, because the real estate is not liable to the payment of debts, unless made so by the contracts or will of the owner; but the laws of this State subject all the estate, real and personal, to this liability; and the heirs therefore can be entitled to no more than may remain, after debts and certain expenses shall have been paid. The consequence is that the interest of the heirs is as much affected by a debt due on a promissory note, as on a bond wherein they are named as bound. It is admitted by the demandant's counsel that a man cannot recover lands from his grantee in virtue of an after-acquired title, provided he conveyed with covenants of warranty. In such case the title afterwards acquired by the grantor, enures to the use and benefit of the grantee, on the principle of estoppel; and in a suit by such grantor against such grantee the demandant might be rebutted by his covenants; and the reason of the principle is, that circuity of action may be prevented.

Several objections have been urged by the counsel for the demandants, with the view of shewing that the principle above stated is not applicable to them, though it might have been to their father, had he been living, and instituted such an action as this against the present tenant. It is contended that the premises demanded were never the property of their father, and that therefore their title is not by descent to them as his heirs, but that they hold the title as purchasers; and that in legal contemplation they hold it as absolutely as though the estimated value of the premises had been received of the administrator on *Charles Webber's* estate, by the administrator on their father's estate, and the same had been decreed and paid to them; and then they had, with the money, purchased the land in question; and that the principle of rebutter in the case at bar, is no more applicable than it would be in the case supposed. The *Stat.* 1821, *ch.* 52, *sec.* 16, makes the real estate levied upon and set off to an executor or administrator assets, liable for the payment of the debts of the testator or intestate; and thus far, at least, it is placed in the same situation and subject to the same liabilities as though their father had died seised of the land, and it had descended to them as

his heirs. But whether that section renders such land, the title to which is acquired after a covenantor's death by a levy in favor of the administrator on his estate, subject to the full influence of the principle of estoppel, is a question of some difficulty, on which the ancient learning in the English books can shed very little light. On this point we do not mean to give any opinion, because we have formed none. Still, however, the inquiry is made, and it must be answered, whether the demandants are estopped and rebutted by the covenants contained in their father's deed, so that they cannot demand and recover the moiety which the tenant claims to hold. We apprehend that the common law upon this subject has been essentially changed and modified by statute in Massachusetts and this State; and that in arriving at a correct conclusion upon the point we are considering, these changes and modifications must be carefully examined. The case of *Boyce v. Burrell & al.* 12 *Mass.* 395, was decided upon principles which seem to have a direct and strong bearing on this part of the cause. That was an action of covenant broken, brought by the covenantee against the children and heirs of the covenantor. It was agreed by the parties that no administration had ever been granted on his estate, but that the time for granting such administration had not expired. The court refused to sustain the action, and stated their reasons, some of which are given in the language of the Chief Justice. He first observes—"whatever may be the liability at common law of an heir upon a covenant made by his ancestor, we are persuaded that by our statutes for the distribution and settlement of estates, such liability is but contingent and eventual; depending on the inability of the creditor, from the nature of his claim, to procure satisfaction during the existence of an administration." Again he observes, "those debts which are due, but not payable within the four years, may be filed in the Probate office. But there may be other demands, neither due nor payable during the liability of the executor or administrator; such as covenants and contracts not broken, but which may afterwards be broken. The provision for these is, that an action may be brought upon them against those who inherit the estate, within one year from the time of the actual accruing of the right of ac-

tion. The legislature contemplated an expiration of the duty of the executor or administrator. It is also clear that where the right of action accrues within the four years from the time when notice of the administration is given, no action will lie against the heir." These extracts from the opinion of the court have been made for the purpose of more fully presenting the argument, founded upon them, in relation to the case under consideration. The provisions in the statute of Massachusetts, to which the Chief Justice refers in the above observations, are exactly similar to those which are contained in the 27th and 28th sections of our statute of 1821, *ch.* 52, before cited. Now it appears in the agreed statement, that *Farwell* was appointed administrator on the 9th of *May*, 1820. With these facts before us it is immaterial whether the covenant of seisin, or the covenant to warrant the lands, contained in the deed of *Jeremiah Webber*, to the tenant, was broken. If it was the former, then the tenant's right of action for damages accrued at the time the deed was executed, viz. *December* 28th 1819; and consequently it was barred by the statute limiting actions against executors and administrators, that is, in *May*, 1824. If the latter covenant was broken, then the tenant's right of action for damages accrued at the time of the levy of the execution, viz. *Sept.* 27, 1824, that levy being an ouster of *George*, the tenant. See *Gore v. Brazier*, 3 *Mass.* 523; *Langdon v. Potter & al. ib.* 215; *Wyman v. Brigden*, 4 *Mass.* 150. And therefore, according to the provision of our statute above referred to, an action for such a breach happening after the expiration of the four years, and so barred by the statute as against the administrator *Farwell*, might have been brought and maintained against the demandants and the other heirs, within one year from the date of the levy; but that year had expired almost two years before the commencement of the present action. The tenant has lost all remedy against the administrator and the heirs of *Jeremiah Farwell*, the covenantor; and therefore, the principle relied upon by the tenant does not, and ought not to apply in the present case; the reason for its application, where it does apply, does not exist between these parties; for there is no circuity of action to be avoided. Lord *Coke*, in his commentary on *Littleton*, 265, *a.* says, "The reason (which

in all cases is to be sought out) wherefore a warranty, being a covenant real, should bar a future right, is for avoiding circuity of action." So 6 *Wood's Conv.* 144, a rebutter is allowed to prevent circuity of action. "Hence" says Mr. *Dane*, "there is no rebutter where there is no circuity of action." 4 *Abr.* 495. See also *Hutchinson v. Stiles*, 3 *N. Hamp. R.* 404. We cannot perceive any sound principles of law or reason on which the title of the demandants under the levy, being unquestionably good and subsisting, should be defeated or embarrassed by an extinguished right of action which the tenant once had, but which by his voluntary delay he has lost forever; nor why, after all this, he should be permitted to avail himself indirectly of the rights he has so lost, and in lieu of damages, which he is barred from recovering, still hold the land, and have his title confirmed by a judgment of this court. It is a maxim, and an approved one, that what cannot properly be done directly, ought not to be allowed to be done indirectly.

We are all of opinion that the title of the demandants is maintained, and that there is no legal defence; and in as much as the premises were appraised at their value at the time of the levy, and on that principle set off to the administrator, it is evident that the heirs of *Jeremiah*, the intestate, have paid the full price of the improvements made on the land, by having the increased value of the premises, occasioned by such improvements, applied in part satisfaction of *Farwell's* execution; and as they have thus allowed and paid for them once, they ought not to be held to pay for them again. It is true the improvements were made by the tenant at his own expense, and the sum paid for them was accounted for and paid to the tenant as administrator on the estate of *Charles Webber*; and as that estate has received the benefit of that sum, we perceive no objection to his claiming it of the estate and having it allowed to him by the Judge of Probate. The defendant, according to agreement, must be called. *Defendant defaulted.*

See *Chadwick & al. v. Webber & al.* 3 *Greenl.* 141.

COTTLE *vs.* COTTLE.

Where the prevailing party in a cause tried by jury, previous to the trial, but during the same term, conveyed one of the jurors several miles, in his own sleigh, to the house of a friend, where he was hospitably entertained for the night; the verdict was, for this reason, set aside.

A verdict in this action having been rendered for the plaintiff, the defendant moved the court to set it aside, for causes which are sufficiently apparent in the opinion of the Court, which was delivered by

WESTON J. The party obtaining a verdict in this case, did, during the session of the court at which his action was tried, carry one of the jury to whom his cause was submitted, knowing him to be a juror, several miles in a sleigh to the house of a friend of the party, where the juror was gratuitously provided with refreshment and lodging. Whether furnished at the party's own house, or at the house of another by his procurement, either as an act of hospitality, or for a pecuniary compensation to be paid by the party, it is equally exceptionable. This is by statute made a sufficient reason, at the discretion of the court, to set aside the verdict. *Stat.* 1821, *ch.* 84, *sec.* 15. There is no doubt also that at common law, independent of the statute, it would afford just ground for the interposition of the court. There is too much reason to believe that the party intended to practice with the juror. He sought his society, and attempted to impress his mind with the justice of his claim. It is insisted that the juror was not in fact influenced, and that justice has been done between the parties. It may be so; but it may be useful to the party to learn that a good cause may be injured, but cannot be promoted, by conduct of this sort, and to the public generally, to know that it will be tolerated in no case whatever.

New trial granted.

R. Williams, for the plaintiff.

W. W. Fuller, for the defendant.

BENSON *vs.* FISH.

A paper, drawn up by the plaintiff, containing a statement of the items composing his claim for damages, having been accidentally passed to the jury, with the other papers in the cause, though not by them regarded as evidence regularly before them; the verdict, which was for the plaintiff, was for this cause set aside.

THE defendant in this cause moved that the verdict, which was for the plaintiff, might be set aside; for the reasons stated in the opinion of the Court, which was delivered by

WESTON J. It appears that a paper drawn up by the plaintiff, containing items and statements exhibiting the amount of damages, to which he claimed to be entitled, was passed to the jury with other papers in the case, although they did not regard it as evidence regularly before them. It was prepared by the plaintiff to aid his counsel in argument; and there is reason to believe that it went to the jury by mistake and accident. It was, however, calculated to influence their decision, and furnishes therefore a well founded objection to the verdict. It is not to be distinguished from the case of *Whitney v. Whitman*, cited in the argument. In *Hackley v. Hastie*, 3 *Johns.* 252; and *Hix v. Drury*, 5 *Pick.* 302; the papers improperly before the jury, were not read or looked at by them. The case of *Sargent v. Roberts*, 1 *Pick.* 337, is a strong illustration of the solicitude, with which every statement or communication with the jury, not made in open court, and in the presence and with the knowledge of the parties or their counsel, is excluded. The written instructions given by the judge in that case to the jury, after the adjournment of the court, contained nothing exceptionable; but it being deemed irregular even for the judge to communicate with the jury at such a time, the verdict was set aside. *New trial granted.*

Boutelle, for the plaintiff.

Allen and *Sprague*, for the defendant.

MORTON *vs.* CHANDLER.

If a judgment debtor, whose land has been taken by extent, pays part of the debt in order to redeem the land, but fails to pay the residue, whereby the land is lost, he cannot recover back the money thus paid.

Assumpsit for money had and received. The facts in this case were in substance these.—The plaintiff having been indebted to the defendant, had given him a recognizance for the amount; on which an execution was afterwards issued, which was satisfied by an extent on land. Within the year after the extent, the plaintiff, in order to redeem the land, paid to the defendant a part of the redemption-money; but failed to pay the residue; and now brought this action to recover back the sum thus fruitlessly paid. *Weston J.* before whom the cause was tried, ruled that it was against equity and good conscience for the creditor to retain the money thus paid; and directed the jury to find for the plaintiff; but reserved the point for the consideration of the court.

Allen, for the plaintiff, argued that upon principles of natural justice the defendant ought to refund the money, he having received it without the payment of any consideration. And he distinguished this case from that of *Rounds v. Baxter*, 4 *Greenl.* 454, and divers others of that class, which were cases of express contract between the parties; whereas here, the creditor, receiving part of the redemption-money, is merely the depository and trustee of the debtor, holding his money till it shall appear whether the whole will be paid or not. There is no contract between them; and, therefore, no forfeiture of part of the money, by non-payment of the whole. *Keyes v. Stone*, 5 *Mass.* 391.

R. Williams and *A. Belcher*, for the defendant, cited *Joyce v. Ryan*, 4 *Greenl.* 101; *Rounds v. Baxter*, *ib.* 454; *Wallis v. Wallis*, 4 *Mass.* 135; *Dowdle v. Camp*, 12 *Johns*, 451; *Ketcham & al. v. Evertson*, 13 *Johns.* 359; *Holmes v. Avery*, 12 *Mass.* 135; *Bishop v. Little*, 5 *Greenl.* 362; *Kelly v. Beers*, 12 *Mass.* 237; *Williams v.*

Reed & tr. 5 *Pick.* 480; *Stark v. Parker*, 2 *Pick.* 267; *Woodward v. Cowen* 13 *Mass.* 216; *Lyon v. Annable*, 4 *Conn. Rep.* 350.

MELLEN C. J. delivered the opinion of the Court at the following *July* term in *Waldo*.

In this case, a new trial is moved for on the ground that the instructions of the judge were incorrect. The land of the plaintiff having been levied upon in satisfaction of an execution in favor of the defendant, the plaintiff paid, within one year, a part of the amount at which it was appraised, with a view of redeeming it; but failed to pay the whole and thus entitle himself to a reconveyance of the land, the title to which became absolute in the defendant. The present action was brought to recover back the sum so paid, and the judge, presiding at the trial, ruled that the action was maintainable, and that it was against equity and good conscience for the defendant to retain it. The question here presented has been settled by this court in the case of *Rounds v. Baxter*, cited in the argument, unless the case of an express contract between two parties, defining their respective rights and liabilities, is to be distinguished from the present case, where the rights and liabilities are defined and established by statute. *Baxter* agreed with *Rounds* to convey to him certain real estate, on payment or security for payment of a certain sum by several instalments at specified days of payment; a partial payment was made by *Rounds*, but he never entitled himself to a deed by performance on his part, and *Baxter* conveyed the land to some other person. *Rounds* not being able to maintain his action on the special contract, claimed to recover back the sums he had paid; but it was decided that he was not entitled to recover. We refer to that case and the authorities there collected. The counsel for the plaintiff has cited no case but *Keyes v. Stone*; and that seems to have little bearing on the subject. He contends that the justice of the case is with the plaintiff, and that he is entitled to recover on the ground of a failure of consideration; the failure, however, is not the consequence of any act on the part of the defendant. The money was voluntary paid, with a knowledge of the law and the facts; and no deception was practised by the defendant. We do not perceive

any difference between the present case, and that of a part payment of a contract, as in the case of *Rounds v. Baxter.* In both, the party paying must have known that a partial payment could give him no claims; none under the contract in one case, and none under the statute in the other. Had there been an express promise to return the money, no question would exist; but as there was none, does the law imply a promise? In *Holmes & al. v. Avery*, the court say, "This was at least a voluntary payment of money by the underwriters; which cannot be recovered back, unless some circumstance of mistake, fraud, or circumvention is proved, as the actuating cause of payment."

The same principle is laid down by *Parsons C. J.* in the case of *Wallis v. Wallis*, and in as strong terms; and many of the other cases cited by the defendant's counsel were decided on the same ground, and recognize the same doctrine. See *Dougl.* 655; *Taylor v. Hare*, 1 *New Rep.* 260; *Gower v. Popkin*, 2 *Starkie's Cases*, 85; 2 *Stark. Evid.* 112, and cases there cited. *Bluett v. Osborn*, 1 *Stark. Cases*, 384.

Suppose a man should mortgage his farm to secure the payment of $500, and that no personal security should be given; and suppose the mortgagor should pay $200 in part of the sum of $500, and then resolve to pay no more; and thereupon the mortgagee should enter for breach, and the estate should not be redeemed; could the mortgagor recover back the $200 on the ground that there was a failure of consideration? The counsel for the plaintiff does not contend for such a principle. In all such cases it is the fault or omission of the person paying, which renders the payment ineffectual, because not sufficient in amount. The very term payment, when voluntary and with full knowledge of facts, excludes the idea of an implied promise to refund. If an infant contracts a debt and when of age pays it, he cannot recover it, under the idea that he was not bound to pay it. So, in the case of payment of a debt barred by the statute of limitations. The person paying, voluntarily parts with his money; and he has no more legal right to recover it back again, than if he had given it to the person to whom he paid it;—*volenti non fit injuria.* According to the principles established by

the adjudged cases cited, we are all of opinion that the instructions of the Judge, though evidently delivered to the jury from a sense of the equity of the plaintiff's claim, cannot be sanctioned as correct; and accordingly the action cannot be sustained.

Verdict set aside and a new trial granted.

BATTLES *vs.* HOLLEY.

After the lapse of more than thirty years, the authority and qualification of an administrator were presumed, from the existence of an inventory, and a schedule of claims, in the Probate office, attested by his oath; and a petition preferred by him to the Court of Common Pleas for license to sell the real estate of his intestate, with the original certificate of the Judge of Probate thereon, recognizing him as an administrator;—the Probate records and files of that period appearing to have been loosely kept; and no other vestige of his appointment being discoverable.

THIS was a writ of entry, in which the demandant claimed title by descent from his father and his brother, and counted against the tenant as entering under a demise from one *David Davis*, an abator.

At the trial before *Weston J.* the tenant made title under a sale from *Davis*, who assumed to act as administrator of the estate of *Joseph Battles*, deceased, the demandant's father; under which sale possession had gone, till the commencement of this action. At the time of the decease of the intestate, and afterwards, till the county of *Kennebec* was erected in 1799, the lands, and the intestate's domicil, were within the county of *Lincoln*. The register of Probate for the latter county, being applied to for the regular evidence of the grant of the letters of administration, certified that upon examination he had found that the records and papers of that period had been loosely kept, and that he could find no copy nor record of any letter of administration on this estate to *Davis*; nor any record or papers in relation thereto; except an inventory, and a schedule of demands exhibited against the estate, signed and sworn to by *Davis*. The tenant also produced the original petition of said *Davis*

to the Court of Common Pleas, for license to sell the real estate of the deceased; to which was attached the usual certificate of the Judge of Probate for the county of *Lincoln*, recognizing *Davis* as administrator of that estate; upon which petition and certificate, license was granted as prayed for.

The counsel for the demandant denied the sufficiency of this evidence, to establish the authority of *Davis* to act as administrator; but the Judge instructed the jury that the Courts of Probate and of Common Pleas having recognized him as administrator; it being an ancient transaction; and the files and records of the Probate office having at that period been imperfectly kept and preserved; they would be justified in presuming the regularity of his appointment and qualification. And they returned a verdict for the tenant; which was taken subject to the opinion of the court upon the correctness of those instructions.

Emmons, for the demandant, contended that to constitute a legal administration, a bond was indispensably necessary; being required by the statute previous to the grant of letters of administration. It lies at the foundation of all the proceedings, constituting the basis of all the remedies for creditors and heirs. Had a bond been given in the present case, its existence might have been proved by those who signed as witnesses or sureties. *Williams v. Reed & tr.* 5 *Pick.* 480.

As to the letter of administration, its loss should not have been presumed; for it was in the possession of the party, without whose affidavit of its loss, and of diligent but ineffectual search, no secondary proof or presumption ought to have been admitted.

Allen and *Sprague*, for the tenant, cited *Gray v. Gardiner*, 3 *Mass.* 399; *Colman v. Anderson*, 10 *Mass.* 113; *Stockbridge v. Stockbridge*, 12 *Mass.* 400; 14 *Mass.* 257; *Todd v. Rome*, 2 *Greenl.* 61; *Pejepscot Prop'rs v. Ransom*, 14 *Mass.* 145; *Blossom v. Cannon*, *ib.* 177; *Brewer v. Knapp*, 1 *Pick.* 337.

Weston J. delivered the opinion of the Court.

The custody of the record and documents, by which the appointment and authority of *David Davis* the administrator is, in this case,

regularly to be proved, did not belong to the tenant, or those under whom he claims; nor is he or they responsible for their safe keeping. It is an ancient transaction; and possession has gone according to the claim of the tenant. It appears that the papers and records of the Court of Probate of that period in the county of *Lincoln*, which was the proper jurisdiction, are in a very loose and disordered state, and that no paper or record in relation to this estate, can now be found, except an inventory, and also a schedule of demands against the estate, signed and sworn to by the said *David Davis*. But it is in evidence that the Judge of Probate of *Lincoln*, at that time, recognized *Davis* as administrator of the estate, and that he made the usual certificate, upon the petition of *Davis* as administrator, to the court of Common Pleas, praying for license to sell the real estate of his intestate. It further appears that the Common Pleas were satisfied of his authority, and granted the license prayed for. The tenant having furnished all the evidence in his power to adduce upon this point, and no objection being made to its competency, we entertain no doubt that the jury were well justified in presuming from it, that the administrator was duly appointed and qualified. Indeed it is not easy to perceive how they could have drawn any other conclusion.

The authorities, cited for the tenant, present cases in which presumptions similar in principle have been held to be warranted and sustained. Public documents may be lost or destroyed by inevitable accident, or by the negligence of those, who are charged with their custody; but rights depending on them, long enjoyed, are not therefore to be defeated. Every fair presumption arising from such enjoyment, and other existing evidence, may and ought to be deduced, by which such rights may be upheld. A failure of proof in a recent transaction, is not entitled to the same indulgence. It warrants rather the inference that what is not proved never existed. Of this character was the case of *Williams v. Reed & tr.* 5 *Pick.* 480, cited in the argument. There the presumption justly arising from the facts which did appear, was clearly against the validity of the sale, upon which the trustee relied for his discharge.

Judgment on the verdict.

The case of DAMON, *alias* FLINT.

On the trial of an indictment for bigamy, oral proof of the official character of the minister or magistrate before whom the marriage was solemnized, is, *prima facie*, sufficient evidence of his authority.

Under the laws of Massachusetts, as they existed in 1805, a marriage between parties competent to contract, and solemnized by a person duly authorized, is to be considered legal and binding; without any evidence of the publication of banns, or of the consent of the parent or guardian of the party within age.

If an indictment for an offence against the statutes of Massachusetts, committed before the separation of Maine, does not charge the offence to have been committed against the peace of Massachusetts, and the laws of that Commonwealth, the omission will be fatal.

IN this case the defendant was indicted for that he, having been lawfully married at *Reading* in Massachusetts, in 1805, was unlawfully again married to another woman, at *Farmington* in this county, in 1812, the former wife being still alive; "against the peace of said State, and against the form of the statute in such case made and provided."

In proof of the first marriage, a witness testified that he was present at its solemnization; which was by the Rev. Mr. *Stone*, a clergyman who had been a settled minister in the town forty years; that the defendant was then a minor; that his mother was living; and that he had previous to the marriage lived at service with a farmer in that town. The sufficiency of this evidence was objected to by his counsel, but the objection was overruled by *Weston J.* before whom the trial was had.

The second marriage was proved by the testimony of a witness who was present when it was solemnized, before *Benjamin Whittier*, Esq. a Justice of the peace in this county, who had often acted in that capacity; but of whose authority no other evidence was produced, except a copy of his certificate of the marriage, recorded on the town records, and certified by the town clerk. This also was objected to, as insufficient; but the objection was overruled. It was further urged by the counsel for the defendant, that the offence

should have been charged as done against the peace of the Commonwealth of *Massachusetts*. This point the Judge ruled, *pro hac vice*, against him; reserving it with the others, for the consideration of the court, in case the jury should convict him; which they did.

The defendant moved for a new trial, because, 1st. there was no sufficient evidence of the authority of the clergyman or magistrate to solemnize marriages; 2d. there was no evidence of publication of banns; 3d. nor of the consent of the defendant's parent or master, he being a minor at the time of the first marriage; 4th. the indictment was defective.

It was submitted without argument, by the *Attorney General* for the State; and *Sprague*, for the defendant; and the opinion of the Court was delivered by

PARRIS J. It is incumbent on the Government to prove that the defendant had been legally married previous to the marriage in 1812, whereby he became incapable, in law, of contracting a second time during the continuance of the first contract. The mere reputation of a marriage, or proof of cohabitation, or other circumstances from which a marriage may be inferred, and which are sufficient in almost all civil personal actions, cannot, in cases of this nature, be admissible. There must be evidence of a marriage in fact, by a person legally authorized, and between parties legally competent to contract. Proof of such a marriage may be made either by an official copy of the record, accompanied by such evidence as will satisfy the jury of the identity of the parties, or by the testimony of one who was present at the ceremony. But it is not necessary that the special or official character of the person by whom the rite was solemnized, should be proved by record evidence of his ordination or appointment. Oral proof of his having previously acted in that capacity, affords a presumption that he acted legally, and is *prima facie* evidence of his authority. "Proof, by witnesses who saw the marriage, is *prima facie* sufficient, and whoever would impeach it, must shew wherein it is irregular." 2 *Dane's Abr. ch.* 45, *art.* 3 *sec.* 4. "If it appears there has been a marriage in fact, either by town or parish certificates, or by a witness present, that saw the parties

stand up and go through the usual ceremonies of marriage, directed by one who usually, or appeared usually to marry persons, the court will presume it was a legal marriage till the contrary is proved"—*ibid. sect.* 18. The same principle was recognized by all the Judges in *Westminster Hall*, in *Gordon's* case, and also in *Berryman v. Wise*, and *Rex v. Verelst*, 3 *Camp.* 433; and even in cases of murder of officers, *Story J.* says in *United States v. Amedy*, 11 *Wheat.* 409, "it is not necessary to prove that they are officers, by producing their commissions. It is sufficient to shew that they act *de facto* as such." The objection that there was no sufficient evidence of the authority of *Stone* and *Whittier* to solemnize marriages, therefore fails.

The next objection to the verdict is, that there was no evidence of publication of intentions, previous to the marriage. The first section of the statute of *Massachusetts* of 1786, *ch.* 3, for the orderly solemnization of marriages, under which this marriage took place, provides, "that every stated and ordained minister of the gospel in the town, &c. where he resides, is authorized and empowered to solemnize marriages between persons that may lawfully enter into that relation, when one or both of the persons to be married are inhabitants of, or residents in the town where such minister resides." The subsequent sections point out the mode of publication, and make it penal for any minister to join persons in marriage otherwise than is allowed and authorized by said acts. Did the validity of the marriage depend upon the previous publication of the banns, proof that it was solemnized by a person legally authorized thereto, might, in the absence of all other proof, be sufficient to raise the presumption that the requisite preparatory steps had been complied with. 3 *Stark. on Ev.* 1250. Even in the English courts, where a marriage without publication or license is now void by statute, proof of publication is not necessary. It is stated in 2 *Phill. Ev.* 148, that "if the marriage is proved, as it may be, by a witness who attended at the ceremony, it does not appear necessary to prove, in addition, the publication of banns, or a license of marriage. It seems not unreasonable to presume, from the fact of the marriage, that it has been duly solemnized, as the solemnization of marriage

without either a license or a publication of banns is so highly penal."

That the validity of the marriage does not, however, depend upon proof of the publication, and that even an omission to publish would not render it void, is evident from the subsequent provisions of the statute of *Massachusetts*, above referred to, and of others upon the same subject. The 1st and 3d sections of the act of 1786, direct the mode of publication, and the officer by whom the ceremony shall be solemnized, but the marriage is no where declared void upon a failure to publish. There are, indeed, penalties for marrying without publishing, but they are penalties of a pecuniary character, and fall upon the officer and not upon the parties; while marriages, entered into contrary to the provisions of the 7th *sect.* are declared "absolutely null and void." The inference is strong, that it was not intended that a non compliance with the provisions of the law requiring the publication of banns should, of itself, nullify the marriage contract.

So by the 1st section of the act regulating marriage and divorce 1785, *ch.* 86, marriages within the degrees are prohibited and declared "null and void;" and by the 2d section all marriages, where either of the parties have a former husband or wife living, are likewise declared to be "absolutely void." So also, by the 5th section of the act under which this indictment is prosecuted, marriages within the age of consent are considered void. It is, therefore, to be inferred that wherever the legislature intended the marriage should be the void, it so expressly provided; as is the case in the English marriage act, 26 *Geo.* 2 *ch.* 33, which expressly declares, that "all marriages solemnized without publication of banns or license of marriage shall be null and void to all intents and purposes whatsoever." We are, therefore, satisfied that, under the laws of Massachusetts, as they existed in 1805, a marriage between parties competent to contract, and solemnized by a person duly authorized, is to be considered legal and binding without any evidence of publication of banns.

The objection that there was no evidence of the consent of the defendant's parent or master to the first marriage, he being, at that time, under twenty one years of age, rests on the same ground. It is penal for a magistrate or minister to join in marriage a male under

the age of twenty one years, or a female under eighteen, unless the consent of the parent, guardian or other person whose immediate care and government such party is under, if within the State, be first had to such marriage. But the marriage is not void, unless, as is provided in the 5th section of the act against poligamy, &c. it is between parties within the age of consent, which, at the time of framing the statute, was well understood at the common law, to be fourteen in males. *Co. Litt.* 79. "By the common law, if the parties themselves were of the age of consent, there wanted no other circumstance to make the marriage valid." 1 *Black. Com.* 463. It was said by *Parsons C. J.* in delivering the opinion of the court in *Milford v. Worcester*, 7 *Mass.* 54, "When a justice or minister shall solemnize a marriage between parties who may lawfully marry, although without publication of the banns of marriage, and without the consent of the parents or guardians, such marriage would unquestionably be lawful, although the officer would incur the penalty of fifty pounds for a breach of his duty."

The only remaining question, presented in this case, is as to the sufficiency of the indictment. The case finds that the second marriage of the defendant was in this county, in 1812. Supposing it to have been proved or admitted at the trial, that at the time of the second marriage the first wife was alive, (and this fact must necessarily have been established to the satisfaction of the jury) the offence set forth in the indictment was committed at that time, and consequently against the peace of the then existing government and the laws thereof. It could not have been an offence against the peace of the State of Maine, or in violation of its laws, for at that time Maine had not been invested with the sovereign power of a State. The territory was a portion of Massachusetts, and the inhabitants were amenable to the laws of that sovereignty.

Whoever commits an offence, indictable either by statute or at common law, is guilty of a breach of the peace of that government which exercises jurisdiction, for the time being, over the place where such offence is committed; and, in setting forth the offence, an omission to charge it as having been done against the peace of that government is fatal. The *Queen v. Lane*, 3 *Salk.* 199; 2 *Ld Ray-*

mond, 1034. It is even insufficient, if charged as against the peace generally, without naming the particular sovereignty, whose peace is alleged to have been violated. 2 *Hale's P. C.* 188. So also, if it be an offence created by statute, as in this case, the indictment must allege it to have been committed against the form of the statute, or it will be fatal. 2 *Mass. Rep.* 116.

Now it would be preposterous to allege the offence to have been committed against a statute of the State of Maine; for at that time Maine had no statutes, and the statute touching this subject, which has since been enacted by our legislature, is materially different, especially in the penal part, from the statute of Massachusetts.

As the indictment, in this case, sets forth a statute offence committed in the year 1812, by a person subject to the laws of Massachusetts, in a place then under the jurisdiction of that government, it consequently must have been against the peace of that sovereignty and that only; and not being so alleged, the prosecution cannot be sustained. The authorities by which our opinion on this point is supported, are 2 *Hale's P. C.* 188; 2 *Hawk. ch.* 25, *sect.* 95; *Yelv.* 66; 4 *Com. Dig. Indictment, G.* 6, and *Rex v. Lookup*, 3 *Burr.* 1903. In the latter case, *Lookup* was indicted for perjury. The fact was charged to have been committed in the time of the late king, whereas the indictment concluded against the peace of the present king. After trial, conviction and sentence, *Lookup* brought a writ of error returnable in parliament, when the following question was put by the lords to the judges—" whether the perjury being alleged in the indictment to have been committed in the time of the late king, and charged to be against the peace of the now king is fatal, and renders the indictment insufficient." The Lord Baron delivered the unanimous opinion of the judges in the affirmative; and upon this point, the judgment of the king's bench was reversed and the defendant discharged.

Conformably to the report of the judge, who tried the cause, the verdict must be set aside and a new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF SOMERSET, JUNE TERM, 1829.

FARRAR & AL. *vs.* STACKPOLE.

Things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, being on the land at the time of its conveyance by deed, do pass with the realty.

Thus by the conveyance of a saw-mill with the appurtenances, the mill-chain, dogs, and bars, being in their appropriate places at the time of the conveyance, were held to have passed.

So, by the grant of a cotton or woolen factory, &c. by that or any other general name which is commonly understood to embrace all its essential parts, it seems that the machinery passes, whether affixed to the freehold, or not.

Parol proof of a usage may be received in explanation of the terms of a deed.

THIS was trover for a mill-chain, dogs, and bars; and was tried before *Weston J.* upon the general issue. The plaintiffs claimed title to the property under a deed from the defendant to *Asa Redington*, and from him to them, conveying a *saw-mill*, with the privileges and appurtenances; and they proved that the chain, dogs and bars, were in their appropriate places when the deeds were made; and that the chain was attached by a hook to a piece of a draft-chain, which was fastened to the shaft by a spike. As the chain in question was prepared for being hooked and unhooked at pleasure, the

Judge ruled it to be a personal chattel, which did not pass by the deed of the mill, unless, by uniform and general usage, it was considered as part of the same.

Testimony was then adduced on both sides, to the point of usage; which the Judge left to the jury, with instructions to return a verdict for the plaintiffs, if they should find the usage in their favor; which they did. And the point of construction, and the admissibility of parol testimony of any usage, to control the language of the deeds, which the defendant had objected to, were reserved for the consideration of the court.

Allen, for the defendant, argued against the admissibility of the parol evidence;—1st because it went to control a contract in writing which contained neither latent ambiguity, nor reference to any extraneous circumstances. *King v. King*, 7 *Mass.* 496; *Brigham v. Rogers*, 17 *Mass.* 571; *Bayard v. Malcom*, 1 *Johns.* 453.—2d. If the chattels in question were personal estate, then they are not conveyed by the deed; but if part of the realty, then the parol testimony is inadmissible by the statute of frauds.—3d. If the evidence was intended to prove a distinct, independent contract, still it is opposed by the statute of frauds, there having been no delivery, nor memorandum in writing, nor earnest paid, and the value exceeding thirty dollars. *Hermon v. Vance*, 6 *Johns.* 5.

And he contended that these chattels did not pass as part of the mill; because they were not fixtures; for these, and these only, he insisted, could pass by a deed of the mill alone. To enlarge this principle, and introduce whatever personal things were necessary to set a mill in operation, would unsettle established rules, and introduce confusion; as it might be supposed to include axes and hand-saws, and even a horse, if the mill was propelled by that power. *Elwes v. Maw*, 3 *East* 28; *Cresson & al. v. Stout*, 17 *Johns.* 116; *Briggs v. Strange*, 17 *Mass.* 406; *Gale v. Ward*, 14 *Mass.* 353; *Union Bank v. Emerson*, 15 *Mass.* 159.

R. Williams, *Redington* and *Codman*, for the plaintiffs.

Weston J. delivered the opinion of the Court.

If the chain in question passed as a constituent part of the mill, the plaintiffs have made out their title, and have a right to judgment on the verdict. A considerable portion of the machinery and power of a mill, like that conveyed by the defendant, is designed to be applied to draw up logs into the mill; which is essential to the operation of one of this construction. It is not denied that other parts of the machinery, intended for this purpose, go with the mill; but it is insisted that the chain is of the nature of personal property, and therefore passes not by a deed of the realty, unless specially named. To this it may be answered, first, that if it be an essential part of the mill, it is included in that term, whether real or personal; secondly, that that which is in its nature personal, may change its character, if fixed, used, and appropriated to that which is real. Is it too much to say that the mill is incomplete, without a chain, a cable, or other substitute? It may be that a mill-wright, who contracts to erect a mill, and to furnish materials, may be deemed to have completed his engagement, without supplying a chain. One mill-wright, a witness in this case, has testified that such is his impression. And if this is understood generally, his contract might not extend further. But the owner would find that he had yet something more to procure, before the mill could be in a condition to operate. The chain is the last of the parts in the machinery, to which the impelling power is communicated, to effect the object in view. Its actual location in the succession of parts can make no difference. If it is in its nature essential to the mill, it is included in that term; and that, as has been before remarked, whether it be personal or real property. But upon consideration, we are of opinion that it ought to be regarded as appertaining to, and constituting a part of the realty.

It is an ancient principle of law, that certain things which in their nature are personal property, when attached to the realty become part of it, as fixtures. One criterion is, that if that, which is ordinarily personal, be so fixed to the realty that it cannot be severed therefrom without damage, it becomes part of the realty; as wain-

scot work, and old fixed and dormant tables and benches. Other things pass as incident to the realty; as doves in a dove house, fish in a pond, or deer in a park. 2 *Com. Dig. Biens B.* On the other hand, as between landlord and tenant, for the benefit of trade, in modern times many things are regarded as personal, which, as between the heir and executor, would descend to the heir as part of the inheritance.

Although the being fastened or fixed to the freehold, is the leading principle in many of the cases in regard to fixtures, it has not been the only one. Windows, doors, and window shutters are often hung but not fastened to a building; yet they are properly part of the real estate and pass with it; because it is not the mere fixing or fastening, which is regarded, but the use, nature and intention. *Dane's Abr. ch.* 76, *art.* 8, *sec.* 39. Modern times have been fruitful in inventions and improvements for the more secure and comfortable use of buildings, as well as of many other things, which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun, whenever it is desirable so to do, are of modern use; so are lightening rods, which have now become common in this country and in Europe. These might be removed from buildings without damage; yet as suited and adapted to the buildings, upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by deed as appertaining to the realty. But the genius and enterprise of the last half century has been in nothing more remarkable than in the employment of some of the great agents of nature, by means of machinery, to an infinite variety of purposes, for the saving of human labor. Hence there has arisen in our country a multitude of establishments for working in cotton, wool, wood, iron and marble, some under the denomination of mills, and others of factories, propelled generally by water power, but sometimes by steam. These establishments have in many instances, perhaps in most, acquired a general name, which is understood to embrace all their essential parts; not only the building, which shelters, encloses, and secures the machinery, but the machinery itself. Much of it might be easily detached, without injury to the remaining parts or to the building; but it would be a

very narrow construction, which should exclude it from passing by the general name by which the establishment is known, whether of mill or factory. The general principles of law must be applied to new kinds of property, as they spring into existence, in the progress of society, according to their nature and incidents, and the common sense of the community. The law will take notice of the mutations of language, and of the meaning of new terms, applied to new subjects, as they arise. In other words it will understand terms used by parties in their contracts, whether executed or executory, whether in relation to real or personal estate, according to their ordinary meaning and acceptation.

There was, at Bath in this State, a saw mill propelled by steam, generally called the steam saw mill. Suppose this establishment had been conveyed by the name of the steam saw mill, without a more particular description. What would pass? There is nothing in the books with respect to this species of property; for it is of quite modern invention; and there is no other mill of the kind in this part of the country. If you exclude such parts of the machinery as may be detached without injury to the other parts or to the building, you leave it mutilated, incomplete, and insufficient to perform its intended operations. The parties in using the general term would intend to embrace whatever was essential to it, according to its nature and design; and the law would doubtless so construe the conveyance, as to effectuate the lawful intention of the parties. Salt pans have been held to pass the realty, and to belong to the inheritance; because adapted and designed for, and incident to, an establishment for the manufacture of salt. The principle is, that certain things, personal in their nature, when fitted and prepared to be used with real estate, change their character and appertain to the realty, as an incident or accessory to its principal. Upon this ground we are satisfied that the chain in question, being in the mill at the time, and essential to its beneficial enjoyment, passed by the deed of the defendant to *Asa Redington*, under whom the plaintiffs claim, independent of any reference to usage. The verdict is therefore sustained, although not upon a ground in accordance with the impressions of the judge who presided at the trial. This we think upon

the whole a fair application of the principles of law to the case. Had the term mill, however, by uniform and general usage, been understood not to embrace the chain, a different construction would no doubt have obtained; for it is a term of art, the proper meaning of which would be fixed by the general understanding of those who are skilled and experienced in it. If they were not agreed, the law would adopt that which was most general, and which would best accord with the nature and character of the subject matter. The jury have found, upon the evidence submitted to them, that by general and uniform usage the chain passed by a deed of the mill. This finding was somewhat stronger than the evidence warranted. It did appear that there had been exceptions to this usage; but the weight of evidence went to support it. At any rate it is apparent that the usage is rather in favor than against the construction we have adopted. But as we are of opinion that the title of the plaintiffs is well supported by the deed, independent of usage, it becomes unnecessary to decide upon the competency or effect of the testimony adduced upon this point. *Judgment on the verdict.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF PENOBSCOT, JUNE TERM, 1829.

PICKERING *vs.* HOLT & AL.

The master of a vessel cannot, by the mere virtue of his office, as such, bind his owners by a charter-party under seal, so as to subject them to an action of covenant thereon.

THIS was an action of covenant, on a charter-party; and was tried before *Weston J.* on the issue of *non est factum.*

The plaintiff, to support the issue on his part, offered in evidence a charter party signed and sealed by himself, and by one *Enoch Norton* representing himself to be master and agent of the schooner *Champion;* which was chartered for a voyage to the *West Indies;* and proved that the defendants were owners of the vessel, and appointed *Norton* as master; that after she was chartered, the defendants surrendered her coasting license, and took out a register, to enable her to go to foreign ports; and that one of the defendants afterwards, being informed that the plaintiff had chartered her to take a cargo of boards to the *West Indies* on shares, spoke of the intended voyage without objection.

Upon this evidence the judge directed a nonsuit; reserving the effect of the evidence for the consideration of the court, upon a motion to set the nonsuit aside.

Greenleaf and *Sprague*, for the plaintiff, contended that the master had power, by his office, to enter into a charter-party for the employment of the vessel, and thereby to bind the owners;—*Abbot on Shipping*, 120, 121, 132, *Marsh. Ins.* 500;—one of whom, in the present case, expressly assented to the enterprise. And having this authority, the imperfect manner of its execution, being in his own name, instead of that of the principal, is cured by our *Stat.* 1823, *ch.* 220.

Allen and *Pond* for the defendants.

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

The only question in this case is whether a master of a vessel, in virtue of his character and authority as such merely, can bind his owners by executing a charter-party under his hand and seal, in such a manner as to subject them to an action of covenant broken upon the charter-party, issue being joined on the plea of *non est factum.* The law on this subject appears to be settled. In *Abbot on Shipping*, 164, it is laid down in these words;—"The execution of a charter-party by the master, although said to be done on behalf of the owners, does not furnish a direct action, grounded upon the instruments against them. This depends upon a technical rule of the law of England, applicable as well to this as to other cases, and not affected by mercantile practice of executing deeds for and in the name of absent persons; the rule being, that the force and effect which that law gives to a deed under seal, cannot exist, unless the deed be executed by the party himself, or by another for him in his presence, and with his direction; or, in his absence, by an agent authorized so to do by another deed; and in every such case, the deed must be made and executed in the name of the principal." See also, *Harrison v. Jackson & al.* 7 *D. & E.* 207, and *Horseley v. Rush & al.* there cited. The above principle, so far as it relates to the mode of executing a deed by an authorized agent, is done away by our statute of 1823, *ch.* 220. In the case at bar it is not pretended that the charter-party was executed in the presence and by the direc-

tion of the owners, or that they had by any deed under their hands and seals authorized *Norton*, the captain, to execute it on their behalf. It has been contended that the facts stated in the oral testimony, and those appearing on the face of the documents from the custom house, furnish evidence of a ratification on the part of the owners, of the act of the captain in signing the charter-party. We cannot admit this argument to possess any force. A parol ratification cannot be more availing than a parol authority previously given; and that would have been clearly insufficient. We see no grounds for setting aside the nonsuit. There must be

Judgment for the defendant for costs.

Buck *vs.* Hardy.

Whether the tenant in a writ of entry, whose title has been found fraudulent and void as against the creditors of his grantor, the demandant being one, can be admitted to take exceptions to the regularity of the demandant's extent on the premises—*quære.*

If the judgment debtor is not in the county, it is sufficient if the officer, who is about to extend an execution on his lands, should leave notice at his last and usual place of abode. But whether *any* notice in that case is necessary—*quære.*

Six hours notice to the judgment debtor, of an extent about to be made on his lands, was held sufficient, he living within a quarter of a mile of the premises.

If, in the return of an extent, the land be described with such certainty that there could be no mistake as to its location, it is enough.

An extent may well be of a chamber in a house or store, with a right of ingress and egress by an outer door, entry and staircase.

An officer was permitted to amend his return of an extent, by inserting notice to the debtor and his absence from the county, after the execution was recorded and returned, and pending an action for the land.

In this case, which was a writ of entry, the demandant made title to the premises under an extent against the grantor of the tenant, made in *June* 1827, in which the premises were described as "the westerly half of the ground floor of the store occupied by *E. S.* and of the cellar under the same, divided from the residue

of said store by a line running from a mark on the north side of said store, through the centre of the same southerly to land of *J. H.*; together with all the land under and adjoining the same west half of said store, northerly to the *Kennebec*-road, and westerly and southerly to land of the said *H.* Also, the northwest chamber in the second story of said store, with a right of passage through the stairway, and an open entry leading from the street to said chamber."— In the officer's return on the execution, which was against the tenant's grantor and another, he certified that the creditor had chosen one appraiser, and that he had chosen the other two; without designating which was appointed for the debtors, who neglected to choose any appraiser; nor did it appear that he had given them any notice of the intended extent.

Hereupon the tenant objected, 1st, that the estate was not sufficiently set out by metes and bounds;—2d, that it did not appear that the debtors were notified and requested to choose an appraiser, nor that they did not dwell within the county;—3d, that the extent upon the chamber, as set forth, with the right of passage, was illegal. But *Weston J.* before whom the cause was tried, overruled these objections for the purposes of this trial, reserving them, together with a motion of the officer for leave to amend his return, for the consideration of the court.

The title of the tenant being impeached as fraudulent and void against the creditors of his grantor, the jury found a verdict against him; which was taken subject to the opinion of the court upon the points raised at the trial.

The Court having granted the officer leave to amend his return, he certified that he made search for the debtors but could not find them, they both being out of the county; and that he left a written notice at their last and usual place of abode, about six hours before the extent, they living within a quarter of a mile of the premises.

J. McGaw, for the tenant, contended that this notice was not sufficient. The creditor has thirty days within which he may extend his execution, his lien being continued for that time after judgment; and it is but reasonable that the debtor should have at least one

day's notice, that he may so arrange his business as to select an appraiser and attend in person. It ought also to be personal notice, its object being to exercise an act of judgment not easily or safely delegated to another. *Eddy v. Knapp*, 2 *Mass.* 155.

And as to the mode of the extent, he insisted that it was defective, in not stating the metes as well as bounds, that the distance from one monument to another might appear, or the quantity in some other way be ascertained. Nor was the right of passage legally taken. If the creditor would avail himself of such an easement, he should take it by the common and ordinary passage of the existing stairs.

Brown, for the demandant.

WESTON J. delivered the opinion of the Court.

It might deserve consideration, whether it is competent for the tenant, who holds under a title found by the jury to have been fraudulent as against creditors, to take the exceptions upon which he relies to defeat the demandant's levy. This point however it will be of no importance to decide, if the exceptions raised are not of a character to be sustained. It is insisted that the course taken by the creditor, and by the officer under his direction, has deprived the judgment debtors of the right, to which they were by law entitled, to choose an appraiser. The creditor may elect at what time, before the return day of the execution, he will cause it to be levied. He may be impelled, from just apprehensions of being anticipated by others, to proceed immediately. The debtor is to be duly notified by the officer, if he be living within the county. As the authority of the officer, through whose agency the levy is made, is limited to his own county, the law does not require him to perform an act of official duty elsewhere. The officer, in his return, as amended by permission of court, states that he made search for the judgment debtors and could not find them; and he further adds that they were not within the county. It was not in his power then to give them personal notice; and it was his duty to complete the levy, that the rights of the creditor might not be defeated. Upon these facts it would be reasonable, although we would not be understood to de-

termine it to be absolutely necessary, that he should leave notice at their last and usual abode, that if there was any one there to whom their affairs had been confided, he might have an opportunity to appear in their behalf. The period of six hours allowed by the officer was ample for this purpose; their residence being within a quarter of a mile of the premises. Neither he nor the creditor were bound to await their return into the county. It might have been hazardous to do so; especially if they had occasion to be absent for some time.

It is not to be supposed that the officer would conspire with the creditor to seek an opportunity to proceed in the absence of the debtor, with the view to deprive him of his right to appoint an appraiser. Whether if such a fact was made out to the satisfaction of a jury, the levy might not be defeated on the ground of fraud, or whether the party aggrieved might not avail himself of some other adequate legal remedy, it is not necessary now to determine.

It is further urged that in extending executions upon real estate, the statute requires metes as well as bounds; and that here although bounds are given, metes are not. By metes in strictness may be understood the exact length of each line, and the exact quantity of land in square feet, rods, or acres. It would be going too far to require that this should be set forth in every levy. The legislature intended that the land should be described with such certainty, that there could be no mistake as to its location. Metes result from bounds; and where the latter are definitely fixed, there can be no question about the former. The bounds are here given with great exactness, and as the metes are with certainty deducible from them, they may be considered as also given, by necessary implication.

We entertain no doubt that an execution may be levied upon a chamber in a house or store, which may be set off as a distinct and separate freehold; and if so, a right of ingress and egress by an outer door, entry and staircase may be given as incident and necessary to its enjoyment. In *Taylor v. Townsend*, 8 *Mass.* 411, *Parker J.* in delivering the opinion of the court, says, " It sometimes happens that the chambers of a house are sufficient to satisfy an execution, sometimes the lower rooms and cellar; now it

is absurd to suppose that these may be taken and set off to the creditor, and yet that no passage through the entry and staircase can be given." *Judgment on the verdict.*

FRENCH & AL. *vs.* CHASE.

The prior right of a partnership creditor, to be paid out of the common property, in preference to a separate creditor of either of the partners, does not exist in the case of a dormant partnership. In such case a creditor whose debt relates to the business of the firm, and who is behind the creditors or vendees of the ostensible partner in his attachment, shall not be permitted to defeat them and gain a priority, because he has discovered the concealed liability of a secret partner.

REPLEVIN of certain merchandize. The defendant pleaded property in one *Walter Brown* and one *Nathaniel E. Quinby*; and that he, as a deputy sheriff, attached the goods by virtue of a writ against them; traversing the property of the plaintiffs; upon which issue was joined.

At the trial of this issue, before *Weston J.* it appeared that the writ, by virtue of which the goods were attached, was issued against *Brown & Quinby*, upon a note signed by the latter alone, with an averment that *Brown* was his partner. There had never been any open and avowed partnership between them; and the greater part of the goods had been purchased in the name, and on the sole credit of *Quinby*, who had done business in his own name at *Frankfort;* but from certain appearances and declarations it was generally believed there that *Brown* was connected with him; and once an advertisement was posted upon the store there, announcing a dissolution of the partnership between them.

Afterwards a store was opened at *Brewer*, in the name of *Brown*; but from the agency of *Quinby* in the business of the store, and from the fact that the greater part of the goods had been purchased on his credit, it was still believed that they were connected in business.

Early in *January*, *Brown* removed the goods from *Brewer* to *Milo*, where he transacted business in his own name, without the presence or apparent assistance of *Quinby*; and having sold off a considerable portion of the goods, he replenished his stock in the following *April*. How these last goods were obtained, did not appear. In *July* ensuing, the goods then in store where attached by one *Kitteridge*, for payment of a note of about 600 dollars, made by *Quinby* alone, upon the assumption that *Brown* was his partner. Hereupon *Brown*, by three bills of sale, conveyed to the plaintiffs the goods in store, with some corn, grain, and other articles, amounting in all to $1054 93; in consideration whereof the plaintiffs assumed, and afterwards paid, the debt due to *Kitteridge*, gave up a note of about $230 due from *Brown* to them, but not yet payable, and gave him their own promissory note for upwards of 200 dollars for the balance. How the note thus given up accrued, did not appear. It appeared, however, from the testimony of one of the plaintiffs' witnesses, that in his opinion the goods conveyed to them would not have produced, at a sheriff's sale, more than enough to have paid the debt due to *Kitteridge*.

There was evidence tending to show that *Quinby* meditated a fraud upon his creditors, with the privity and participation of *Brown*; and whether the plaintiffs also were implicated in the transaction, was left to the jury to determine.

Upon this evidence the counsel for the defendant requested the judge to instruct the jury that the purchase of the property by the plaintiffs, with a view to secure their debt against *Brown*, giving a note to him alone for the balance, whereby the joint creditors of *Brown & Quinby* might be prevented from attaching the same property, was illegal and void as against such creditors. This the judge declined; but he did instruct them that though the plaintiffs might know that the creditors of *Brown & Quinby* might be thus defeated, yet as the business was done in *Brown's* name, he alone being ostensibly concerned therein, they had a right to deal with him individually; and that if the transaction was conducted with good faith on their part, though the creditors of *Brown & Quinby* might thereby be defeated, and this consequence foreseen by the

plaintiffs, yet their title to the property would remain unaffected. But that if the fraud meditated by *Brown & Quinby*, if such there was, upon their creditors, was known to the plaintiffs, and there was sufficient reason, from the evidence, to believe that there was mingled, with other motives of the plaintiffs, any intention to aid in this design, it would vitiate and defeat their title, and the verdict of the jury must, in that case, be for the defendant. But they found for the plaintiffs. And if the instruction requested ought to have been given, or if that which was given was erroneous, was reserved for the consideration of the court.

J. McGaw and *Sprague*, for the defendant, said that this was not a case of dormant partnership, so far as the plaintiffs were concerned, because they well knew the fact of the partnership; and also of its insolvency; and that there was no surplus property, to which either partner could be separately entitled. It was therefore a question whether one of the partners could apply the goods of the firm to the payment of his own private debt, to the exclusion of the partnership creditors. And this they denied. 5 *Pick.* 11.

Allen, Hill & Starrett, for the plaintiffs.

The substance of the following opinion was given by the Court in the county of *Waldo* at the ensuing *July* term; after which it was drawn up by

Mellen C. J. The plaintiffs claim title to the goods in question under a sale of them by *Walter Brown*. The report states that they paid a fair and valuable consideration for them; and the jury, under the instructions they received, have found that the transactions which terminated in the sale, were conducted on the part of the plaintiffs in good faith. Though it does not distinctly appear that *Brown & Quinby* were partners in trade at any time, yet a connection of that kind is alluded to in the report; and in the argument it was admitted; and also that the firm was insolvent. The partnership, however, was a secret one; and at one time the business was carried on in the name of *Quinby*; and afterwards in the name

of *Brown*; *Quinby* then not having any apparent agency or interest in it. Such was the case at the time the plaintiffs made the purchase; but there is no evidence when the note was given by *Brown* to the plaintiffs, or the note by *Quinby* to the attaching creditor. In both cases the notes were signed in the usual manner, each with the individual name of the promissor. Upon these facts we are to decide whether the requested instructions were properly refused, and whether those which were given were correct. Both questions may be considered at the same time; for whatever is a legal answer to one, is equally so to the other; if the instructions given were correct, those refused would have been incorrect.

The defendant contends that he has a right to the goods by virtue of the attachment, superior to that of the plaintiffs under the sale, on the ground that the note in suit was given for a partnership debt, though signed only with the name of *Quinby*; and he relies on the well known principle that the partnership funds must first be applied to the payment of partnership debts; and that until such debts are satisfied, a creditor of one of the firm cannot appropriate any portion of them. But the question here is, whether this principle is applicable in the present case, where *Brown* alone was the ostensible owner, and the existence of any partnership was wholly unknown to the plaintiffs. To extend the principle thus far would be unreasonable and unjust, and farther, we apprehend, than it has ever been carried by any judicial decision. The reason upon which the doctrine is founded, cannot exist where the business of a secret partnership is all transacted by and in the name of one of the partners, who appears to all the world as the sole owner. Persons contracting with him, look, and have a right to look, to the property as well as the ability of the person in such cases for the security of their debts; and there is nothing in the case, as presented to us, which shews that the plaintiffs and the attaching creditor did not both reason, calculate and act upon the same principle at the time they received their respective notes. They must therefore both be considered as standing on the same ground, contracting under the same circumstances, and entitled to the same rights as creditors. Both looked to the visible funds of the person with whom they respectively dealt; and as the plain-

tiffs, if they had attached the goods in question prior to the attachment by the defendant, would have been entitled to hold them, for the same reason they are entitled to hold them under and in virtue of the sale by *Brown* to them; they being fair and honest purchasers, having paid a full consideration in the manner mentioned in the report. In this view of the cause, and laying out of the case the attaching creditors' supposed priority of right, it is clear that the plaintiffs had an unquestionable right to secure their demand by means of the purchase of the goods, although the creditors of the firm might thereby be defeated, and such consequences have been foreseen. They gave up to *Brown* his note for about $230—gave their own note for about $600 to secure the *Kitteridge* demand, which they had paid before the trial, and also a note to *Brown* for the balance; amounting in all to $1030, for the goods in question, estimated at 1054 93; though there was proof that they would not, in the opinion of the witness, have produced, if sold on execution, more than sufficient to have paid the *Kitteridge* debt of $600 and costs. The principle above stated is distinctly maintained by the decision in *Bartels v. Harris*, 4 *Greenl.* 146, and *How v. Ward*, *ib.* 195. We are all of the opinion that the decisions of the judge, in relation to the subject of instructions to the jury, were correct.

Since the last term in the county of *Waldo*, when the opinion formed by the court in this case was made known, and before it was drawn up, the case of *Lord v. Baldwin*, 6 *Pick.* 348, has been seen and examined by us; in which it was decided that in case of a dormant partnership, an attachment of the stock in trade in the hands of the ostensible partner, in a suit against him alone, has preference before a subsequent attachment of the same goods by another person in an action against the partners. The principles upon which that decision is founded apply with equal propriety and force in the case at bar as in that, though the plaintiffs claim in virtue of a prior sale of the goods, and not of a prior attachment. The Chief Justice, in delivering the opinion of the court says, "the basis upon which the rule rests, is, that the funds shall be liable upon which the credit was given. Those who sell goods to, or make a contract with a company or firm, are supposed to trust to the ability or prop-

erty of the firm. Those who trust the individual member, rely on his sufficiency alone." Where all the creditors have trusted the man of business and apparent owner of goods, one of such creditors, who is behind the rest in his attachment, shall not be permitted to supplant them and gain a priority, because he has discovered the concealed liability of a secret partner.

Judgment on the verdict.

DALL *vs.* KIMBALL.

Under *Stat.* 1821, *ch.* 135, parish taxes can be assessed only on the polls and property of members of the parish.

The *Stat.* 1786, *ch.* 10, is no longer in force in this State, its subject matter having been revised in *Stat.* 1821, *ch.* 135.

THIS case, which was decided in *June* term, 1826, and was unavoidably omitted in the cases of that year, was a writ of entry brought to recover two lots of land in *Bangor*, and was tried upon the general issue. The demandant's title was derived under deeds from *James Drummond* and *John Miller*, conveying the premises to him prior to the year 1820. Neither the demandant nor his grantors were inhabitants of *Bangor*.

The tenant claimed title to the premises under a deed from *John Barker*, collector of parish taxes in *Bangor* for the year 1823, by virtue of a sale of these lots as nonresident's property, for nonpayment of parish taxes, assessed upon them as belonging to *John Miller & Co.* for that year.

It appeared that the minister was originally settled by the town, acting as a territorial parish; that his salary, which was 800 dollars *per annum*, had not been raised in the year 1822; and that at a meeting of the inhabitants of the town qualified to vote in parish affairs, called by the assessors of the town in *April* 1823, the sum of 840 dollars was voted for the salary of 1822 in arrear, and 800 dollars more for the salary due in 1823; which, with other sums raised

at the same meeting for parish charges, were duly assessed by certain assessors, chosen at that meeting, pursuant to an article in the warrant, as parish assessors.

Upon this evidence the demandant objected—1st. That the lands of nonresident proprietors were not liable to be assessed for parish taxes.—2d. That the parish meeting was illegal, being called by the assessors of the town, neither of whom was a member of the parish: —3d. That if, by construction of law, the society was a territorial parish, coextensive with the municipal corporation, the tax should have been made by the assessors of the town:—4th. That the vote and assessment of two years' salary at once, was illegal:—5th. That the sum voted as salary for the year 1822 was larger than was due: —6th. That the tax was assessed to *John Miller & Co.* who were not owners of the land. And a verdict was taken for the tenant, by consent, subject to the opinion of the court upon the question whether, upon the evidence, his title was maintained.

J. McGaw and *Williamson*, for the tenant, being called on by the court to answer the first objection, argued that the minister was settled, under the law of Massachusetts, in pursuance of the obligation resting, by statute, on the *town*; that his contract was with the town as a municipal corporation, in which capacity it was bound; that this obligation of the town was not affected by any statute, of that State or of this, fixing or changing the qualifications of voters in parochial affairs, nor was the contract to be impaired by changing or diminishing the fund out of which the salary was to be paid. At the time of making the contract, the lands of nonresidents within the town were bound for its performance, by the laws then in force; and to construe our statute (1821 *ch.* 135,) as relieving them from the liability to be taxed in any case for parish charges, is, in cases like the present, to take away vested rights. Had the minister sued for his salary, the action must have been against the *town*; his execution might have been levied on the property of any citizen, whether of the parish or not; the citizen in his turn, might have had a judgment against the town for money laid out and expended; and this sum could be reimbursed only by a general assessment, as in the case of other town debts. The *Stat.* 1786, *ch.* 10, moreover, is not repeal-

ed, either by express words, or by implication; and by this statute, taxes granted for parochial purposes are to be assessed on all the polls and property within the territorial limits of the parish.

And wherever monies are to be raised for which the town is liable to be taxed, the meeting should be called by the town officers, in the same manner as other town meetings; but the assessment being a parochial act, it was proper that the money should be assessed only by members of the parish, specially chosen for that purpose. *Minot v. Curtis*, 7 *Mass.* 441.

Upon principle also, they contended, there was the same propriety in taxing nonresidents for the support of public worship, as for schools. *Amesbury Nail Factory Co. v. Weed*, 17 *Mass.* 53.

And they insisted that the parish-act of this State did not affect existing parishes, but only provided for the formation of new ones.

Gilman for the demandant.

PREBLE J. delivered the opinion of the Court.

Several questions have been reserved in this case for the consideration of the court, and have been discussed in argument by the respective counsel. The decision of the court, now about to be pronounced, refers to one of those questions only, as the view we have taken of that one is decisive of the case at bar.

By the statute entitled "An Act concerning parishes," passed *March* 13, 1821, *ch.* 135, *sect.* 6, it is provided that every parish may grant and vote money for the support of the public ministry of religion, &c. and may assess the same on the polls and estates of the several members thereof. From the report of the Judge who presided at the trial, it appears that the demanded premises are unimproved lands within the town of *Bangor*, that the demandant who is not an inhabitant of this State, but a resident in *Boston*, in *Massachusetts*, became the sole proprietor of the premises in 1819, and that the expense incurred by the parish in *Bangor*, to defray which the tax in 1823 was voted and assessed, was not incurred until 1822 and 1823, during all which period the demandant was not a member of the parish. Upon comparing the third section of the statute of

1786 and the subsequent statutes of *Massachusetts* relating to parishes and religious societies, with the provisions of the statute of this State already referred to, we cannot doubt that the latter was intended as a revision of the former, and that although by the third section of the statute of 1786, the taxes granted and voted are "to be assessed on the polls and property within the territorial limits of the parish," yet under our statute it was manifestly the intention of the legislature to restrain the right of taxation in a parish upon polls and property, to the polls and property of its members. The verdict therefore must be set aside and a new trial granted.

LAPISH *vs.* WELLS.

B, a "settler" on lands of the Commonwealth of Massachusetts in *Bangor*, within the terms of the two Resolves of *June* 25, 1789, sold one acre of his possession, by metes and bounds, to *McG*; and afterwards sold the residue of his lot, excepting the acre, to *P*, from whom it passed to *L*, and his associates; who subsequently received from the committee on Eastern lands a deed of the whole lot, as the assignees of *B*, without any exception of the acre; they having complied with the conditions of the Resolve of *Feb.* 5, 1800, relating to settlers in *Bangor*. *L.* resided on the lot ever after his purchase. *McG.* always resided in another town; and never occupied the acre, nor took any measures to confirm his title, nor exercised ownership over it, till after the Commonwealth, by its committee, had granted it to *L.* and others. In an action by *L.* against a grantee of *McG.* to recover part of this acre, it was *held*,—

That it was competent for the tenant to impeach the deed from the Commonwealth to *L.* and others on the ground of fraud, so far as related to its conveying the acre to the grantees:—

That *McG.* was entitled to be confirmed in his right to the acre, as the assignee and legal representative of a settler, within the meaning of the resolves:—

That a grant by Massachusetts, of lands in this State previous to the separation, is impeachable for fraud, in the courts of this State; notwithstanding the general language of the 7th of the terms and conditions of the act separating Maine from Massachusetts, confirming all the grants of the parent Commonwealth:—

That if the committee on Eastern lands accidentally omitted to except the acre sold to *McG.* from their deed to *L.* and others, and the latter, perceiving the mistake, took the deed in silence, intending to defraud *McG.* of the acre; the deed, as to that acre, was void.

It is the duty of a judge, when requested, to instruct the jury upon every point pertinent to the issue.

Whether the "grants," &c. mentioned in the 7th of the terms and conditions of the act separating Maine from Massachusetts, can be extended beyond the immediate acts of the legislature, so as to include lands conveyed by the deeds of the committee on Eastern lands,—*dubitatur*.

THIS was a writ of entry, in which the demandant counted on his own seisin of a parcel of land in *Bangor*; and a disseisin by one *William McGlathry*, under whom the tenant claimed title; and it came before the court upon exceptions taken to the decisions of *Weston J.* before whom it was tried.

The demandant, at the trial, relied on a deed from the committee

for the sale of eastern lands, appointed by the Commonwealth of Massachusetts, dated *March* 2, 1802; conveying to himself, and *Zadock French*, and *Amasa Stetson*, "assignees of *James Budge*, who settled in *Bangor* prior to *Jan.* 1, 1784, the lot *No.* 11, in *Bangor*, as it was surveyed by *Park Holland*, in the year 1801;" and further describing it by metes and bounds, including the demanded premises, and extending to low-water mark.

The tenant adduced a deed from *James Budge* to *William McGlathry*, dated *April* 19, 1798, conveying an acre of land, of which the land defended was a part; bounded "beginning at a stake on the west bank of *Penobscot* river, near a thorn-bush marked on four sides; running north eleven rods to a stake and stones; thence southerly to a stake and stones, a corner; thence south nine rods to a stake and stones on the same bank of the same river; thence running on the western bank of said river, to high-water mark, sixteen rods to the first mentioned bounds; with all the privileges of water and landing to the same belonging." This deed was recorded *May* 7, 1798.

He also read a deed from *Budge* to *John Peck*, dated *March* 13, and recorded *March* 20, 1799, conveying a tract of land in *Bangor* known by the name of *Budge's* farm; bounded "beginning on the east corner of *Penobscot* river; from thence running north one mile, adjoining the land formerly owned by *Francis Rogers*, deceased; thence west fifty rods on the land belonging to the Commonwealth; thence south to *Kenduskeag* stream, on the land owned by one *Harlow*; from thence down the *Kenduskeag* stream to *Penobscot* river; and from thence up the said *Penobscot* river to the place of beginning; meaning to contain one hundred acres; excepting one acre sold to *William McGlathry*, as by his deed dated *April* 19, 1798," &c.

He also read a deed of the same land from *Peck* to *Daniel Wilde*, dated *March* 23, and recorded *April* 2, 1799; and another from *Wilde* to *Zadock French* and *Robert Lapish*, the demandant, dated *Nov.* 21, and recorded *Dec.* 15, 1800, conveying an undivided moiety thereof; both deeds containing the same description and exception.

It was further proved by the tenant, that at a legal meeting of the

inhabitants of *Bangor*, holden *Dec.* 30, 1800, *Lapish* was chosen to be "their agent to carry in their claims to the government of Massachusetts, and procure deeds for them as settlers in said town;" that in *Oct.* 1800, the *Budge*-lot was surveyed by *Moses Hodsdon* for *Lapish*; who, while they were making the survey, observed that the value of the lot was much less, by reason of the acre sold to *McGlathry*;—That *McGlathry* resided in *Frankfort*, and was never an inhabitant of *Bangor*;—and that the acre sold to him, lay in common with the rest of the land at *Kenduskeag*-point, until a part of it was occupied and fenced, and a house built upon it in 1803, by *Luke Wilder*, who bought a quarter of the acre of *McGlathry* in 1802; which was the earliest actual occupancy of any part of the acre.

The tenant also proved by *Oliver Leonard* Esq. who wrote the deed from *Budge* to *McGlathry*, that the latter had sued *Budge*, and attached his cattle; that *Budge* employed the witness to procure for him a settlement of their accounts and dealings, which were of long standing; that *McGlathry* met him, by appointment, at the house of *Budge*, where each party produced his demands against the other, and a balance was struck of about a hundred dollars, for which *McGlathry* agreed to receive the acre of land, which was measured and conveyed to him on the same day; that this was a settlement of all demands between them; upon which *McGlathry* promised to stop the suit; that the witness was the attorney of *Budge*, and attended the court to which the writ was returnable, and looked for the action, with a view to answer for the defendant, but was unable to find it.

On the part of the tenant was also shown the resolve of *March* 5, 1801, passed on the petition of the inhabitants of *Bangor*, and procured by the solicitation of *Lapish* as their agent, granting lots of one hundred acres each to all who were actual settlers prior to *Jan.* 1, 1784, on payment of eight dollars and forty five cents; and to all who were actual settlers between that day and Feb. 17, 1798, similar lots, on payment of one hundred dollars each; with the expenses of survey in both cases; and directing a survey to be made and returned to the committee on Eastern lands, on or before

Nov. 1, 1801; after which time six months were allowed to the settlers to pay for their lands.

Under this resolve a survey was made by *Park Holland*, and returned *Nov.* 30, 1801; in which he certified that he had laid out, by metes and bounds, "to *Robert Lapish* and others, assignees of *James Budge*," one hundred acres of land in *Bangor*, being the lot *No.* 11, on his plan, bounded "beginning at a stump with stones about it, standing on the bank of the river, being the southwest corner of lot *No.* 12; and from thence north seven degrees west, sixty rods, to a pine stump marked; thence north, two hundred and thirty one rods, to a stake marked; thence west, fifty seven rods, to a fir tree marked; thence south, about two hundred and twenty-seven rods, to a stake standing in the county road, one rod east of an oak stump in said road; thence west, four rods, to the stream; thence on said stream, on the bank thereof, and on the bank of the *Penobscot* river, to the first bounds."

It also appeared that a dispute respecting the bounds of their adjoining lots had arisen between *Lapish* and one *Harlow*; which had been referred to the decision of arbitrators; whose award, dated *Jan.* 14, 1802, set forth the boundaries of *Lapish's* lot, describing it as containing one hundred acres, "except one acre sold to *Wm. McGlathry*," and it was proved that *Lapish*, though requested, did not produce any title-deeds to the referees; alleging that they were lost or mislaid; and that copies of them were afterwards obtained from the record and exhibited by *Harlow*.

It was further proved, in the defence, that the acre was called "the *McGlathry* acre" in 1801; that in *February* of that year *Lapish* offered *McGlathry* eight hundred dollars for it; that in 1805 he said he did not pretend to claim it; that in the same year he and *Amasa Stetson*, Esq. who owned half the *Budge*-lot, said to *Wilder* that their deed covered the acre as well as the rest of the lot, and that they did not see why they could not hold that also; but on *Wilder's* replying that it was not right to take away the land, Mr. *Stetson* answered, in presence of *Lapish*, that though their deed covered that lot, yet they had no moral right to it. *Stetson* and *Lapish*, having previously caused *Kenduskeag* point to be surveyed

into streets and lots, which they had extended across the acre without reference to its lines, asked *Wilder* if he intended to conform to their plan of the streets and lots; to which he replied in the affirmative. And a part of his lot extending a few feet across one of their streets, they wished him to sell them that strip; to which he assented, for an agreed price; and had no doubt he gave them a deed of conveyance. *Wilder* also testified that the owners of the land at the point were very desirous that people should build and occupy there; that before he purchased, he told *Lapish* he thought he should buy of *McGlathry*; and that when he was laying down the sills of his house, *Lapish* pointed out the place which would conform to their plan of the streets, assisted at the raising of the frame, and permitted the people at work under him, as surveyor of highways, to leave their work and assist also.

On this evidence the tenant contended that the deed under which the demandant claimed the acre, and so far as it purported to include it, was obtained from the committee by fraud, and was therefore void, as to that parcel.

The demandant, to rebut this evidence, read copies of certain documents from the land-office; from which it appeared that the existence of *McGlathry's* claim, and of the exception of it in the deeds of the *Budge*-lot, must have been known to the committee at the time of executing the deed of *March* 2, 1802; those deeds, with other papers relating to some disputes respecting the bounds of the lot, having been laid by them before the late Chief Justice *Parsons*, then at the bar, for his advice whether the demandant and his associates were entitled to a deed as the representatives of *Budge*; which he answered in the affirmative. The effect of this evidence was denied by the tenant, who contended that it ought to be rejected.

Two resolves, passed *June* 25, 1789, were also read, restricting the term "settler" to one who made a separate improvement on his lot, fitted for mowing, pasturage or tillage, with an intent to abide and remain thereon; and was resident on such lot, by himself or some other person under him, during the period mentioned in the resolves. Also, the resolve of *Feb.* 23, 1798, directing the resurvey of the *Waldo* claim; and the resolve of *Feb.* 5, 1800, on

the report of *Thomas Davis*, surveyor; to show that the persons to be quieted in their possessions in *Bangor*, were none but the actual residents mentioned in the preceding resolves.

The demandant also produced a copy of a judgment recovered by *McGlathry* against *Budge* at *May* term, 1798, on default, for one hundred and six dollars damages, with costs, in an action of *assumpsit*; and a certificate thereon, showing that execution was issued *Nov.* 21, 1798; but it did not appear that any part of the judgment had been satisfied.

He further proved by *Holland*, the surveyor, that advertisements of his intended survey of the settlers' lots were posted up in the taverns in the vicinity, six weeks before the time of the meeting; which was also published in the newspaper printed at *Hampden*, adjoining both *Bangor* and *Frankfort;* that the settlers generally attended at the survey; and after it was completed, Maj. *Neal*, who had attended as the agent of Gen. *Knox*, certified his assent to the assignment of the lots to the settlers; but during all this time there was no appearance, nor any claim, either by *McGlathry* or any one in his behalf; nor did it appear that he had any personal knowledge of any of these transactions, other than might be inferred from the foregoing testimony. But *Lapish* always had resided on the *Budge*-lot, not far from the acre, from the time of his purchase from *Budge*, till long after the deed was made to him and his associates by the committee, in 1802.

Other evidence was offered by the demandant, showing that the acre lay in common, and was occupied indiscriminately with the rest of the point, by transient occupants and others, up to the year 1805; except the separate inclosure of *Wilder's* lot in 1803, as before stated. *Holland* further testified that he did not recollect having any knowledge of *McGlathry's* claim till long after the survey; but thought he must have had some evidence of the deeds, and of the title of the demandant and his associates to hold as the assignees of *Budge*, or he should not so have returned their names. And he said that had *Lapish* pointed out the acre to him, requesting him to mark it on the plan, he should have marked it.

After the tenant purchased the land defended, it continued in the

occupancy of him and his grantees, till the commencement of this action.

Hereupon it was contended on the part of the demandant, that by force of the resolves referred to, all the lands in *Bangor* were conveyed to Gen. *Knox* and others, interested in the *Waldo* claim, except one hundred acres to each settler then occupying the same; and that as *McGlathry* was not a settler, and never occupied any land in *Bangor*, he could have no right or claim under the resolve of 1801, and was not entitled to any grant or deed from the committee :—

And that as *McGlathry* did not attend before the surveyor, and preferred no claim to him or to the committee, either as a settler or the legal representative of one; and wholly omitted the condition required by the resolve, of paying for the survey, and paying money into the treasury of the State; he had no right to claim any land either as a settler, or as the representative of a settler.

But these points the judge overruled. And he instructed the jury that if the committee had before them the evidence of *McGlathry's* title to the acre under *Budge*, but it escaped their attention, and therefore was not noticed in their deed to *Lapish* and others; and if *Lapish*, when he took the deed, then perceived, though for the first time, that the acre was not excepted; and took the deed with intent to defraud *McGlathry*, to deprive him of the acre, and to hold it against him; this would vitiate the deed as to that acre, and so far render it void ;—and that if the deed was so received, with such intent, it was a fraud, not only on *McGlathry*, but on *Budge*, his warrantor of the acre.

It was further contended by the demandant, that if the committee, at the time of giving their deed, were deceived as to the right of *French*, *Lapish* and *Stetson* to the whole lot; yet the present tenant could not take advantage of this, nor impeach the deed for this cause. But this point the judge overruled.

It was also contended by the demandant, that by the statute of Massachusetts for the separation of Maine, incorporated into our constitution, the grant from Massachusetts to the demandant was

confirmed, so that neither the State of Maine, nor any of its tribunals, could now invalidate or set it aside. But the judge instructed the jury that if the deed was originally obtained by fraud, it was competent for a judicial tribunal in Maine to declare the grant void; in the same manner as such a tribunal in Massachusetts might have done before the separation of the State.

The demandant also requested the judge to instruct the jury, that if the committee perceived the exception of the acre sold to *McGlathry*, as stated in the deeds from *Budge*, down to *Lapish* and his associates; but considered *McGlathry* as not entitled to any land under the resolve, and intentionally excluded him; meaning to convey the whole lot to *Lapish* and his co-tenants; it was not a fraud in the latter to receive such a deed.

But the judge declined so to instruct them; saying that such a course, on the part of the committee, was not to be presumed.

And a verdict was returned for the tenant, as to so much of the demanded premises as lies above high water mark, and within the limits of that part of the acre by him defended. Whereupon the demandant filed exceptions, under the statute, to the opinions and decisions of the judge, above stated.

McGaw, *Greenleaf* and *Sprague*, for the demandant, maintained the following propositions.

1. The entry of *Budge* on the land of Massachusetts, was without pretence of right; and was not even a disseisin; because the State cannot be disseised. He therefore had nothing which he could convey to *McGlathry*. The latter was not a "settler," within the terms of the resolves referred to;—*Lambert v. Carr*, 9 *Mass.* 190; *Harlow v. French*, *ib.* 192; and so was not entitled to any of the bounty granted by the Commonwealth to that class of persons. Nor was it any longer in the power of the Commonwealth to grant him the land; because all the township, not in the hands of actual settlers, was already granted to Gen. *Knox*; which the grantor could not control. *Dartmouth College v. Woodward*, 4 *Wheat.* 518. Yet to the grant to *Lapish*, *Knox* had assented, by the presence of his agent at the survey. *Bussey v. Luce*, 2 *Greenl.* 367.

Neither was *McGlathry* the "legal representative" of a settler,

though such are mentioned in the resolve of 1801. That term applies only to executors, administrators and heirs; to whom his estate would be distributed, by the statute; not to assignees in fact. But *Lapish* was an actual settler, within the letter and spirit of the resolve.

2. But if *McGlathry* was within the meaning of the resolve, yet he never complied with its terms; and so was not entitled to any land. He did not reside in the town; he claimed nothing; he paid nothing; and if he ever had actual possession, he had long since abandoned it; had prosecuted his suit against *Budge*; and obtained judgment for the very sum agreed to be extinguished by the conveyance of the acre. He was not a tenant in common of any portion of the lot; but had a deed of an acre in severalty. He therefore could, in no view of the case, be entitled to a deed; because the committee could only convey in lots of a hundred acres; and to resident settlers, such as was the demandant.

3. Though the acre conveyed to *McGlathry* escaped the attention of the committee, and *Lapish*, perceiving it, took the deed in silence, yet this was no fraud in him; unless he had taken some measures to deprive *McGlathry* of that to which he was entitled. The mere suppression of a fact within his own knowledge, is no fraud. *Laidlaw v. Organ*, 2 *Wheat.* 178. Nor was he bound by any notice respecting the claim of *McGlathry*, the latter having no rights entitled to be respected. *Cowp.* 711, 712; 1 *Cranch*, 70, 100; *Everenden v. Beaumont*, 7 *Mass.* 76; *Bullard v. Hinckley*, 5 *Greenl.* 272; *Co. Lit.* 57, *b.*; *Dyer* 266, *b.*

4. But admitting, for the sake of the argument, that the committee were deceived; yet the *tenant* is not entitled to this objection; which can only be made by the grantor; as in the cases of infancy or duress. *Worcester v. Eaton*, 11 *Mass.* 371. It was on this principle that *Story J.* held that the associate of this demandant could not avail himself of the fraud practised by *McGlathry* against *Budge*, in obtaining judgment against him. *Dunlap & al. v. Stetson*, 4 *Mason*, 349.

5. The deed from the committee to the demandant, being a grant by Massachusetts, which had received a solemn judicial exposition in the case of *Lambert v. Carr*, in which it was established that the

committee were the exclusive and final judges of the claims of settlers, is now confirmed by the Constitution of Maine, *Art.* 10, *sec.* 5, *condition* 7; and cannot be impeached in this State, nor vacated by its tribunals.

6. The instruction requested from the judge, but which he declined giving to the jury, was pertinent to the issue; and was therefore improperly refused. There was evidence, from which it was plainly to be inferred that the committee knew of the claim of *McGlathry*. They passed it over through inadvertence, or design. On the former supposition, the jury had already been instructed by the judge. But if they adjudicated on his claim, and designedly rejected it, as, by the decision of *Lambert v. Carr*, they had the right to do, it was no more fraud in the demandant to reap the benefit of that decision, than for any other party to have the benefit of a judgment fairly rendered in his favor by a competent tribunal.

W. D. Williamson, for the tenant.

The opinion of the Court was read at the ensuing *October* term, as drawn up by

Mellen C. J. We have listened with attention to the arguments of the respective counsel, and have since deliberately re-examined the facts, and the principles adduced to support and resist the motion for a new trial; and although for some time we were not able to unite in any conclusions, yet on further discussion and reflection, we became satisfied with the opinion which we have formed. This opinion, with the reasons on which it is founded, will now be delivered.

Several reasons have been urged by the counsel for the demandant in support of the motion; these we will consider separately, though not in the order in which they are presented in the report.

1. As the deed from the committee contains no exception of the acre previously conveyed by *Budge* to *McGlathry*, it is contended that the tenant has no right to impeach the deed on any of the alleged grounds; but as it is admitted that he claims under *McGlathry*, he has a direct interest in the question in issue, and has the same right to impeach the conveyance on those grounds as *McGla-*

thry himself would have if he were the tenant in this action. This simple answer is sufficient, without being further extended.

2. It is denied that *McGlathry* was a settler, within the true meaning of any of the resolves offered in evidence; and that if he was a settler, he had not complied with the terms prescribed, and so was not entitled to a deed of the disputed acre from the committee. The answer to this objection is plain and obvious. Neither of the parties in this case, nor the committee, ever considered him as the original settler, but only as the assignee of a settler. The deed from the committee describes *James Budge* as the original settler, and they recognized him as such. This objection, therefore, may at once be laid out of the case as wholly unimportant.

3. The third objection has an intimate connection with the one just answered, and a part of it is involved in that. This however proceeds on the ground that, although *McGlathry* was the assignee of *Budge*, still he was not such a legal representative of him, as to be entitled under any of said resolves, to a deed of the acre from the committee of the Commonwealth. This argument seems to the court to be founded upon too narrow a construction of the terms "legal representative." We apprehend the legislature never could have intended merely the "heirs, executors or administrators" of a settler, to the exclusion of his legal assignees. Such a construction would be an unreasonable limitation of the bounty intended by them, as it would have operated to prevent settlers from realizing any advantages from the provisions of the resolves directly or indirectly, in case of a transfer of their possessory interests. Besides, the argument of the demandant's counsel is unfortunate in being liable to the objection that it proves too much. By the report it appears that *Budge* conveyed all his farm, (except the acre in question,) to *Peck*, who conveyed the same to *Wilde*; and he conveyed an undivided moiety of the same to *French* and the demandant. Now *Peck*, under whom the demandant claims, and *McGlathry*, under whom the tenant claims, were both of them assignees of *Budge*, in different proportions; and one of them was as well entitled to a deed from the committee as the other. And if nothing could legally pass by their deed to an assignee of *Budge*, because he was not his legal

representative, according to the construction of the demandant's counsel, then it would follow that nothing passed by the deed to *Peck*; the consequence of which would be that upon that principle, if on no other, there ought to be judgment on the verdict.

4. In the next place it is contended that by the seventh provision in the first section of the act relating to the separation of the District of Maine from Massachusetts proper, and forming it into a separate and independent State, the deed from the committee to *Lapish*, *French* and *Stetson* has been confirmed; and as the foregoing provision, with others, is incorporated into the constitution of this State, no tribunal thereof can now legally invalidate or set it aside. The language of the above mentioned provision relating to the point is this;—"All grants of land, franchises, immunities, corporate or other rights, and all contracts for, or grants of land not yet located, which have been, or may be made by the said Commonwealth, before the separation of said District shall take place, and having, or to have effect within the said District, shall continue in full force, after the said District shall become a separate State." It is very questionable whether the above cited provision was intended to have any relation to conveyances made by the agents of the Commonwealth, in the common form of deeds. It would seem from the words "grants of land, franchises, immunities, corporate and other rights," that the immediate acts of the legislature were intended. But, be that as it may; the expression is that they "shall continue in full force"; which implies legal and effectual grants, and, as such, being then in force. But we can never presume that the legislature intended that grants or deeds should be more binding and sacred in this State and in its judicial courts, than they would have been in the judicial courts of Massachusetts, provided Maine had never been erected into a separate State. It would be a singular construction of the language quoted, to consider it as designed to confirm and sanction a deed fraudulently obtained from an agent of the Commonwealth, and to deprive the courts of justice in this State of the power of examining and deciding a title, depending on such deed, according to the unquestioned principles of the common law. We do not feel at liberty to countenance this objection.

5. The next objection relied on has reference to the instructions of the judge to the jury on the subject of the alleged fraud in the procurement of the deed by the demandant from the committee. He instructed them that "if the committee had before them the evidence of *McGlathry's* title to the acre under *Budge*, but it escaped their attention, and therefore was not noticed in their deed to *Lapish* and others; and if *Lapish* when he took the deed then perceived, though for the first time, that the acre was not excepted, and took the deed with intent to defraud *McGlathry*, to deprive him of the acre, and to hold it against him; this would vitiate the deed, as to that acre, and so far render it void;" and "that it would be a fraud, not only on *McGlathry*, but on *Budge*, his warrantor of the acre."

It is contended that this instruction cannot be sustained upon legal principles; that unless the demandant was instrumental in causing the omission of the exception of the acre in the deed of the committee, his mere silence when he saw the mistake which they had carelessly made, and his receiving the deed under such circumstances, did not amount to a fraud on his part which would vitiate the deed; though it might render *Lapish*, *French* and *Stetson* trustees of the acre; and, as such, compellable in a court of equity to convey the same to those entitled to the estate therein. In support of this objection it has been urged that the whole subject in relation to the contending titles to the acre conveyed to *McGlathry*, and afterwards by the committee to the demandants and others, has recently undergone a critical and laborious examination in the Circuit Court of the United States in the case of *Dunlap & al. v. Stetson*, 4 *Mason*, 349; and that the learned judge who tried the cause decided that there was no ground for the imputation of fraud on the part of the grantees, but that the deed, as to the acre, conveyed an estate to them in trust. The force of this argument disappears when we consider that the case abovementioned was a bill in equity, and that the defendant in his answer had expressly denied all fraud and management; and the answer being under oath, and not disproved, was of itself proof that no fraud existed in the obtainment of the deed from the committee; or at least it removed all presumption of fraud; and even if any existed, the case was left destitute of all proof of it. But the

case furnishes us with no principles of law repugnant to those delivered to the jury in the instructions we are considering. On the contrary, principles directly establishing the same doctrine are strongly stated. He observes—" would it be pretended, that if a man should fraudulently procure from the Commonwealth a title to lands intended for another, either by its bounty or its contract, by misrepresenting himself to be that person or his assignee, that he should possess the land, thus procured by his fraud or misrepresentation, free of all claims of the injured party? That because his deception had been complete, therefore it should constitute and perpetuate an unimpeachable title? A court of law would not hesitate to set aside such a conveyance. No conveyance is so sacred, that, if infected by fraud, it may not be overturned." Again he observes, when speaking of the grantees,—" If they represented themselves as the sole owners, or, knowing the mistake of the commissioners, if they took the deed, intending to defraud *McGlathry*, the transaction, both at law and in equity, would be pronounced void for the fraud, and the deed be set aside on that account as well against *McGlathry* and his assignees, as against the Commonwealth."

We have examined the cases cited by the counsel for the demandant, but do not perceive that any of them, except *Laidlaw v. Organ*, 2 *Wheat.* 178, have any special bearing upon the point now under examination. In that case *Organ*, having heard of the news of peace at *New Orleans*, purchased a quantity of tobacco of *Laidlaw* who had not heard of it; and a few moments before the sale was completed, being asked whether there was any intelligence calculated to enhance the price of tobacco, *Organ* remained silent. *Marshall, C. J.* says—" The question is whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated. The court is of opinion he was not bound to communicate it; but at the same time each party must take care not to say or do any thing to impose upon the other. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties." A note is added by the reporter from *Pothier* in

these words: "Where the vendee conceals from the vendor the knowledge he may have, touching the thing sold, and which the vendor may not possess, it does not vitiate the sale; because the vendor ought to know best the quality of the articles he sells; and if he does not it is his own fault." In the above named case the principle decided had reference to the intelligence of extrinsic circumstances, as it is expressed, or the general knowledge of business or public events; and the note subjoined has reference to knowledge of some fact, in relation to an article, possessed only by the vendee. In the case at bar no want of knowledge is imputed to either party. The instruction complained of was, that if the committee knew of the title of *McGlathry* to the acre, but that the fact escaped their recollection when they made the deed; and if *Lapish* saw their mistake, arising from that forgetfulness, but fraudulently received the deed with intent to hold the land which belonged to *McGlathry;* then such a transaction would vitiate and avoid the deed. Thus far, certainly, a difference exists between the cases. That case seems to us to go as far as moral principles will justify, even in cases of that description, depending on public intelligence; and further than the same Court seemed willing to go in the case of *Etting v. Bank of United States*, 11 *Wheat.* 59. In that case it appeared that *McCullough* had been cashier of the Branch bank at *Baltimore*, and had been guilty of a fraudulent appropriation of a large sum of money belonging to the bank to his own use. The fact being discovered, it was resolved on by the directors that he should be removed. He was immediately called upon for security, which after some time was procured. As a part of the security furnished, a note was given by *McCullough*, indorsed by *Etting*. After the bank had obtained security in full, and not till then, *McCullough* was immediately removed from the office of cashier. As soon as *Etting* discovered what the transactions of the directors had been, he refused to pay the note, on the ground that he had been misled, deceived and defrauded by their conduct, and the concealment of the facts from his knowledge. A verdict was returned in favor of the defendant. The Circuit Court instructed the jury that if they should find that the directors contemplated, though they did not

promulgate, the removal of the cashier as soon as security should be furnished; that *Etting* indorsed the note in ignorance of the fraud of the cashier, or probability of his removal; and that he would not have indorsed the note had he known the circumstances; and that the bank did not disclose their intention to remove the cashier, lest it should increase the difficulty of his procuring security or prevent it; yet if *Etting* indorsed the note at the request of the cashier, without making any inquiries of the bank, or having any communication with them, the plaintiffs were entitled to recover; and that the note was binding on the defendant, unless he had shown such inquiries or communication, and a misrepresentation or concealment on the part of the bank. The court were requested by the counsel of *Etting* to instruct the jury that if they should find that the directors knew of *McCullough's* fraud and insolvency; that thereupon they resolved to remove him, but concealed the facts and continued him in office for the purpose of obtaining security, and that *Etting* was ignorant of the above facts; that then the plaintiffs were not entitled to recover. But the court refused to give this instruction, unless the jury should be further of opinion that the defendant was led into this state of ignorance in consequence of inquiries made of the plaintiffs, or some previous communication between them and him. *Etting's* counsel filed a bill of exceptions, and thereupon a writ of error was brought. After long and learned argument, the court, consisting of six of the judges, were equally divided; and though by the rule of the court in such cases, the judgment was affirmed, yet the case shews that the court did not sustain the opinion of the Circuit Court, that inquiry or communication for the purpose of information was necessary to create the obligation to disclose material facts. "The fraud, said the counsel, "consists, in such cases, in dealing with the party in ignorance, and leaving him so. It is not necessary that the other party should have created the false impression or intended it; it is sufficient that he knows it, and takes advantage of it." In support of this general principle may be cited, *Stuart v. Wilkins*, 1 *Dougl.* 18; *Cockshot v. Bennet*, 2 *D. & E.* 763; *Jackson v. Duchaire*, 3 *D. & E.* 551. In the instruction of the judge to the jury in the case at bar, a part of it was that if *La-*

pish saw the mistake, but took the deed with intent to defraud *McGlathry*, it would vitiate the deed as to the acre. The question of fraudulent intent was properly submitted to the jury, and they have found the fraud. Upon authority we cannot perceive any incorrectness in the instruction. *Lapish* was instrumental in giving it effect; because the deed could have no operation as to any part of the land, until delivery, and acceptance of it; and he received and accepted the deed, knowing there was a mistake in it, important in its nature, and that the committee had, through mere inattention, committed the mistake. The laws of morality can never give sanction to such a proceeding; and it surely cannot be the duty of a court of justice to be more indulgent in its judgment. It would be a reproach to our laws and tribunals which administer them, to permit fraud to accomplish its designs, when those designs are detected and disclosed. In the case before us the jury, who are the exclusive judges of facts, have by their verdict pronounced that the deed in question was fraudulently obtained from the committee. The objection therefore, to the instruction to the jury on the point we have been considering is not sustained.

6. The last objection is to the refusal of the judge to give certain requested instructions. The cases cited in support of it shew that it is the duty of a judge to instruct the jury upon any point which is pertinent to the issue; though not as to abstract principles which are irrelevant. The inquiry, therefore, is whether the instructions requested, were pertinent to the issue? The judge was requested to instruct the jury that if the committee perceived the exception of the acre sold to *McGlathry*, as stated in the deeds from *Budge* down to *Lapish* and his associates, but considered *McGlathry* as not entitled to any land under the resolve, and intentionally excluded him, meaning to convey the whole to *Lapish* and his co-tenants, it was not a fraud in the latter to receive such a deed. On this part of the cause there has been some vibration of opinion; but on consideration we are satisfied that the requested instruction had been virtually and essentially though not formally given, and was included in the instructions which we have just been examining. He presented to the consideration of the jury a number of particulars re-

specting the deed, and the conduct of *Lapish* at the time of its execution and delivery; and instructed them that if they should find all those particulars true, then the deed was void as to the acre. This amounted to a distinct expression of his opinion that if they should not find them all true, then the deed was not void. The implication is so strong that it could not be misunderstood. The jury had no authority from the court to consider the deed as void, except in one case and under certain specified circumstances. They have found that all those circumstances existed, viz. the committee's knowledge of *McGlathry's* title to the acre; their forgetfulness of the fact when the deed was executed; the knowledge of *Lapish* of the mistake in the deed; and his silence and acceptance of the deed with intent to defraud *McGlathry*. All these are totally repugnant to the facts assumed as the basis of the requested instruction, and the verdict proves that if given, it could not have changed the aspect of the cause, or been productive of any legal consequences in relation to either of the parties. It cannot therefore be considered as relevant. The instruction called for, in fact, amounted to no more than this, that if *Lapish* received just such a deed as the committee intended to give, in the honest execution of their supposed powers, it was no fraud in him. This seems to bear a strong resemblance to an abstract proposition, and even to a self-evident one. We think the judge was justified in declining to give the instruction, for the reasons we have mentioned.

Knowing, as we have reason to know, that this cause, and others on the docket, growing out of the same transactions, are important in a pecuniary point of view, and interesting to the feelings of all the parties connected; we have been disposed to assign the reasons of our opinion more at large than usual. And though from the evidence disclosed by the report, we cannot readily perceive the advantages of another trial, or any peculiar equity in the claim of the demandant; still we should promptly have set aside the verdict and submitted the cause to another jury, had legal principles demanded it. But those principles render such a course improper.

Judgment on the verdict.

Rogers *vs.* White.

Where one of two tenants in common of a quantity of boards shipped them for sale to his own factors, in a distant port, who sold them on credit, in the usual manner, taking a note therefor payable to themselves, and passed the amount to the credit of their principal, who was largely their debtor; and who paid over half the proceeds of sale to his co-tenant; and the purchaser became insolvent before the maturity of his note; after which the factors and their principal settled a further account, in which no notice was taken of this bad debt; nor was it charged back to the principal till the settlement of a third account, more than eight months after the maturity of the note and the insolvency of the maker; of whom payment could not, by any means, be obtained; at which settlement a large balance, due to the factors, was carried to a new account, and still remained unpaid;—and the principal gave no notice of these events to his co-tenant till sometime after the last of them had transpired;—it was *held*—that the acceptance of the moiety originally paid over to the co-tenant, was a ratification, by him, of the act of the other in making the shipment and consignment for sale;—that here was sufficient diligence, both on the part of the factors, and of the consignor;—that the latter was justly charged with the whole sum by his factors;—and might well recover back from his co-tenant the moiety he had paid over to him.

In this case, which was *assumpsit* for money had and received, it appeared that the plaintiff and defendant were owners in common of a quantity of boards, which the plaintiff, in *June* 1825, shipped to *Boston*, consigning them to *Peters, Pond & Co.* for sale. They sold them on the 12th of *July* 1825, to one *Pike*, then in good credit, for $287, taking his promissory note for the amount, payable to themselves in three months, with grace and interest. In so doing they gave the usual term of credit, and pursued the usual course of business. Upon this sale they credited the net proceeds in account with the plaintiff, between whom and themselves were large dealings. The account containing this credit was settled *Aug.* 31, 1825, and a balance of $57; then due to the plaintiff, was carried to a new account. Two or three weeks before *Pike's* note arrived at maturity he failed; and the holders, using all due diligence on their part, have been unable to obtain payment from him. On the 30th of *Nov.* 1825, another account was settled between *Peters, Pond & Co.* and the plaintiff, and a large balance due them was carried to a new

account; no notice being taken of *Pike's* note in this settlement. On the 27th of *June* 1826, another account was settled between them, in which the amount of *Pike's* note was charged to the plaintiff, and a larger balance again carried to a new account. A further account was settled between them *Sept.* 16, 1826, the balance of which was still against the plaintiff, and was carried forward as before. It did not appear that this last balance had been paid, the plaintiff having become insolvent. And there was no evidence of notice to the plaintiff of the failure of *Pike*, except what arose from the settlement of the account of *June* 1826.

It further appeared that in *Sept.* 1825, the plaintiff paid over to the defendant his half of the proceeds of the boards; that in the same *September*, and again on the 27th of *May* 1826, other accounts were settled between them, in which no notice was taken of the item in controversy; and that the plaintiff, within three months before the commencement of this suit, which was *May* 22, 1827, often requested the defendant to refund the money thus paid him; which he refused.

Upon this evidence *Weston J.* before whom the cause was tried, instructed the jury that the boards being for sale, the plaintiff having an interest in them, having consigned them to a competent factor, and having caused them to be sold in the usual course of business, and upon the usual credit; to which the defendant made no objection; the plaintiff was under no obligation to sustain alone the entire loss, which was not imputable to any default or negligence on his part; that *Peters, Pond & Co.* having paid a sum of money to the plaintiff under the expectation of being reimbursed from *Pike's* note, and this expectation having failed from causes for which they were not responsible, they had a right to reclaim it; and that their having forborne to do this for several months, till they had no further hope of obtaining it from *Pike*, was no injury to the plaintiff; that he was bound, in good faith, to refund the money to his factors; and that if he did not call upon the defendant so early as he might have done, for money paid him before he knew of the failure of *Pike*, this, being an injury to himself and not to the defendant, constituted no sufficient defence to the action. Whereupon the jury return-

ed a verdict for the plaintiff, which was taken subject to the opinion of the court upon the correctness of the instructions thus given.

Sprague, *Kent* and *Rogers*, for the defendant, maintained—1st, that the plaintiff, being only a tenant in common, and not a partner, with the defendant, had no right to sell the goods owned in common. For such a tenancy is created involuntarily, by operation of law; and not by the mere act of the parties themselves, as is always the case of partnership; and therefore a sale of the property can only be by the joint act of both. *Co. Lit.* 189 *a*. *Johnson v. Robinson*, 3 *Mason*, 141; *Rice v. Austin*, 17 *Mass.* 197.

2d. The plaintiff, having placed the property beyond the control of the defendant, and converted it to his own use, became in fact the purchaser of the defendant's moiety, and responsible to him for its value, from the moment he placed it in the hands of his own creditors in *Boston*. *Brigham v. Eveleth*, 9 *Mass.* 538; *Jones v. Harraden*, *ib. in notis*; *Hemmenway v. Hemmenway*, 5 *Pick.* 389; *Amory v. Hamilton*, 17 *Mass.* 103. And so the plaintiff must have regarded it, by his holding no intercourse with the defendant on the subject till long after he had been made debtor to his own factors for the loss. The silence of the defendant proves nothing against him, he having no knowledge of the facts. *Smith v. Lascelles*, 2 *D & E.* 189; *Rathbone v. Warren*, 10 *Johns.* 595.

3d. And if it were not so; yet the plaintiff was not liable to refund to the money to his factors, because of their neglect of seasonable notice to him of the facts which had transpired. It was a payment in his own wrong. *Simpson v. Swan*, 3 *Campb.* 292; *Jameson v. Swainston*, 2 *Campb.* 546; *Clark v. Moody*, 17 *Mass.* 153; *Cheever v. Smith*, 15 *Johns.* 276; *Paley on Agency*, 27, 28, 37, 38.

4th. The money having been voluntarily paid by the plaintiff to the defendant, with knowledge of all the existing circumstances, and no seasonable notice having been given to the defendant of the failure of *Pike*, it cannot now be recovered back. 5 *Taunt.* 143; *Bilbee v. Lumley & al.* 2 *East*, 470; *Stevens v. Lynch*, 12 *East*, 38.

J. McGaw, for the plaintiff.

MELLEN C. J. delivered the opinion of the Court at the ensuing *July* term in *Waldo.*

This is an equitable action; and the sum demanded is claimed on the ground that in equity and good conscience the defendant ought not to retain it. The action is resisted on several grounds.

1. It is contended that the parties not being partners in trade, *Rogers* had no power to bind *White* by his contracts; and therefore could not sell *White's* share of the lumber without his authority; this principle is not denied by the plaintiff's counsel.

2. It is contended that there was no authority given, and that there is no proof of any; and that the plaintiff must be considered as the purchaser of the defendant's half of the boards; and, of course, that any loss sustained on the sale is the proper loss of *Rogers.* The sale of the boards by *Peters, Pond & Co.* was on the 12th of *July*, 1825, on a credit of three months, and payment secured by the note of *Pike* the purchaser. And it appears that in *September* following, *Rogers* paid over to *White* his half of the proceeds of the boards; the whole amount of the proceeds having been credited to *Rogers* by *Peters, Pond & Co.* in their account, settled *August* 31, 1825. This fact completely negatives all pretence or presumption that *Rogers* was a purchaser of *White's* half of the boards; and we think it amounts to a distinct recognition by *White* of the authority of *Rogers* to take and consign the defendant's half for sale, as his agent. In the next place it appears that in the sale of the boards, *Peters, Pond & Co.* gave the usual term of credit and pursued the usual course of business; and that though *Pike* was in good circumstances when the note was given, yet that he failed before its arrival at maturity. Thus far all was correct on their part, and though the note was made payable to them, that circumstance would not have subjected them to liability in consequence of the failure of *Pike. Greely v. Bartlett*, 1 *Greenl.* 172. It now remains to be examined whether their subsequent conduct had amounted to an assumption of the debt, prior to their charging the same to *Rogers*, and thus claiming a return of the sum which they had previously paid to him; or if not, then whether the plaintiff, by his conduct, has lost any right

which he might have had to recover the amount now demanded. It appears that *Peters, Pond & Co.* using all due diligence, have been unable to obtain payment of any part of said note. It has been argued by the counsel for the defendant that the receipt by *White* of payment of his half of the proceeds of the boards, can amount to a recognition of those facts only which were then made known to him; and that it does not appear that when the payment was made to him in *Sept.* 1825, he knew that the boards had been sold on credit. Still it was an acknowledgment of the plaintiff's authority as agent to consign the property for sale, and thus *Peters, Pond & Co.* became, in effect, agents of the defendant as well as the plaintiff; and they having acted faithfully in the sale, and according to usage as to the terms of credit, the recognition of the defendant must be considered general in relation to those facts which had at that time taken place.

3. Our third inquiry is whether *Peters, Pond & Co.* had by their conduct rendered themselves liable for the loss. On this point the facts are, that *Pike's* failure was about the 1st of *October* 1825; that *November* 30, 1825, an account was settled between them and *Rogers*, in which no notice was taken of the *Pike* note, though this was two months after *Pike's* failure; and in addition to this it does not appear that any notice of the failure was given to *Rogers* till *June* 1826, when another account was settled in which they charged the plaintiff with the amount of the note. These facts are relied on as proving that they had assumed the responsibility themselves, and considered the debt their own and of course had no right to charge the amount of the loss to *Rogers*; several cases have been cited in support of this position. In *Amory v. Hamilton*, 17 *Mass.* 103, it appears that goods were consigned by *Hamilton* to *Amory* for sale, who employed *Hayward*, an auctioneer, to sell them; and on sale he charged them in account to purchasers at the usual rate; and that an account was open with those purchasers, and that the balance on his books was generally in their favor; and when *Hayward* failed, there was nothing due to him from the purchasers of *Hamilton's* goods. The sale appears to have been in *October*, an account of which was rendered on the 22d of the month; and on the 22d of

November, *Hayward*, who was then in good credit, gave his note to the plaintiff, with an indorser, for the proceeds of the defendant's goods; but gave the defendant no notice that such note had been taken, till *Dec.* 28, about which time *Hayward* and the indorser both failed. The note was of no value. The plaintiff having paid the defendant's bills which had been drawn in anticipation of funds arising from the sale of the goods, brought the action to obtain reimbursement. The Chief Justice observed that the cause had been argued rather upon the ground that the verdict was against evidence, than upon any matter of law arising at the trial; that the manner in which *Hayward* managed the business was undoubtedly wrong; for that he was not authorised to deprive the owner of the goods of the responsibility of the purchasers and give his own in lieu thereof; that the plaintiff had notice of that circumstance on the 22d of *November*, but instead of demanding immediate payment or security, he took the note of *Hayward* with the indorser. These circumstances were submitted to the jury and they pronounced it negligence on the part of *Amory*; and the court declined granting a new trial, and entered judgment on the verdict. The negligence in the above case consisted in the discharge of the purchasers from responsibility and the acceptance of the auctioneer's security, without any notice to the defendant till after the failure of the parties to the note. The case in several respects differs from the one at bar. In this, the note of the purchaser was fairly taken according to the common course of business, and his failure occasioned the loss. *Hemmenway v. Hemmenway*, 5 *Pick.* 389, was one in which defendant sold certain land on credit, not being authorised so to do; and the court observed that *stricto jure* he might have been held to have assumed the debt, by taking a note payable to himself; but the cause was submitted to the jury on the ground of fraud or unreasonable delay, and they found for the plaintiff. That case also essentially differs from the present. As to notice by *Peters, Pond & Co.* it appears that an account of sales was settled *Aug.* 31, 1825, with the plaintiff, and more than a month before *Pike's* note became due; and they used all due diligence to obtain a payment; which seems necessarily to imply that this diligence was

used after the failure; because, before that time, they had no right to demand payment or security. It does not appear, from any facts in the case, that the want of earlier notice has been or could have been productive of any injury or inconvenience to any one; or that *White* has ever questioned the correctness or fairness of the proceedings on the part either of *Peters, Pond & Co.* or of *Rogers*. And in the absence of all such proof, we may fairly presume that the delay on their part was for the purpose of procuring payment of *Pike*, if possible; but that finding their endeavors vain, they charged the amount of the loss to the plaintiff and gave him notice of it. This loss being attributable to no fault on the part of *Peters, Pond, & Co.* we see no legal objection to the claim they made on *Rogers*, or how he could have successfully resisted it. The payment which they had made by passing the amount of proceeds to the credit of *Rogers* in account, was made under a mistake and an expectation of funds from *Pike's* note, which funds were never realized. The cases of *Bilbee v. Lumley*, and *Stevens v. Lynch*, cited from *East's* reports, were those in which the plaintiffs sought to recover monies paid by them respectively to the defendants under a mistaken opinion of the law; but with full knowledge of all the facts; about which there was neither a dispute nor a mistake. The omission therefore of the plaintiff to consult the defendant before he repaid the money to *Peters, Pond & Co.* could not have been any prejudice to the defendant; nor does it now furnish any ground of objection to the plaintiff's right to recover in this action.

4. The fourth objection is that admitting the plaintiff was bound by law to refund to *Peters, Pond & Co.* the sum they had paid to him, and that he rightfully paid it, yet it is contended that by his own conduct and delay he has lost his remedy against the defendant. The payment was made by the plaintiff to the defendant in *September* 1825, as we have before observed, and it appears by the report that the plaintiff frequently called on the defendant to refund it, which he refused to do, and hence the present action was commenced. We do not perceive that the plaintiff has lost any of his rights by this delay and indulgence granted to the defendant since the amount was refunded by the plaintiff to *Peters, Pond & Co.* The delay could be injurious to no one but the plaintiff himself. To the

objection made to his right to recover the money on the ground that he had voluntarily paid it to the defendant, we give the same answer which we have before given in relation to the payment by *Peters, Pond & Co.* to the plaintiff, and the objection to their right to claim a reimbursement on account of the unexpected failure of *Pike.* In both cases the payments were made under similar circumstances of misapprehension. We cannot consider the plaintiff bound to sustain the whole loss; the defendant, on every principle of justice, ought to bear one half of it. We are all of opinion that there must be

Judgment on the verdict.

EMERSON *vs.* FISK & AL.

The owner of a township of land entered into a written contract with *A.* and *B.*, in the autumn of 1825, by which they were to cut all the pine timber on a certain tract in it, suitable for boards, which a prudent man would cut; and to transport one fourth part of the logs to a certain place for the owner, as his share; the other three-fourths to be taken to the same place, sawed, and delivered to the owner; who was to retain his title to the whole till he should be satisfied that his quarter part was of an average quality with the residue; and till he should be paid thereout all which the others might owe him;—and if they should fail to take off the timber in the ensuing winter and spring, they agreed to pay him the value of one fourth part of what might remain; the timber to stand pledged for the performance of this part also;—and they did not cut the timber till 1827; and before it reached its destined place they sold it to third persons, from whose possession the owner instantly replevied it; the original contractors being largely in his debt.

Hereupon it was *held*—that the owner's lien extended as well to the logs cut after the winter and beyond the bounds mentioned in the contract, as to those cut within them:—

That a license to cut timber on the lands of the grantor is not assignable:—

That the contractors *A.* and *B.* had no authority to sell the logs; being only bailees for a special purpose;—and that immediately upon the sale to third persons, their right as bailees terminated, and the owner might replevy the logs.

The 35th of the rules of this Court, respecting notice to produce papers at the trial of a cause, is hereafter to be applied only to cases where the notice was given previous to the commencement of the trial.

THIS was an action of replevin for 500 pine mill-logs, which the plaintiff, in his writ dated *April* 21, 1828, alleged to be his property.

It was tried before *Weston J.* upon the issue of property in the plaintiff.

The defendants claimed the logs under a purchase from *Tobias Michael* and *Hugh Alexander*, of all their interest therein; who, it appeared by the finding of the jury, had cut them principally in the winter of 1827, on a township of land belonging to the plaintiff, under a contract entered into on the 30th day of *November* 1825, and within the tract therein described. By this contract the plaintiff granted to them "permission to enter upon the township numbered two, in the ninth range, and cut and carry away all the pine timber thereon, being suitable for boards, within" the limits of a tract described by metes and bounds; "on the terms and conditions herein after expressed." The residue of the contract was in these words,—"And the said *Tobias* and *Hugh*, on their part, obligate themselves to cut and haul from the premises all the pine timber suitable for sawing into boards, which a prudent man, owning the same, would cut and haul; and transport one fourth part to *Stillwater*, and there deposit safely into a boom for the said *William Emerson*, free of expense to him; the other three fourths of said logs also to be run to *Stillwater*, and there deposited into a boom safely; and the said *Emerson* to retain the sole ownership thereof, until satisfied that the quarter part first named for stumpage to be deposited in the boom is of an average quality with the whole; and until paid all money and debts due to said *Emerson* from said *Tobias* and *Hugh*, or either of them, at that time, for either money, goods, oxen, or any other advances made for them. And it is further agreed by the said *Tobias* and *Hugh*, if they fail to remove from the premises aforesaid all the pine timber as aforesaid the ensuing winter and spring which a prudent man would remove; then the said *Tobias* and *Hugh* agree to pay to said *William Emerson* such sum as is equivalent to one fourth part of the timber remaining, and for which the timber above is also pledged. And the said *Tobias* and *Hugh* are to saw and run to *Bangor* the one fourth of said logs received for stumpage, at the usual rate which may be agreed on; and the other three fourths they are also to run to *Bangor* the ensuing spring. And after the demands before named are paid to

said *Emerson*, the boards are to be delivered over to said *Michael* and *Alexander*, which are made from the other three fourths of said logs." This contract was under seal; and was signed only by the plaintiff and *Michael*.

The plaintiff proved the declarations of one of the defendants, that he and his partner had purchased the interest of *Michael* and *Alexander* in the logs in controversy; which was three fourth parts, the other fourth belonging to the plaintiff for his share; that they were cut on the plaintiff's land, under a contract; and were to be delivered at *Stillwater*; that the defendants were to fulfil the obligations of their vendors, to the plaintiff; and that they were ready to do so, by paying to him his part in money or in logs, as he might elect. The logs were forty five miles above *Stillwater*, and on their way to that place, when they were replevied.

The defendants offered testimony tending to show that these logs were cut beyond the limits described in the written contract, and under a parol agreement with an agent of the plaintiff, made at a subsequent time, and similar, in its general features, to the written contract, except that the plaintiff was to have no lien for his fourth part. But this part of the defence was negatived by the finding of the jury.

It further appeared that the logs were floated down the river as early as the state of the water would permit; that at the time of the replevin *Michael* and *Alexander* were indebted to the plaintiff in a sum exceeding six hundred dollars; and that it was the general usage in that part of the country, in cases similar to this, for the owner of the land to retain a lien on the logs, for the security of his fourth part.

Upon the evidence offered, the judge was requested by the defendants to instruct the jury that if the logs were cut within the bounds described in the written contract, the plaintiff had no right to replevy them. But he instructed them that in such case the plaintiff had that right.

The trial of this cause commenced at about three o'clock in the afternoon; and the evidence was closed at eleven in the next morning. At four o'clock on the first day, the counsel for the plaintiff

called on the defendants to produce the bill of sale, which, it appeared, they had taken from their vendors. This not having been done, the counsel for the plaintiff, in his address to the jury, commented on its non-production, as evincing a consciousness of unsoundness in the defence. Such comments were objected to, on the part of the defendants, as a violation of the rule of the court on that subject, no notice to produce the paper having been given previous to the trial. But as the defendants' place of business was within a few rods of the court house, the judge deemed the case to be within the spirit of the rule, if, the paper being the evidence of title in the defendants, it fell within the rule at all; and permitted the counsel to comment on their refusal to produce it; at the same time informing the defendants that if they would say that they could not produce the paper forthwith, he would rule otherwise; and would in the interim afford them time to consult their counsel. But they declined offering the paper.

The verdict being for the plaintiff, the judge, at the request of the defendants, reserved this point of practice, as well as the correctness of his instructions to the jury, for the consideration of the court.

Allen and *T. McGaw*, for the defendants, argued that this action would not lie against them, because their possession of the logs was lawful; the plaintiff, by his own contract, having no right to the possession till they should arrive at *Stillwater*; and the logs having been replevied on their way thither. *Wyman v. Dorr*, 3 *Greenl.* 183; *Ward v. McAuley*, 4 *D. & E.* 489; *Gordon v. Harper*, 7 *D. & E.* 9; *Smith v. Plummer*, 15 *East*, 489.

And they insisted, as to the other point, that to entitle a party to comment on the non-production of any paper, the notice to produce it must have been given previous to the trial. 1 *Phil. Ev.* 339, 342.

Gilman and *Sprague*, for the plaintiff.

WESTON J. delivered the opinion of the Court, at the ensuing *July* term in *Waldo*.

The issue submitted to the jury in this case was, whether the logs in controversy were the property of the plaintiff. They were in-

structed by the judge at the trial that if they were satisfied that the timber was cut on the land described in the contract made between the plaintiff and *Tobias Michael* and *Hugh Alexander*, on the thirtieth of *November* 1825, the plaintiff was entitled to their verdict. We are called upon to decide upon the correctness of this instruction. The timber was originally the property of the plaintiff, and must be understood to have continued his, unless he had parted with it. *Michael* and *Alexander* had permission to enter upon the land, to cut the timber, to cause it to be transported to *Stillwater*, there to saw it, and thence to run the boards to *Bangor*. That no question might arise as to whose property the timber, logs and boards were to be considered in their various stages, it was expressly provided that the plaintiff should retain the sole ownership, until satisfied that the fourth part, to be deposited for his special use, was "of an average quality with the whole, and until paid all money and debts due to said *Emerson* from said *Tobias* and *Hugh*, or either of them, at that time, for either money, goods, oxen, or any other advances made for them." It is therefore so far from being true that any change of property in the transit is to be implied from the contract, that it is therein expressly negatived.

It is however insisted that these terms are limited to the timber that should be cut the winter and spring following the date of the contract, and that they do not attach to such as might be cut subsequently; that *Michael* and *Alexander* were the purchasers of the timber, which remained on the land after 1826; and that the logs replevied, having been wholly or principally cut in 1827, cannot be regarded as the property of the plaintiff. They stipulated that they would cut all the pine timber suitable for boards, within the limits specified, which a prudent man would cut from his own land. But for this provision, their interest might have tempted them to cut only that which was most valuable and most accessible. That the plaintiff might be secure upon this point, he required that they should pay for what might remain after the first season, in the same manner as if they had cut the whole; and that he should retain for the fulfilment of this part of the agreement, as much as for his fourth part of what might be actually cut the first season, and for his advances. If these

engagements on their part had actually been complied with in 1826, and the plaintiff had been paid for his whole timber and advances, that which remained on the land might be considered as transferred to them for their separate and proper use. This, although not expressly stipulated, would fairly result from the fact of payment. But payment is not pretended. If by the terms of the contract the plaintiff's right to retain his original title to the timber was restricted to such as might be cut the first season, if they abstained from cutting that season, he would subsequently retain only a personal remedy against them for the timber and advances, upon which it is manifest he did not intend to rely. He clearly guards against such an implication, providing that no part of the property should be held to be theirs, until he was paid and indemnified. Then, and then only, such of the boards as might not be wanted for this purpose, were to be delivered over to them.

But it is urged that if the general property was in the plaintiff, yet if at the time of the replevin he had no right to the possession, his action cannot be maintained; and that he was not entitled to possession, while the logs were on their way to the place of their destination. It might admit of question whether, if *Michael* and *Alexander* had not sold the logs, the plaintiff might not have taken possession of them in their transit, as he expressly retained the sole ownership to himself. If he had done so to the prejudice of their just expectations under the contract, he would doubtless have been bound to indemnify them for any loss they might have suffered from his interference. But however this may be, we are well satisfied that the agency, authority, or license, given or confided to them by the plaintiff, was not assignable. The plaintiff had a right to appoint his own agents in the management of his property, and they could have no authority to substitute others. If a party license A to cut timber upon his grounds, A has no right to transfer such license to B. The owner may repose a confidence in the one, which he would not extend to the other. The plaintiff was to remain the sole owner. This would seem to take away all pretence even of special property on the part of *Michael* and *Alexander*, leaving them only a charge or oversight of the logs, but entitled by contract to a specific compensation. But

suppose they had a special property ; it could only be as bailees for a special purpose. They clearly had no authority to sell the logs. This would be entirely inconsistent with the rights of the plaintiff as the general owner. By this unauthorized act, the bailment, and their authority under it, was determined. The defendants could derive no rights from the tortious act of *Michael* and *Alexander*. The plaintiff, the original proprietor, chose to retain to himself his right as sole owner, until his demands were satisfied. This right, the defendants having shown no sufficient title against him, has been properly sustained by the verdict.

The rule, which precludes counsel from commenting on the non-production of a paper by the adverse party, unless such party has been notified to produce it before trial, is designed to protect him from any unfavorable inferences to be drawn from his omission to do what he might not know would be expected of him. It is founded also upon the presumption that if seasonable notice had been given to the party, he might have produced the evidence required. As the trial in the case before us consumed part of two days, as the paper in question was within a few rods of the court house, and the defendants were notified to produce it the first day of the trial, which they declined to do, the presiding judge, being of opinion that it was not a case within the reason of the rule, permitted the counsel for the plaintiff to comment on its non-production. Upon consideration we think it better that it should be understood hereafter that the rule will be uniformly enforced according to its terms ; yet under the circumstances of this case we are of opinion that the verdict ought not to be disturbed upon this objection.

Judgment on the verdict.

See *Waterston & al. v. Getchell* 5. *Greenl.* 435.

The President &c. of the Bangor Bank, *vs.* Treat & al.

Where the promissee in a joint and several note signed by three, sued one of the makers alone, and had judgment; this was an election to treat it as a several contract respecting them all. And having afterwards sued the other two jointly, setting forth the previous recovery against one alone, the judgment was for this cause arrested.

This case was briefly spoken to by *W. D. Williamson* for the plaintiffs, and *Gilman* for the defendants. The facts appear in the opinion of the Court, which was delivered by

Mellen C. J. This is an action of *assumpsit*, and the declaration states that the note was signed by the defendants and *Allen Gilman*, jointly and severally; and that a judgment had been recovered on the note against *Gilman* in a several action against him. The defendants have moved in arrest of judgment on account of the joinder of them in the present suit. When three persons by bond, covenant or note jointly and severally contract, the creditor may treat the contract as joint or several at his election; and may join all in the same action or sue each one severally; but he cannot, except in one case, sue two of the three, because that is treating the contract neither as joint or several. But if one of the three be dead, and that fact be averred in the declaration, the surviving two may be joined. In the present case *Gilman* is living. The plaintiffs contend that as judgment had been recovered against him, such judgment entitled them to join the other two in the same manner as though he was dead. This is not so. When they sued *Gilman* alone, they elected to consider the promise or contract as several; and having obtained judgment they are bound by such election. In case of death, the act of God has deprived the party of the power of joining all the contractors; but he may still consider the contract as joint, and sue the surviving two. The plaintiffs have disabled themselves from maintaining this action by their former one. 1 *Saund.*

291, *e.* The objection is good in arrest of judgment, where the fact relied on by defendants appears on the record, as in the present case.

Judgment arrested.

See *Harwood & al. v. Roberts*, 5 *Greenl.* 441.

NOURSE *vs.* SNOW.

Where the defendant contracted to carry fifty tons of the plaintiff's hay to a distant port for sale; the hay to be delivered at the ship's side; and after receiving 24 tons on board, declined taking any more, because the ship was full;—it was *held* that it was not necessary for the plaintiff, after this refusal, to tender the residue of the hay at the ship's side, in order to entitle himself to damages;—and that the rule of damages was the difference between what the plaintiff in fact, received, or with due diligence and prudence might have obtained for the hay left in his hands, and the price at the port of destination, deducting freight and expenses.

THIS was an action of *assumpsit* for not carrying a quantity of hay in the defendant's ship. The agreement set forth in the declaration, was for the transportation of fifty tons of hay from *Brewer* to *New-Orleans*, or the southern ports in *South Carolina* and *Georgia*, at nine dollars per ton if the hay sold well; but at any rate at eight dollars; the hay to be delivered at the ship's side. The proof was from a witness adduced by the plaintiff, who testified to the admissions of the defendant that he had agreed to carry the hay for the plaintiff; that he was going to seek for freight; that he spoke of going to *Charleston* or *Savannah*, possibly; but thought he should go to *New Orleans*; to which latter port he did in fact go;—that he was to have nine dollars per ton for freight, if the hay did well; otherwise eight dollars.

It further appeared that the plaintiff screwed and had ready fifty tons of hay, part of which was in a factory, within a few rods of the ship, and the residue in a barn nearly a mile distant. The plaintiff procured men to deliver all the hay alongside the ship, as fast as it could be received; of which the defendant was notified; and was

requested, each morning, to state the quantity he could receive for the day, that none might be unnecessarily exposed to the weather. After the defendant had received about twentyfour tons on board, he directed the plaintiff's men not to bring any more, the ship being full.

The counsel for the defendant hereupon contended that to entitle the plaintiff to recover, he should have tendered the residue of the fifty tons, alongside the ship. But *Weston J.* before whom the cause was tried, ruled that he had done all that in this respect was necessary. It was further contended for the defendant, that the true measure of damages was the difference between the price of the hay at *Brewer*, which was from ten to fourteen dollars per ton, and the price at *New Orleans*, where it produced fifteen dollars and fifty cents per ton, clear of charges. But the Judge instructed the jury that the defendant was bound to indemnify the plaintiff for all he had lost by the breach of the contract on his part; and that they should by their verdict place the plaintiff in as good a situation as he would have been in, had the defendant performed what he undertook:—that the plaintiff must, in the first place be held accountable for all which, in the exercise of due diligence and prudence, he might have obtained, or did in fact obtain, for the hay left upon his hands; and that he was entitled to so much as this sum fell short of what might have been realized at *New Orleans*, deducting expenses; with interest from the date of the writ. And they returned a verdict for the plaintiff according to these instructions; which was taken subject to the opinion of the court upon the correctness of the Judge's decision.

Allen, Kent and *Rogers*, for the defendant, to the point of variance between the contract laid, and the contract proved, cited *Penny v. Porter*, 2 *East* 2; *White v. Wilson*, 2 *B. & P.* 116; 2 *Stark.* 83; *Yelv.* 57, *note*; *Bristow v. Wright*, *Doug.* 665; *Churchill v. Wilkins*, 1 *D. & E.* 447; *Robbins v. Otis*, 1 *Pick.* 368; *Goulding v. Skinner*, *ib.* 162; *Cunningham v. Kimball*, 7 *Mass.* 65; 4 *D. & E.* 687.

To the point that it was the duty of the plaintiff to have tendered

the hay at the side of the vessel, where alone the defendant agreed to receive it, they cited *Waterhouse v. Skinner*, 2 *B. & P.* 447; *Rawson v. Johnson*, 1 *East* 203; *West v. Emmons*, 5 *Johns.* 179.

And as to the rule of damages, they referred to *Bracket v. Mc Nair*, 14 *Johns.* 170.

Brown and *Sprague*, for the plaintiff.

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

Comparing the contract as set forth in the writ, with the testimony of the plaintiff's witness, which the jury have found to prove a contract on the part of the defendant for the transportation of the hay in question, we do not perceive any variance either as to the places of destination, or the stipulated amount of freight. Nor do we think that a tender of the residue of the hay alongside the vessel, was necessary to enable the plaintiff to maintain this action. It would have been a useless trouble and expense, after the defendant had expressly directed that no more should be brought, because the vessel was full. By this language and conduct on his part, he excused the plaintiff from the formality of a tender. Cases are numerous to this point. As to the question of damages, the instruction of the Judge was perfectly correct. The plaintiff was entitled to be placed in the same situation, in a pecuniary point of view, as he would have been in, if the defendant had honestly performed his engagement.

Judgment on the verdict.

SHERBURNE, libellant, *vs.* SHERBURNE.

The *Stat.* 1829, *ch.* 440, respecting divorces, applies only to cases where the desertion commenced after the passing of the statute.

THIS was a libel for divorce *a vinculo matrimonii*, filed *May* 13, 1829, by the husband against the wife; alleging that she had unreasonably and wilfully deserted him more than five years, commencing *Feb.* 28, 1822. The wife did not appear.

Pond, for the libellant, relied on the *Stat.* 1829, *ch.* 440, which first authorized a divorce *a vinculo* for this cause.

But THE COURT said that to construe the statute in such a manner would be a violation of private rights. Until the passing of the statute, the desertion of the wife could not affect the existence of the marriage contract; and to declare it dissolved now, for that cause, would be to give the statute a retrospective operation which the legislature could not have intended. *Libel dismissed.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF HANCOCK, JUNE TERM, 1829.

The CHIEF JUSTICE was not present at this term.

THAYER *vs.* HAVENER.

Where the payee of a promissory note lodged it, with other demands, in the office of an attorney for collection, and afterwards drew an order on the attorney, directing him to pay to a third person the amount which might be collected on the demands left with him; which the attorney accepted to pay such sums as he should receive after obtaining what might be due to himself;—this was held to be no assignment of the note in question; and therefore a subsequent payment to the promisee was held good.

THIS was *assumpsit* by the indorsee against the maker of a promissory note, made *Sept.* 22, 1825, for sixty dollars, payable to one *James Cochran* or order, in six months from the date.

At the trial, before *Weston J.* it appeared that soon after the note was given it was left, with others, by *Cochran*, in the office of *Wilson & Stevens* attornies, for collection; that on the 5th day of *November* 1825, *Cochran* drew an order on *Wilson & Stevens*, directing them to pay to *Thayer* the plaintiff "the amount that is or shall be collected on the demands I left with you for collection;" which order *Thayer* transmitted to the drawees for acceptance, requesting them to furnish him with a memorandum of what demands of *Cochran's*

they had in their hands, with the probabilities of collecting them. The drawees accepted the order in these words,—"we will pay such sums as we receive, after getting our due, to the person presenting this order."

Afterwards, on the 15th day of *November* 1825, the defendant and *Cochran* rescinded and annulled the bargain between them, upon which the note had been given; and the consideration on both sides was waived and abandoned. The note, however, was not taken up by the defendant; and in *May* 1826, *Cochran* indorsed it to the plaintiff.

Upon this evidence a nonsuit was entered, subject to the opinion of the court whether the defence was admissible and sustained.

The question was submitted without argument by *Wilson & Stevens* for the plaintiff, and *Ashmun* for the defendant; and the opinion of the Court was delivered at the ensuing *July* term in *Waldo*, by

PARRIS J. The note in question was, by the terms of it, made payable *March* 22, 1826, but it was not indorsed to the plaintiff until *May* 1826, and of course is liable, in this action, to the same equities and the same defence as though *Cochran* himself was the plaintiff, unless the alleged assignment of the note to the plaintiff in *November* 1825 has changed the principle. If it has not changed it, the nonsuit must be confirmed, because it appears that ten days after the alleged assignment, the bargain, out of which the note originated, had been mutually rescinded by *Cochran* and *Havener*, and the consideration abandoned. As to the assignment the facts are few and simple. They only shew that a short time before the contract was annulled, the note, with others, had been lodged by *Cochran* with Messrs. *Wilson & Stevens* for collection;—and that *Cochran* on the 15th of *November* drew an order on them for the amount of monies they might collect on those demands. They accepted the order conditionally—that is, to pay such sums as they might receive, after getting their due, to the person presenting the order. It does not appear that they ever received any thing on the notes;—it does not appear that *Thayer* was a creditor of *Cochran*, or that

the note, if assigned, was assigned to the plaintiff upon a valuable consideration;—and if there had been such an assignment and such a consideration, it does not appear that the plaintiff gave the defendant any notice of it prior to the rescinding of the contract. Nothing can be plainer than that a payment of a debt to the assignor, after the assignment but before notice of it given to the debtor, is a good payment and discharges him. The defence, in this case, is as effectual as payment. There is no possible ground on which this action can be maintained. *Nonsuit confirmed.*

ABBOT, plaintiff in error, *vs.* CRAWFORD.

Whether it is necessary that the clerk of a militia company, suing for a penalty occasioned by neglect of military duty, should indorse the writ with his own name, provided the captain has indorsed his approval of the suit as required in *Stat.* 1821, *ch.* 164, *sec.* 46.—*quære.*

Where the clerk of a militia company had no other evidence of his appointment than a certificate on the back of his sergeant's warrant, stating that he, "appointed clerk," had taken the oath of office;—it was held not to be sufficient to satisfy the requirement of *Stat.* 1821, *ch.* 164, *sec.* 12.

ERROR to reverse the judgment of a justice of the peace, rendered in an action brought by the clerk of a militia company against the now plaintiff in error, to recover certain penalties for the non-performance of military duties. The material facts, and the principal errors assigned, are stated in the opinion of the court.

The case was briefly spoken to at this term by *Abbot* for the plaintiff in error, and *Allen* for the defendant; and the opinion of the Court was delivered by

PARRIS J. The judgment which this writ is brought to reverse, was rendered in a suit for the recovery of sundry penalties, alleged to have been incurred by the defendant, in neglecting to attend the different meetings of the company of artillery, of which he is a member, for inspection, drill and improvement in military discipline

in the year 1828. The justice of the peace before whom the cause was tried, in certifying the record, has embodied the facts as they were proved on trial; and we are called upon to decide whether, for either of the causes assigned, the judgment by him rendered is to be reversed as erroneous.

The plaintiff in error has assigned ten causes, but relies principally upon the first, second, sixth and eighth. The first, that the writ was not properly indorsed, which objection was urged before the justice, at the return day of the process, and overruled. The second, that there was no legal evidence of the appointment of the plaintiff to be clerk. The sixth, that the captain had no authority to order his company to meet at twelve o'clock at noon on the 13th of *September*, mentioned in the second count; and the eighth, that the supposed offences are alleged to have been committed against the form of the statute, whereas they ought to have been alleged against the form of the statutes in such case made and provided. The two first and the last strike at the foundation of the whole process, and if either of these errors be well assigned, the judgment rendered on all the counts must be reversed.

As to the first error the case finds that the original writ was indorsed by the plaintiff, by the name of *J. B. Crawford.* By the statute regulating judicial process, *chap.* 59, *sec.* 8, it is enacted, "that all original writs issuing out of the Supreme Judicial Court, or Court of Common Pleas, or from a justice of the peace, shall, before they are served, be indorsed on the back thereof by the plaintiff or plaintiffs or one of them, with his christian and sirname, if he or they are inhabitants of this State, or by his or their agent or attorney, being an inhabitant thereof. There can be no doubt but this was an original writ, and, unless there are good reasons for excluding it from the operation of the statute, must be indorsed in the same manner as other writs issuing from the courts therein mentioned.

But it is contended that inasmuch as the indorsement of a writ is a peculiar species of security given by a plaintiff for the costs which the defendant may recover against him; and as in prosecutions of this character, the plaintiff is, by statute, exempt from the payment of costs in any case in which the commanding officer of

the company has indorsed his approval on the writ, the provisions of the statute requiring original writs to be indorsed cannot apply.

It is manifest that, under such circumstances, the indorsement would be a mere nullity, wholly inoperative, giving the defendant no claims upon the plaintiff for his costs, and subjecting the plaintiff to no liabilities from which the certificate of his commanding officer would not be an effectual relief. But it is equally apparent that in all cases of mesne process, the indorsement of the writ by the plaintiff neither increases his liability, nor adds to the security of the defendant. The prevailing defendant looks not for payment of costs, to the plaintiff, in his character of indorser, but as the losing party; and against whom the defendants rights are as perfect without as with the indorsement of the original writ.

But, situated as this case is, we do not find it necessary to decide whether a distinction between this and ordinary process may or may not take it out of the operation of the statute, especially as a decision upon the second error assigned is more important to the militia generally, that the practice, in that particular, may be settled.

The plaintiff prosecutes this suit in the character of clerk of a company of artillery, and, by virtue of his office under the statute for organizing, governing and disciplining the militia, demands the payment of a forfeiture, a portion of which enures to his own private benefit. In prosecuting for this penalty he must be holden to shew his official character, with which he assumes to be clothed, and by virtue of which he claims to exercise important functions; and unless he do this, as well might any other person claim of the defendant payment of the alleged forfeiture. Has he done it? The case finds that the only certificate on the back of his sergeant's warrant, is in these words;—"This may certify that *James B. Crawford*, appointed clerk of the company of artillery under my command, on this 25th day of *August* 1828 personally appeared and took the oath required by law to qualify him to discharge the duties of his office; before me, *Charles Rogers*, captain of artillery;"—and it is contended that this is a sufficient appointment, or that, from this, an appointment may be presumed.

What says the statute? That "on the back of his warrant, as sergeant, the captain or commanding officer of the company shall in writing certify that he does thereby appoint him to be clerk of the company;" and then provides that before he enters upon the duties of his clerkship, he shall be sworn in the manner pointed out; and, after giving the form of the oath, requires the captain or commanding officer to certify further, "on the back of the warrant of the sergeant appointed to be clerk, that he was duly qualified by taking the oath required by law."

The language of this section, and its collocation, leave no doubt that it was intended that the appointment should be a separate act, distinct from the qualification; and that each should be particularly certified. We do not say that one certificate may not include the appointment and qualification, but that each must be certified explicitly, and that the existence of the one will not supply the omission of the other.

The office, which is thus created, is one of no small importance. With the clerk are entrusted the records of the company; he revises and keeps the roll, and state of the arms and equipments; he distributes and registers orders; he keeps the details of all drafts and detachments; he enrols such as come to live within the bounds of the company; he examines the equipments of the men, when thereto ordered, and he sues for and recovers all fines and forfeitures. There is probably, no officer, civil or military, of whatever grade, the evidence of whose appointment is of a slighter character than that required by the statute in the case of militia clerks; and we do not feel at liberty to fritter away that evidence by requiring less than was evidently contemplated by the statute.

The lowest non-commissioned officer known in the militia law is furnished with an official warrant from the commanding officer of his regiment or battalion, as evidence of his appointment; and yet the clerk, an officer of much higher importance, has nothing as evidence of his appointment to that office, but a mere certificate of the fact from the commanding officer of his company. In this certificate the statute expressly requires the commanding officer to certify that he does thereby appoint. Inasmuch as this requirement is wholly omit-

ted in the case before us, the appointment being no where certified, and there being no evidence of such appointment except what is inferable from the certificate of the oath, we are of opinion that the second error is well assigned, and that the judgment be reversed.

NELSON *vs.* OMALEY.

The mode of service of process against an absent defendant, provided by *Stat.* 1821, *ch.* 59, *sec.* 3, by leaving a copy with his attorney, is not to be restricted to those cases only in which the defendant has property in this State; but extends to all cases where the process is by original summons.

THIS was a process by original summons, in *assumpsit*, in which the defendant was styled of *Baltimore* in the State of *Maryland*. The service was by reading the precept to *R. B. Allyn*, Esq. as attorney to the defendant; who entered an appearance at the return term, and filed a plea in abatement of the writ, because it was not served either by being read to the defendant in person, or by a copy delivered to him, or left at his dwelling house or last and usual place of abode. To this the plaintiff demurred.

Allyn, for the defendant, argued that by a sound construction of the *Stat.* 1821, *ch.* 59, *sec.* 3, service on the defendant's attorney was sufficient only in those cases in which property was attached, or the action was brought to recover land. In all others, the service should be on the defendant himself. But here was neither property attached, nor realty concerned, nor notice to the defendant; and the judgment itself, when rendered, would be a useless ceremony. *Lawrence v. Smith & al.* 5 *Mass.* 362.

Abbot, for the plaintiff.

WESTON J. delivered the opinion of the Court, at the ensuing *July* term in *Waldo*.

Process by original summons is without question suitable and prop-

er in this case. It is not one in which the law requires a separate summons to be left with the defendant. It is then within the express provisions of the second section of the act regulating judicial process and proceedings, *Stat.* 1821, *ch.* 59. The defendant having never been an inhabitant of this State, or having removed therefrom, service was made by reading the original summons to his attorney, in conformity with the third section of the same act. It is admitted to be a service warranted by the words of the statute; but it is insisted that it ought by construction to be restricted to cases where the defendant has property within the State which may be taken to satisfy such judgment as may be rendered against him. The law lends its final process to a party in whose favor a judgment may be rendered; but if neither the person nor property of the judgment debtor can be found, upon which to enforce satisfaction, the dignity and authority of the law remains unaffected. It is of private concern; and is not a consideration which warrants or requires a constructive limitation of the terms of the statute. Service might have been made upon the defendant, by reading to him the summons, if he had happened to be casually here, but upon his return to his residence in *Baltimore*, there would be the same difficulty, which may now exist, in enforcing satisfaction. The law has in this case made a service upon his attorney equivalent to a service upon himself. There is nothing unreasonable in this. Notice reaches him by the agency of his attorney, if he is faithful to his duty, which must be presumed. For any thing that appears, there may be property within the State, of which the plaintiff may avail himself. If there is not, and the plaintiff cannot enforce satisfaction of his judgment, if he should obtain one, he, and not the defendant, would be prejudiced thereby.

As to the case of *Lawrence v. Smith & al.* cited in the argument, neither the process nor the service was like that now before the court.

Judgment of respondent ouster.

CASES

IN THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF WALDO, JULY TERM, 1829.

WILKINS & AL. *vs.* REED & AL.

A. and *B.* being joint owners of a vessel, *A.* who was master, purchased supplies for her, giving therefor a negotiable note in his own name and that of *B.* jointly, but without authority from *B.*—In an action by the promisee against *A.* and *B.* brought upon this note, with the usual general counts for money and goods, and an *insimul computassent*, it was *held*—that the note being void as to *B.* it was no extinguishment of the original implied promise of both the owners; and that therefore the plaintiff might well recover against both, on the general counts.

THIS was an action of *assumpsit* by the promisees against the makers of a promissory note; with the common money counts, a *quantum valebant*, and an *insimul computassent*.

At the trial, before *Weston J.* it appeared that all the counts were for one and the same original cause of action;—and that the defendants *Reed* and *Libby* were joint owners of a schooner, of which *Reed* was master, and for which the plaintiffs furnished the supplies mentioned in the writ, taking therefor a negotiable promissory note signed by *Reed* in his own name and that of *Libby*, jointly. The defendant *Libby* pleaded that he never promised jointly with *Reed*; and contended that the note was void, as against him, for want of authority in *Reed* to bind him in that manner; and that he was not liable on

the general counts, the implied contract on which they were founded having been merged in the note given by *Reed*, which was negotiable.

But *Weston J.* before whom the cause was tried, instructed the jury that the note was accepted in payment of the account only on the faith that both of the defendants were holden thereon;—that if one of them disclaimed his liability, and was not bound, he was still holden on the original cause of action; that *Libby* neither was nor had been in danger of being twice charged;—that if not holden upon the note, he could not have been liable to a third person to whom it might have been negotiated;—and that therefore he remained answerable, with the other defendant, to the plaintiffs, for the value of the supplies furnished. And they accordingly returned a verdict for the plaintiffs; which was taken subject to the opinion of the court upon the correctness of the instructions given them.

Crosby, for the plaintiffs.

Wilson, for the defendants.

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

The note declared on is in form a joint one, and the case finds that it was never signed by *Libby*, or by his authority; and therefore the action is not maintainable on the first count; and the only question is whether it is on either of the general counts upon the original cause of action.—The note being negotiable, is said to have merged all implied promises, and that therefore the remedy of the plaintiffs exists only against *Reed* upon the note, on which he may sustain a several action against him. There is no doubt as to the principle relied on by the defendants, where the parties to the implied and the express promise are the same. Nor is there any doubt that when a creditor of two persons, knowingly and intentionally takes the security of one of them only, which security is valid in law, the other original debtor is considered as discharged. But in the present case there is no pretence for supposing that the plaintiffs ever intended to extinguish the liability of *Libby*. The very form of the signature of the note proves the contrary. *Libby* never could be sued on the original account, except by the present plaintiffs; and in such an action,

the verdict and judgment in this action would be pleadable in bar. He cannot, therefore, be endangered, as the note is void in respect to him. Perfect justice has been done by the verdict; and both defendants are safe. Our opinion is that the instructions of the judge were correct. *Judgment on the verdict.*

LASSELL *vs.* REED.

An outgoing tenant *in agriculture* is not entitled to the manure made on the farm during his tenancy, even though lying in heaps in the farm yard, and though it were made by his own cattle, and from his own fodder.

This case, which was trespass *quare clausum fregit*, came before the court upon a case stated by the parties.

The defendant had been the lessee of the plaintiff's farm, for the term of one year, ending *April* 15th; on which day he left the premises, leaving thereon a quantity of manure, lying in heaps about the barn and in the farm yard, so frozen that it could not then be removed without great inconvenience. It was afterwards taken away by the defendant, between the 10th and the 30th of *May*, as soon as it conveniently could be removed; doing no other damage than was unavoidable in effecting that object; and this act was the trespass complained of. Some of the cattle kept on the farm belonged to the lessor and were leased with the premises; others belonged to the defendant. Some of the hay also, was purchased by the defendant and the residue was cut on the farm.—The lease was referred to in the statement of facts, as containing covenants for the breach of which the lessor had recovered judgment; but none of them related to the surrender or mode of management of the farm, or in any manner touched the cause of this action.

The parties agreed that if the opinion of the court should be wholly with the defendant, he should have judgment for costs;—that if he had a right to take away the manure at the end of his term, and not afterwards, the plaintiff should have judgment for

nominal damages and costs;—but if he had no right to the manure, the plaintiff should have judgment for its value, being fifteen dollars, and costs.

Johnson, for the defendant, contended for the right of an outgoing tenant in agriculture to remove all the fruits of his good husbandry not absolutely incorporated with the soil; and that the law bound him only to leave the premises in as good condition as he received them; and cited *Penton v. Roberts*, 2 *East* 88; *Elwes v. Maw*, 3 *East* 38.

Crosby for the plaintiff, cited 1 *Esp. N. P.* 279; 3 *Bac. Abr.* 63.

The opinion of the Court was read at the ensuing *September* term in *York*, as drawn up by

Mellen C. J. Upon examination of the lease referred to in the statement of facts, we do not perceive any covenants on the part of *Reed* which have any direct bearing on the questions submitted for our decision. Nothing is said as to the management of the farm in a husband-like manner, or surrendering it at the end of the year in as good order and condition as it was at the commencement of the lease. The lease is also silent on the subject of manure. The same kind of silence or inattention has been the occasion of the numerous decisions which are to be found in the books of reports between lessors and lessees, mortgagors and mortgagees, and grantors and grantees, or those claiming under them, in relation to the legal character and ownership of certain articles or species of property, connected with or appertaining to the main subject of the conveyance or contract. A few words, inserted in such instruments, expressive of the meaning of the parties respecting the subject, would have prevented all controversy and doubt. In the absence of all such language, indicating their intention as to the particulars above alluded to, courts of law have been obliged to settle the rights of contending claimants, in some cases according to common understanding and usage; thus window blinds, keys, &c. are considered as part of the real estate, (though not strictly speaking fixtures,) or rather as so connected with the realty as always to pass with it. In other cases,

as between landlord and tenant, the question has been settled upon the principles of general policy and utility ; as in the case of erections for the purpose of carrying on trade, or the more profitable management of a farm by the tenant. It does not appear by the facts before us, that there is any general usage, in virtue of which the manure made on a farm by the cattle of the lessee during the term of his lease is considered as belonging to him exclusively, or to the lessor, or to both of them ; and we have not been able to find any case directly applicable to the present. There being no usage, nor such decision, nor expressed intention of the parties to guide us, the case is one which must be decided on the principles of policy and the public good ; for we do not deem the case cited from *Espinasse* as applicable. The opinion there given was founded on certain expressions in the lease, by means of which the lessee was considered as a trespasser in removing the manure from the farm at the end of the lease.

What then does policy and the public good dictate and require in the present case ? Before answering the question we would observe that we do not consider the case in any way changed by the fact that a part of the fodder was carried on to the farm by the defendant, and a part of the cattle on the farm were those leased ; for the purposes of the lease, such fodder and such cattle must be considered as belonging to the tenant during the term ; and he must be considered as the purchaser of the fodder growing on the land, by the contract of lease, as much as if he should purchase it elsewhere on account of the want of a sufficiency produced by the farm ; because a farm not yielding a sufficiency would command the less rent on that account. Numerous cases shew that a tenant, at the termination of his lease, may remove erections made at his own expense for the purpose of carrying on his trade ; because it is for the public good that such species of enterprise and industry should be encouraged ; and where the parties are silent on the subject in the lease, the law decides what principle best advances the public interest and accords with good policy, and by that principle settles the question of property. It is our duty to regard and protect the interests of agriculture as well as trade. It is obviously true, as a general observation, that

manure is essential on a farm; and that such manure is the product of the stock kept on such farm and relied upon as annually to be appropriated to enrich the farm and render it productive. If at the end of the year, or of the term where the lease is for more than a year, the tenant may lawfully remove the manure which has been accumulated, the consequence will be the impoverishment of the farm for the ensuing year; or such a consequence must be prevented at an unexpected expense, occasioned by the conduct of the lessee; or else the farm, destitute of manure, must necessarily be leased at a reduced rent or unprofitably occupied by the owner. Either alternative is an unreasonable one; and all the above mentioned consequences may be avoided by denying to the lessee what is contended for in this action. His claim has no foundation in justice or reason, and such a claim the laws of the land cannot sanction. It is true that the defendant did not remove and carry away any manure, except what was lying in heaps, probably adjoining the barn in the usual places; but still if he had a right to remove those heaps, why had he not a right to travel over the farm and collect and remove as much as he could find scattered upon the ground during the summer and autumn by the cattle in their pastures? In both instances the manure was the product of his cattle; yet who ever claimed to exercise such a right, or pretended to have such a claim? The argument proves too much, and leads to impossibilities in practice, as well as to something in theory which bears a strong resemblance to an absurdity.

We do not mean to be understood by this opinion, as extending the principles on which it is founded to the case of tenants of livery stables in towns, and perhaps some other estate, having no connexion with the pursuits of agriculture; other principles may be applicable in such circumstances; but as to their application or their extent we mean to give no opinion on this occasion.

The case most nearly resembling the present is that of *Kittredge v. Woods*, 3 *N. Hamp. Rep.* 503, in which it was decided that when land is sold and conveyed, manure lying about a barn upon the land, will pass to the grantee, as an incident to the land, unless there be a reservation of it in the deed. The Chief Justice observ-

ed that the question would generally arise between lessor and lessee, and very plainly intimates an opinion that a lessee, after the expiration of his lease, would have no right to the manure left on the land. On the whole, we are all of opinion that the defence is not sustained, and that the defendant must be called. According to the agreement of the parties, judgment must be entered for $15,00 and costs.

JONES *vs.* FARLEY.

An agent having discretionary power to adjust and collect an unliquidated demand, settled it by taking a negotiable note payable to his principal, which he afterwards pledged as collateral security for a debt of his own. It was held that his authority did not extend so far as to justify the pledge; and that the pledgee, after demand and refusal, was liable in trover for the note. Held also, that any payments to the agent, made before notice of the termination of his authority, were good.

TROVER for a promissory note. It appeared, in a case stated by the parties, that the plaintiff *Theodore Jones*, in the autumn of 1825, having an unsettled account against one *Weston*, delivered it to one *John Jones*, for collection, who confided it to the defendant, a counsellor of this court. The defendant, in *November* 1826, succeeded in liquidating the claim by a negotiable promissory note for $143,43 payable to the plaintiff, which he still retained in his possession. He received all his instructions from *John Jones*, who had served his time with the plaintiff, and who considered himself entitled to appropriate the demand to his own use at pleasure, holding himself accountable to the plaintiff. On the 20th of *November*, a few days after this note was made, the defendant became the indorser of *John Jones* to the *Thomaston* bank, on a note at ninety days for $105 borrowed by *Jones*, who then pledged *Weston's* note to the defendant as collateral security against his liability. The note thus indorsed was ultimately paid by the defendant. On the 16th of *December*, *John Jones* wrote to the defendant, saying that he should be obliged to stop payment, and requesting the defendant to dispose of

Weston's note and apply the proceeds to his own protection against his liability to the *Thomaston* bank; promising to make good any deficiency. And again on the 14th of *Jan.* 1827, he requested the defendant to get *Weston's* note discounted at the bank, and deduct thereout his demand against said *Jones.* The defendant, in the course of that winter and the ensuing spring, received some partial payments from *Weston,* and paid divers sums to the order of *John Jones*; but had no intimation that the demand was not entirely under the control of *John Jones,* till the receipt of a letter from the plaintiff dated at *Athol* in Massachusetts, *Jan.* 11, 1828, after *John* had stopped payment, directing the defendant to pay over the amount of *Weston's* note, when collected, to the plaintiff's agent, Gen. *Estabrook* of *Camden.* On the 7th of *March* following, the note and money collected thereon were demanded of the defendant, who refused to comply with the demand.

About the latter part of *November* 1826, *John Jones* gave the plaintiff all the information he then possessed, respecting the business.

Allen, for the defendant, upon these facts, contended that *John Jones* was so far the agent of the plaintiff as to be entitled to receive the money; and that the mode of receiving it was of no importance. All the transactions between him and the defendant were but modes of payment. The money taken from the bank may well be presumed to have been sent by *Jones* to the plaintiff, because it was his duty to have done so. This sum, with those paid by the defendant directly to the order of *John Jones,* amount to more than the note in question; and the payments having been made before any notice to the defendant of the revocation of the agency, he ought to be protected. *Erick v. Johnson,* 6 *Mass.* 193.

J. Thayer, for the plaintiff.

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

It is evident, from the statement of facts, that the promissory note, for the conversion of which this action was brought, was then the

property of the plaintiff; and we must, in a case submitted as this is to our decision, consider the demand of the note, and the defendant's refusal to deliver it to *Estabrook*, as evidence of a conversion, entitling the plaintiff to maintain the action, unless the other facts agreed furnish a defence. Viewing all the circumstances we think there was authority given by the plaintiff to *John Jones* to settle the account with *Mr. Weston* in the manner above mentioned, with or without the assistance of the defendant. And that as the note taken on the settlement, was placed in his hands by the assent of *Jones* for collection, all sums collected and paid over to *John Jones*, were paid to him lawfully, and must be allowed to the defendant; but we are also of opinion that the agency of *Jones* did not authorize him to speculate on the note or appropriate it to his own use by pledging it to the defendant as security for his liabilities at the bank. This was no part of his duty, and that transaction could not bind the rights of the plaintiff; he had authority to reclaim the note at his pleasure; and the order which he drew in favor of *Estabrook* upon the defendant, and the presentment of it to him and the demand of the note by virtue of it, amounted to a revocation of the power he had given to *Jones* and consequently of the derivative authority of the defendant; it not appearing that he had any legitimate lien upon it. Our opinion therefore is that a default must be entered, according to the agreement of the parties, and judgment be rendered for the amount due on the note at the time of the demand and refusal. The parties will ascertain that sum, and the clerk is directed to enter the judgment accordingly.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF YORK, APRIL TERM, 1830.

PEASE *vs.* NORTON & ALS.

The bond given by a debtor in execution pursuant to *Stat.* 1824, *ch.* 281, may be given either to the creditor or to the officer.

And if such bond be not taken in exactly the full amount of the debt, costs and fees, yet it is still a good bond at common law, if accepted by the creditor.

The bringing of a suit on such bond by the creditor is an acceptance of it.

Where the time for taking the poor debtor's oath under *Stat.* 1824, *ch.* 281 was fixed in the bond to be *Dec.* 17, but the notification to the creditor was altered to *Dec.* 19, by the officer, without the debtor's knowledge; and the debtor attended at the time and place fixed in the bond, but the justices to whom he applied to administer the oath declined attending on that day, for want of notice to the creditor; and on the 19th the debtor and the justices met at the place named in the bond, but the debtor refused to take the oath; and within ten days from the day named in the bond the debtor surrendered himself to the officer making the arrest, who now refused to receive him;—it was *held* that the debtor having done all in his power, and committed no fraud, the condition was saved.

The ten days mentioned in *Stat.* 1824, *ch.* 281, *sec.* 1, do not commence till the justices, to whom a poor debtor applies to be admitted to the oath of insolvency, have disallowed the oath; provided the debtor has done all in his power to take it. And in the computation of the ten days, the day appointed for taking the oath is excluded.

DEBT on a bond dated *Nov.* 13. 1827, in the penal sum of

$247 88; conditioned "that whereas the above bounden *James Norton* hath been and now is arrested by *Nathaniel Tilton*, deputy sheriff for the county of *Cumberland*, by virtue of an execution issued against him the said *James Norton* on a judgment recovered against him by the said *Simeon Pease* at the Court of Common Pleas holden at *Alfred*, within and for the county of *York*, on the third Tuesday of *October*, 1827, for the sum of one hundred and nine dollars, debt or damage, and costs of suit taxed at eight dollars and seventy four cents, with twenty five cents more for one writ of execution, and the officer's fees and charges for arresting the said *James Norton* on said execution, taxed at six dollars and five cents; and whereas the said *James Norton* hath signified to the said *Nathaniel Tilton*, the officer making said arrest, his intention to avail himself of the privilege of taking the oath or affirmation provided in the act for the relief of poor debtors, passed *Feb.* 9th, *A. D.* 1822, and hath made complaint to *John Anderson* Esquire, one of the justices of the peace for the county of *Cumberland*, of his inability to pay the debt aforesaid or to support himself in prison; and whereas the said *John Anderson*, justice as aforesaid, hath in due form of law made out a notification to the said *Simeon Pease*, the creditor, signifying the said *James Norton's* desire to take the privilege and benefit of the aforesaid act, and that monday the seventeenth day of *December* next, at eleven o'clock in the forenoon, is intended for the caption of the oath or affirmation allowed by said act, at the office of *John Anderson* Esquire, in said *Portland*. Now if the said *James Norton* will appear at the time and place appointed for taking the oath or affirmation aforesaid, and further, if, in case the justices of the *quorum* to whom such notification may be returned shall not allow said *James Norton* to discharge himself by taking said oath or affirmation, the said *James Norton* shall surrender himself to the said officer or to the keeper of the jail of said county, within ten days after such justices shall disallow the oath or affirmation aforesaid to the said *James Norton*, to be dealt with in the same manner as if the proceedings aforesaid had never been had, then," &c.

In a case stated by the parties it was agreed that the notification to the creditor, which was made out pursuant to the bond, had been

altered by the officer to whom it was sent for service, from the 17th to the 19th day of *December*, without the knowledge of the debtor, and had been accordingly served and returned; and that the debtor appeared at the time and place mentioned in the bond, and requested the attendance of two justices of the *quorum*; but finding that the notification had been altered, nothing further was done. On the 19th of *December* the debtor and the justices both attended at the same place, but the debtor refused to take the oath. And on the 27th day of *December*, the debtor personally surrendered himself to the officer making the arrest, who, though well knowing what had been done, refused to retake or receive him. Upon these facts the case was submitted to the decision of the court.

J. Shepley, for the plaintiff, contended that the condition of the bond was broken. The debtor was bound to attend at the time and place appointed for taking the oath; and to constitute a legal appointment, all those things must occur which are essential to authorize the magistrates to proceed; of which notice to the creditor was an indispensable requisite. And this notice the debtor should have given at his peril. Having failed to do this according to the bond, the condition is gone, and cannot be saved by any subsequent act of the obligors.

But if it could; it has not been saved by any thing subsequently done; for it was the duty of the debtor, if he would rely on the notice actually given, to have taken the oath on the 19th, unless disallowed by the magistrates. But this he refused to do. His surrender came too late, on either principle; for he might have surrendered himself on the 17th, which therefore is to be accounted as one of the ten days; and thus the 27th, when the surrender was made, is excluded from the computation. *Presby v. Williams*, 15 *Mass.* 193; *Wheeler v. Bent*, 4 *Pick.* 167.

To the point that the bond, though not taken for the exact sum mentioned in the statute, was still a good bond at common law, he cited *Buker v. Haley & al.* 5 *Greenl.* 240.

N. Emery, for the defendants, insisted that the bond was void, first because it was taken to the creditor, instead of the sheriff, for whose security alone it was intended; and secondly because it was taken

for an excessive amount; the statute requiring that it should be taken for the exact amount of debt and costs, and this being for more than double that amount.

But if it were a good bond, he argued that the debtor had in substance performed the condition, having done all that was in his power. 2 *Saund.* 61; 6 *D. & E.* 153; 1 *Com. Dig. Bail*; 10 *East*, 100; 3 *Mod.* 87; 1 *Burr.* 244; 1 *Caines* 9; *Shep. Touchst.* 137; *Knight v. Winter, Barnes*, 68; *French v. Knowles, ib.* 111; *Ryan v. Watson*, 2 *Greenl.* 382; *Champion v. Noyes*, 2 *Mass.* 481.

MELLEN C. J. delivered the opinion of the Court at the ensuing *July* term in *Waldo*.

In the case of *Buker v. Haley & al.* decided in this county, *April* term 1828, the bond declared on was given by the defendants to *Buker*, the officer who had made the arrest, and that circumstance was urged as an objection against the validity of the bond. The statute of 1824, *ch.* 281, being silent as to the person to whom the bond should be given, the court considered the objection as unsubstantial; and that there was nothing in the act forbidding such a bond. In the case before us the bond was given to *Pease* the creditor, instead of *Tilton* the officer; and the objection now is that it should have been given to the latter. Our opinion is that such a bond might have been lawfully made either to the officer or to the creditor. In both cases the beneficial interest belongs to the creditor. The statute has since been repealed by the statute of 1828, *ch.* 410. The bond having been given to the creditor, cannot be impeached, as having been given for ease and favor. None are liable to that objection but such as are given to an officer. *Winthrop v. Dockendorff*, 3 *Greenl.* 156, and the authorities there cited.

It is urged that the bond is void because it was given for more than the amount prescribed by the statute. The penal sum is $247 88, and the amount of the plaintiff's execution, debt and costs, together with the officers fees and charges as estimated and stated in the condition, amount only to $124 04; whereas the statute declares that the bond shall be "in the full amount of the debt and costs, and all legal costs arising thereon." It would seem as though the

bond was intended to be double the amount of debt, costs and fees: but it is not double to such amount. In fact, it was not such a bond as the law required, and might not have justified the officer in discharging *Norton* from his arrest and custody; but still, the plaintiff has sanctioned his conduct, so far as he could, by accepting the bond, and commencing this action to obtain the benefit of it: and though it is not good as a statute bond, there is no reason why it may not be good at common law. It was voluntarily entered into, for the benefit of the defendant, *Norton*, to procure for him a lawful release from a lawful arrest; at least a temporary release. According to our decision in the before mentioned case of *Winthrop v. Dockendorff & al.* supported by the authorities there collected, we have no hesitation in pronouncing the bond in question as good at common law.

The next inquiry is whether the defendant, *Norton*, complied with the terms of the condition. It appears that the 17th of *December*, 1827, was the day appointed for him to take the poor debtor's oath, at the office of Mr. *Anderson;* at which time and place, he requested the justices to attend. But because the notice had not been duly given to the plaintiff, returnable on that day, but had been altered, without *Norton's* knowledge, so as to be returnable on the 19th, they declined proceeding on the 17th. *Norton* did not offer to take the oath on the 19th; and no further proceedings were had; and, of course, no certificate was ever made by the justices. In these circumstances, all of which were known to *Tilton*, *Norton*, on the 27th day of *December*, being the last of the ten days mentioned in the condition of the bond, offered to surrender himself to the officer, and requested him to retake him on the execution, to be dealt with in the same manner as though no proceedings had been had. At this time *Tilton* knew that *Norton* had not taken, nor attempted to take the oath by law prescribed: of course he well knew that the justices could not have made any certificate of their proceedings, because there had been no proceedings on their part. *Norton* might have been satisfied that he would not have been admitted to his oath, and concluded to proceed no further, but return to the custody of the officer. Why did he not receive him and commit him? We see no good reason for his refusal. The surrender was offered within

the limited time, and in the peculiar circumstances of the case, there being no appearance of fraud or management on *Norton's* part, we think it was a substantial compliance with the condition of the bond.

But there is also another ground which seems to us to sustain the defence. Suppose that there was no disallowance by the justices, and that *Norton* had never made any offer to surrender himself to the officer; do the facts before us shew any breach of the condition of the bond? According to that condition, *Norton* was to appear at the time and place designated therein for taking the oath by law prescribed. This part of the condition he performed. And if the justices should not allow him to take the oath, he was to surrender himself to the officer, or at the prison, within ten days after such disallowance. Now if the proceedings which were had, did not amount to a disallowance by the justices, then the condition of the bond is not broken; because the term of ten days, during which a surrender might legally be made, has not as yet commenced. In either view of the case our opinion is, that the present action on the bond cannot be maintained.

FERNALD *vs.* LINSCOTT & AL.

The purchaser of a right in equity of redemption at a sheriff's sale, may maintain trespass *quare clausum fregit* against the mortgagor in possession, who cuts and takes off the growing grass; the mortgagee never having entered for condition broken.

THIS was an action of trespass *quare clausum fregit* brought *July* 24, 1827, against *William* and *James Linscott*, and others; and was originally entered in a Justice's court, where the defendants pleaded that the *locus in quo* was the soil and freehold of one *James Pugsley;* which was traversed in the court of Common Pleas. At the trial in this court, before *Parris J.* the plaintiff showed a deed of the land from *William* to *James Linscott,* dated *April* 22, 1822; and a mortgage from *James* to *Pugsley*; and proved that he had himself become regularly entitled to the right in equity of redemption,

as the purchaser at a sheriff's sale, held *Aug.* 3, 1826, under an execution against *James*. And it was admitted that an action was still pending in favor of *Pugsley* against *James*, which was brought to recover possession of the mortgaged premises. The plaintiff also proved that he entered and repaired the exterior fences of the farm in the spring after the date of the sheriff's deed to him; and that the defendants, in *July* following, entered into the *locus in quo*, and cut and carried away the grass there growing.

The defendants proved that *James Linscott* had continued to dwell in the mansion house standing on the premises; that he claimed the right to occupy, and take the grass, forbidding the plaintiff when he attempted to cut it; that *Pugsley*, at the mansion house, after condition broken, told him he might cut the grass, requested him to employ a sufficient number of men for that purpose, and said that if it was necessary, he would advance the money to pay them; and that he accordingly engaged the other defendants to assist him in doing the acts complained of. *James* had taken the profits of the land up to that time, without interruption. The plaintiff had exercised no act of ownership, except the repairing of some of the exterior fences; and this was done without the knowledge or consent either of *James* or of *Pugsley*. The latter, being called by the plaintiff, testified that he had never entered for condition broken, nor received any of the produce of the land.

Upon these facts, reported by the Judge, the parties agreed that if the testimony was admissible, and would authorize a jury to find for the defendants, then judgment should be entered for them;—but that if the court should be of a different opinion, then judgment should be entered for the plaintiffs for twenty dollars.

J. Holmes and *D. Goodenow*, for the defendants, adverted to the agreement of the parties that the defendants were to have judgment if the facts would justify a jury in finding for them; and they contended that though the testimony of *Pugsley* himself negatived a formal entry for breach of the condition of the deed, yet the jury would have been warranted, from the other evidence, in finding that he was in actual possession of the land, by *James Linscott*, his tenant. The

case then, they contended, even in the aspect most favorable to the plaintiff, stood as an action of trespass brought by the mortgagor against the mortgagee; which could not for a moment be sustained. On the contrary the mortgagee may treat the mortgagor as a trespasser or a disseisor, even before condition broken; and his remaining in possession after the mortgage is no disseisin of the mortgagee. *Goodwin v. Richardson*, 11 *Mass.* 469; *Newhall v. Wright*, 3 *Mass.* 138; *Erskine v. Townsend*, 2 *Mass.* 493; *Taylor v. Weld*, 5 *Mass.* 120; *Groton v. Boxborough*, 6 *Mass.* 50; *Read v. Davis*, 4 *Pick.* 216; *Gould v. Newman*, 7 *Mass.* 239; *Perkins v. Pitts*, 11 *Mass.* 125; *Hicks v. Bingham*, *ib.* 300; *Barker v. Parker*, 4 *Pick.* 505.

But here the plaintiff was a mere stranger. His repairing of some of the fences was a clandestine act, which cannot avail him. The statute gives the purchaser of a debtor's equity, no right of entry whatever, but only a mere right to redeem. This the plaintiff had not exercised; and *James* was still in actual possession under the mortgagee. As purchaser, the plaintiff acquired no title to the possession, till the last remainder of title in the mortgagor was extinct, by the lapse of a year after the sheriff's sale, without redemption of his right in equity, by payment of the amount for which it was sold.

The pendency of *Pugsley's* action does not affect the case, it being brought merely for the purpose of foreclosure.

J. and *E. Shepley*, for the plaintiff, cited *Wellington v. Gale*, 7 *Mass.* 138; *Porter v. Millet*, 9 *Mass.* 101; *Foster v. Mellen*, 10 *Mass.* 421; *Hatch v. Dwight*, 17 *Mass.* 299; *Erskine v. Townsend*, 2 *Mass.* 493; *Wilder v. Houghton*, 1 *Pick.* 87.

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

According to the form of the issue joined by the parties, the question would seem to be whether, at the time of the alleged trespass, the *locus in quo* was the soil and freehold of *Pugsley*; but from an inspection of the facts detailed in the report, as well as from the information of the Judge who tried the cause, we learn that the principal inquiry and point in dispute at the trial was, whether upon all

the facts in the case, the defence was sustainable, admitting the *locus* to have been, at the time alleged, the soil and freehold of *Pugsley*. We were, at first view of the cause, inclined to the opinion that, as the pleadings stand, we could not decide it on its merits, as they were intended to be decided by the parties; but on further consideration we have altered that opinion. It appears that evidence was offered on both sides, and the conclusion of the report is, " that if the testimony aforesaid was admissible, and would in law authorize a jury to find for the defendants, then judgment is to be entered for them; but if the court should be of a different opinion, then judgment is to be entered for the plaintiff, for $20." Thus it appears that we are to decide the cause upon its merits, without any particular reference to the pleadings. In the first place we do not perceive why the testimony which was introduced was not admissible. On one side, it was the testimony of *Pugsley*; and on the other, the declarations of *Pugsley* in relation to the same subject. The single question then is whether the relation in which the parties stand to each other, is such, that the action is maintainable. The defendants allege that the *locus in quo* was the soil and freehold of *Pugsley*; and to prove that fact they read the deed of *James Linscott*, conveying it to *Pugsley*, in mortgage. The plaintiff is the owner of the equity of redemption, and is now clothed with all the rights which *James Linscott* formerly had as mortgagor. The report states that *Pugsley* never entered for breach of the condition of the mortgage; but that prior to the alleged trespass he had commenced an action, founded on the mortgage, to recover possession of the premises of *James Linscott* the mortgagor, who has always remained in possession; which action was then pending, no judgment having been rendered. The alleged trespass consisted in cutting and carrying away the grass. In the circumstances abovementioned, what were the rights of *Pugsley*, under whom the defendants justify the entry and cutting? While a mortgagor remains in possession he is not liable to account for rents and profits to the mortgagee. 2 *Atk.* 107. 3 *Atk.* 244. In *Hatch v. Dwight*, 17 *Mass.* 289, the court say, " although a mortgagee may enter at any time, yet until he enters, the land must be considered as belonging to the mortga-

gor." So in the case of *Houghton v. Wilder*, 1 *Pick.* 87, the Chief Justice in delivering the opinion of the court says, "The mortgagee may enter and dispossess him (the mortgagor) but until this is done, he has the same rights that he would have, if he had never mortgaged, except that he cannot lawfully do any thing to impair the estate or the security of the mortgagee." The case also decides the principle that until entry, the mortgagor is not accountable for rents and profits; for he is not a trespasser in taking them, nor is there any express or implied promise to account for them. But we have decided in the case of *Stowell v. Pike & al.* 2 *Greenl.* 387, that before entry, the mortgagee may maintain an action of trespass against the mortgagor, for cutting down and carrying away the timber growing on the mortgaged premises; as it may be destructive of the mortgagee's security. Now in the case before us, as *Pugsley* never had entered and taken possession of the land, he had no right to the profits, nor could he take them himself or authorise any other person so to do. They belonged to the plaintiff. The case of *Blaney v. Bearce*, 2 *Greenl.* 132, differs from this. There the decision was wholly on the question of title to the *locus in quo*, which was expressly in issue by the pleadings. That was an action of trespass *quare clausum* by the mortgagor against the assignee of the mortgagee; and as it did not appear that the defendant did any thing more than barely enter on the land, doing no damage to the mortgagor, or taking the profits of the land, the court would not sustain the action. On the facts presented in this cause, we are satisfied that, for the reasons above assigned, the action is maintainable. According to the agreement of the parties there must be *Judgment for* $20 *damages and costs.*

PAUL *vs.* NOWELL.

Recognizances for the prosecution of appeals in civil actions are not within the *Stat.* 1821, *ch.* 50. giving remedies in equity; but in case of a forfeiture, judgment must go for the whole penalty.

A recognizance for the prosecution of an appeal in a civil action needs not to be spread at large on the record of the court appealed to. To entitle the conusee to his remedy, under the statute regulating appeals, it is sufficient that it be returned and placed on file.

THIS was a *scire facias* upon a recognizance entered into by the defendant and another at *October* term, 1822, of the court of Common Pleas, for the prosecution of an appeal to this court, in a civil action. The appeal was not entered in this court; and the plaintiff, upon complaint made, obtained affirmation of the judgment, with additional damages and costs. The recognizance was brought up and filed with the other papers in the case, in the usual manner; but was not entered at large on the record. Execution had been duly issued upon the judgment; but it had never been returned to the clerk's office.

Upon these facts, which were agreed to by the parties, the case was submitted to the decision of the court.

D. Goodenow, for the plaintiff, cited *Commonwealth v. Green* 12 *Mass.* 1; *Bridge v. Ford*, 7 *Mass.* 209; *Johnson v. Randall*, 7 *Mass.* 340; *Merrill v. Prince*, *ib.* 396.

J. Shepley, for the defendant, objected that the recognizance was not made a matter of record; *Bridge v. Ford*, 4 *Mass.* 641;—and he further contended that the execution not having been returned, nor the omission explained, here was presumptive evidence of payment; at least sufficient to absolve the defendant, who was only a surety.

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

We do not think that a record at large of the recognizance is necessary as the foundation of a *scire facias*. It has been returned to and placed on the files of this court, and nothing more is required by

our statute respecting appeals. As the defendant did not enter and prosecute his appeal, the condition of the recognizance was broken, and of course there must be a default entered, and judgment rendered for forty dollars, that being the amount of the penalty. We have examined, but have not been able to find any power given to us to consider the question in equity and order execution to issue for no more than is due in good conscience. The second and third sections of the statute of 1821, *ch.* 50, relate only to specialities under the hand and seal of the party contracting; and not to recognizances; and the fourth section, relates only to recognizances taken or entered into in criminal cases, or by witnesses conditioned to appear on behalf of the State.

Note.—By *Stat.* 1831, *ch.* 497, the remedy by hearing in chancery after forfeiture is now extended to recognizances taken in civil cases.

Fox *ad'x. vs.* Cutts.

A promissory note, given to a third person by the defendant as surety for the plaintiff, and taken up by the defendant, with the creditor's receipt of payment from the defendant thereon, being duly filed in the clerk's office by way of set-off, is of itself sufficiently explicit as a demand for monies paid, within the meaning of *Stat.* 1821, *ch.* 59, *sec.* 19.

Where one of two principal debtors in a joint promissory note is dead, and the money has been paid by a surety, he may file it in offset against a demand in favor of the estate of the deceased against him, by the operation of *Stat.* 1821, *ch.* 52, *sec.* 25;—and this though the estate has been represented insolvent.

This was an action of *assumpsit* on a promissory note for $53 34, given *Aug.* 15, 1827 by the defendant to *Samuel Fox*, the plaintiff's intestate.

It appeared, in a case stated by the parties, that the defendant, on the 15th day of *May* 1827, became surety for *Fox* and one *Randall*, in a joint and several promissory note for fifty dollars, given by them to *Smith & Mellen*; which the defendant, at its matu-

rity, had been obliged to pay. *Fox's* estate was represented insolvent; and *Randall* had become insolvent, though still living. This note, with the receipt of payment at the bottom by *Smith & Mellen*, from the defendant, he filed in the clerk's office by way of set-off in this action; and the clerk certified on the back of the envelope that it was so filed. The balance of debt, with the costs of suit, were duly tendered.

Upon these facts the case was submitted to the decision of the court, the parties agreeing that judgment should be entered by nonsuit or default, according to its opinion.

E. Shepley, for the plaintiff, objected to the form of the set-off claimed; that it was not a note of hand given by the plaintiff to the defendant, as the statute contemplates; nor did it purport to be a transcript of a book account, or claim for monies paid; nor was it in terms sufficiently explicit to give the plaintiff distinctly to understand what he was to come prepared to meet.

But if in form it were sufficient, it could not be allowed; because it is not a contract between the parties to this suit; but is a joint claim against the plaintiff and another;—nor can a suit be sustained upon it against the plaintiff, the estate she represents being insolvent. The ground of set-off is to prevent the multiplicity of suits; and where the claim is not one on which an action against the plaintiff can be founded, there can be no set-off. 5 *Dane's Abr. ch.* 168. *art.* 1. *sec.* 6. 7.

D. Goodenow, for the defendant, cited *Stat.* 1821, *ch.* 52, *sec.* 25; *Lyman v. Estes*, 1 *Greenl.* 182; *Sewall v. Sparrow*, 16 *Mass.* 24; *Moody v. Towle*, 5 *Greenl.* 415; *McDonald v. Webster*, 2 *Mass.* 498.

Weston J. delivered the opinion of the Court.

The act for regulating judicial process and proceedings, *Stat.* 1821, *ch.* 59, *sec.* 19, has prescribed no form for filing an account in offset. By the paper filed in the case before us, it is sufficiently apparent that the defendant had paid money for the plaintiff's intestate. The privity between the parties, and the occasion and circumstances under which it was paid, also appear. As it was seasonably

filed in the clerk's office, after this action was instituted, it is impossible to mistake its object and design. It is to be regarded as an account for monies paid; which is an offset authorized by the statute.

But it is objected that it cannot be allowed in the present case; because the claim which the defendant had to be reimbursed the money he had paid as surety, was against the plaintiff's intestate and another jointly, who were principals on the note. And it is undoubtedly true that if one pay money as surety for several principals, the promise of indemnity implied by law is joint. 1 *Chitty on pleading*, 28. It is equally true that a joint account against the plaintiff and others, cannot be filed in offset, under the statute, against the several demand of the plaintiff; although the court in its discretion may offset judgments, where the creditor in the one is one of several joint debtors in the other. If therefore the plaintiff's intestate was now alive and prosecuting this action, the defendant's account could not be allowed under the statute. But since his decease, the implied promise to the defendant arising from his payment, has by operation of law become several, as well as joint. *Stat.* 1821, *ch.* 52, *sec.* 25. Prior to the statute last cited, upon the decease of one of several joint promissors, the common law afforded a remedy only against the survivor or survivors. The defendant, having now under the statute a several demand against the estate of the deceased, it is a fair matter of offset against the claim of the estate against him. If, by reason of the insolvency, the defendant could maintain no action at common law against the estate of the deceased, except where it is allowed by statute in the nature of an appeal from the decision of the commissioners of insolvency; yet when an action is brought against him, he is entitled to be allowed his offset, by way of defence. *Plaintiff nonsuit.*

NASON *vs.* ALLEN.

Where one seised of a remainder expectant upon an estate for life, mortgaged the premises in fee, and died; and his widow brought an action of dower against the mortgagee; it was *held* that the latter was estopped to deny the seisin of the husband.

IN this case the plaintiff, as the widow of *Thomas Nason*, demanded her reasonable dower in two parcels of land. In a case stated by the parties it appeared that the husband, and his mother *Joanna Nason*, were tenants in common of both parcels;—that in 1804, the mother, who is still living, conveyed one of the parcels, called the six-acre-tract, to *Thomas* in fee; receiving from him, at the same time, a lease of that tract during her life;—that on the 21st day of *October* 1809, the mother and son both joined in a mortgage of both parcels to the defendant in fee;—that the plaintiff's marriage with *Thomas* took place *Feb.* 17, 1813;—that on the 31st day of *March* 1815, the defendant, by his deed of release and quitclaim in common form, conveyed to *Thomas Nason*, all his right title and interest in the premises as mortgagee;—and that on the 6th day of *May* 1824, *Thomas Nason* mortgaged the premises in fee to the defendant, who, in *May* 1827, recovered judgment for possession of the same, in an action upon the mortgage.

Before the commencement of this action, the defendant had assigned to the plaintiff her dower in one moiety of all the premises, except the six acres.

It was further agreed by the parties that if the court should be of opinion that the defendant, by holding the premises under *Thomas Nason's* deed of *May* 6, 1824, was estopped to deny his seisin, then the facts relative to the mother's estate for life in the six acres were to be disregarded, and considered as not admitted; and that the court should render such judgment, upon the case thus stated, as might conform to the principles on which the case should be decided.

D. Goodenow, for the defendant, contended that the deed and lease of 1804 being one transaction, the husband was never seised

except of an estate in remainder; and of this the wife is not dowable. *Eldridge & al. v. Forrestal & ux.* 7 *Mass.* 253; *Co. Lit.* 35; 4 *Dane's Abr. ch.* 130, *art.* 4, *sec.* 4.

Nor ought the defendant to be estopped by the mortgage to him in 1824. Though the warrantor may not aver against his own deed, yet the warrantee may. *Porter v. Hill*, 9 *Mass.* 36. There is a wide difference, on this point, between a lessee and a grantee in fee. In the case of the former, there are relations still subsisting, which he is very properly forbidden to impair, by any averment inconsistent with his character of lessee. But no such relations subsist between grantor and grantee in fee; and the latter may therefore protect himself by the acquisition of any outstanding or paramount title. *Fox v. Widgery* 4 *Greenl.* 218. It is only where the principle of subordination exists, and a duty is still due, that the reason of the doctrine of estoppel applies. But even a lessee, if he admits that some interest passed by the lease, is not estopped to show what that interest was. 5 *Dane's Abr. ch.* 160, *art.* 1, *sec.* 22; *Co. Lit.* 47; 8 *D. & E.* 487; 2 *Saund.* 418.

Appleton, for the plaintiff, cited *Bancroft v. White*, 1 *Caines* 185; *Hitchcock v. Harrington*, 6 *Johns.* 291; *Collins v. Torrey*, 7 *Johns.* 278; *Embree v. Ellis*, 2 *Johns.* 119; *Kimball v. Kimball*, 2 *Greenl.* 226; *Hitchcock v. Carpenter*, 9 *Johns.* 344; *King v. Stacy*, 1 *D. & E.* 4; 3 *Com. Dig. Estoppel D.*; 5 *Dane's Abr. ch.* 160, *art.* 1; 4 *Bac. Abr.* 107.

Mellen C. J. delivered the opinion of the Court in *Cumberland*, at the adjournment of *May* term in *August* following.

The plaintiff demands her dower in two tracts of land; one of the tracts contains six acres; of which she has not been endowed. As to the other tract, she has had her dower assigned to her in one moiety of the same; and, unless upon the principle of estoppel, she is not entitled to dower except in one moiety of this tract; nor in any part of the six acres; because *Thomas Nason* was not seised of the freehold, but only the inheritance of the tract of six acres, during the coverture; nor of more than one moiety of the other tract. It

appears that although such was the seisin of *Thomas Nason*, still, on the 6th of *May* 1824, by his deed of that date, he conveyed both the lots in fee and in mortgage to *Allen* the tenant, who afterwards commenced an action, counting on the mortgage deed, and recovered judgment for the premises, that is, both tracts. And the counsel for the plaintiff contends that as the defendant claims the premises under the deed of her husband, with the usual covenants of seisin and warranty, and also under the judgment he has recovered, he is on legal principles estopped to deny the seisin of the husband as alleged in the writ. If he is so estopped, then the facts set forth in the statement, shewing that the husband was not so seised during the coverture, are to be considered as out of the case, and so are not to be regarded. We place the cause on this ground, because we do not perceive that the release from the tenant to *Thomas Nason*, bearing date *March* 31, 1815, can have any bearing in the decision of it. The question then is, whether the tenant is estopped to deny the alleged seisin of the husband?

In the case of *Taylor*, 34 *Eliz.* (cited in *Sir W. Jones*, 357) it was held that if a tenant at will, or for years, made a feoffment in fee and died, and his wife brought dower against the feoffee, he could not plead that the husband was not seised. In that case it was evident that, independent of the estoppel, there was no estate in the husband, whereof the wife was dowable. In *Bancroft v. White*, 1 *Caines* 185, the same principle was urged by counsel and admitted by the court. In *Hitchcock & ux. v. Harrington*, 6 *Johns.* 290, the facts were, that the former husband of *Ann Hitchcock*, one of the plaintiffs, was *Moses Northop*; and the defendant claimed under a conveyance from the son and heir of *Northop*. *Kent C. J.* in delivering the opinion of the court says, "The objection of the want of seisin in the husband cannot be received from the defendant, as he holds under the husband, by a conveyance from his son and heir. In *Collins v. Torrey*, 7 *Johns.* 278, the same principle was recognized and applied. In *Hitchcock & ux. v. Carpenter*, 9 *Johns.* 344, it appears the wife's former husband was one *Ferris*, and the defendant claimed to hold under the heirs of *Ferris*. The court say, "as the defendant claims under the heirs of *Ferris*, he is estopped from

denying the seisin and death of the former husband of the demandant." In *Kimball v. Kimball*, 2 *Greenl.* 226, the same principle was adopted by this court. In that case the defendant claimed under the deed of the demandant's husband. A similar case came before us in the county of *Kennebec*, and was decided in the same manner. The decision was not reported. In the cases above mentioned, the defendants claimed and held by virtue of absolute conveyances; whereas, in the present case, the defendant claims and holds as mortgagee, and under a judgment on the mortgage; but we are not aware that the difference in fact makes any in principle. The defendant claims title under it, and he may avail himself of the covenants in the deed, after his title shall have become absolute, and dower been assigned to the plaintiff, and recover such damages as he may sustain in consequence of the assignment of dower. *Porter v. Noyes*, 2 *Greenl.* 22. And if the estate should never be redeemed, then the defendant could never suffer any injury by reason of such assignment. There must be dower assigned to the demandant in the six acres, and in one moiety of the other tract; her dower in one moiety of the same having already been assigned to her; and judgment be entered accordingly; and for such damages as may be asssessed by the person appointed by the court for that purpose.

GORDON *vs.* TUCKER & ALS.

J. T. and other individuals, named only as such, gave bond to R. G. submitting to arbitrators "his claim for damages occasioned to his land by the erection and continuance of the dam across *Saco* river at Union falls." The arbitrators, reciting that they had *viewed the premises*, awarded that J. T. "*and other proprietors of the Union-falls-mills,*" should pay to R. G. a certain sum, and costs. It was *held* that here were sufficient indications that the award was between the parties to the bond;—that the award was of itself a bar to any farther claim for damages, and operated to secure to the obligors the right to flow the land in future, without farther payment of damages to the obligee; and that therefore it was mutual and final.

Submissions and awards, like other contracts, are to be expounded by the intent of the parties and arbitrators.

Arbitrators at common law have no authority to award costs, unless it is expressly given to them.

If an award is bad in part only, it may be good for the rest; unless, by the nullity of a part, one of the parties cannot have the advantage intended as a consideration therefor.

If an award be good for the damages awarded, but bad as to the costs; whether a replication would not be vitiated by assigning non payment of costs as part of the breach;—*quære.*

Where the question of damages for flowing land has been submitted to arbitration, and the award performed; whether a subsequent grantee of the land can pursue any remedy for damages accruing after his purchase;—*quære.*

In debt on an arbitration bond, it appeared, on *oyer* of the condition, that the defendants, who were named as private individuals, mutually agreed with the plaintiff "to submit to the determination of *Moses Bradbury*, *Gibeon Elden* and *Jabez Bradbury*, the claim of the said *Reuben Gordon* for all damages which have been occasioned, or which may hereafter be occasioned to the land of said *Reuben Gordon*, by the erection and continuance of the dam across *Saco* river at *Union falls*, to the height the same is now erected; the report of whom or the major part of whom to be final and conclusive between the parties;" and covenanted "well and truly to perform, fulfil and keep the award," &c.

The defendants pleaded, *first*, that the arbitrators "made no such award, report or determination of and upon the premises as was contemplated in the condition of said writing obligatory, and in conformity thereto." The plaintiff replied that they did make such award, setting it forth *in hæc verba* :—"We the subscribers, a committee appointed by *Reuben Gordon* of *Hollis*, on the one part, and *Jonathan Tucker* of *Saco, and other proprietors of the Union falls mills in said Hollis*, on the other part, having duly notified the parties therein concerned, met and viewed the premises agreeably to our appointment, and having heard their several pleas, proofs and allegations, and maturely considered the same, do award and determine, and this is our final award and determination, that *Reuben Gordon* recover of *Jonathan Tucker* of *Saco, and other proprietors of the Union falls mills*, the sum of one hundred and twenty five dollars damage, and costs of reference taxed at twenty-five dollars and fifty-seven cents." Which was signed by all the arbitrators. To which the defendants answered by a general demurrer.

The defendants pleaded, *secondly*, that the plaintiff "had not well and truly performed, fulfilled and kept the award" of the arbitrators, "in all things on his part to be performed, &c., as specified in the counterpart of the same writing obligatory," made on the same day. The plaintiff replied that he had so kept the award. The defendants rejoined that the plaintiff had not "made, executed and delivered to the said defendants a good and sufficient deed, conveying to them the right to flow the premises set forth in the counterpart of said writing obligatory, agreeably to the award" &c. And the plaintiff hereupon demurred in like manner.

Goodwin, for the defendants, contended that the award was bad. 1st. It is not made between the parties to the submission. The obligors in the bond have not described themselves as proprietors of the *Union falls mills*, nor as part owners either of the mills or of the dam; nor have they stipulated in behalf of the proprietors; neither does it appear by the bond that any of the obligors are owners of the mill; and the award is made on a separate paper. Now parol proof is not admissible to connect the award with the bond, nor to rectify any mistake of this kind. *Montague v. Smith*, 13 *Mass.*

396; *Woodbury v. Northy*, 3 *Greenl.* 85. Neither does it appear by the award that these obligors were heard by the arbitrators; nor is any thing awarded for them to perform. They are not bound by the award, not having bound themselves for the proprietors; nor are the proprietors bound, they being strangers to the submission. *Eveleth v. Chase*, 17 *Mass.* 458; *Cutter v. Whittemore*, 10 *Mass.* 442; *Kyd on Awards*, 103—105; *Boston v. Brazier*, 11 *Mass.* 447.

2. The award is not made of and upon the premises. The arbitrators have not reported what sum they allowed for damages up to the time of submission; nor what for future damages; nor for what consideration the sum named in their award was allowed. *Bacon v. Dubarry*, 1 *Ld. Raym.* 246; 12 *Mod.* 129; *Kyd* 139.

3. It is not mutual. Nothing is awarded to be done by *Gordon*; nor does it appear for what cause the money is to be paid; nor what rights or privileges are to accrue to the defendants by the payment; neither could this submission and award, taken together, be successfully pleaded in bar of any future action or complaint for flowing the plaintiff's land, brought by himself; much less would it bar his grantee, who could learn nothing from the award. *Peters v. Pierce*, 8 *Mass.* 398; *Stain v. Wilde Cro. Jac.* 352; *Ormelade v. Coke*, *ib.* 354; *Lumley v. Hutton*, *ib.* 447.

4. It is not final. It creates no lien or incumbrance on the plaintiff's land; nor does it give the defendants any rights beyond what were already secured to them by the statute regulating mills. The bond is not an instrument of defeazance, but a penal bond. It does not provide that the defendants shall use the land of the plaintiff, on any conditions whatever; and the award leaves the whole subject open to the same litigation as if no bond had been made. *Erskine v. Townsend*, 2 *Mass.* 493; *Harrison v. Phillips Academy*, 12 *Mass.* 456; *Jones v. Boston Mill Corporation*, 4 *Pick.* 507; *Palmer's case*, 12 *Mod.* 234; *Veale v. Warner*, 3 *Saund.* 293, *note* 1.

5. It is at least void so far as costs are concerned; the arbitrators having no power to award these, unless specially given; which was not the case here. *Cutter v. Whittemore*, 10 *Mass.* 442; *Bussfield v. Bussfield*, *Cro. Jac.* 577; *Abrahat v. Bragdon*,

10 *Mod.* 201 ; *Pinkney v. Hale*, 1 *Lev.* 3 ; *Dolbier v. Wing*, 3 *Greenl.* 421.

6. The replication is bad, because it assigns as a breach the non payment of damages *and costs*. Being bad in part, it is wholly defective and insufficient. And this fault may be shown either upon general demurrer, or in arrest of judgment. *Heard v. Baskerville*, *Hob.* 232 ; 5 *Com. Dig. Pleader F.* 14, *C.* 47 ; *Cooke v. Whorwood*, 2 *Saund.* 337 ; *Pope v. Brett ib.* 293, *note* 1 ; *Hayman v. Gerrard*, 1 *Saund.* 102 *note* 1 ; *Fox v. Smith*, 2 *Wils.* 267 ; *Addison v. Gray*, 2 *Wils.* 293 ; *Roberts v. Marriot*, 1 *Mod.* 289 ; *Hill v. Thorn* 2 *Mod.* 309 ; *Thirsby v. Helbot*, 3 *Mod.* 272 ; *Meredith v. Alleyn*, 1 *Salk.* 138 ; *Barrett v. Fletcher*, *Cro. Jac.* 220 ; 1 *Nelson's Abr. tit. Arbitr. M. pl.* 1, 2, 3, 4 ; *Kyd* 200 ; 1 *Chitty's Pl.* 643 ; *Earl of Manchester v. Vale*, 1 *Saund.* 28 ; *Perkins v. Burbank*, 2 *Mass.* 81 ; *Webber v. Tivill*, 2 *Saund.* 127.

J. & E. Shepley, for the plaintiff, to show that the objection of want of parties to the award was not open upon these pleadings, cited 1 *Chitty's Pl.* 476 ; 2 *Saund.* 184 ; 1 *Saund.* 63. To the goodness of the award they cited *Gaylord v. Gaylord*, 4 *Day* 422 ; *Butland v. Conway*, 16 *Mass.* 396 ; *Peters v. Pierce*, 8 *Mass.* 398 ; *Forsyth v. Shaw*, 10 *Mass.* 253 ; *Jones v. The Boston Mill Corporation* 6 *Pick.* 148 ; *Strong v. Ferguson*, 14 *Johns.* 161. And to the faultiness of the defendant's second plea they cited 2 *Chitty's Pl.* 477 ; *Beane v. Farnham*, 6 *Pick.* 272.

Weston J. delivered the opinion of the Court at the adjournment in *August* of the ensuing *May* term in *Cumberland*.

From the award set forth in the replication, it sufficiently appears that it was made between the parties to the bond of arbitration now in suit. There are indications to this effect, which are not to be mistaken. The plaintiff is therein named as one of the parties, and *Jonathan Tucker*, who first executed the bond set forth on *oyer*, is also named as one of the other parties. The arbitrators are the same, and their signatures are arranged to the award, as they are in the submission. They award damages to *Reuben Gordon* ; and his

claim for damages was the subject matter submitted to their determination, by the agreement of the parties before us. So many marks of identity might have been satisfactory, even if there had been recited in the award circumstances of a more prominent character, inconsistent therewith. Effect is given to deeds, although the premises conveyed cannot be located in accordance with every particular in the description. *Worthington v. Hylyer*, 4 *Mass.* 196. But the description of the parties in the award may, for any thing which there appears, be exactly coincident with the parties named in the bond. *Jonathan Tucker* and others, particularly named in the bond, are the parties of whom damages are demanded. In the award, the parties against whom damages are awarded, are described as *Jonathan Tucker* and other proprietors of the *Union*-falls mills. Now it is no where averred in the pleadings, nor does it otherwise appear, that the defendants are not the proprietors of those mills. Whatever is deducible from the case before us, would rather establish, than disprove that fact. The arbitrators were evidently of that opinion. In the condition of the bond, the damage is stated to have been occasioned "by the erection and continuance of the dam across *Saco* river at *Union* falls." It would certainly not be unreasonable to presume that the dam at *Union* falls was erected and continued by the proprietors of *Union* falls mills. It not appearing that there was any other submission, to which the award could apply; we are satisfied that it must be regarded as having been made between the parties to the bond of arbitration now in suit.

It is objected that the award is not made, "of and upon the premises." It is urged that the award is to be taken as an instrument by itself; that it does not refer to the bond, and that it cannot be connected therewith by parol testimony. How far parol testimony, for this purpose, might be introduced in a case like this, it is not necessary to determine, as we entertain no doubt that, by fair implication, the award does in its terms refer to the bond, and follows the submission therein made. It is impossible to read them both without perceiving, to every reasonable intent, their connection and identity. This point being established, the award is to receive the same construction, as if made upon the bond. The arbitrators say that, after

having duly notified the parties, they viewed the premises agreeably to their appointment. What were the premises? The dam, and the land of the plaintiff, alleged to have been injured thereby. After having examined the premises, they proceed to state that, having heard the parties, their several pleas, proofs and allegations, and maturely considered the same, they award a certain sum in damages to the plaintiff. It appears that the subject submitted was distinctly considered, and adjudicated upon by the arbitrators. This objection therefore cannot prevail. Nor is there any uncertainty in the award when connected with the bond.

The award, it is insisted, is void, for want of mutuality. So far as the damages awarded apply to the injury sustained, prior to the date of the bond, the defendants have already enjoyed an equivalent; and so far as they are prospective, payment would doubtless be a protection against any future claim. If the plaintiff should prefer a complaint against the defendants for flowing, under the statute, these proceedings, being pleaded and verified, would constitute a sufficient bar to such complaint. Here then is mutuality; and if the defendants are not so perfectly protected, as they would have been by a deed executed by the plaintiff acknowledged and recorded, assuring to the defendants a right to flow the plaintiff's land; it may be said that the defendants did not, in the condition of the bond, stipulate for such an assurance; nor is it made the duty of the arbitrators to award it. As the award stands, they are protected from all claim on the part of the plaintiff, and it was his damage which the arbitrators were appointed to estimate; and this, when ascertained, the defendants have stipulated to pay. How far they might be held answerable to the grantee of the plaintiff, with or without notice, for damages arising from the flowing, subsequent to the assignment of the land flowed, or whether the grantee, having purchased land covered with water, by the consent and agreement of the grantor, could pursue any remedy against the defendants, by whose dam the flowing of such land was rightfully and lawfully occasioned, at the time of his purchase, we do not deem it necessary to determine. The case of *Jones v. the Boston Mill Corporation*, 6 *Pick.* 148, is an authority to show that the plaintiff would be precluded by the award, from demanding further

damage. And the court in that case go the length to determine, that an award of arbitrators may affect and determine the title to real estate, without the execution of releases. If so, the defendants would be protected against the assignees or grantees of the plaintiff. But be that as it may, we are of opinion that protection against the plaintiff, is mutuality enough to sustain the award.

The award adjudicates upon, and puts at rest the controversy, between these parties. It liquidates the damage sustained by the injury complained of; and this absolutely, without any condition or contingency. Upon payment of the sum awarded, all claim on the part of the plaintiff is satisfied and extinguished. The award is therefore final, upon the subject matter submitted.

The law, as it was formerly understood on the subject of awards, was exceedingly narrow and illiberal. They were considered as instruments, not within the range of the sound rules of construction and interpretation, which were applied to deeds and wills; and they were often defeated upon objections, which could not now be seriously urged. But courts, at the present day, look at the intent of the parties and of the arbitrators, as it may be collected from the express terms and just implication of the instruments, in which the submission and award are set forth; and objections which are merely formal, and which do not go to the merits, are regarded with little favor.

One objection is urged by the defendants, which, upon consideration, we are satisfied is justly taken. No authority is given by the submission to the arbitrators to award costs. No power to this effect is vested in them by the common law, as incident to their appointment and office; nor is it given by any statute. The parties are at liberty, by their submission, to give this power to the arbitrators; and where they do so, they are bound by their determination upon this point. It may be often equitable that the adjudication should be obtained, at the joint expense of the parties. The party upon whom a debt or duty has devolved, may be willing and anxious to discharge it, but there may be an uncertainty as to the extent of his liability. There has been no direct decision upon this point in Massachusetts, or in this State. In *Peters v. Pierce*, 9 *Mass.* 398, *Sedgwick J.* expresses a strong opinion, that arbitrators have

no authority to award costs; unless it is expressly given in the submission. In *Dolbier v. Wing*, 3 *Greenl.* 421, it is merely stated by the Chief Justice, that the law seems unsettled upon this point; but no opinion whatever is given.

The case of *Strong v. Ferguson* 14 *Johns.* 161, has been cited. It was an action of debt on an arbitration bond, where a power to award costs was not included in the submission. The arbitrators had awarded, in favor of the prevailing party, the costs of arbitration. To their award upon this point, the defendant objected. But the court allowed these costs, upon the authority of *Kyd* on awards, and of *Doe ex dem. Wood v. Roe*, 2 *D. & E.* 644. In the latter case, which was a submission to arbitration under a rule of court, an objection was taken to the award of costs, but it was not sustained; the court stating that the power of awarding costs was necessarily consequent on the authority, conferred on the arbitrator, of determining the cause. And this is a general principle, which *Kyd* in his text deduces from this case, as applicable to all cases of arbitration. The case itself was a reference under a rule at *nisi prius*; and it is not distinctly stated whether the costs objected to were the costs of arbitration, or of the action. In the appendix, however, to *Kyd's* second edition, he states that after the greater part of that edition had gone to press, he had seen a manuscript report of the case of *Candler v. Fuller* in the common pleas, in the time of Lord *C. J. Willes*, in which it was decided that in the case of a submission by bond, the arbitrators cannot award the costs of reference, unless power be expressly given to them for that purpose; and he admits, if this is law, his doctrine in his text must be considered erroneous. He further states that he has found no case, where costs have been allowed, where the submission was by bond.

Bradley v. Tunstow, 1 *Bos. & Pul.* 34, was a reference at *nisi prius;* but the court refused to allow the costs of reference, *Eyre*, Chief Justice, saying that the reference having been made for the convenience of both parties, both ought to sustain the expense; unless it was otherwise provided in the rule. The prothonotary in that case, being directed to make inquiry as to the practice in the King's bench, reported that he had been informed by the master,

that although the question had not been directly raised to his knowledge, it was generally understood that an arbitrator had no power to give the costs of the award; unless under a provision inserted in the order of *nisi prius*.

If the award is bad as it respects the costs, the counsel for the defendants insists that it is bad for the whole. It is laid down that if by the nullity of any part, one of the parties cannot have the advantage intended as a consideration therefor, the award is bad in the whole. *Pope v. Brett*, 2 *Saund.* 293. *note* 1. But if an award is bad as to part only of what is ordered to be done by one of the parties, but good as to the rest, it is not competent for him who is ordered to perform it to object to the whole. In *Addison v. Gray*, 2 *Wils.* 293, there was, upon a submission under bonds of arbitration, awarded to the plaintiff a sum of money, and also certain costs. The award was holden bad for the costs, but good for the residue; and the plaintiff had judgment. There is then a good breach assigned in the replication, in the non payment of the damages awarded; and the plaintiff's right of action is unaffected by the award of costs, which is unauthorized. It would seem therefore that upon the whole record, the plaintiff is entitled to judgment. But doubts being entertained whether, according to some of the older authorities, the replication is not vitiated by the assignment of the non-payment of costs as part of the breach, the plaintiff has leave to amend his replication, by striking out this part of the breach. This being done, the replication to the first, and also to the second, plea in bar are to be adjudged good.

WEBSTER *vs.* MADDOX.

M. granted his farm in fee to B. and at the same time took back a conveyance to himself and his two minor sons. The former deed was registered; the latter not; and M. remained in possession as before. It was *held* that this possession was sufficient notice of the conveyance to M. without registry; and that therefore a creditor of B. who extended his execution on the land, without other notice, took nothing by the extent.

THIS was a writ of entry, on the demandant's own seisin. In a case reported by the Chief Justice, before whom it was opened, it appeared, by the showing of the demandant, that the tenant, being seised of the demanded premises, conveyed the same to one *Bean* by his deed dated *Feb.* 22, 1822, and recorded *March* 8, 1823; and that the demandant caused the premises to be attached as the property of *Bean*, *March* 27, 1826; and subsequently, after judgment, caused them to be regularly set off to himself by extent.

It further appeared, by the showing of the tenant, that *Bean*, on the 3d day of *March* 1823, conveyed the same premises by deed to the tenant and his two sons *John* and *Jesse Maddox*; on which day both the deeds were actually delivered; but the deed from *Bean* to the tenant and his sons was not recorded till *April* 19, 1826, after the attachment. The tenant when he conveyed to *Bean*, was living on the premises, his two sons being minors, unmarried, and residing in his family. No change of possession or appearance took place till after all these events; and no consideration in money passed between the parties to the deeds; but they adopted this course for the conveyance of the father's property to his sons.

Upon proof being made of these facts, the parties submitted two questions to the decision of the court:—1st, whether the instantaneous seisin of *Bean* was sufficient to support the demandant's extent on the land as the estate of *Bean*, he being then, and long before, an insolvent debtor to the demandant:—And 2d; whether there was such a possession under the deed from *Bean*, to the tenant and his sons, as in legal contemplation was equivalent to the reg-

istry of the deed. And they agreed that judgment should be entered upon nonsuit or default according to such decision.

Goodwin, for the demandant, contended—1st, that the parol evidence of the intention and object of the parties to the deeds ought to be rejected and laid out of the question; as the construction of the deeds is a matter independent of the parol agreement, and ought not to be affected by it, there being no ambiguity. *Tuckerman & al. v. Newhall*, 17 *Mass.* 581; *Flint v. Sheldon*, 13 *Mass.* 443; *Holbrook v. Finney*, 4 *Mass.* 566; *Wade v. Howard & al.* 6 *Pick.* 492; *King v. King*, 7. *Mass.* 496; *Kimball v. Morrell*, 4 *Greenl.* 368; *Emery v. Chase*, 5 *Greenl.* 232.

2. That the seisin of *Bean*, upon the facts reported, was not instantaneous, as it respects purchasers and his attaching creditors; but was a continued legal seisin; and that the two deeds, though executed and delivered at the same time, could not be considered as one act or conveyance, against such purchasers and attaching creditors, without notice, unless both deeds had been recorded. He is rather to be considered as a trustee in possession, his deed on record being the most unequivocal evidence of that fact; and a bargain and sale by such person to a purchaser without notice, is held to pass the estate. 3 *Bl. Com.* 337; 3 *Mass.* 577. This case is distinguishable from *Holbrook v. Finney*, 4 *Mass.* 566; *Clark v. Monroe*, 14 *Mass.* 351; and *Chickering v. Lovejoy*, 13. *Mass.* 51. Two deeds, to be considered in law as one conveyance, must not only be executed and delivered, but must also be recorded at the same time. *Dudley v. Sumner*, 5 *Mass.* 538; *Erskine v. Townsend*, 2 *Mass.* 493; *Kelleran v. Brown*, 4 *Mass.* 443; *Porter v. Millet*, 9 *Mass.* 101; *Newhall v. Pierce*, 5 *Pick.* 450.

3. That the possession of *Maddox* and his two sons was not, in legal contemplation, equivalent to the registry of the deed to them. It is not for the demandant to prove that he had not notice of their deed; but for the tenant to prove that he had; and the law does not infer notice from facts which only make it probable that the tenant claims by deed. The facts should be such as make the inference of title necessary and unavoidable. *McMechan v. Griffin* 3 *Pick.* 149. Suspicion of notice, though strong, is not sufficient. 2 *Atk.* 275;

Jolland v. Stainbridge, 3 *Ves.* 478; *Norcross v. Widgery* 2. *Mass.* 509. And if it were, yet from the time which had elapsed after the deed to *Maddox* and his two sons, without any registry of the same, a stranger might well presume that the deed was not *bona fide*, or that it had been cancelled, or that the estate had been reconveyed. *Farnsworth v. Childs*, 4 *Mass.* 637; *Priest v. Rice*, 1 *Pick.* 164. But the material fact under this point is, that *Maddox* and his sons did not enter into the premises under their deed; nor did they, by force and virtue of that deed, take the visible occupation of the same. 3 *Mass.* 578; 2 *Bl. Com.* 314; *Marshall v. Fisk* 6 *Mass.* 24; *Davis v. Blunt*, *ib.* 487; *Prescott v. Heard*, 10 *Mass.* 60; *Commonwealth v. Dudley ib.* 403; *Brown v. Maine Bank*, 11 *Mass.* 153.

E. Shepley, for the tenant.

The opinion of the Court was delivered in *August* following, at an adjournment of the *May* term, in *Cumberland*, by

Mellen C. J. On the 22d of *February* 1822, the tenant was the undisputed owner of the premises; and on that day made and executed a deed of the same to *Bean*; but it was not delivered to *Bean* till *March* 3, 1823, and was recorded *March* 8, 1823. The deed from *Bean* to the tenant and his two sons was delivered at the same time when the deed to *Bean* was; but it was not registered till *April* 19, 1826. *Webster's* attachment was prior to this registry, viz. *March* 27, 1823, and the execution issued on the judgment was duly extended within thirty days after judgment, and seasonably recorded. *Bean*, it is admitted, had only an instantaneous seisin as between the parties; but as his deed to the tenant and his sons was not on record, it is contended that as to the demandant, a creditor, the seisin continued till after the attachment. Is this true? *Bean* was never in possession of the premises; but *Maddox* and his sons were; at least, the tenant was, even if the sons were resident on the premises merely as a part of his family. Such was the state of the possession, when both deeds were delivered and took effect. Now, it is a well settled principle of law, requiring at this day the citation of no

authorities to support it, that the open and peaceable possession of real estate by the grantee under his deed, perfects and secures his title as effectually as the registry of his title deed. It is contended, however, that the tenant should have entered and taken possession under his deed; but this vain ceremony surely was not necessary to give notice to any one; for at the time the deed was delivered to him, he was already in possession. The tenant's title, then instantly became perfected; the title was gone from *Bean*, and vested in the tenant. On this principle the defence is maintained, and the action fails. In this view of the cause it is not necessary to notice the arguments of counsel in relation to other points. A nonsuit must be entered pursuant to the agreement of the parties.

CLARK *vs.* WENTWORTH.

A wife cannot be assignee of a mortgage made by the husband; but the debt is, by such assignment, extinguished.—*Semble.*

THIS was a writ of entry on the demandant's own seisin; and was submitted to the court upon the following facts developed at the trial before the Chief Justice.

Richard Wentworth, late husband of the tenant, but now deceased, being seised of a parcel of land, including the demanded premises, mortgaged the same in 1812, to one *Norton* in fee. In 1815 *Norton* released and conveyed to the tenant all his right in the land as mortgagee; and at the same time the husband conveyed, by metes and bounds, about two thirds of the same tract to one *Goodwin*; his wife, by the same deed, releasing her right of dower therein. The consideration of *Norton's* release to the tenant was her release of dower to *Goodwin*, and the money paid by *Goodwin* for the land; all which was received by *Norton* in payment of the debt secured to him by the mortgage.

In 1821 the demandant, being a judgment creditor of the hus-

band, for a debt contracted prior to 1810, extended his execution on the residue of the premises released to the tenant, and not conveyed to *Goodwin*; the premises being appraised without any regard to the supposed incumbrance of the mortgage.

The release or assignment from *Norton* to the wife was made with the consent of the husband, to place the property beyond the reach of his creditors, he being insolvent.

E. Shepley and *Burleigh*, for the demandant, cited *Bolton v. Ballard*, 13 *Mass.* 226; *Wade v. Howard*, 6 *Pick.* 492; 2 *Com. Dig.* 200; *How v. Ward*, 4 *Greenl.* 495.

D. Goodenow, for the tenant, supported her title on the ground that she was in the situation of a prior creditor, having an inchoate claim of dower, which is always to be favored, and which it was the object of the parties, by the conveyance, to secure and preserve.

Weston J. delivered the opinion of the Court.

Whether the wife can be assignee of a mortgage, made by her husband, in a manner which would secure the estate to her is very questionable. If the debt is paid before condition broken, the interest of the mortgagee, and of those claiming under him, ceases both at law and in equity. And if paid after condition broken, the mortgagee can maintain no action to obtain possession of the land. From the nature of the relation between husband and wife, he cannot be her debtor. It would seem then to result, that a demand against him assigned to her, is thereby extinguished. At any rate, his rights cannot be impaired or prejudiced, by such assignment. He may relieve his estate from incumbrance, by paying the amount for which it may have been mortgaged. If the mortgage is assigned to the wife, to whom shall a tender be made, and against whom may a bill in equity be brought? It is unnecessary however to consider the legal effect of an assignment to the wife, as the deed to the tenant is very clearly fraudulent and void, as against the demandant, a prior creditor; being made to defeat creditors, with the knowledge and consent of all the parties thereto.

But although, the tenant has no title to the land, the demandant

must prove the seisin, upon which he has counted. It does not appear that the mortgagee ever entered for condition broken. As against all other persons, *Wentworth*, the mortgagor, and those claiming under him, are the owners of the land, and have a seisin therein; which they may convey; or upon which they may maintain a writ of entry, against a stranger. *Willington v. Gale.* 7 *Mass.* 138; *Porter v. Millet,* 9 *Mass.* 101. The demandant, having recovered a judgment against *Wentworth*, the mortgagor, extended his execution on the land as his property, without regarding the incumbrance. By this extent, the seisin and title of *Wentworth* was, by operation of law, transferred to the demandant. This is sufficient to enable him to maintain the action against the tenant, who has made no valid title under the mortgagee, if the mortgage has not been extinguished. But the case finds that the mortgage has been fully paid and satisfied, by the funds of the mortgagor. We are all of opinion that the demandant is entitled to recover.

Tenant defaulted.

Ridlon *vs.* Emery.

The *Stat.* 1829, *ch.* 443, giving to justices of the peace jurisdiction of actions of replevin of goods not exceeding the value of twenty dollars, does not, by implication, take away any jurisdiction previously existing in the court of Common Pleas.

But should replevin now be brought originally in the court of Common Pleas, for goods of less value than twenty dollars, *it seems* the plaintiff can recover no more than a quarter of the value in costs, by a fair construction of *Stat.* 1822, *ch.* 186, *sec.* 2.

This case, which was briefly spoken to by *J. Shepley* for the plaintiff, and *Elden* for the defendant, is fully stated in the following opinion of the Court, which was delivered at the ensuing term in *Cumberland*, by

Mellen C. J. This is an action of replevin for a cow, alleged to be of the value of twenty-five dollars. The defendant pleads to

the jurisdiction of the court, traversing the value of the cow as alleged, and averring that her value was less than twenty dollars, and that the action should have been commenced before a justice of the peace. The replication does not traverse or confess and avoid the facts averred in the plea: but merely states the substance of the writ and the commencement and entry of the action. This replication cannot be maintained. The question is whether the plea is good. The plaintiff relies upon its alleged insufficiency. In the case of *Small v. Swan*, 1 *Greenl.* 133, we particularly examined the statutes of Massachusetts of 1783, 1797 and 1807 as to the jurisdiction of justices of the peace in actions of replevin, and then decided that those statutes gave them no such jurisdiction. The act of 1789 respecting actions of replevin, which has been re-enacted in this State, gives jurisdiction to a justice only in those cases where the action was brought to replevy cattle distrained or impounded for doing damage. In all other cases the action is required by our revised act of 1821, to be commenced before the court of Common Pleas. By our statute of 1822, *ch.* 193, original and exclusive jurisdiction was given to the court of Common Pleas of all civil actions, excepting such actions wherein the Supreme Judicial Court or justices of the peace now have original jurisdiction; but, as at that time justices of the peace had no jurisdiction of actions of replevin, such actions of course, do not fall within the exception. Thus we see that the court of Common Pleas, by the act last named, held jurisdiction of actions of replevin, and by the same section a concurrent and original jurisdiction in such actions is also given to this court. So the law remained until the act of 1829, *ch.* 443, was passed. This act declares "that each and every justice of the peace in his county is hereby authorised and empowered to hear, try and determine any action of replevin, for the replevying any goods and chattels, not exceeding the value of twenty dollars, and the same forms of writs, bonds and executions shall be used, as are used in actions of replevin in the courts of Common Pleas *mutatis mutandis*." By this act a justice has only a concurrent jurisdiction, where the value does not exceed twenty dollars; but not exclusive. It does not take from the court of Common Pleas any of the powers

given to it by the act of 1822 before mentioned. In the present case, therefore, the plaintiff had his election to commence the action before a justice of the peace or at the court of Common Pleas, though the value was less than twenty dollars, as the defendant contends. This review of the several statutes shews that the plea is insufficient to bar the action. The plaintiff alleges the cow to have been worth more than twenty dollars; but should a person elect to commence an action of replevin in the court of Common Pleas, where the property replevied is of less value, it is probable he would make the election at the peril of a proportion of his costs, within the fair construction of the second section of the act of 1822, *ch.* 186. *Plea adjudged insufficient.*

Judgment that defendant answer over at the bar of this Court.

SAYWARD *vs.* DREW & *trustee.*

Where a son gave bond to his father for the payment of certain sums of money, and the delivery of certain quantities of provisions, at fixed times in each year during his father's life; it was *held* that he could not be charged as trustee of the father for any thing not then actually payable; all future payments being contingent, depending on the life of the obligee.

THE trustee in this case set forth, in his disclosure, a bond given by him, to the defendant, who was his father, conditioned for the payment of money and provisions at stated times, in each year, for his support during life; and declared that at the time of the service of the writ, he had paid all which was then due.

The opinion of the Court upon the question of his liability, was delivered at the ensuing term in *Cumberland*, by

MELLEN C. J. By the disclosure it appears that the bond therein set forth was given for the support of the alleged trustee's father during his natural life; and that the articles therein mentioned were, by the terms of the bond, to be delivered, and the several sums of money therein expressed, were to be paid to the father, at certain specified

times or periods in each year; and that at the time of the service of the writ, nothing was due to the father; all having been paid that had become due. Whether any further sum of money, or any of the enumerated articles, would ever become due, was wholly contingent; depending on the continuance of the father's life. A contingent debt is not attachable by this process. *Frothingham & al. v. Haley & al. & trustees*, 3 *Mass.* 68; *Davis v. Ham, ib.* 33; *Willard v. Sheaf & trustee*, 4. *Mass.* 235; *Wood v. Patridge*, 11 *Mass.* 488. In this last case it was settled that a covenant to pay rent creates no debt or legal demand for the rent which is liable to be attached by this process, until the time stipulated for payment arrives; for the debt is contingent, and may never become due. A debt must be payable absolutely; if it is, then it may be attached, though *solvendum in futuro*; otherwise not. *Trustee discharged.*

Fernald *vs.* Lewis *& al.*

The liability of seceding members of a parish to contribute to the payment of its then existing debts, is created for the benefit of the parish alone.

The remedy for satisfaction of a judgment against a parish, by levy on the property of its members, is to be pursued against those only who were members at the time of the rendition of judgment, or, at farthest, at the time of commencement of the action.

If all the members of a parish withdraw, and thus dissolve the corporation:—*quære* whether its creditors may not have a remedy by action of the case, or by bill in Chancery, against those individuals on whom the liability would have remained had the corporation continued to exist.

Whether a seceding member of a parish, who does not join any other society, is liable, by a fair construction of *Stat.* 1821, *ch.* 135, *sec.* 8, for any other and greater portion of the then existing debts of the parish, than one who does;—*dubitatur*.

The membership of a parishioner ceases, *ipso facto*, upon his filing a certificate pursuant to *Stat.* 1821, *ch.* 135, *sec.* 8.

In trespass for taking a yoke of the plaintiff's steers, the defendants justified under an execution in favor of *Lewis* against the inhab-

itants of the second parish in *Kittery*; alleging the liability of the plaintiff's property to be taken in satisfaction of the judgment.

At the trial in the court below, it appeared that the claim of *Lewis* against the parish was for certain repairs done on their meeting-house, from *Sept.* 30, 1823, to *Aug.* 31, 1826, which was liquidated by an order drawn *March* 12, 1827, by the parish committee on the treasurer. A suit having been commenced on this order, judgment was rendered in favor of *Lewis* at *October* term 1828; on which execution was duly issued; by virtue of which the officer, who is the other defendant in this action, seized and sold the cattle in question, in due form of law.

It further appeared that the plaintiff, who was previously a member of the parish, on the 7th day of *Dec.* 1826, filed a certificate with the parish clerk, according to the statute, stating that he did not consider himself any longer a member, nor liable to pay any charges arising in the parish after that time; which certificate was duly recorded. And it also appeared that at the date of the certificate the plaintiff had been taxed for all monies previously voted by the parish, which taxes he had paid, excepting a tax of three hundred dollars assessed on the pews in the meeting-house.

Upon this evidence *Whitman C. J.* instructed the jury that the plaintiff was entitled to recover; for that although he might be liable to be assessed for the payment of debts due from the parish before he ceased to be a member, yet his property was not liable, after his membership ceased, to be taken in execution by a creditor of the parish. And they found for the plaintiff. To which the defendants excepted, according to the statute.

Hayes and *E. Shepley*, in support of the exceptions, took a distinction between the two classes of persons mentioned in *Stat.* 1821, *ch.* 135, *sec.* 8, seceding from the parish to which they belonged, viz.—those who joined another parish, and those who did not. The former are made liable only for the taxes actually assessed before they left the parish; probably because they assumed new burdens by uniting with another. And so is the law of Massachusetts. *Whittemore v. Smith*, 17 *Mass.* 347. But the *proviso* respecting the latter class of persons is peculiar to this State, and goes in effect to

render them liable for all the past expenses of the parish; as the condition of their liberty to withdraw. This construction gives effect to all parts of the section; and secures the rights of creditors, which otherwise might be destroyed by the secession of all the members of a parish, and its consequent dissolution. Upon this principle the plaintiff remained a member of the parish so far as respected his liability as such to prior creditors, whose rights ought not to be impaired by his act, without their consent.

D. Goodenow and *Burleigh*, for the plaintiff, cited *Windham v. Portland*, 4 *Mass.* 386; *Richards v. Daggett*, *ib.* 534; *Bond v. Appleton*, 8 *Mass.* 472; 1 *Bl. Com.* 484; *Vose v. Grant*, 15 *Mass.* 505; *Child v. Coffin*, 17 *Mass.* 64.

Weston J. delivered the opinion of the Court at the adjournment of *May* term in *Cumberland*, in *August* following.

The defendants justify, in virtue of a judgment and execution thereon, recovered by *Lewis*, against the inhabitants of the second parish in *Kittery*. The justification must prevail, if, at the time of the rendition of judgment, the plaintiff was an inhabitant of that parish. The judgment was recovered in *October*, 1828. On the 7th of *December* 1826, the plaintiff filed with the clerk of the parish a certificate, stating that he did not consider himself a member of the parish; nor liable to pay any charges arising therein, after that date. Did he thereupon cease to be a member of the parish? We are of opinion that he did.

By the act concerning parishes, revised statutes, *ch.* 135, *sec.* 8, it is plainly indicated as the design and policy of the legislature, that the continuance of a member with the parish or society to which he belongs, or has attached himself, shall be purely voluntary. And when any member shall choose to withdraw himself from such society or parish, the mode of doing so is pointed out. It is not directly stated that he shall no longer be regarded as a member; but this is plainly implied by his withdrawing himself, which is provided for and sanctioned by the statute. Thereupon he is to be no longer liable for future expenses.

It has been urged, and we think justly, that it is implied that he

shall be liable for expenses, which had been incurred prior to his departure. The former part of the section made provision for the case of a member, who had been accepted as such by another society, and given notice thereof to the clerk of the society, he was about to leave. He is however held liable to be taxed for all monies raised by such society, before he ceases to be a member thereof. Whether this provision is to be limited to money duly voted by such society, or whether it may not be regarded as constructively including expenses lawfully incurred by the prudential officers of such society, it is not necessary now to determine. If it is to be restrained to monies voted, the departing members, who join another society, are more favored than those who do not. There does not seem to be any just ground for this difference. The mode in which the liability is to be enforced in the former part of the section is by taxation; no mode is pointed out, in regard to the implied liability in the latter part.

It has been insisted, that those who have claims upon the society for expenses incurred prior to the departure of a member, and the case before us is of that description, may hold his person and estate still liable to their judgment and execution. But we are not satisfied that the liability implied, after the member has withdrawn himself, can be enforced by this extraordinary remedy. It assumes that his membership, for this purpose, continues; but we do not feel warranted in making this deduction, from the language of the act. The provision was introduced for the benefit of the society from which the member seceded, that their burthens might not be increased, in regard to expenses before incurred. They have without doubt a remedy upon him, either by taxation or by a special action.

But it is inquired, what if all the members withdraw, or all who are responsible, shall the claims of creditors be thus defeated? To this it may be replied, that if the corporation is dissolved, it cannot be charged as a corporation. And if members have seceded, in pursuance of their statute privilege, they are no longer liable as such. Whether a remedy in such cases might not be afforded by an action on the case, or, upon contracts in writing, by a bill in chancery

against those upon whom a liability may still remain, although not as corporators, we are not called upon in this action to decide.

At common law, corporators are not answerable, in their persons or their private property, for the debts or liabilities of the corporation. But by the usage and practice, for it does not seem to have any other foundation, of Massachusetts and Maine, the case of towns and parishes forms an exception to this principle. But the liability is confined to inhabitants. The person and property of a citizen, who removes out of one town and becomes domiciled in another, is no longer subject to be taken upon an execution, in a suit subsequently instituted against the town from which he removed; although it might have issued upon a judgment for a debt which accrued prior to his removal. We do not feel at liberty to extend this peculiar remedy by construction; but hold its operation limited to those, who were members or inhabitants at the time of the rendition of judgment; or at most at the time of the commencement of the action.

Exceptions overruled.

BUTLER *vs.* RICKER *ad'x.*

Statutes of a penal character should, if possible, be so construed as to leave the citizen free from penalties and from danger, without appealing to the discretion of any one.

The account which an administrator is required by *Stat.* 1821, *ch.* 51, *sec.* 28, to render within six months after the report of the commissioners of insolvency, at the peril of being liable to the creditors of the deceased for their whole demands, is an account of the personal estate only.

THIS was an action of *assumpsit*, brought to recover the amount of two promissory notes made by the defendant's intestate, and payable to the plaintiff.

In a case stated by the parties, it appeared that the intestate died in *July* 1827; that the defendant was afterwards appointed administratrix, and on the sixth day of *November* 1827, duly returned an inventory of the estate, and on the same day represented it insolvent,

and procured the appointment of commissioners to receive and examine the claims of creditors;—that the commissioners, at the expiration of the time allowed by the judge of Probate for creditors to bring in their claims, which was *Dec.* 2, 1828, made their report, in which the plaintiff's notes were included;—that on the same day the defendant exhibited and settled with the Judge of Probate her administration account of all the personal estate; and in *January* 1829, obtained license to sell the real estate of the deceased.

More than six months having elapsed after the commissioners had made their report, without the settlement of any final account by the defendant, the plaintiff, in *October* 1829, commenced this action for the recovery of his whole debt. On the sixth day of *November* following, the judge of Probate allowed the defendant a further time of three months to settle her final account; which she rendered and settled *Dec.* 7, 1829; on which day the judge decreed that the estate was insolvent, and that distribution thereof *pro rata* be made among the creditors, including the plaintiff; whose distributive share was afterwards tendered, with costs up to the time of tender, and refused.

Upon these facts the case was submitted to the judgment of the Court.

N. Emery, for the plaintiff, relied on the *Stat.* 1821, *ch.* 51, *sec.* 28, which requires administrators to settle their account of administration within six months after report made by the commissioners of insolvency, upon peril of liability to creditors in the same manner as if the estate had not been represented insolvent. And he contended that the account there mentioned was a final account of the whole estate, upon which the judge might decree a distribution among the creditors. *Pierce v. Whittemore*, 8 *Mass.* 282; *Ring v. Burton*, 5 *Greenl.* 45.

J. Shepley and *Burleigh*, for the defendant, cited *Nelson v. Jaques*, 1 *Greenl.* 139; *White v. Swaine*, 3 *Pick.* 365; *Ex parte Allen*, 15 *Mass.* 58; *Paine v. Fox*, 16 *Mass.* 129; *Wildrage v. Patterson*, 15 *Mass.* 148; *Walker v. Lyman*, 6 *Pick.* 458; *Foster v. Abbot*, 1 *Mass.* 324; *Hunt v. Whitney*, 4 *Mass.* 620; *Col-*

man v. Hall, 12 *Mass.* 570; *Shillaber v. Wyman*, 15 *Mass.* 322; *Pierce v. Whittemore*, 8 *Mass.* 282.

WESTON J. delivered the opinion of the Court at an adjournment of the ensuing *May* term in *Cumberland.*

This action is attempted to be sustained, upon the twenty-eighth section of the act to regulate the jurisdiction and proceedings of the courts of Probate; the defendant not having settled her final account of administration, within six months after the report of the commissioners of insolvency, upon the estate of the intestate, had been made to the judge. The section before stated, is transcribed in the revised laws of this State, with very little alteration, from the statute of Massachusetts of 1794, *ch.* 5. It may aid in the just interpretation of the revised statute, to ascertain what the effect of the statute of Massachusetts was, at the time of its enactment; from which the original intention of the legislature may be the better deduced. The statute of Massachusetts of 1783, *ch.* 36, respecting intestate estates, *sec.* 8, required an administrator to give bond with sureties, in the form therein prescribed; conditioned among other things to render an account of administration, within one year. The condition of the bond was limited to personal estate; and accordingly it has been decided, that it did not impose upon the administrator the obligation to return an inventory of the real estate of his intestate, or to obtain license for the sale of the same, if wanted for the payment of the just debts of the deceased. *Henshaw v. Blood*, 1 *Mass.* 35; *Freeman v. Anderson*, 11 *Mass.* 190.

An administrator, as such, has nothing to do with the real estate; except when there is a deficiency of personal assets. The administration account then, properly so called, could relate only to the personal estate. It was not until the act of *Massachusetts* of 1817, *ch.* 190, relating to Probate Courts, that a new form of bonds of administration was prescribed, requiring administrators to inventory real estate; which is the form also prescribed in our revised statute. But the account of administration, which they are required to render within a year after it is granted, as the law now stands both in Massachusetts and Maine, is of the goods and chattels, rights and

credits of the deceased, at the time of his death. Neglecting to do this within six months after the report of the commissioners of insolvency, the administrator is made liable to the creditors of the deceased, for their whole demands.

That the account, required to be settled within the period of six months after such report, is of the personal estate, is further apparent, from the provision in the same section, that if, in consequence of such neglect, the real estate of the deceased is levied upon and taken in execution, it shall be deemed waste in the administrator. This assumes that the real estate has not been sold under license. Another reason is, that until the administration account, that is of the personal estate, is settled, it cannot be known whether any, or if any how much of the real estate may be wanted for the payment of debts. It may be urged, that this may be known by comparing the amount of claims allowed by the commissioners, with the inventory of the goods and chattels, rights and credits of the deceased. But there are still to be ascertained debts due for taxes, to the State, and for the last sickness, and necessary funeral expenses of the deceased, and the charges of administration. The allowance to the widow, or, if there is no widow, to the minor children, is to be taken into the account. So if the personal property is sold, which the administrator may obtain license to do, at the discretion of the judge, the administrator is to account for the proceeds of the sales. Further, it requires time, according as the business of the deceased was more or less extended, to ascertain how far his rights and credits may be available; and to demand and receive payment, by suit or otherwise. All these are proper items in the account of administration, upon the settlement of which further proceedings may be had, if necessary, for the sale of the real estate. The settlement required by the statute upon which we have been commenting, cannot be such as finally discharges the administrator from his trust and duty. It is merely to determine the amount of assets in his hands, subject to the claims of creditors. He has still duties to perform; for which he may be holden to account. The assets, thus ascertained, after the sale of the real estate if there be any, are to be

held by the administrator, subject to the decree of distribution among the creditors, in cases of absolute insolvency.

The time allowed to the administrator, for the settlement of his administration account of the goods and chattels, rights and credits of the deceased, from the time of his appointment, until six months after the report of the commissioners, may be sufficient for this purpose. If not, the judge may extend it. But it is not sufficient to obtain license, and to sell the real estate; and to collect and account for the proceeds. If the administrator petitions a court of common law for such license, which he may do, the kind of notice to all persons interested, which the law requires to be given by such court, renders a continuance of the petition to the succeeding term indispensable. The same notice is required to be given, upon a similar petition to the Court of Probate; and after that court shall have passed a decree, granting such license, an appeal lies therefrom to the Supreme Court. The efficacy of the license when granted, is by law extended to the term of one year. It can very rarely be possible, with the utmost diligence, to obtain the license, and to make sale of the real estate, within six months from the report of the commissioners. If the account therefore, required to be settled within six months, is to embrace his proceedings in relation to real estate, under peril of the very penal consequences, upon which the defendant is attempted to be charged in this action, he may be irretrievably ruined, when in no fault; and even while in the faithful, diligent, and meritorious discharge of his duty.

But, it may be said, he may escape this peril, by applying to the judge for an extension of the time, under his hand and seal. To this it may be replied, that a diligent and faithful administrator should be in no peril; and that the law, if possible, should be so construed, as to leave him free from penalties and from danger, without appealing for security to the discretion of any one. Immunity to those who are in no fault, should be a matter of right and not of intreaty.

The rights and duties of the administrator, in regard to real estate, did not originally appertain to his office; but are given and enjoined, to carry into effect the policy of our laws, subjecting the real estate of persons deceased to the payment of all their debts. For the fore-

going reasons, we are of opinion that the account required to be settled by the twenty eighth section of the act, upon which the plaintiff relies, is limited to the administration account of the personal estate. And whatever relates to the personal estate, the administrator must at his peril settle within the period limited, unless he obtain from the proper authority an extension of time. Thus provision is made to quicken his diligence, in the main branch of his duty. If it should be contended, that this construction will leave creditors without adequate remedies against the administrator, if he neglects his duty in relation to the real estate, it might be replied that this consequence could not change the construction. It would be for the legislature, and not the court, to provide a remedy. In *Wildrage v. Patterson*, 15 *Mass.* 148, *Parker C. J.* says there is no defect of remedy; for that on a representation of such neglect to the Judge of Probate, "he has the authority, and would be bound to execute it, to remove such administrator and appoint another, even one of the creditors, whose interest as well as duty it would be to do justice in this respect."

It remains to apply the construction we have given to the statute, to the case before us. The defendant settled her account of administration, charging herself with the whole personal estate, on the day when the report of the commissioners was made to the judge. There does not appear from the facts agreed, any failure of duty, or want of diligence on her part. According to the agreement of the parties, judgment is to be rendered for the defendant; and the opinion of the court is, that she is entitled to her costs.

Judgment for the defendant.

SMITH, *plf. in error*, *vs.* MOORE.

In a declaration upon *Stat.* 1821, *ch.* 51, *sec.* 11, to recover the penalty there enacted against an executor for neglecting to file and obtain probate of a will, it is necessary to allege, in the words of the statute, that the neglect was "without just excuse made and accepted by the Judge of Probate for such delay." And the want of this allegation is not cured by verdict.

But it is not necessary to aver that such omission was intentional.

Where, after verdict for the plaintiff, the question whether the action was maintainable, upon the facts proved at the trial and reported by the presiding judge, was reserved for the consideration of all the judges, and judgment was entered for the plaintiff according to their opinion; this was held to be no bar to a writ of error brought to reverse the judgment for a defect of substance in the declaration.

ERROR to reverse a judgment of this court rendered against the present plaintiff in error, in an action brought against him as executor of the last will and testament of *John Moore*, to recover the penalty provided by *Stat.* 1821, *ch.* 51, *sec.* 11, for neglecting to file the will within thirty days after the death of the testator, and obtain probate of the same. See this case in 5 *Greenl.* 490.

The principal errors assigned were, that in the declaration it was not alleged that the original defendant neglected to file the will "*without just excuse made and accepted by the Judge of Probate for such delay*"—nor that the omission was intentional.

D. Goodenow, for the plaintiff in error, to the first point cited *Little v. Thompson*, 2 *Greenl.* 228; *Spieres v. Parker* 1 *D. & E.* 141; 1 *Day* 186 *note*; *Doug.* 683; 1 *Salk.* 364; 2 *Salk.* 662; *Williams v. Hingham*, 4 *Pick.* 341. And to the second point, *Stebbins v. Lathrop*, 4 *Pick.* 33; *Sanford v. Emery*, 2 *Greenl.* 5; *Greenfield v. Cushman*, 16 *Mass.* 393.

J. & E. Shepley, for the defendant in error, said that no writ of error would lie in cases situated like this, it having been submitted to the decision of the court upon the evidence reported by the judge; the parties agreeing, as the report showed, that if the evidence offered by the defendant was admissible, and, in the opinion of the court,

constituted a good defence to the action, the verdict should be set aside, and the plaintiff become nonsuit; otherwise, that judgment should be rendered on the verdict, which was for the plaintiff, for such sum as the court thought proper. Such an agreement, certified by the judge as made in open court, has all the effect of a case stated by the parties, the judgment upon which is not reversible by writ of error. *Wellington v. Stratton*, 11 *Mass.* 395; *Gray v. Storer*, 10 *Mass.* 163; *Carroll v. Richardson*, 9 *Mass.* 329; *Alfred v. Saco*, 7 *Mass.* 380. It was a judgment rendered by consent; and if it does not so appear, it is the mistake of the clerk, which the court will cause to be corrected. *Ex parte Weston*, 11 *Mass.* 418.

The judge's report also shows that the plaintiff in error has had the benefit of proving, at the trial, all matters which he chose to offer in excuse; which goes to cure the omission complained of, within the principle of *Pangburn v. Ramsay*, 11 *Johns.* 141; *Dunning v. Owen*, 14 *Mass.* 157; *Keay v. Goodwin*, 16 *Mass.* 1.

As to the words omitted in the declaration, they constitute no part of the statute offence; but are merely a provision by which the offender may be excused for neglect of his duty. It is true that some authorities do state, in general terms, that the declaration should negative the exceptions in the enacting clause of the statute on which the action is founded; but all agree that even an exception needs not to be negatived, if found in a different section of the same statute. No good reason can easily be found for this distinction. But in other cases it has been held that this rule is by no means universal. *Lee v. Clark*, 2 *East* 333; *King v. Stephenson*, *ib.* 362; 1 *Chitty on Plead.* 357; 1 *Saund.* 309 *note* 5.

The omitted words, however, do not constitute an *exception*; which is a restriction of the right of action to a certain class of individuals; or the exemption of a particular class from the operation of the law. They merely form an *excuse* for every offender, upon certain conditions. And such matter of excuse, it is never necessary to negative in the declaration; it should be pleaded, or proved, by the defendant. 1 *Chitty on Plead.* 229, *Day's ed. note*; *Shelden*

v. Clark, 1 *Johns.* 513; *Bennett v. Hurd*, 3 *Johns.* 438; *Teal v. Fonda*, 4 *Johns.* 304; *Hart v. Cleis*, 8 *Johns.* 41.

The opinion of the Court was read in the ensuing term, as drawn up by

MELLEN C. J. The objection which has been urged against our sustaining the writ of error in this case, we do not consider as well founded. The judgment before us discloses none of those facts on which the counsel rests his argument. They do not appear on the record; and it is well known that neither a report of a judge, nor an exception alleged by a party according to our statute, constitutes any part of the record. But if the facts did appear on the record, it would not alter the case. The question reserved was whether the action was maintainable upon the facts reported; and the usual language of the report cannot fairly be construed as meaning any thing more. Whether all the facts necessary to the maintenance of the action were averred in the declaration, was no part of the case reserved; and the consideration of it was expressly excluded in giving our former opinion in this case. The case of *Knox v. Waldoborough*, 5 *Greenl.* 185, in some measure resembles this. In a former suit for the same cause of action, the parties agreed on a statement of facts, with the usual clause, that if the court should be of opinion that the action was not maintainable, the plaintiffs would become nonsuit; and in submission to their opinion, a nonsuit was entered; and the question was whether these proceedings in the first action amounted to a bar to the second. The court decided that they did not.

The 11th section of *ch.* 51 of the revised statutes, on which the original action is founded, so far as it relates to the errors assigned, is in these words;—"That whenever any executor or executors of the last will of any person deceased, knowing of their being so named and appointed, shall neglect to cause such will to be filed within thirty days next after the death of the testator, in the Probate office of the county where he last dwelt, and proved and recorded within such time as the Judge of Probate shall limit and appoint; or present the said will and in writing declare his, her or their refu-

sal, every executor so neglecting his or her trust and duty in that behalf, (without just excuse made and accepted by the Judge of Probate for such delay) shall forfeit" &c. The declaration contains an averment that the will was then in full force and unrevoked; that the defendant knew of his appointment as executor; and charges his neglect in the language of the act, omitting, however, the words contained in the above parenthesis.

Three questions are here presented. 1st Whether the defendant's neglect is sufficiently alleged. 2d, Whether the plaintiff was bound to aver that the defendant had no just excuse for his delay, which was made to and accepted by the Judge of Probate. 3d, Whether, if bound so to do, the omission and defect are cured by the verdict.

It is generally considered as a safe mode of declaring for a statute penalty, to declare in the words of the statute, as the plaintiff has done in the present case; without alleging any corrupt or illegal motive in express terms, where no particular motive is mentioned in the law. It is averred in the present case that the defendant knew he was appointed executor, and that the testator was dead. Now as every man is bound and presumed to know the law, we must consider him as knowing that he was under a legal obligation to present the will to the Judge of Probate within thirty days, and cause it to be proved and recorded, or in writing declare his refusal. His omission to comply with his duty in this respect was a voluntary and direct violation of law. The averment of neglect, as to this point, seems to be sufficient; for if a man knowingly violates a law, he must certainly be considered as doing it willingly and intentionally. The cases of *Greenfield v. Cushman*, and *Sanford v. Emery*, cited in the argument, differ from this. In neither of those was there any question of pleading, but merely as to sufficiency of proof; nor was there evidence in either of an intent to violate any law, or even do an improper act.

2. As to the want of an averment that the defendant's delay was without excuse, accepted by the Judge of Probate, there is some perplexity and contradiction in the books, respecting the principles to be applied in the decision of the question, in this and many other cases somewhat similar. There seems to be much curious learning

and many nice and rather shadowy distinctions, the sound reason and solid sense of which are not very easily discoverable; still, where they are firmly established, it is our duty to respect them in our decisions. The rule is laid down by *Chitty, vol.* 1, 229, in these words: "In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exception; but if there be an exception in a subsequent clause, that is matter of defence, and the other party must show it, to exempt himself from the penalty." The same principle is laid down in 5. *Bac. Abr. Statute L.* and in *Rex v. Pratten*, 6 *D. & E.* 559, and *Rex v. Jarvis*, 1 *East*, 646, *note.* So also in *Spieres v. Parker*, 1 *D. & E.* 141, Lord *Mansfield* says,—"It is a settled distinction between a proviso in the description of the offence, and a subsequent exemption from the penalty under particular circumstances; if the former, the plaintiff must, as in actions upon the game laws, aver a case which brings the defendant within the act; therefore he must negative the exceptions in the enacting clause, though he throw the burden of proof upon the other side." Indeed such seems to be the whole current of English decisions as to the above mentioned principle of pleading. In answer to these, however, the counsel for the defendant relies upon some supposed distinctions, between this case and *Spieres v. Parker* and also on several cases in *New York.* Mr. *Day*, the learned editor of many valuable English works, in his edition of *Chitty, vol.* 1, 229, in a note observes,—"The correct rule is this; if the proviso furnishes matter of excuse for the defendant, it need not be negatived in the declaration, but he must plead it. In this point of view it is immaterial whether the proviso be contained in the enacting clause, or be subsequently introduced in a distinct form. It is the nature of the exception, and not its location, which decides the point." As the ground of his opinion he cites the case of *Sheldon v. Clark*, 1 *Johns.* 513; *Bennett v. Hurd*, 3 *Johns.* 438, and *Teel v. Fonda & al.* 4 *Johns.* 304, which seem fully to support Mr. *Day's* opinion; except that in all three of the cases there was a distinct proviso in form in the section on which the action was founded. Mr. *Dane, ch.* 196, *art.* 8, *sec.* 21, cites the above case of *Teel v. Fonda*, and states the principle of the decision; but he expresses

his opinion in the sentence which follows: "But this decision must be understood to be subject to the rule laid down, *art.* 3, especially *Rex v. Pratten*" 6 *D & E.* 559; in which case it was admitted and held that the distinction had always been allowed between an exception in the enacting clause, creating the forfeiture, and a subsequent proviso in the same statute.

In the case at bar, what has been termed the proviso or exception, but which, properly speaking, is a qualification, stands in the centre of the enacting clause, and before the first sentence is finished. Indeed we are not able to distinguish it from the case of *Little v. Thompson.* That was an action of debt for taking and disposing of certain of the plaintiff's logs. The statute on which the plaintiff professed to maintain his action, provides "that if any person shall take, carry away, or otherwise convert to his own use, without the consent of the owner, any log, &c. he shall forfeit," &c. The plaintiff did not aver that the logs were taken without his consent; and for that reason the judgment was arrested. In both cases the omitted words were in the midst of the enacting clause; in one case, there was delay without just excuse, prohibited under a penalty; and in the other, a conversion of property, without consent of the owner, prohibited under a penalty. The case of *Williams v. Hingham & Quincy Turnpike, &c.* was decided on the same principle, and the court expressly proceeded on the above mentioned distinction. The section which subjected the proprietors to liability in damages to the sufferer, limited the action to those liable to pay toll, (persons of a certain description being by law exempted from the payment of toll;) and the declaration did not contain any averment that *Williams* was so liable. The Chief Justice in delivering the opinion of the court, says, "the cases before cited sufficiently establish the rule that where an action is "given by statute, and in another section, or a subsequent statute, exceptions are enacted, the plaintiff need not take notice of them in his count, but leave it to the defendant to set them up in his defence; but when the exception or limitation is in the same section which gives the right of action, the plaintiff must negative its application to his ground of action." The same principle is distinctly laid down 2 *Pick.* 139, *Commonwealth v. Maxwell.* After a careful exami-

nation, we have not found ourselves at liberty to depart from a rule so long and so firmly established, although we are always disposed to go to the utmost limits of our legal authority in support of a declaration, after a verdict has been given.

With the same disposition, we have also examined the 3d question; but we are satisfied that the defect in the declaration is not cured by the verdict. On this point the beforementioned case of *Little v. Thompson* seems to be a guide for us; for though the omitted averments should have been in both cases inserted; yet in both also the burden of excusing proof, would have been thereby thrown upon the defendants. But in addition to this, we would observe that in most cases where a defective declaration is cured by verdict, the facts omitted are such as must be presumed to have been proved on trial, by the plaintiff, or he could not have obtained a verdict. Our law books contain numerous cases of this kind. But the present case is different; the plaintiff was entitled to a verdict, on proof before the jury of the facts stated in the declaration. Those facts we presume were proved; but as the facts alleged have no reference to those facts necessary to be proved in the defence, there is no ground for any presumption. It follows therefore, that the verdict for the plaintiff does not prove that no excuse ever was made and accepted. The cause might have been called on to trial when the defendant's witnesses to prove that fact were absent. It is said in the argument that the defendant attempted to prove an accepted excuse, but failed. The answer to that observation or statement is, that in deciding this motion we have nothing but the record to inspect for allegations and facts; and the declaration is the only part of the record which contains any which can aid us.

Judgment reversed.

COFFIN'S *case*.

Where the plaintiff in an action served his own writ by leaving a summons with the defendant, and made a return of the same, with an attachment of property thereon, in the name of *J. D.* a deputy sheriff;—this was held not to be "pretending himself to be a deputy sheriff," nor acting *as such;* and therefore not indictable under *Stat.* 1821, *ch.* 92, *sec.* 8.

THE defendant was indicted for falsely pretending himself to be a deputy sheriff, and taking upon himself to act as such, in assuming to serve a writ in his own favor against one *Mehitable Berry.*

At the trial, it appeared that the defendant left the summons in the window of the house, and wrote a return on the writ stating that fact, and the attachment of certain real estate; which he signed with the name of one *Joseph Davis*, a deputy sheriff of this county; and that soon afterwards, meeting *Davis* in his office, he held up the return at a little distance from him, saying, "I have served a writ for you; you wont deny your name, will you?" Perceiving *Davis* to hesitate, he repeated the question; to which *Davis* replied "No, I shall not deny my name."—But this, the officer testified, was said not intending to acknowledge the signature, but to obtain possession of the writ, that he might take a memorandum of the names of the parties, and the date of the return. The jury found that the signature to the return was not the handwriting of *Davis.*

Hereupon the defendant contended that what was thus done by him did not constitute the offence charged;—and that what passed between himself and the officer was a sufficient recognition of the act, to authorize an acquital. But by direction of *Weston J.* before whom the cause was tried, a verdict was returned against the defendant; which was taken subject to the opinion of the court upon the points raised in defence; it being agreed that if the court should be of opinion with the defendant, the verdict should be set aside, and a general verdict entered in his favor.

The cause was submitted without argument.

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

The language of the 8th *sect.* of the revised statute, *ch.* 92, on which the indictment is founded, is this :—" Be it enacted that if any person, not being really and *bona fide* a sheriff, deputy sheriff or constable, shall pretend himself to be either of said officers, and take upon himself to act as such, or to require any person or persons to aid or assist him in any matter appertaining to the duty of sheriff," &c. To subject a person to the penalties of the above provision he must do both the acts specified ; he must pretend himself to be a sheriff, deputy or constable, and assume to act as such. The offence is charged in the words of the statute ; but the proof was, not that the defendant pretended himself to be a deputy sheriff, but that he did an act in the name of the deputy sheriff mentioned, and with the intention of obtaining his sanction and adoption of it. This branch of the charge therefore, is disproved by the evidence, and this is a constituent part of the offence described in the statute. Neither do we think that the defendant in what he did, " took upon himself" to act as a deputy sheriff, according to the true construction or design of the act, which evidently contemplates the open assumption and exercise of authority, claiming it as officially belonging to him ; as in the instance put, of requiring aid and assistance.

We are all of opinion that the indictment is not maintained by the proof; and according to the agreement in the case, the verdict must be set aside, and a general verdict be entered for the defendant.

Cowell *vs.* The Great Falls Manufacturing Company.

In a complaint for flowing lands, under *Stat.* 1821, *ch.* 45, no appeal lies from the judgment of the court below, unless the respondent, in his plea, either denies the title of the complainant to the lands flowed, or claims the right to flow them without the payment of damages, or for an agreed composition.

This was a complaint for flowing lands by the erection of the re-

spondents' mill-dam. On the appearance of the respondents, the court below, by consent of parties, appointed commissioners pursuant to the statute, to make a true and faithful appraisement, under oath, of the yearly damages, if any, done to the complainant by flowing his land; and how far the same might be necessary; and to ascertain and make report what portion if the year the land ought not to be flowed. The commissioners returned that no damages were sustained. Whereupon the complainant requested a trial by jury, at the bar of the court; and the respondents filed a general plea of not guilty, upon which issue was joined. The jury found that the respondents were guilty; and that it was necessary that they should keep up their dam at its present height, during the whole of each year; and assessed a sum in damages, to be paid for each year in which the flowing might be continued. Judgment being rendered upon this verdict in the court below, the respondents claimed an appeal to this court; which *Whitman C. J.* refused to allow; and the question now was, whether, in this case, any appeal did lie.

The point was briefly spoken to, by *J. Shepley* for the appellants, and *N. Emery* and *Hayes* for the appellee; after which the opinion of the Court was delivered by

Weston J. It has been contended, by the counsel for the party claiming an appeal in this case, that the second section of the act of Massachusetts, *Stat.* 1797, *ch.* 63, and the third section of our revised statute, for the support and regulation of mills, are substantially the same. Upon comparing them however, a manifest difference will be found to exist. In the Massachusetts statute, it is provided that if any owner or occupant of any mill shall plead to such complaint, and in his plea shall dispute the statement made by the complainant, or shall deny the complainant's title to the lands, said to be damaged by flowing, &c. after the trial of an issue joined thereon in the Common Pleas, an appeal is given to the Supreme Judicial Court. In the corresponding section, in the revised statute of Maine, the words, " and in his plea shall dispute the statement made by the complainant," are omitted. But if the owner or occupant of the mill deny the right of the complainant to the lands,

alleged to have been flowed; or claim to flow without payment of damages, or for an agreed composition after issue, trial and judgment thereon in the Common Pleas, an appeal is given to the Supreme Judicial Court. Now in the case before us, no such plea was made by the respondents there, either before or after the appointment of the commissioners. These pleas are in their nature preliminary to the appointment of commissioners, and could not regularly be received after the agreement of the parties to such appointment, for the purpose of obtaining their report upon the questions by law to be submitted to them. Their adjudication upon these questions is not conclusive, but subject to the revision of a jury, at the bar of the court. *Stat.* 1824, *ch.* 261, *sec.* 1. It is manifest, that these questions alone are open to their consideration; for these proceedings are directed by the statute, only in case the owner or occupant of the mill, after notice, shall not appear to answer to the complaint, or appearing, shall not show sufficient cause against the appointment of commissioners. Neither of the questions in the third section of the statute of 1821, *ch.* 45, were or could be tried by the jury, after their report, and consequently no appeal lies to this court.

The respondents rely upon the case of *Lowell v. Spring*, 6 *Mass.* 398, in which it is stated by *Parsons C. J.* in delivering the opinion of the court, that if the respondent deny that the complainant has sustained any damage, and issue be joined upon this point, after trial and judgment in the Common Pleas, an appeal lies to the Supreme Judicial Court. And it is insisted that this question being one of those which by our law is submitted to the commissioners, and subsequently to the jury, the same construction should obtain upon our statute. An appeal lies in Massachusetts, because such plea disputes the statement made by the complainant; but in our statute, the right of appeal is clearly narrowed, by the omission of this general ground, given by the statute of Massachusetts, and it is limited to judgments rendered in the Common Pleas, upon the pleas specifically pointed out in our statute, of which the plea upon the complaint under consideration is not one; we are therefore of opinion that the court of Common Pleas rightfully refused to allow the appeal in the case before us; and it is accordingly not sustained.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF CUMBERLAND, MAY TERM, 1830.

PLUMMER *vs.* NOBLE.

Where a judgment creditor had been absent from this State several years, having entered the army during the last war; and was slain in battle in 1814; and his attorney, not knowing this fact, afterwards sold and assigned the judgment to another person, alike ignorant of the death, and who commenced an action of debt on the judgment, believing that there was good cause to maintain it, and probably led into that belief by the conversation and belief of the attorney;—it was *held*, in a suit by the debtor against the assignee for malicious prosecution, that these circumstances were sufficient proof of probable cause.

THIS was an action of trespass on the case for maliciously suing the plaintiff and attaching his estate, in an action of debt on judgment, in the name of one *Lemuel Bradford*, who was dead.

At the trial, before the Chief Justice, the plaintiff proved that the defendant caused a writ to be sued out against him, *Oct.* 13, 1824, in the name of *Bradford*, on a judgment recovered at *October* term, 1807, for something more than a hundred dollars; and that thereupon the sheriff had attached his interest in the house in *Portland*, in which he dwelt, and also in another lot in *Portland*, fronting on Fore-street. He also proved that *Bradford* was killed in the sortie from fort *Erie*, *Sept.* 17, 1814; that the official report of the killed and wounded in that affair was published in the newspapers of the day;

and that his death was generally known in *Portland*, where he resided at the time he entered the army.

It further appeared that the defendant bought the judgment declared upon, of Mr. *Kinsman*, the attorney who recovered it; and who did not know of his client's death, but supposed him to reside in Massachusetts; and who, being a creditor of *Bradford*, assumed to assign the judgment to *Noble*, passing the whole amount to the credit of *Bradford*. The purchase was made at the suggestion of the attorney, who was to receive forty dollars for the demand, if it should be recovered. *Noble*, who came to reside in *Portland* after *Bradford's* departure, was ignorant of the fact of his death, till after service of the writ; and on ascertaining it, the plaintiff was informed that the suit would be prosecuted no farther.

The plaintiff further proved that the estate attached in Fore-street, was mortgaged by him to the defendant, *July* 13, 1818.

The defendant then produced a copy of a deed of release and quitclaim, dated *Sept.* 1, 1822, by which he had conveyed all his interest in that parcel to one *Eleazar Wyer*.

The plaintiff then offered parol evidence to show that this conveyance to *Wyer* was without valuable consideration, and was in trust for *Noble*; but this evidence the Chief Justice rejected, as it contradicted the deed, which, moreover, the plaintiff had no right to impeach.

Upon this evidence the Chief Justice instructed the jury that there were two questions in the cause for consideration;—first, whether the prosecution against the plaintiff was without probable cause;—and secondly, whether it was malicious. On the first point he said that the judgment recovered by *Bradford* was incontestible proof of a lawful demand; that a judgment closed all dispute between the parties concerning its subject matter;—that this judgment appeared to be due; but of this they might inquire;—and that Mr. *Kinsman* had a right to transfer it; crediting his client with the amount, as he had testified. But he further instructed them that *Bradford* being then dead, he considered it their duty, on the whole, to regard the action against the plaintiff as commenced without probable cause.

On the question of malice, he instructed them to examine all the

evidence, and thereupon to decide whether the suit was instituted fairly, to recover the amount of the judgment, under a purchase, and an authority supposed to be sufficient; and without knowledge of the plaintiff's death; or whether the defendant had in that transaction acted maliciously.

Under these instructions, to which the plaintiff filed exceptions, the jury found for the defendant.

Deblois, for the plaintiff, argued—1st. That if it were competent for the defendant to introduce the deed from himself to *Wyer* to rebut the inference of malice; it was equally proper for the plaintiff to avoid that effect by evidence showing that the conveyance was merely colorable. Any stranger may falsify a deed for covin. 2 *Stark. Ev.* 585, 587. Yet the proof here offered was not contradictory to the deed, but merely went to show a resulting trust in the grantor. On either ground, whether of covin or of trust, it was admissible. 1 *Cruise's Dig.* 474, 482, 492; 1 *Stark. Ev.* 254; *Jackson v. Stiernberg*, 1 *Johns. Ca.* 153; *Foot v. Colvin*, 3 *Johns.* 216; *Lloyd v. Spillet*, 2 *Atk.* 150; 3 *Stark. Ev.* 1040, 1043; *Prec. Chan.* 80.

2. The purchase of the demand was illegal, being of the nature of *champerty*; and was therefore of itself evidence of malice. 2 *Hawk. P. C.* 393; 2 *Inst.* 208; *Thurston v. Percival* 1 *Pick.* 415.

3. The conduct of the defendant, in commencing the suit without making due inquiry, when the circumstances rendered it so very probable that the original plaintiff was dead, and the truth was so easily ascertained, involved all the consequences of actual knowledge. It was the *crassa ignorantia*, which in law amounts to malice. 5 *Amer. Law Jour.* 514; *Brooks v. Warwick*, 2 *Stark. R.* 342; *Purcell v. McNamara*, 9 *East.* 362; 2 *Stark. Ev.* 915; 2 *Dane's Abr. ch.* 70, *art.* 1, 3, 6.

4. The transfer of the judgment was illegal and void, for want of authority in the attorney, his principal being dead. *Harper v. Little*, 2 *Greenl.* 14.

N. Emery argued on the same side.

Longfellow, for the defendant, cited 2 *Phil. Ev.* 114.

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

The questions presented on the exceptions are, whether the copy of the deed from *Noble* to *Wyer* was liable to impeachment in the manner and for the reasons urged by the plaintiff's counsel; and whether the instructions of the judge to the jury were correct. It is contended that the conveyance, if made without any consideration, and merely in trust for the benefit of *Noble*, would, if admitted to the jury, have been evidence, tending to prove malice in the defendant. The deed was made more than two years before the alleged malicious action was commenced; and would on that ground seem to have no possible tendency to prove any thing in the cause. But the proof offered was parol only; and of course was improper to shew a trust, when the deed was in the usual form, conveying the land to the grantee in fee, to the use of him and his heirs. *Northampton Bank v. Whiting*, 12 *Mass.* 104; *Jenny v. Alden*, *ib.* 373; *Storer v. Batson*, 8 *Mass.* 431; *Flint v. Sheldon*, 13 *Mass.* 443.

It was not alleged that it was fraudulently made, but only without consideration. But what was that to the purpose? The deed would have passed the estate to *Wyer*, as against all persons but the creditors of *Noble*. This objection cannot be sustained.

The next is, that the purchase of *Bradford's* judgment of *Kinsman*, was in itself an offence, and amounted to *champerty*. The answer is that an offence cannot be committed without an improper intention; and the jury, under the instruction of the court, have decided that the suit was fairly instituted to recover the amount of the judgment, under a purchase, and an authority supposed to be sufficient, and without knowledge of the plaintiff's death; and that he acted in the transaction without any malice, and with the intention of securing the demand. This objection seems to be completely settled by the verdict; and in this view of the subject the exceptions must be overruled; because, in order to support the action, there must have been a want of probable cause, and also malice. It is urged that the instructions were incorrect, because the judge did not state the law to the jury that from the want of probable cause, malice may be presumed. He did state that both must concur; and such is the law.

If any more explicit instruction was desired it should have been requested; and then, if improperly withheld, there would be good ground of exception. But though the judge did, with some appearance of doubt, instruct the jury that there was not probable cause; yet we are all, upon consideration of the facts, inclined to a different opinion. The debt due from *Plummer* to *Bradford* was certain and undisputed; there was a good cause of action, by some person, on that judgment; and though the action brought in the name of *Bradford* after his death, could not be maintained, yet his death was not then known. *Noble* believed there was a good cause to maintain that action, and was probably led to that belief by the conversation and belief of *Kinsman*.

On the whole, in any view of the case, our opinion is that the exceptions must be overruled.

Judgment on the verdict.

BULLARD *vs.* HINKLEY.

Where a debtor, to defraud his creditors, made a fictitious mortgage of his estate; and afterwards a creditor, deeming the mortgage *bona fide*, attached the right in equity of redemption, which was subsequently sold by the sheriff to an innocent purchaser; and pending the attachment another creditor extended his execution on the land, and caused it to be set off in fee, treating the mortgage as a nullity; it was *held*, that the mortgage, being fraudulent, created no equity of redemption; that the sheriff's sale was void; and that therefore the subsequent extent gave the better title to the land.

THIS was a writ of entry. The principal facts are stated in 5 *Greenl.* 272, where the same case is reported. Both parties claimed the land under levies of executions against one *Houghton*. The demandant, who was a judgment creditor, took the land by extent, in *May* 1825, under an attachment made *March* 28, 1824.

The tenant claimed title by deed from Mr. *Everett*, who had purchased the right in equity at sheriff's sale, *Aug.* 17, 1824; and showed a mortgage made by *Houghton* to one *Larrabee*, *June* 1,

1822, which was recorded *March* 13, 1824; and an attachment of the right in equity *March* 19, 1824, at the suit of *David Dunlap*; under which attachment the right was regularly taken and sold on execution. After the right was seized in execution, and before the sale, *Larrabee* sent the notes mentioned in the mortgage, and a deed of release of the mortgage itself, to *Houghton's* wife, he being then out of the country, to which he did not return till long after all these transactions. She had no authority from him to receive the deed; of which he had no knowledge till his return. The demandant proved that the mortgage was fraudulent; the debt therein mentioned being principally fictitious. *Houghton* released the land to the tenant *July* 29, 1825.

Upon this evidence the jury were instructed by the Chief Justice that if the mortgage was fraudulently made, as it seemed to have been, yet if that fact was unknown to the tenant at the time of his purchase for a valuable consideration, it could not in law affect his title: and that if *Houghton's* wife was not authorised by her husband to receive and accept the release, it did not operate to pass any estate till it was accepted by *Houghton*, upon his return; and therefore did not affect any rights previously acquired under the sale. The jury returned a verdict for the tenant; saying that the mortgage was fraudulent; but that neither the tenant, nor *Everett*, nor the officer were conusant of the fraud; and that the wife had no authority to receive the release. The verdict was taken subject to the judgment of the court upon the instructions given to the jury.

Fessenden and *Deblois*, for the demandant, argued that the mortgage having been found to be fraudulent, there never was any right in equity of redemption created, and so no foundation for the proceedings under which the tenant claimed to hold. *Sands v. Codwise*, 4 *Johns.* 546; *Goodwin v. Hubbard*, 15 *Mass.* 210; *Ricker v. Ham*, 14 *Mass.* 137; 3 *Mass.* 573; *How v. Ward*, 4 *Greenl.* 195; *Powel on Mortg.* 23, 24. It was equally void as to all the creditors of *Houghton*; and therefore no one of them could make it good by election. But if it were not so, yet the notes having been voluntarily given up before the sheriff's sale, that was in law a discharge of the mortgage: leaving no equity remaining to be sold.

Gray v. Jenks, 3 *Mason* 520; *Vose v. Handy*, 2 *Greenl.* 322; *Darling v. Chapman*, 14 *Mass.* 101.

Greenleaf, for the tenant, maintained his title on the ground that the mortgage might be treated as void or not, at the election of any creditor who might first acquire the right by priority of seizure; and that an innocent purchaser under a sale of the equity ought to be suffered to hold it, on the same principle by which the innocent purchaser from a fraudulent grantee is protected. If the right in equity produced more than sufficient to satisfy the demand it was sold for, the surplus might be attached in the sheriff's hands by any other creditor. If it sold for less than its value, it might be redeemed by an unsatisfied creditor, within the year, and sold again. And in either case, the fraudulent mortgagee might be reached by a bill in equity, and compelled to satisfy any creditor, to the value of the pretended mortgage.

The payment of the debt after seizure in *execution*, he insisted, was not within the provisions of *Stat.* 1821, *ch.* 60, *sec.* 1, 17, 18; and so did not affect the case. The statute contemplates only payments made after attachment, and before seizure in execution.

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

Mellen C. J. This cause has once been before the court, upon certain facts reported and questions of law reserved. The decision is found in 5 *Greenl.* 272. Upon revision of our opinion, we are perfectly satisfied of its correctness. The verdict was then set aside, which had been returned for the demandant, and a new trial granted. On the last trial a new question of law arose, for the decision of which the cause is again to be examined, in connexion with a new and prominent fact, which did not appear on the former trial; but it appears now, the jury having found that the mortgage deed from *Houghton* to *Larrabee* was fraudulent, and made to defeat the rights of *Houghton's* creditors; though they have also found that neither the officer who attached and sold the equity, nor *Everett*, the purchaser of it, nor the tenant, was in any manner or in any degree conusant of the fraud. The introduction of these facts into the cause, has chang-

ed its complexion, and occasioned much doubt and hesitation on our part. The question before us is by no means free from difficulty; and such as has never before been presented to our minds. We have, however, after much consideration, come to a conclusion with which we are satisfied.

The demandant's title is short and simple. The mortgage, though executed and recorded before the demandant's attachment, being fraudulent, was voidable by the creditors of *Houghton*. At the time of the attachment, *Larrabee* was the apparent owner of the fee as mortgagee; and the demandant attached the land, not treating the conveyance as a mortgage, but as a nullity. Whether he then knew or suspected the fraud, does not appear. He obtained judgment and extended his execution upon the land *May* 28, 1825, within thirty days after the judgment, which levy was seasonably recorded. All this, *Bullard*, as a creditor of *Houghton*, had an unquestioned right to do; for, as against him, the mortgage was an ineffectual conveyance and voidable at his pleasure. This is his title; and it is a good one, unless the proceedings relating to the attachment and sale of the equity, and the purchase of *Larrabee's* right as mortgagee, have defeated it. In the statement and view of the demandant's title, we may here introduce the quitclaim deed from *Larrabee* to *Houghton*, dated *July* 15, 1824. Though this does not appear to have been accepted by *Houghton* at the time of its date, yet it was delivered to him and accepted by him, several months before *Bullard's* levy, which was not till the latter part of *May* in the next year. So that whatever estate was conveyed by the mortgage to *Larrabee*, was reconveyed to *Houghton* before the levy, provided such operation was not prevented by the previous seizure of the equity on *Dunlap's* execution. We formerly decided that the release in the then existing circumstances and upon the facts then disclosed to us, could not and did not operate to the prejudice of the tenant; but on the contrary that it operated by way of assignment of *Larrabee's* title as mortgagee. It is, however, of no importance now, whether it operated as an assignment or a release of the mortgage, provided the fraud between *Houghton* and *Larrabee*, which poisoned the mortgage deed in its creation, produced those fatal consequences in relation to the

tenant's title, which the counsel for the demandant contends were produced; for in that case, it vested the estate in *Houghton* and made him absolute owner of it in appearance as well as in fact, before *Bullard's* execution was extended. The important inquiry then is, "What effect has the original fraud produced upon the mortgage, and upon the respective rights of *Houghton* and *Larrabee*, as mortgagor and mortgagee, and upon those claiming under them?"— The position of the demandant's counsel is, that a fraudulent mortgage creates no equity of redemption in respect to a creditor who elects to consider and treat it as a nullity, by extending his execution in usual form upon the land; and that by such a levy the apparent equity of redemption instantly vanishes, and the purchaser of it, when sold on execution, is at once defeated, and his supposed title becomes a perfect nullity *ab initio*; and that what was considered as a substance at the time of the sale, has been proved to be merely a shadow. If this position is correct, the priority of attachment and title, is a matter of no importance. In examining the cause, as to the effect of the fraud in the mortgage, we have been led into some confusion by comparing the sale of the equity by a sheriff on execution, to a sale by *Houghton* himself: but upon a more careful examination of the subject, we perceive a distinction which must not be disregarded, considering the purchaser in both cases as unaffected by notice of the original fraud. As to all persons but the mortgagee, the mortgagor is in law considered as the owner of the fee; therefore, in the present case, if *Houghton* had conveyed to *Everett* the premises in question, he, being an innocent purchaser, might defend himself against *Larrabee*, and by proof of the fraud, completely defeat the mortgage and hold the land relieved of all incumbrance, as an absolute estate. But a sale of an equity of redemption is a statute sale, and in all cases of a statute title, all the circumstances necessary to give effet to that title must concur; otherwise nothing passes. The numerous decisions respecting the levy of executions are illustrations of this principle. The statute which authorises a sale of an equity, presupposes the existence of a legal mortgage. Surely the legislature, in enacting this provision, cannot be considered as making arrangements and regulating proceedings respecting the management

and disposition of property, in such a manner as to protect fraudulent transactions, while at the same time the law condemns all such transactions; and as has been before observed, authorises a levy upon the land, by any creditor, who may incline to treat the mortgage as a nullity; which levy, by the express language of our statute shall make as good title to the creditor, his heirs or assigns, as the debtor had therein; and, as to such creditor, a fraudulent grantor or mortgagor has a good and legal title, his conveyance notwithstanding. Though a deed may be valid between the parties, but voidable on the ground of fraud, by the creditors of the grantor, yet we do not perceive on what consistent principles it can be, as in the present case, treated by one creditor as a valid deed and a subsisting mortgage, and by another creditor as fraudulent and void; or, to be more definite and particular, how one creditor, by choosing to treat a mortgage as valid and *bona fide*, and attaching the equity of redemption, which may apparently be worth but one tenth of the value of the premises mortgaged, can by so doing, deprive another creditor of the right of effectually attaching the land or premises—disregarding the mortgage—and extending his execution thereon and acquiring a good title to the whole. If one creditor of the mortgagor, and perhaps a friendly one, can, by attaching the equity, bind the hands and rights of all other creditors, it would seem to change the law and prevent the due application of its principles; for in such a case the purchaser of the equity will have the right to redeem; and by redeeming, he will become, in the case put, the owner of the whole by paying one tenth—being the apparent value of the equity of redemption; and in what manner can the honest creditors of the mortgagor reach the property in the hands of the purchaser of the equity, who has, on the principles contended for by the tenant's counsel, acquired a good title to the whole, by paying the one tenth of its value. Principles which may lead to such consequences, have a suspicious appearance; and on examination, they cannot be sanctioned. The law, under which the tenant professes to derive his title, has authorised the sale of an equity of redemption. The provision of the statute presupposes the legal estate to be in one man, and the equity of redemption in another; and it has prescribed the

mode of proceeding by which a creditor of the mortgagor may avail himself of all the interest which he has in the premises, that is, by a sale of the equity, which is worth the difference between the debt honestly secured by the mortgage, and the fair value of the premises mortgaged. But in the case of a fraudulent mortgage such is not the fact. In such a case, where the asserted debt is merely fictitious, the whole estate in the premises is liable for the debts of the mortgagor, and may be seized, appraised and taken in execution; and the whole legal estate being gone, there can be no equity of redemption. It is true, it does not appear that the fraud was discovered until after the levy on the land and the sale of the supposed equity; but the rights of *Everett*, in virtue of his purchase, must be decided upon facts as they then existed; not merely as they were then known. In the view we have taken of the cause, the want of a *scienter* on the part of *Everett* and the tenant, ceases to be of any importance. *Everett*, in fact, purchased nothing at the auction, and he sold nothing to the tenant, nor did any thing pass to him by *Houghton's* deed of *July* 29, 1825, because it was executed several months after *Bullard's* levy. We conclude this opinion by observing that a *bona fide* purchaser, without notice, may indeed protect his title; but he must be a *bona fide* purchaser of the mortgage; and not a person claiming and coming in after, but not under, the mortgage. As in this case the tenant does not so claim, *Bullard* by his levy has defeated the mortgage *ab initio*, and proved that there never was an equity of redemption, by the sale of which on execution, a levy on the land, before or after such sale, could be defeated.

We are of opinion that the verdict must be set aside and a

New trial granted.

CLARK *vs.* FOXCROFT.

Where the sheriff justifies under *final* process, it is not necessary to show it returned.

In a suit against the sheriff for not levying an execution, it is a good defence that the plaintiff's judgment was fraudulent, the sheriff first proving that he represents a creditor of the judgment debtor, by showing a legal precept in his hands.

The sheriff, justifying under a brief statement, is not bound to prove all the facts therein stated, if enough is shown to constitute a good defence.

The title of a purchaser under a sheriff's sale may be good, without showing the execution returned.

THIS was an action of the case against the late sheriff, for neglect of his deputy in not levying an execution against one *Small*, on the goods attached on the original writ against him. The judgment was recovered at *October* term, 1826.

The sheriff pleaded the general issue, and filed a brief statement pursuant to the statute; justifying his alleged neglect on the ground that certain other creditors of *Small*, impeaching the plaintiff's judgment as obtained by fraud, had placed their precepts in the hands of the deputy, by virtue of which he had sold the goods in question; and that certain creditors of *Clark*, insisting that he was a partner with *Small*, had placed their precepts also in the same officer's hands, directing him to retain a moiety of the proceeds of sale to their use.

At the trial, the defendant showed one of the precepts against *Small*, mentioned in the brief statement; and proved that it was delivered to the deputy within thirty days after the rendition of judgment in a suit in which the same goods had been regularly attached subsequent to the attachment of the plaintiff. And he also offered testimony tending to show both the fraud, and the partnership, as alleged.

The plaintiff called for proof that the execution had been regularly returned, with the doings of the officer thereon, into the clerk's office, agreeably to its precept, before the defendant could be entitled to impeach his judgment for fraud. And the Chief Jus-

tice ruled that until such proof was made, the defendant would not appear to have any such interest in the property as would entitle him to impeach the title of the plaintiff, or to interfere in the question of partnership between him and *Small*.

The defendant then prayed that the deputy might have leave to make out and annex to the execution a return of his doings thereon, which he had principally prepared during the trial. But this was refused by the Chief Justice, the sheriff and the deputy having been out of office about nine months.

The plaintiff also called for proof of all the other precepts mentioned in the brief statement; but after the motion to amend was denied, no further proof was offered. And the defendant filed exceptions to the decisions of the Chief Justice, the jury under his direction, having found for the plaintiff.

N. Emery, *Fessenden* and *Deblois*, supported the exceptions. To the point that it was not necessary for the sheriff to show his precept returned, they cited *Rowland v. Veale Cowp.* 18; *Hoe's* case, 5 *Co.* 90; *Mountjoy v. Andrews*, *Cro. El.* 237; *Morse v. James*, *Willes* 126, *note b*; *Chesley v. Barnes*, 10 *East.* 82; 6 *Com. Dig. Retorn, F.*; 2 *Chit. Pl.* 591, *note x*; 3 *Dane's Abr.* 91; *Bealls v. Guernsey*, 8 *Johns.* 52; *Ingersol v. Sawyer*, 2 *Pick.* 279; *Adams v. Balch*, 5 *Greenl.* 188; *Gates v. Gates.* 15 *Mass.* 310; *Pierce v. Jackson*, 6 *Mass.* 242; *High v. Wilson*, 2 *Johns.* 48; 5 *Burr.* 2631; 1 *Wils.* 44. That it was competent for the defendant to have proved that half the goods were *Clark's*, against whom he held a precept; by way of reducing the damages; *Prescott v. Wright*, 6 *Mass.* 20; *Quincy v. Hall*, 1 *Pick.* 357. And that the motion to amend the return should have been granted; *Gardiner v. Hosmer*, 6 *Mass.* 327; *Hayward v. Hildreth*, 9 *Mass.* 393; *Waterhouse v. Waite* 11 *Mass.* 207; *Ladd v. North*, 2 *Mass.* 514; *Ludden v. Leavitt*, 9 *Mass.* 204; *Tidd's Pr.* 928; *Wells & al. v. Pickman*, 7 *D. & E.* 174; *Cooper v. Chitty*, 1 *Burr.* 20; 9 *Johns.* 99; 4 *Wheat.* 503; *How v. Starkweather*, 17 *Mass.* 239; 8 *Mass.* 326.

Longfellow and *Greenleaf*, for the plaintiff, contended that whatever might be the law in England; yet that in this State, by force of

statutory provisions, the sheriff was bound to return his precept, before he could justify under it. *Stat.* 1821, *ch.* 59, *sec.* 37; *Stat.* 1821, *ch.* 60, *sec.* 3, 5; *Hammat v. Wyman*, 9 *Mass.* 138; *Winslow v. Purinton*, 7 *Mass.* 392. But even in *England*, the sheriff must return a *ca. sa. Wickham v. Hobart*, 6 *Com. Dig.* 240. And the English authorities concur that he must return all those precepts which are either the foundation of farther proceedings, as mesne process; or which are of a nature to be executed by an inquisition; as an *extendi facias*, or an *elegit*. And our writ of execution partakes of the nature of both these. *Ladd v. Blunt*, 4 *Mass*, 402.

The amendment, they said, was properly refused; the sheriff having been long out of office, and so not responsible for the act of the deputy if he should make a false return; *Blake v. Shaw*, 7 *Mass.* 505; *Stat.* 1821, *ch.* 92, *sec.* 1; *Wells v. Battelle*, 11 *Mass.* 477; and it would be of mischievous tendency, as it went to the ground of the action, the suit being against the officer himself. It is only in suits *inter alios* that such amendments have been allowed.

The opinion of the Court was delivered at the adjournment of this term in *August* following, by

Weston J. It is a principle well settled, and not contested in this action, that fraudulent judgments may be impeached by third persons, who may be injured, or be in danger of being injured by them. The defendant at the trial, claiming to act in behalf of persons, liable to be injured by the plaintiff's judgment, attempted to prove that it was obtained by fraud. Could he do so, without shewing the executions, which issued upon judgments in favor of the other creditors, in whose behalf he defends, as he alleges, with his doings thereon returned? It is certainly deducible from the English authorities, from *Fulwood's* and from *Hoe's* cases in *Coke*, to *Cheasley v. Barnes*, 10 *East*, 73; that an officer may justify under process of execution, without showing it returned. And the law is so understood by *Comyns*, 6 *Dig. Retorn F.* 1. *Freeman v. Bluwit*, 1 *Salk.* 409, is an exception to the current of authorities; and it was disregarded by lord *Ellenborough* in *Cheasley v. Barnes*; *Middleton v. Price*, 1 *Wils.* 17, was an arrest upon mesne process. It

has been contended that these authorities do not apply in this State; because our statute has prescribed a fixed day for the return of executions. But a fixed day of return is also appointed in all the English forms of final process; for disobedience to which the sheriff is liable to be amerced. 5 *Com. Dig. Retorn F.* 1. *Hoe's* case, 5 *Co.* 90. So the sheriff may be there ruled to return final process; a course which in the English practice precedes an attachment; and the court may enlarge the rule at their discretion. *Wills v. Pickman*, 7 *D. & E.* 174. *Dane*, in his abridgment, *vol.* 3, *ch.* 75, *Art.* 12, states the substance of the English cases, without any intimation that they do not apply; or that the law is otherwise understood in Massachusetts.

In *Ingersoll v. Sawyer*, 2 *Pick.* 276, *Parker C. J.* in giving the opinion of the court, says that at common law a return is "wholly immaterial, if the process be final, upon which no judgment or other process is to be had, as a *fieri facias*, *capias ad satisfaciendum*, or *habere facias seisinam*;" and he cites *Fulwood's* case and *Comyn.* If such is the common law, by what statute has it been changed, as it respects the seizure of goods on execution, which is done upon *fieri facias* in the English practice? No doubt it is the duty of the sheriff to return the execution, in obedience to its precept; and any person injured may maintain an action against him, if he neglects to do so. In *How v. Starkweather*, 17 *Mass.* 240, *Parker C. J.* intimates that a purchaser at a sheriff's sale on execution, could not maintain his title, unless a compliance with the law was shown by the return of the officer; but he states in the same paragraph, that such purchaser will hold, notwithstanding any irregularity in the proceedings of the officer making the sale, for which he cites 8 *Mass.* 326. It is laid down by *Parsons, C. J.* in *Ladd v. Blunt*, 4 *Mass.* 402, that when goods sufficient to discharge a judgment are seized on *fieri facias*, a form of process combined with others in our execution, the debtor is discharged, even if the sheriff waste the goods, or misapply the money arising from the sale, or does not return the execution; for by a lawful seizure the debtor has lost his property in the goods." It would appear to result from the authority of this case, as well as from the common law, which held the return of a *fieri facias* imma-

terial, that the title of a purchaser under a sheriff's sale on execution might be good, although the execution might not be returned.

It is however not only the duty, but clearly for the interest of the sheriff, to return the execution, with his doings thereon. Such return will be evidence of his proceedings, when called upon either by creditor or debtor to answer for and justify what he has done, not liable to be controverted; except in an action for a false return. It would be attended with much greater difficulty to justify by evidence *aliunde;* but this he may be permitted to do, if a return is not essential to his justification; and at common law it is not so regarded. The law affords adequate remedies to any person injured by the misconduct of the sheriff; whether he does or does not return an execution committed to him. There is great weight of authority in support of the opinion that an officer may, if he can, furnish other proof, justify a seizure and sale of goods on execution without showing it returned, with his doings thereon. But it is not necessary to decide this point. It is not a seizure and sale of goods he is called to justify; but for neglecting to serve and return the plaintiff's execution; although goods were attached, to respond the judgment, on the original writ.

His defence is, that the judgment was fraudulent. In order to be admitted to this defence, it is insisted that it must appear, that he represents a creditor. And we are of opinion, that this does sufficiently appear. In behalf of other creditors, he made subsequent attachments of the goods in question. Judgments were duly rendered in favor of these creditors, and executions, issuing thereon, were put into the hands of the officer, within thirty days of their rendition. These facts appeared from evidence not objected to, or liable to objection. Suppose then the officer succeeds in his defence, to whose benefit does it enure? Clearly to that of the other creditors. Their claim to hold him accountable to them for the proceeds of the sales, will then be relieved from the conflicting and prior claim of the plaintiff. It is manifest that the defendant does not take this ground of defence for himself, or his deputy; for they cannot, upon the facts proved, escape accountability to the plaintiff, or to the other creditors; according to their priority of attachment. And wheth-

er the executions are returned or not, the sheriff ought not to be twice charged, for the same goods. We are constrained to take notice from the facts proved, assuming that none of the executions have been returned, that there can be no other reason for the defence, but to let in the other creditors, and that it can have no other effect. Acting for them then, the defendant has a right to impeach the plaintiff's judgment; and if this defence is sustained, let the defendant answer as he may his liability to the other creditors, or to the judgment debtor. The plaintiff has no right to require him to justify any doings of his, affecting them. The officer often becomes a party, through and by whom the conflicting claims of creditors and purchasers, are settled. And there has been a liberality of practice, in permitting him to act in their behalf. Thus in actions of replevin, by the uniform practice of our courts, the officer is permitted to impeach the title of the plaintiff as fraudulent against creditors; although he does not set forth his authority in an avowry; and there is nothing in the record to show that he is acting for a creditor. *Quincy v. Hall*, 1. *Pick.* 357.

With regard to the omission of the deputy to make a formal return, on the executions in favor of creditors, whose attachments were subsequent to that of the plaintiff, these creditors might, and probably did, waive their right to require this; until the validity and effect of the plaintiff's judgment should have been determined. Their executions could then be returned satisfied or not, according to the result. It has never been our practice to proceed by attachment, with or without a rule to show cause, against the sheriff for not returning process mesne or final; although the common law would authorize such a course of proceeding. Parties injured are left to their civil remedies; and these they may prosecute or waive at pleasure. If our courts were in the practice of ruling sheriffs to return final process, the officer might furnish a just excuse for his neglect to return the executions in question, until the determination of this suit. If the plaintiff prevails, it will be his duty and his interest to return the goods seized and sold upon his execution. If he does not, to apply and return them on the other executions, according to their priority.

When process, whether mesne or final, is returned by the officer, with his doings indorsed thereon, such return becomes matter of record; and as such may be pleaded. 4 *Mass.* 403. If not according to the fact, through inadvertency or otherwise, application may be made to the court by the officer, for leave to amend it. This is granted or refused, according to circumstances. In the exercise of this discretion, no exception lies to the determination of the judge. But the officer may enter his doings upon an execution in his possession, before he has returned it to the clerk's office, without asking or obtaining permission of court. Nothing is more common than for him to do so, after the return day of an execution. He acts at his peril; and is held responsible for any thing false or irregular in his proceedings. It has been contended that he cannot do this, after his official power has ceased, by the expiration of the term for which the sheriff was appointed. To this it is a sufficient reply, that his authority and duty in relation to precepts in his hands, when the sheriff's office terminated, is continued until such precepts are served, executed and returned. Statute of 1821, *ch.* 92, *sec.* 1.

It is insisted that the defendant, having in his brief statement, averred a seizure and sale under the executions, in favor of the other attaching creditors, is bound to prove it, and can prove it only by the return of such executions. If the defendant attempted to prove any thing, of which the plaintiff could have no notice from the brief statement, or any thing inconsistent therewith, the plaintiff might well object to such a course; but the defendant is bound to prove only so much of his brief statement, as constitutes a good defence. All which he can be required to prove is, that he represents a creditor, and that the plaintiff's judgment is fraudulent. If he has introduced unnecessary averments, he is not to be prejudiced thereby. The strictness required in pleading, is not applied to a brief statement; which is an indulgence allowed to the officer, for his benefit and relief.

New trial granted.

Richardson *vs.* Field.

Where one purchased a right in equity of redemption, and afterwards took an assignment of the mortgage; and immediately mortgaged the same land to the original mortgagee in fee;—it was held, in a writ of entry brought by the assignee against the mortgagor, that the declarations of the original mortgagee could not be given in evidence to prove usury in the first mortgage.

This was a writ of entry brought by the assignee of a mortgagee, against the mortgagor; the facts of which case are fully stated in the report of the same case, *ante p.* 35. The action was resisted on the ground that the promissory note, to secure which the mortgage was made, was given upon a usurious consideration; and to prove this the tenant offered to give in evidence the declarations of one *Bracket*, the mortgagee. In support of the motion to admit this evidence, the tenant proved that *Bracket* had requested some of the witnesses to attend at the trial, had paid some of them their fees, and had himself been present, consulting with the demandant's counsel; and that the demandant himself had said that he cared little or nothing how the cause might be decided, as he was indemnified; and spoke of the action as *Bracket's*; saying, however, at the same time, that he also himself had an interest in the land. And the tenant further showed that on the same day on which the mortgage was assigned to the demandant, the latter gave a mortgage of the same premises to *Bracket* to secure a debt of about $1900; the demandant having more than a year previously acquired the right in equity of redemption, by purchase at a sheriff's sale.

The counsel for the demandant opposed the admission of any declarations of *Bracket*, he not being a party to the record, nor solely interested in the suit; and even his testimony in court not being admissible to impeach the security he had put into circulation, by showing usury in its original concoction. And the Chief Justice, before whom the cause was tried, rejected the testimony; but reserved the point for the consideration of the Court, a verdict being found for the demandant.

Fessenden and *Deblois*, for the tenant, argued that the testimony ought to have been admitted. 1st. Because *Bracket* was the party in interest in the cause. The assignment and the new mortgage constituted but one contract, and revested the whole estate in *Bracket*. The seisin of the demandant was merely instantaneous, of which his wife could never be endowed. *Holbrook v. Phinney*, 4 *Mass.* 566; *Kelleran v. Brown*, *ib.* 443. And the demandant expressly avowed that the suit was *Bracket's*. Though the declarations of one merely interested in the event of the suit are not admissible, yet those of the party in interest are always received. *Hanson v. Parker*, 1 *Wils.* 257; *Rex v. Hardwick*, 11 *East.* 578; 1 *Phil. Ev.* 74; *Johnson v. Keen*, 1 *Serg. & Rawle*, 25; *Bell v. Ainsley*, 16 *East.* 141; *Tyler v. Ulmer*, 11 *Mass.* 163; *Howard v. Cobb*, 3 *Day* 309. 2. Because *Bracket* was in fact the owner of the land in dispute. The title was never out of him, except for an instant, and by legal fiction. *Deering v. Sawtel*, 4 *Greenl.* 191.

Longfellow and *Greenleaf*, for the demandant.

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

The only question in this case is, whether evidence of *Bracket's* declarations, offered to prove the alleged usury, was properly rejected. *Richardson* having purchased *Field's* equity of redemption, which was never redeemed, and afterwards obtained from *Bracket* an assignment of the mortgage, by this union of the two parts of the title, became absolute owner of the property, unless his title was defeazable, or rather void, in consequence of the usury which the tenant contends corrupted the original contract. It is true that on the same day on which *Richardson* became the owner of the whole estate, he made a new mortgage to *Bracket* to secure about $1900; but this mortgage had no connection with the former; nor is it pretended that there was any usury in the contract. Still, as the defence, if established, would defeat and destroy not only the demandant's title, acquired as before stated, but also the conditional title or interest which *Bracket* has in the premises in virtue of the second mortgage, it is evident that both have an interest in the event of the present

action; but their interests are distinct. The interest of *Bracket* is nothing more than that which every grantee has in the goodness and safety of his grantor's title; for whether his deed contains the usual covenants, or no covenants, he may still be interested. It seems to be well settled that where an action is brought in the name of A, in trust for B, or for his exclusive benefit, the defendant may give in evidence, the declarations of either or both of them; but it does not appear that this is so brought. It appears that the demandant has an interest in the land demanded; and there is no remedy but by action to become possessed of it. Now, as *Bracket* was not a party, nor wholly interested in the property in question, as in the case supposed, or as in the cases cited by the counsel for the tenant, it would seem to be manifestly unjust that his declarations should be permitted to defeat and destroy, not only his own conditional and dependent interest in the land, but the title and interest of the demandant, over which he certainly can exercise no other kind of control. It is a familiar principle that as to every one, except *Bracket*, the demandant is to be considered as the owner of the legal estate, unless his title deeds are void; and we think he cannot be deprived of his legal rights by a stranger, or by one standing as *Bracket* does in relation to the demandant. Suppose that in this case *Field* had pleaded *non est factum*, and that the demandant had offered to prove by *Bracket's* declarations that *Field* had confessed to him that he signed the deed; could such evidence be admitted? Or suppose that *Field* had offered to prove the declarations of *Bracket* that he was present when the deed was signed by another man with *Field's* name—that is, that the deed was forged. Could such proof be admitted? If not, how can they be admitted to shew the usury to the prejudice of the demandant? The principle contended for might produce glaring injustice. Suppose that the premises, which are said to be worth above two thousand dollars, had been mortgaged to *Bracket* for only one hundred dollars; if his admissions or declarations can be admitted, he might collude with *Field*, for the purpose of injuring *Richardson*, and by losing his own hundred dollars, confess away *Richardson's* property to the amount of two thousand dollars. Or, without collusion with any one, he might do the same thing from

enmity to the demandant. It does not appear when the declarations which the defendant offered to prove were made; if after the deed was made by *Bracket* to the demandant, they are inadmissible on the plain principle that a grantor shall not by his declarations injure or defeat the title he has conveyed. *Alexander v. Gould*, 1 *Mass.* 165.

The question may also be presented in another point of view. According to the decision of this court in the case of *Deering v. Sawtel*, 4 *Greenl.* 191, *Bracket* could not have been admitted as a witness to impeach the mortgage by testifying to the usury in the notes secured by the mortgage, even had he been totally disinterested. In that case the action was brought by the assignee of a mortgage against the grantee of the mortgagor; and the mortgagor was offered as a witness to prove the notes, secured by the mortgage, to have been usurious; and he was decided to be inadmissible, as he was a party to the mortgage. For the same reason, *Bracket*, the mortgagee, was inadmissible, because he was a party to the mortgage. Now, it would be strange indeed if his declarations should be better evidence against the demandant, than his oath would have been. The more we examine the question before us, which seems to be a new one, the more we are satisfied that the evidence of *Bracket's* declarations was properly rejected. Accordingly there must be

Judgment on the verdict.

McLELLAN, *adm'r vs.* CROFTON, *Ex'r.*

The total omission, or the smallness of the *ad damnum* in a writ, cannot properly be considered as merely a *circumstantial* error, within the *Stat.* 1821, *ch.* 59, *sec.* 16, after the rendition of judgment. But until judgment it may be so considered. And therefore where no damages had been laid in the writ, the plaintiff, after verdict and before judgment, may have leave to amend by inserting a sufficient sum.

An objection to a juror because he is related to a party interested in the cause, must be made by way of challenge. After verdict it comes too late.

To prove a charge of $15 for that sum paid for the note of the defendant's testator to a third person, the charge having been made more than twenty years, and all the parties being dead; it was held that the books of the plaintiff's intestate containing the charge, together with the note found among his papers, with the payee's receipt of payment by the plaintiff's intestate on the back of it, were competent evidence from which the jury might properly infer the fact of payment; it also appearing by unobjectionable proof, that the plaintiff's intestate had been in the practice of paying small sums for the defendant's testator.

A paper book in the handwriting of the defendant's testator, containing accounts between himself and the plaintiff's intestate, being found among the intestate's papers, though mutilated and torn; it was held to be competent evidence to the jury, as admissions of the defendant's testator against himself; and that the plaintiff was not bound at his peril to account for the mutilations; nor were the jury bound to infer that the parts missing contained any settlement of the accounts; but that the whole was open to their consideration, to be weighed with the other evidence in the case.

Where an account of more than six years standing appeared footed on the books of the plaintiff's intestate, and the balance carried to new account, and interest claimed thereon; it was held that the jury were not therefore bound to regard this as conclusive evidence of an account then liquidated and stated, so as to enable the statute of limitations to attach to it; but that they were at liberty, if they were so satisfied by the evidence, to treat it as the act of the creditor alone, and of no effect.

A promissory note given by the maker and accepted by the payee in satisfaction of a book debt due from a third person, and with his consent, is a discharge of such debt; and the liability thus incurred by the maker of the note, forms a good ground of action against the party relieved, to recover the amount of the debt, though the note has not been paid.

The lapse of twenty years is not conclusive evidence of the payment of a debt, at common law; but is merely a presumption, liable, like all others, to be repelled by the circumstances of the case.

McLellan *v.* Crofton.

Where, to a plea of the statute of limitations, the plaintiff replies that the accounts were merchant's accounts; and the defendant rejoins that the accounts between the parties were not open and current, but were liquidated and closed more than six years before action brought; which the plaintiff traverses; the issue is substantially framed not on the replication, but on the rejoinder; and therefore the burden of proof is not on the plaintiff, to show that the accounts continued open; but on the defendant, to show that they were liquidated and closed.

"Stated" or "liquidated accounts" are those which have been examined and adjusted by the parties; and where a balance due from one of them has been ascertained and agreed on as correct.

In the case of merchant's accounts, the death of one or both the parties has no operation on the accounts, by way of causing the statute of limitations to attach to them.

Neither has the cessation of dealings between the parties for more than six years, any such operation.

THIS was an action of *indebitatus assumpsit*, on promises alleged to have been made by *James Dunn* the defendant's testator, to *William Waite* the plaintiff's intestate, for the goods, &c. mentioned in the schedule annexed to the writ. This schedule appeared to be a transcript from *Waite's* book, being charges of sundry items accruing from *March* 7, 1795 to *Aug.* 15, 1801, at which time the account was footed by *Waite* and the balance carried to new account.

The defendant pleaded, *first*, the general issue, which was joined: *secondly*, *non assumpsit infra sex annos*; *thirdly*, *actio non accrevit infra sex annos*; *fourthly*, that from and after *Oct.* 28, 1799, mentioned in the plaintiff's declaration, being the time when the last charge but one was made on the schedule annexed, and probably intended to refer to the settlement of the accounts of the ship *George*, hereafter mentioned, more than six years had elapsed; and *fifthly*, that the suit was not commenced within six years next after the cause of action set forth by the plaintiff, if any existed.

To the second, and following pleas, the plaintiff made the general replication of merchant's accounts. The defendant rejoined that at the time of the plaintiff's action there were no open and running accounts between the plaintiff's intestate and the defendant's testator; but that all accounts, concerns and transactions between them were liquidated and closed at the time of, and more than six years before, the commencement of the action.

The plaintiff surrejoined that the accounts, promises and causes of action accruing between said *Waite* and *Dunn* as merchants, and concerning the trade of merchandize, were open and running on the fifteenth day of *August* 1801; that *Dunn* removed out of the Commonwealth of Massachusetss, and continued absent till his death in 1805; that *Waite* died *Nov.* 9, 1805, and no administration was taken out on his estate till *Feb.* 19, 1822; that the will of *Dunn* was not filed, and letters testamentary granted, till *June* 6, 1826; and that said accounts have always remained open and unsettled; and concluded with a traverse of the rejoinder, that the same were liquidated and closed at the time of, and for more than six years before, the commencement of the plaintiff's action.

On this traverse issue was taken and joined; and the cause was tried before the Chief Justice on both the issues.

The plaintiff offered in evidence certain account books proved to have belonged to *Waite*; being his day-books, the entries in which were mostly in his hand writing, and his legers, in which were many entries proved to be in the hand writing of *Dunn*, the last of which was dated *April* 25, 1796; as competent evidence to prove such charges as might have been substantiated in this manner by the suppletory oath of the party, if living. To the admission of this evidence the defendant objected; but the objection was overruled, and the books admitted.

Among other entries on the books, copied into the schedule, was the following;—"*Oct.* 28, 1799. For cash paid *John Waite*, Esq. per receipt of yours taken up this day, $15." The exhibition of the book in support of this charge was objected to. To support the charge, the plaintiff produced a promissory note signed by *Dunn*, payable to *John Waite*, with a sum of fifteen dollars indorsed thereon in his hand writing, as received from *William Waite*. This evidence was objected to, as inadmissible to support this item of charge. But both these objections were overruled, and the charge, accompanied by the note and the receipt thereon, were admitted to be read; though the charge alone was not admitted as legal evidence; but all together being competent for the jury to consider, as furnishing a degree of presumptive proof; all the parties to the transaction being dead, and

the papers being in the hands of the administrator, and by him produced.

Certain account books of the original entries and charges of *Waite* against the owners of the ship *George*, the owners being himself, *James Dunn* and *Francis Waite*, were also offered by the plaintiff to support a charge in the account-book of *Waite* against *Dunn* of $698,49, as the balance of the ship *George's* account adjusted by *Waite* and *Dunn*, *Oct.* 4, 1799. The admission of these books as evidence was objected to; but they were admitted for the purpose proposed, so far as they contained charges in the hand writing of *Dunn*, on the ground of their being admissions on his part; but no farther, nor for any other purpose. It appeared by the plaintiff's testimony, that this ship was captured by the Spaniards, and condemned, in 1797.

The plaintiff also produced in evidence a paper book in the handwriting of *Dunn*, containing mutual accounts of debt and credit between himself and *Waite*, and between himself and the owners of the ship *George*, and between each of the owners and the ship; the last entries therein being dated *Feb.* 26, 1798; and the balances for and against each of the owners being therein carried to their respective private accounts; and being also brought into private account between *Dunn* and *Waite*; offering the book as evidence of the admission of *Dunn* of the truth of the entries therein contained in favor of *Waite*. It was hereupon insisted by the counsel for the defendant that the book of accounts was to be taken together, if considered by the jury at all; and that those parts and entries which went in discharge of *Dunn*, and to reduce the balance against him, were entitled to equal weight and credit with those which went to charge him. And the Chief Justice instructed the jury that they were to examine this book for themselves, and draw their own conclusions from the facts and statements it contained, and the debts and credits it exhibited; and that, like any other evidence laid before them, it was a subject for their consideration.

It was likewise contended by the defendant's counsel, that this paper book was a statement or duplicate of various accounts between said *Dunn* and *Waite*, drawn off by *Dunn*, and shewing all

their accounts; as it was described by the Plaintiff's counsel on producing it; and that it was in fact, an account stated between the parties subsequent to the loss of the ship *George*, as appeared by the last dates therein; and requested the Chief Justice so to instruct the jury. But this he declined; and left it as a fact for the jury to decide whether it was an account so stated.

And it was also contended by the defendant's counsel, that inasmuch as said book was produced by the plaintiff, and had been in his possession and the possession of *William Waite*, or other persons in interest, and as it appeared on inspection, that leaves and part of leaves, once belonging to, and constituting parts of said paper book were by some means torn and removed therefrom; it was incumbent on the plaintiff to account for, or explain the loss; and that not being otherwise accounted for or explained, it was evidence either that such portions were fraudulently removed, or that they were lost by time and accident; and that the jury might presume, in the absence of such explaining evidence, that if the book had been entire, and especially the whole of the last leaf preserved, it would shew a settlement and liquidation and close of all accounts between *Dunn* and *Waite*, including those of the ship *George*. And the Chief Justice was so requested to instruct the jury. On this head he instructed them, that it was a common principle that fraud was not to be presumed; and that there was no direct proof in the case that any of the leaves, or parts of leaves, of the book had been removed or torn off by design, or with a fraudulent intention. If any proof existed of the fact supposed, it must result from inspection of the book itself. That they would therefore examine the book carefully, with this view; and also to ascertain whether the leaves had been lost by time and accident. That they would also examine and see if the book did not furnish some proof that no such settlement had been made on the last leaf, as suggested, inasmuch as the charges and credits on the page in question, and the page opposite, had never even been footed. That the whole was a question of presumption, and exclusively within their province.

The defendant's counsel also contended that the statement of the account of *William Waite* with the ship *George*, and the charge of

balance to *James Dunn* in *Waite's* account, *Oct.* 4, 1799, was evidence of an account stated by *Waite* at that time; and requested the Chief Justice so to instruct the jury. His instructions to them were, that the statement of the account referred to, certainly was evidence in the case; but whether it was evidence proving any account stated, liquidated and closed by and between *Waite* and *Dunn*, was a fact for them to decide, on examination of the whole evidence relating to that point.

The defendant's counsel also contended that the account annexed to the Plaintiff's writ exhibited, and was in form and fact an account stated *Aug.* 15, 1801; and requested the Chief Justice so to instruct the jury; which he declined, for the reasons given in the last instruction.

It was proved by the defendant that the will of *James Dunn* was allowed and approved in the Prerogative Court of *Ireland* in *Dec.* 1805; and it was contended by his counsel, that all dealings having ceased between the parties for six years before their decease, it might be presumed that the accounts of *Waite* and *Dunn* had been stated and rendered; and that the death of those parties was a closing of all accounts between them, and equivalent, in legal effect and contemplation, to an account stated. On this head the Chief Justice instructed the jury that the law did not seem to have been settled in England, New York, Massachusetts or this State; and that he was not prepared to say whether a cessation of dealings between merchant and merchant for more than six years next before the commencement of the action, or the death of both or one of the original parties, was equivalent to an adjustment of accounts between such parties, and should subject the accounts, so adjusted to the operation of the statute of limitations; nor did he deem it necessary to give any definite opinion on those points, because the form of the issue rendered it unnecessary. That the single point in issue upon the special pleas was, whether the accounts in question had been liquidated and closed more than six years before the commencement of the action; that the words "liquidated and closed," implied the operation of the minds of the original parties on the subject—a thing very different from the death of either of them, or the mere cessation of

dealings; and that the affirmative was on the defendant, to satisfy them, that the accounts had been liquidated and closed, as he had affirmed in the pleadings.

The defendant's counsel also contended that each and all of these circumstances, viz. the statement of accounts in the paper book of *James Dunn* to *Feb.* 26, 1798; the charge of balance by *Waite* to *Dunn* on adjustment of ship *George's* accounts *Oct.* 4, 1799; the statement of account as annexed to the writ, and balance struck *Aug.* 15, 1801; and the decease of each of the parties at the end of the year 1805; were evidence in support of the issue on the second, third, fourth and fifth pleas; that the death of the parties in law closed the accounts previously existing, which were no longer open and running, and that the jury ought therefore to find the second issue for the defendant. On these several points thus collectively considered, the Chief Justice referred the jury to his instructions upon each of them separately as before stated.

The last item of the charge in the account annexed was a sum of money paid to *Pierson & Thatcher*, *Aug.* 15, 1801. It appeared by the books of said firm that the original charge was duly made against *Dunn*; and from the testimony of *George Pierson*, the surviving partner, it appeared that at the request of *Waite* the amount of the charge was transferred to his account with *Pierson & Thatcher*, and a corresponding credit of the amount entered to the account of *Dunn*, in these terms, viz. "By carried to the account of *William Waite*, which when paid is in full of this account." *Pierson* also testified that *Dunn* had once or twice, some time previous, referred him to *Waite* for settlement of some small accounts; but that he had no particular direction from *Dunn* respecting this account; that *Waite* afterwards gave his promissory note for the amount, to the assignees of *Pierson & Thatcher*, who became bankrupts; but that the note was not negociable, and was never paid by *Waite*.

On this evidence the defendant's counsel contended that the assumption of *Waite* to pay this demand for *Dunn* was officious; that the circumstances proved did not amount to payment, nor shew a discharge of *Dunn*; and that the charge for money paid *Pierson & Thatcher* could not be sustained. But the Chief Justice instructed

the jury that if they should believe that the assignees of *Pierson & Thatcher* accepted the note in full satisfaction of the debt originally charged against *Dunn*, and transferred and charged to *Waite*, and that the transfer of the charge was made by the request or assent of *Dunn*, expressed or implied, then they were authorised to consider the debt so transferred and assumed by *Waite* and secured, as paid, in respect to *Dunn*; and that the plaintiff had a right to recover that amount in this action, though the note had never been paid; and that they would judge whether there was evidence of the implied assent to the above arrangement on the part of *Dunn*, arising from the testimony, or from the circumstance of *Waite's* paying debts for *Dunn*, such as are charged in the account sued.

On the general issue, the defendant's counsel also contended, that from the lapse of time since all dealings ceased between the said parties, who died more than twenty years before the commencement of the action, the jury were bound or warranted to presume payment and discharge. But the Chief Justice instructed them that though, after the lapse of twenty years, a bond, note or account, was presumed to be paid, yet such presumption might be repelled by facts and explanatory circumstances, such as payment of interest, acknowledgment of the debt, &c. That it was the practice of the courts to deduct eight years in the computation, on account of the revolutionary war; that the mere poverty of a debtor was not sufficient to control the presumption, where the parties lived in the same state or country; but that where a debtor was abroad in a foreign country for twenty years, that fact rebutted the presumption; that the subject was for the consideration of the jury; that according to the evidence *Dunn* left the state of Massachusetts and this country in the fall of 1799, and returned to Ireland, where he continued till his death in 1805; and that he was poor when he went away.

The defendant's counsel also contended that interest was not allowable on an account stated; that the interest account could not be supported; that no interest could accrue after the death of *Waite* until demand made by his administrator; and that the parties were not accustomed to charge interest, in the settlement of accounts. But the Chief Justice instructed the jury that if they were satisfied, from

the evidence of certain merchants who testified to that effect, that it was a custom among merchants to charge interest, and that *Waite* and *Dunn* adopted the usage, they might allow it on the account, excluding the period intervening between the death of *Waite*, till the appointment of an administrator.

To which rulings and directions of the Chief Justice the counsel for the defendant filed exceptions, as by law provided; the jury having found a verdict for the plaintiff, for $2031,96.

After verdict the defendant filed a motion for a new trial, on the ground that *Nathan Winslow*, one of the jurors, was son-in-law to *Samuel F. Hussey*, one of the principal creditors of *Waite*, whose claim had been allowed by the commissioners on his estate; and that this fact was not known to, or not recollected by the defendant, his agent, or attornies, till near the close of the argument to the jury on the part of the plaintiff; after which, and before the cause was committed to the jury, the counsel for the defendant stated the fact to the Judge, who replied that the objection, if valid, could not then be made, but might be offered after verdict.

In support of this motion, *C. S. Davies*, Esq. of counsel for the defendant made affidavit that he had no recollection of the circumstance that *Hussey* had any interest in the event of the suit, till the trial of the cause was considerably advanced, when it was mentioned to him that *Hussey* sitting near the jury box, had been speaking to *Winslow*;—that he had not then any knowledge of their alliance, but knew they were members of the society of Friends; that he did not suspect the fact till it was mentioned to him immediately before it was communicated to the court; but that he might formerly have heard that *Winslow* had married a daughter of *Hussey*.

Samuel Fessenden, Esq. also of counsel for the defendant, made affidavit that he had no knowledge that *Hussey* was a creditor of *Waite's* estate till near the close of the argument for the plaintiff, to the best of his recollectiou.

The counsel for the plaintiff, by way of objection to the motion, filed the affidavit of *Stephen Longfellow*, Esq. one of said counsel, stating that at the trial of this cause in the court below, *Hussey* was offered as a witness for the plaintiff; that he was objected to by the

counsel for the defendant, on the ground of his interest in the suit as a creditor of *Waite*; and that for this cause he was rejected by the court as incompetent to testify. They also filed the affidavit of *Winslow*, stating he did not know, till after verdict, that *Hussey* was a creditor, in his own right, to the estate of *Waite*. *Winslow*, on further examination, testified that he was present at the trial in the court below, and heard *Hussey* state something about his having a demand against *Dunn's* estate as agent for some person or persons; but that he knew nothing about the facts till after the verdict was returned at the present term. *Hussey* also testified to his having been offered as a witness in the court below, and excluded on the ground of interest; and further stated that since that trial he had distinctly informed *Joseph T. Sherwood*, the defendant's agent, who was present at the trial, and had also stated to one of the defendant's counsel, that he was a creditor to *Waite's* estate.

It being discovered after verdict that the blank in the writ which was left for the amount of the *ad damnum* had never been filled; the counsel for the plaintiff moved for leave to amend it by inserting a sum sufficient to cover the amount of the verdict; which the defendant strenuously opposed.

Both these motions, together with the points raised by the exceptions, stood over for argument before all the Judges.

Fessenden, *Davies* and *Deblois* argued for the defendant, to the following effect.

The first question is whether merchants' accounts are, in any case, within the statute of limitations. The provisions of the English statute on this subject have been substantially copied into those of our own State, New York, Massachusetts, and others; and the decisions upon them are generally in unison. In New York, the exception of merchants' accounts, in the statute of that state, has been confined to open and current accounts only, and not to accounts stated, or, in the words of the rejoinder, "liquidated and closed." *Ramchander v. Hammond*, 2 *Johns.* 200. So is the doctrine stated in 2 *Stark. Ev.* 900, *note a*. The leading case at law on this question, is, *Webber v. Tivill*, 2 *Saund.* 124, which is to the same point, and seems

never to have been shaken. And the rule is the same in equity, as at law. It was held in an early case in chancery that the statute was no bar to an open account, though it was considered as applying to every other; *Scudemore v. White*, 1 *Vern.* 456; and again that only open accounts were saved by the exception; but the case most frequently and respectfully resorted to as settling the principle, is that of *Welford v. Liddel*, 2 *Ves.* 400, where Ld. *Hardwicke* held that the defendant might plead the statute in all cases where the account is closed and concluded between the parties, and the dealings and transactions over. 2 *Saund.* 127 *a*; *Coster v. Murray*, 5 *Johns. Chan. Rep.* 527; 3 *Pick.* 112; *Martin v. Heathcote*, 2 *Eden* 169; 1 *Mad. Chan.* 98; *Foster v. Hodgson*, 19 *Ves.* 133. It is difficult to discover any sensible or material distinction between the decisions which have been made on merchant's accounts, and those on mutual accounts; and they seem to have been placed on the same footing by the decided cases. 19 *Ves.* 182; *Cotes v. Harris, Bull. N. P.* 49; *Cranch v. Kirkman, Peake's N. P.* 121; 5 *Johns. Ch. Rep.* 524; *Catling v. Skoulding*, 6 *D. & E.* 193. In this last case there is an *obiter dictum* of *Ld. Kenyon*, importing that merchants' accounts are not within the statute, even though there had been no dealing of any kind within six years; but this remark was regarded by Chancellor *Kent* as extra-judicial, the case showing credits on each side within six years. 5 *Johns. Ch. Rep.* 526; 3 *Pick.* 110; 19 *Ves.* 186. In the case of *Crawford v. Liddel*, cited in *Jones v, Pingree.* 6 *Ves.* 580, it was held by Ld. *Roslyn* that where all the transactions were over six years, the statute might be pleaded, as well to merchants' accounts as others. And to the same effect is *Duff v. The East India Co.* 15 *Ves.* 199; and *Barber v. Barber*, 18 *Ves.* 286; and so is the rule laid down in *Beame's Pl. in equity p.* 167, and in 1 *Mad. Ch.* 98. The English decisions on this subject are ably reviewed by the learned and sagacious Chancellor *Kent* in *Coster v. Murray* before cited; and the weight of authority pronounced to be in favor of the application of the statute to open merchants' accounts, where all the items are above six years before the commencement of the action. This conclusion was also adopted in South Carolina, in *Van Rohyn*

v. Vincent, 1 *McCord* 150. *Davis v. Smith*, 4 *Greenl.* 337. Thus it seems established, that if any transaction between the parties is within six years, there is no difference, in the operation of the statute, between mutual accounts and merchants' accounts; that when all the transactions are over six years, the statute may be pleaded as well to merchants' accounts as to others; and that there is no difference, as to the persons who are parties to such accounts, whether merchants or others, provided they relate to merchandize; and no distinction is admitted between foreign and inland merchants.

There being no apparent or established difference in doctrine, between merchant's accounts and mutual accounts; it is difficult to see what distinction can prevail between them in practice or pleading. The denial that accounts were merchants' would be useless and unavailing, if the case could be brought within the compass of mutual accounts; and the replication of merchants' accounts, upon that principle, would always prevail, whether the accounts were in fact between merchants or not. Again, if it be holden necessary to prove a liquidation of accounts previous to the prescription, to secure the protection of the statute, the limitation, which applies alike to mutual accounts and merchant's accounts would be entirely annulled. The limitation of the statute is *in se*, and *ipso facto*, a liquidation of accounts; and the intention of the whole statute, as expounded in a long series of decisions, appears to be, to put an end to all accounts that have been standing over six years, unless their vitality can be preserved, or a new animation imparted to them within the period of prescription. How this effect can be produced where there have been no dealings or transactions between the parties within the time, and no recognition of their existence, or any continuance of any former concerns resulting from any living and operative cause, presents a difficulty, both upon the letter and the spirit of the statute, not easily to be surmounted.

The result of an examination of all the existing authorities seems to be, that an open merchants' account, and that only, is saved from the operation of the statute. Accounts may cease to be open, and become closed, by being stated; by which operation they become closed in form; or they may become closed by the cessation of

dealings, and the operation of time; whereby they become closed in fact. But unless they remain open and current in fact, within six years, they are not protected against a plea of the statute.

2. When the statute of limitations is pleaded, it is incumbent on the plaintiff to take his case out of it, and to show that his right of action did accrue within six years, and establish his allegation; or, by his replication, to bring his case within the exception. 1 *Barnw. & Ald.* 92; 2 *Stark.* 887; 6 *Mod.* 309; 2 *Saund.* 64, *a.*; 6 *D. & E.* 192. The office of a plea in bar is to allege matter which, if true, destroys the claim made by the suit. *Beame's Pl.* 63. Such is the plea of the statute of limitations; which being pleaded, it is the business of the plaintiff to remove the bar. Hence the issue is substantially on the replication. Now in the present case the replication affirms that the matter of the action was merchants' accounts. But it has already been shown that these should not only be matters between merchants, or concerning merchandise, but also that the accounts should be open, current and continuing. Of this affirmation, there is a special denial in the rejoinder, which, not disputing what the character of the accounts might have been originally, avers that there were no open accounts between the parties within six years. The rejoinder admits that *Waite* and *Dunn* were merchants, and that they dealt together in merchandise; but it denies the legal effect of such transactions as constituting what in law are called merchants' accounts, by denying that they were open, or could be open between the parties, six years having elapsed since they had any dealings. It thus narrows the ground of the replication, by negativing the existence of one material ingredient. The surrejoinder is supplementary to the replication, which it supports and reiterates, concluding with a formal and technical traverse of the defendant's denial that the accounts were open. On this special traverse issue was taken; so that the issue is still on the original averment of the plaintiff; which it is necessary for him to make good, in order to extract his case from the statute, or to establish it as within the exception. The presumption of law, arising out of the very principle of the statute is that the subject matter of the action is, so to speak, dead; and the burden of proof is on the plaintiff to show that it is alive. His case is

within the statute, unless he can show that which removes it from its operation. *Gilb. Ev.* 148; *Bull. N. P.* 298.

3. In point of fact, the account in the case at bar was stated *Aug.* 15, 1801, by the plaintiff's intestate, who on that day struck a balance, which he carried forward to a new account, on which interest is charged. On that day, therefore, the statute of limitations attached to the account. The very basis of the charge of interest is that a sum certain was ascertained to be due; in which case it is no longer an open and running account. *Union Bank v. Knapp*, 3 *Pick.* 96; 5 *Dane's Abr.* 394; 2 *Saund.* 124, 127, *note a;* 1 *Ves.* 209. To constitute a stated account, it is not necessary that it should be signed by the parties. The assent of the party to be charged may be inferred from lapse of time, without objection. *Beame's Pl.* 230; 1 *D. & E.* 42; *Sherman v. Sherman*, 2 *Vern.* 276; *Ficket v. Short*, 2 *Atk.* 252; *Denton v. Skellard*, 2 *Ves.* 239; 1 *Mad. Ch.* 101; *Walden v. Sherburne*, 15 *Johns.* 409; *Topham v. Braddock*, 1 *Taunt.* 571. So also accounts are to be considered as technically closed by the death of either of the parties. *Bridges v. Mitchell, Gilb. Eq. Rep.* 225; *Story's Pl.* 91. Hence the instructions of the judge to the jury that the words "liquidated and closed" implied the operation of the minds of the parties, were incorrect; as this principle would go to exclude the rule of law as laid down in the cases already cited. 2 *Stark. Rep.* 397; 3 *Stark. Ev.* 1090. The courts of equity proceed on the same rule, in refusing to decree an account after an extraordinary lapse of time. *Foster v. Hodgson*, 19 *Ves.* 179; *Ld. Pomfret v. Ld. Winsor*, 1 *Ves.* 482; *Smith v. Clay, Amb.* 645; 3 *Bro. Ch. Ca.* 639; 1 *Mad. Ch.* 99; 2 *Sch. & Lefr.* 639; *Hercey v. Dinwoody*, 4 *Bro. Ch. Ca.* 257; *Havenden v. Ld. Armesley*, 2 *Sch. & Lefr.* 607. The true principle of law, to be deduced from all these authorities, is, that after the lapse of a reasonable time, an accounting will be presumed; and that this is the only probable presumption; to raise which the lapse of even fourteen years has been held amply sufficient.

This presumption is corroborated by the evidence furnished by the plaintiff. The case shows a charge, made *Oct.* 4, 1799, as the balance of the accounts of the ship *George*, adjusted on that day,

which were the only matters of merchants' accounts pretended to exist between the parties; and which is, of itself, evidence of an account then stated. And a still more important piece of evidence to this point was exhibited by the plaintiff, in the paper book in the handwriting of *Dunn*, which was a mutual statement of all their concerns up to *Feb.* 1798, a year after the capture and condemnation of the ship; and after the *spes recuperandi* was forever lost. It was at least an account stated and rendered by *Dunn*, and received by *Waite* without objection. On this point the instructions of the judge did not set forth the whole law to the jury, nor shed the light necessary for their direction. They were not informed, that the paper book was of itself, and so far, evidence of an account stated; nor were they instructed as to the degree and bearing of the evidence, and its proper influence to establish that conclusion; nor in the legal presumption inseparable from this proof, in the absence of any positive evidence to the contrary. Nor were they instructed, as it is contended they should have been, that from the mutilated condition of this piece of evidence, part of its last leaf, and perhaps others, being wanting, every presumption was to be made in favor of the defendant, against the party in whose possession it was found. It is always incumbent on the party producing mutilated documents, to account for their want of entireness. *Bull. N. P.* 255. Such is the spirit of the doctrine of the *onus probandi* in *Ross v. Gould*, 4 *Greenl.* 204; 1 *Inst.* 225 *a*; *Hatch v. Hatch*, 9 *Mass.* 312; 10 *Co.* 92; 1 *Phil. Ev.* 264, 347; *King v. Castleton*, 6 *D. & E.* 236; 1 *Stark. Ev.* 370, 291; *Gilb. Ev.* 44. If the paper book be considered as the admission of *Dunn*, as it was treated at the trial, by the plaintiff, then, on this ground, the whole should have been taken together; and for defect of the whole, the part offered should have been excluded. *Bull. N. P.* 237; *Randall v. Blackburn*, 5 *Taunt.* 245; *Kirkpatrick v. Love*, *Ambl.* 589; 1 *Stark. Ev.* 372. But being admitted, inasmuch as it purported to be a statement of accounts long after the principal subject of their dealings was lost, the rule of *omnia præsumuntur rite et solenniter esse acta* was strictly applicable; and here also the jury should have been directed to presume that the lost portion of the last remaining leaf contained a final statement and liquidation

of the account. This rule has been particularly applied in favor of the perfectness of transactions, in *Colman v. Anderson*, 10 *Mass.* 105; *Pejepscot Proprietors v. Ransom*, 14 *Mass.* 145; *Blossom v. Cannon, ib.* 176; *Gray v. Gardiner*, 3 *Mass.* 399.

4. On the general issue, the presumption of law, arising from the lapse of twenty years, is that the debt was paid. This rule is simple, unqualified and imperative. The lapse of time holds the place of particular and individual belief. The presumption arises because there are no means of belief or disbelief. The law concludes, definitively and absolutely, that the obligor or covenantor has in that long time lost his receipts and vouchers; or that the witnesses, who could prove the payment, are dead. The judges, as is said in *Grantwick v. Simpson*, 2 *Atk.* 144, have bound it down as an irreversible rule, that if there be no demand for money due on a bond for twenty years, they will direct a jury to find it satisfied, from the presumption arising from length of time. *Oswald v. Legh*, 1 *D. & E.* 270; *Henderson v. Lewis*, 9 *Serg. & Rawle*, 379; *Giles v. Barremore*, 5 *Johns. Chan.* 545. And so, it is contended, the jury in the case at bar should have been instructed.

5. The books of *William Waite*, and the promissory note of *Dunn* for fifteen dollars, payable to *John Waite*, with the indorsement thereon of the receipt of its amount from *William Waite*, were not admissible to support the charge of that sum as paid for *Dunn's* receipt. That the book itself is inadmissible for this purpose, even with the suppletory oath of the party, is clear from the case of *Prince v. Smith*, 4 *Mass.* 455; it being a case of the payment of money to a third person, and therefore in its nature susceptible of better evidence. No request of *Dunn* was proved; without which it was an officious payment, and not recoverable. *Exall v. Patridge*, 8 *D. & E.* 308; *Kilgour v. Finlayson*, 1 *H. Bl.* 155; *Child v. Moseley*, 8 *D. & E.* 613; 2 *Comyn on Contr.* 151. The charge, moreover, is for money paid for *Dunn's* receipt taken up; but the evidence offered is a promissory note. No receipt was produced; nor any evidence offered of its loss. But if the paper were a receipt, it would not be sufficient evidence of itself, without proof of a request from *Dunn*.

6. The jury should have been directed not to allow the charge of money paid for *Dunn* to *Pierson & Thacher*. He was not discharged of the debt on their books; the credit being for *Waite's* note, to be in full of the account when paid. Nor was the note thus given a negotiable note; and therefore it was not of itself a satisfaction. Neither was it ever paid. *Banorgee v. Hovey*, 5 *Mass.* 11; *Thatcher v. Dinsmore*, 5 *Mass.* 299; *Maneely v. McGee*, 6 *Mass.* 143; *Johnson v. Johnson*, 11 *Mass.* 359. Nor was there any ground for the jury to believe it was so received; nor any evidence from which they could presume that this debt was assumed at *Dunn's* request. On the contrary, the evidence was against such presumption. *Waite*, in the most favorable light for the plaintiff, was merely the surety of *Dunn*; and as such could not call on his principal till actual payment. *Rowell v. Smith*, 8 *Johns.* 249.

7. The charge of interest, upon the plaintiff's own principles, could not be sustained, the account being treated as open and unliquidated. If it was not so, it is barred by the statute. If it was, then no interest was chargeable unless by the custom of the place. And this custom, if any existed, it was apparent from the books themselves that the parties never had adopted; and so the jury should have been instructed.

8. Touching the motion to amend the *ad damnum*, the proposed amendment is not matter of form, but of substance. 1 *Chitty Pl.* 398; 1 *Bac. Abr. tit. Amendment E*; *Bonner v. Charelton*, 5 *East* 140; *Wray v. Lister*, 2 *Stra.* 1110; *Percival v. Spencer, Yelv.* 45; *Benger v. Kortwright*, 4 *Johns.* 415. And this being true, it cannot be made after verdict. *Curtis v. Lawrence*, 17 *Johns.* 111; *Grosvenor v. Danforth*, 16 *Mass.* 74; 6 *Dane's Abr. ch.* 184, *art.* 5, *sec.* 10; *Burk v. Barnard*, 4 *Johns.* 309; *Burr v. Thomas ib.* 190; *Marriott v. Lister*, 2 *Wils.* 147; *Paine v. Bustin*, 1 *Stark. Rep.* 60; *Hoit v. Malony*, 2 *N. Hamp.* 322.

Longfellow and *Greenleaf*, for the plaintiff, cited the following authorities. That the balance of the ship *George's* account being carried forward, became merely an item in the account current, and so not within the statute; *Farrington v. Lee*, 1 *Mod.* 270; expounded in *Union Bank v. Knapp*, 3 *Pick.* 111. That the liquida-

tion and closing of accounts imported some joint act of the parties; the death of one not being sufficient; *Bass v. Bass*, 6 *Pick.* 362; *Webber v. Tivell*, 2 *Saund.* 125, *note* 6; *Truman v. Hurst*, 1 *D. & E.* 40. That merchants' accounts are not within the statute, though no item is within six years; *Oswald v. Legh*, 1 *D. & E.* 270; *Catling v. Skoulding*, 6 *D. & E.* 189; *Jones v. Pengree*, 6 *Ves.* 580; *Foster v. Hodgson*, 19 *Ves.* 180; *Willard v. Dorr*, 3 *Mason*, 164; 1 *Ball & Beatty*, 119; 2 *Sch. & Lefr.* 632; 10 *Ves.* 466; 15 *Ves.* 496; 1 *Ves. & Beame*, 539; *Mandeville v. Wilson*, 5 *Cranch* 15; *Davis v. Smith*, 4 *Greenl.* 339; *Murray v. Coster*, 20 *Johns.* 582; *Styles v. Donaldson*, 2 *Dal.* 196; *Franklin v. Camp*, 1 *Coxe* 196; *Van Rhyn v. Vincent*, 1 *McCord* 310; *Richards v. The Maryland Ins. Co.* 8 *Cranch* 84; *Ballantine on Lim.* 71, 73, 81, 82. That the note of a third person, accepted in payment, is a discharge of the debt; *Maneely v. McGee*, 5 *Mass.* 299; *Wiseman v. Lyman*, 7 *Mass.* 286; *Ellis v. Wild*, 6 *Mass.* 321; *Hob.* 69 *note*; and that the maker may recover the amount, though he has not paid the note; *Sheehy v. Mandeville*, 6 *Cranch* 311; *Cornwall v. Gould*, 4 *Pick.* 444; *Witherbee v. Mann*, 11 *Johns.* 518; *Gallagher v. Roberts*, 1 *Wash. C. C. R.* 320; *Parker v. United States*, 1 *Pet. C. C. R.* 262. That the lapse of twenty years was merely presumptive evidence of payment, liable to be rebutted by other evidence; *Cowp.* 214; 3 *Dane's Abr.* 506; *Dunlap v. Ball*, 2 *Cranch* 184. That the jury were rightly instructed on the point of interest; *Selleck v. French*, 1 *Conn.* 32. That the objection to the juror came too late; and was not valid at any time; *Jeffries v. Randall*, 14 *Mass.* 205; *Fellow's case*, 5 *Greenl.* 333; 6 *Dane's Abr.* 248. And that the motion to amend was allowable; *Bogart v. McDonald*, 2 *Johns. Ca.* 219; *Stat.* 1821, *ch.* 59, *sec.* 16; 5 *Dane's Abr.* 436; 7 *D. & E.* 699; *Danielson v. Andrews*, 1 *Pick.*156; *Haynes v. Morgan*, 3 *Mass.* 208; *Perkins v. Burbank*, 2 *Mass.* 83; *Bullard v. The Nantucket Bank*, 5 *Mass.* 99; *Putnam v. Hall*, 3 *Pick.* 445; *Williams v. The Hingham Turnpike*, 4 *Pick.* 349.

The opinion of the Court was delivered at the adjournment in *August* following, by

MELLEN C. J. In this case three different questions are presented to the court for decision.

1. The first is a motion on the part of the plaintiff, for leave to amend, by inserting an *ad damnum*; through inattention none having been laid in the original writ.

2. The second is a motion at common law, for a new trial; on the ground that one of the jurors who tried the cause was incompetent, for certain reasons stated in the motion on file.

3. The third is a motion for a new trial, founded on exceptions to the opinions and instructions of the judge who presided at the trial of the cause. A verdict was returned for the plaintiff for the sum of $2031,96.

We shall proceed to examine these several motions in the order in which we have arranged them.

It is a principle of law established by several decided cases, that if judgment be rendered for a sum larger than the amount of the *ad damnum*, it is, for that reason reversible on a writ of error; and it must be reversed, unless the plaintiff will enter a remittitur of the excess. If this be done, the court will affirm the judgment for the residue. *Hutchinson v. Crossen*, 10 *Mass.* 251; *Grosvenor v. Danforth*, 16 *Mass.* 74. In the present case, the counsel for the plaintiff, after the verdict was returned, discovered that no *ad damnum* was laid; and anticipating the danger to which his client would be exposed by taking judgment on the verdict, in case the defendant's motions should be overruled, he very prudently made the motion to amend. The 16th section of our revised statute, *ch.* 59, has respect only to circumstantial errors or mistakes; and it would seem that, inasmuch as a judgment is liable to reversal, if rendered for a larger sum than the *ad damnun* alleged, the total omission, or the smallness of an *ad damnum*, cannot properly be considered as merely a circumstantial error or mistake; at least after rendition of judgment. Perhaps until judgment is rendered, it may be so considered. We are not aware of any decisions opposing this idea. Matters of sub-

stance are those essential to the maintenance or defence of an action. Circumstantial errors or mistakes are those which are in matters not essential. It will be observed that, as yet, no objection has been made by the defendant on account of the omission of the *ad damnum*, either by plea in abatement or motion; but he filed his pleas in chief, and the cause has been tried on its merits. The declaration sets forth a good cause of action; and the omission we are considering has not, up to the present stage of the cause, been of the least importance to either of the parties; nor has it the remotest connexion with the justice of the case. And now, why is not the want of an *ad damnum* at this time a circumstantial error or mistake? If so, then it is a subject of amendment by the very terms of the section before mentioned. When a writ of error is brought to reverse a judgment because it exceeds the *ad damnum*, if the creditor remits the excess, this *remittitur* is considered as a species of amendment, which he has the power to make by releasing his damages down to the amount of the damage alleged; and probably, in those cases where judgment has been reversed for excess of damages, the court would have avoided the necessity, had they been empowered in such cases to grant leave to the plaintiff to make a more advantageous amendment, by increasing the *ad damnum* to a sufficient amount; but on error, this cannot be done. In the before cited case of *Hutchinson v. Crossen*, the court say, "The writ of error is a commission to this court to examine the record of a judgment in an inferior court, and thereupon to reverse or affirm such judgment according to law. We can only examine that record, as it is certified to us, and determine whether it warrants the judgment rendered by the other court." But the present case is not before us on error but on appeal, which opens all questions in relation to the merits of the cause on every ground. We are in the constant habit of allowing amendments in such cases; but not in proceedings on error. At common law, if a verdict, and general damages be given, where the declaration contains several counts and one of them is bad, judgment may be arrested or reversed on error, for that reason; but if the judge who tried the cause will certify that all the counts were for the same cause of action, or that the evidence applied only to the good

count or counts, the court, even at a succeeding term, will allow the plaintiff to amend the verdict, so as to make it applicable to the good count or counts. This is done to prevent an arrest or reversal of judgment. This is stronger than the present case. *Barnard v. Whiting*, 7 *Mass.* 358; *Barnes v. Hurd*, 11 *Mass.* 57; *Sullivan v. Holker*, 15 *Mass.* 374; *Patten & al. v. Gurney*, 17 *Mass*, 182. In *Petrie v. Hannay*, 3 *D. & E.* 659, the verdict took no notice of one of the issues; and afterwards a writ of error was brought in the House of Lords. The plaintiffs there obtained a rule to show cause why they should not be allowed to amend by the judge's notes, by adding a verdict on the second plea; and the amendment was allowed. The same thing was allowed on error in the case of *Clark v. Lamb*, 7 *Pick.* 512, as to the amendment of a verdict. These decisions go further still in support of the justice of the case, after the merits have been fairly decided. In both cases the error or omission was considered as matter of form; and a more liberal principle was adopted and acted upon than was deemed proper in *Hutchinson v. Crossen*, which we have before cited. In *Sayer v. Pocock*, *Cowp.* 407 no issue was joined; but the cause went down to trial and a defence was made. After verdict, the party had leave to amend by adding a *similiter*; Lord *Mansfield* at the same time saying that one was ashamed and grieved that such objections remained; but by amending, the court only made that right, which the defendant himself understood to be so, by going down to trial. So also in *Grundy v. Mill*, 1 *N. Rep.* 27, a tender was pleaded, but no regular issue was joined; and after verdict, the court allowed the record to be amended, on the principle adopted in *Sayer v. Pocock*. In both these cases there was an omission of one of the parties of such a nature as to leave no question regularly presented for trial; but the error was promptly corrected; the parties having tried the cause fairly on its merits without knowing that any omission or error existed. The same observation may also be applied to this case. The omission in question must have been the consequence of mere inattention; an evident mistake of the clerk who made the writ; whereas the insertion of too small a sum by way of *ad damnum* may be the effect of misjudging or miscalculation; it

has not the appearance of mistake. In New York in the case of *Bogart v. McDonald*, 2 *Johns. Ca.* 219, leave was given, on motion to amend by increasing the *ad damnum*. So also in *Danielson v. Andrews*, 1 *Pick.* 156. We will, on this point, cite one case more, which seems to be a direct authority, viz. *Tomlison & al. v. Blacksmith*, 7 *D. & E.* 132. It was an action of *assumpsit*; damages laid at £100; verdict for the plaintiff for the sum of £600, 9, 6. The plaintiff moved for leave to amend by increasing the *ad damnum* to £1000, and leave was granted accordingly; but Lord *Kenyon* at the time observed "it would be going too far to make the amendment required, without sending the cause to a new trial, as the defendant might have gone to trial, relying that no more than £100 could be recovered." Such was the reason for granting the amendment upon the above terms in that case. But in the present case, to impose such terms would be useless and absurd; for the defendant has exerted his full strength and contested every item of the plaintiff's account, without measuring his defence by the amount of the *ad damnum*; for there was none. He did not, and could not make any such calculations; and for the most conclusive reason; for it is not even pretended that he had any idea of the omission of an *ad damnum* till after the close of the trial. But it is contended, that as the plaintiff inserted no *ad damnum*, the court of Common Pleas had no jurisdiction of the cause, and, therefore, that this court has none; and that although no plea to the jurisdiction was given, the defendant may still avail himself of the objection, as it appears on record. If we are referred to the record, we must look to the whole of it. An account of some thousands of dollars is annexed to the writ and the verdict which the jury have returned, has established the plaintiff's claim to a large amount, shewing that legal jurisdiction over it appertained to the court of Common Pleas, and now belongs to this court. It would be matter of regret, if not of reproach to our laws and to the administration of them, if such a motion could not be sustained. We entertain no doubt on the point. The plaintiff, therefore, has leave to amend, by inserting a sufficient *ad damnum*, and the clerk will enter, that such leave is granted and that the amendment is made accordingly.

The motion to set aside the verdict and grant a new trial on account of the asserted disqualification of *Nathan Winslow*, one of the jurors, is the next subject for our consideration. It is proved that he is the son-in-law of *Samuel F. Hussey;* who is a creditor of *Waite*, the intestate, and whose claim has been allowed by commissioners; and from the evidence reported by the judge relating to the subject of the motion, it appears that the juror was wholly ignorant of the existence of *Hussey's* claim, and of course it could have had no influence upon his mind in the decision of the cause. And from the same reported evidence it appears that the agent of the defendant, Mr. *Sherwood*, who attended the trial, had been distinctly informed, before that time, of *Hussey's* claim; and one, at least, of the defendant's counsel knew the fact; but it seems it escaped the recollection of them all. These facts certainly do not countenance the motion, which is addressed to the discretion of the court. If a juror be drawn more than twenty days before the sitting of the court, it is a good reason for dismissing him; but the objection comes too late after verdict, though not till then known to the party objecting. *Amherst v. Hadley*, 1 *Pick.* 43. So if a *talesman* sits in a cause for which he was not returned, the objection cannot be sustained after verdict. *Howland v. Gifford*, 1 *Pick.* 43 *note*. So if a person, not by law qualified to sit in the trial of a real action, where the tenant claims compensation for his improvements, because he holds lands by a possessory title in the same manner, does actually sit as a juror; a new trial cannot be granted on that account, though the disqualification was not known till after verdict. *Jeffries v. Randall*, 14 *Mass.* 205. So if a *talesman* be returned by the sheriff, in an action where his deputy is a party. *Walker v. Green*, 3 *Greenl.* 215. The utmost which can be urged by the defendant's counsel is, that they forgot to make the objection in season by way of challenge; nor was it intimated to the court, and then not in the hearing of any of the jury, till near the close of a long trial. But the fact is, there was no disqualification on the part of the juror, and there could not have been any till he had been informed of *Hussey's* claim. We see no grounds for disturbing the verdict on account of any reasons set forth in the motion. The

great objects of a trial by jury have been attained; the facts have been submitted to them; and they have impartially returned their verdict upon those facts, under the influence of no motives that we have the right to believe or even suspect to be improper.

We therefore pass to the consideration of the third question, or motion founded on the exceptions. The exceptions alleged are numerous, and have respect to almost all the proof introduced, and all the decisions and instructions of the presiding judge; and, of course, the opinion of the court may be extended to an unusual length in the examination of this branch of the cause. Several of the exceptions, however, and the subjects with which they are connected, may be embraced in one view; because one general answer may apply to them, and the same principles govern our decision in respect to them. But in this examination we shall arrange the exceptions, so as in the first instance to dispose of the minor questions, and then proceed to a distinct and full consideration of the more important.

The exception against the admission of the day book of the intestate is entirely destitute of legal foundation. It was admitted under such instructions and restrictions as are usual in similar cases; the principles regulating this species of proof are very familiar, and the citation of authorities is unnecessary. The exception to the admission of those charges in the leger entered in the hand writing of *Dunn*, as evidence to the jury, we consider as equally unsupported; they were admissions on the part of *Dunn*, and, as such, competent proof, upon the plainest principles of law.

As to the charge for cash paid to *John Waite*, we cannot pronounce the instructions of the judge to be incorrect, in the peculiar circumstances of the case. The evidence, such as it was, was left to the jury for their consideration. They were informed that the book alone was not legal proof of the charge, but was admissible, and might be considered in connexion with the other proof. *John Waite* had for many years been dead; the receipt on the back of the note given by *Dunn*, was in *John Waite's* writing, and the note was produced on trial, by the plaintiff, in whose possession we should expect to find it after it was paid by the intestate. The numerous instances of small sums charged by him as paid for *Dunn*, and proved

in the usual manner, as we see by the account annexed to the writ; the age of the transaction, and other circumstances above mentioned, we think furnished good grounds for the jury to infer the truth and fairness of the charge.

The admission of the paper book, containing sundry accounts in the hand writing of *Dunn*, as mentioned in the exception, was perfectly correct. The statements therein made were confessions of *Dunn* deliberately made; and, being legally in evidence, it was the province of the jury to examine it, and draw their own conclusions from its contents; and with respect to the supposed loss of some of its leaves, either by accident or design, and the inferences to be drawn from its appearance, they were all subjects exclusively within the province of the jury; and the instructions of the judge to that effect were in our opinion correct and proper. A similar answer may be given to the exception alleged against the direction of the judge touching the statement of the account of *October* 1799, and that appearing on the account annexed to the writ. The question was, whether it was a statement or adjustment made by both parties, that is, by *Waite* and *Dunn*; or only a statement by the intestate only, or some person employed in drawing off the account. This was a subject also to be examined and decided by the jury; and it was very properly submitted to their determination.

The next exception relates to the instruction of the judge as to the note given by the intestate to the assignees of *Pierson & Thatcher*. The jury have decided that the charge originally made against *Dunn*, was transferred and made against *Waite* by the consent of *Dunn*; and that afterwards *Waite* gave the note in question; and that the assignees received it in full satisfaction of the debt due originally from *Dunn*, and afterwards, by transfer of the charge, due from *Waite*. It has been urged in the argument that there was no sufficient or satisfactory proof that the transfer of the charge and the assumption of the debt by *Waite* were authorised by any request on the part of *Dunn*. On this head all the evidence is not particularly detailed in the exception; but if it had been, we are not inquiring whether the verdict in this particular is against evidence or the weight of evidence. There is no motion before us for a new trial on such

ground. This same answer may also be considered as applying to the decision of the jury upon several of the particulars we have been examining. It was admitted that the note has never been paid to the assignees; and it is contended by the counsel for the defendant, that the sum for which the note was given cannot be recovered in this action. The instruction was that it might be recovered, and the jury have allowed it. It seems to be a well settled principle that a surety cannot maintain an action against the principal or a co-surety for reimbursement or contribution, until after payment of the debt by him, or what is equivalent thereto. 2 *Stark Ev.* 99. And this principle will not be changed by such surety's having given to the creditor collateral security for the debt. The reason is obvious; for such additional security does not in the least impair the obligation on the part of the principal or co-surety; the original liability still remains, and each may be called on for payment, as he might have been before. By the payment of the debt by the surety, it is admitted that he at once acquires a right of action against the principal or co-surety. The reason is, that by such payment, all the obligors or promissors are discharged from their original contract. This discharge of the principal and co-surety is the consideration of the promise of immediate reimbursement or contribution which the law raises. Now, in the case before us, *Waite* has relieved *Dunn* from his original liability to *Pierson & Thatcher*, by assuming the debt himself, at his request, and thus subjecting himself to liability; and *Dunn*, in his life time, was as effectually discharged from responsibility by this arrangement, as he would have been if *Waite* had paid the debt in cash to the assignees; for the jury have found that the note was accepted in full discharge of the debt originally due from *Dunn*; and the object of this suit is to collect a sum of money to be appropriated to the benefit of *Waite's* creditors; to pay, in whole or in part, among other debts of *Waite*, the very note in question. Authorities on this point are not wanting. In *Barclay & al. v. Gouch*, 2 *Esp.* 571, it was decided by Lord *Kenyon*, that the plaintiffs having at the request of the defendant given their note for a debt which he owed, was in law to be considered as payment in respect to the defendant; and the plaintiffs had a verdict for the amount for which the note

was given, though it had not been paid. A new trial was moved for at the next term and refused. This case is mentioned by the court in that of *Douglas v. Moody & al.* 9 *Mass.* 553, with approbation, and the correctness of the decision recognized. The same court also, in the case of *Cornwall v. Gould*, 4 *Pick.* 444 confirmed the same doctrine. There the plaintiff had indorsed a note made payable to him by one *Kenniston*, at the request of the defendant, and the same was discounted for his benefit at a bank in *Georgia*, and he received the money. After one or two renewals of the note, the plaintiff took it up, and paid it by giving a new note, signed by himself and indorsed by one *Clafflin*. On a count for money paid, the plaintiff was allowed to recover the amount, though it never had been paid to the bank, except by the new note. The ground of the decision was that *Kenniston*, the original debtor and maker of the first note, was completely discharged. In accordance with the above decisions is the opinion of the court in New York in *Witherby v. Mann*, 11 *Johns.* 516. The facts were almost precisely similar to those in *Barclay v. Gouch.* The principal case which seems to shake that of *Barclay v. Gouch* is *Taylor v. Higgins*, 3 *East* 169, decided five years afterwards. The opinion was given after a few moments conversation in court, on a motion to hold the defendant to special bail. The motion was not sustained, on the principle that the plaintiff had only given his bond, in satisfaction of a former bond signed by himself and the defendant, and as his surety, but had never paid the same. In *Cornwall v. Gould*, the court did not consider *Barclay v. Gouch* as an overruled case. If, however, the English cases should be viewed as balanced, the weight of authority seems clearly in favor of the correctness of the principle as laid down by Lord *Kenyon*, and sanctioned by the court. In a previous case this court has adopted and decided on the same principle.* On the facts and authorities before us, relative to this part of the cause, we perceive no incorrectness in the direction given to the jury. To the above point we would also refer to the cases cited by the plaintiff's counsel in *Cornwall v. Gould.*

The next objection in the order in which we have arranged them

* See *Dole v. Hayden*, 1 *Greenl.* 152.

relates to the instructions of the judge as to the presumption of payment, arising from lapse of time, or rather the circumstances relied on as repelling that presumption. The general principle of law is very plain; it is also perfectly clear that many circumstances may exist and which are proper subjects for the consideration of the jury, tending to account for delay, and remove the presumption of payment, and, of course, the ground of defence; such, for instance, as the debtor's acknowledgment of the non-payment of the debt—payment of a part of the debt—payment of interest—frequent demand of payment—obstacles to a recovery, arising from the interruption of the course of justice, as was the case during the war of our revolution. In *Dunlap v. Ball*, 2 *Cranch* 180, *Marshall, C. J.* says, "the principle upon which the presumption of payment arises from the lapse of time, is a reasonable principle, and may be rebutted by any facts which destroy the reason of the rule." Insanity and poverty of the defendant were held sufficient to rebut the presumption of payment. So the poverty and absence from the State, of the debtor, were held sufficient. 5 *Dane* 506, *art.* 3, *sec.* 1. The instruction given was that mere poverty of *Dunn* did not rebut the presumption; but that the debtor's absence from the country, during the twenty years, was sufficient to control and repel the presumption. This principle was expressly decided in the case of *Newman v. Newman*, 1 *Stark. R.* 101, in language the most unequivocal; and the opinion was not questioned. It appears by the exceptions that *Dunn* left this country in the fall of 1799, in indigent circumstances, and returned to Ireland, the place of his nativity, where he continued to reside till his death in 1805; and that no administration was granted on *Waite's* estate till the year 1822. Though no reference was made to these facts particularly in the instructions to the jury, yet they were in the case, and are before our eyes. So that there was poverty, as well as absence from the country, to repel the presumption, according to one of the cases cited in *Dane*. In the case of *Fladong v. Winter*, 19 *Ves.* 196, it was decided by Lord *Eldon* that the presumption of payment of a bond, after twenty years, might be repelled by evidence that the obligor had no opportunity or means of paying; and in support of the latter, the chancellor stated

that such he understood to be the principle of the decision in the case of *Wynne v. Waring*, which had a short time before been decided. As it regards opportunity of paying, the want of administration on *Waite's* estate till 1822, was considered by the judge a sufficient reason for excusing the defendant from the payment of interest from the time of *Waite's* death until the grant of administration. This circumstance seems to furnish the same reason for the non-payment of the principal as of the interest. On the whole, we see no ground for setting aside the verdict on account of any misdirection of the judge touching the question involved in the exception thereto on this point. The only remaining question on the exceptions, growing out of the facts in evidence on the general issue, relates to the instruction on the subject of the allowance of interest. This may be disposed of in a moment. The claim to interest was placed on the ground of mercantile usage and the adoption of this usage in the transactions between the intestate and testator; and the question of usage was very properly submitted to the jury for decision.

We now proceed, in the last place, to the consideration of the questions arising on the exception to the judge's instruction relative to the defence upon the plea in bar, and the construction of that part of the statute of limitations which was presented by the issue.

Though the pleadings are protracted to a surrejoinder before an issue to the country is formed; yet the simple and single question put in issue is whether "all accounts, concerns and transactions between the plaintiff's intestate and the defendant's testator were liquidated and closed at the time of, and for more than six years before, the commencement of the plaintiff's action." This fact the defendant in his rejoinder affirms, and the plaintiff in his surrejoinder denies, and issue is taken on the traverse.

This part of the cause demands and has received our particular attention, and been subjected to a patient investigation. By a review of the numerous cases to be found in our law books upon the subject, we perceive that the exception in the statute as to merchants' accounts has created doubts and been the cause of a series of contradictory decisions by able judges, both in England and in this country, in courts of chancery and courts of law; and the learned

Chancellor *Kent* has observed that the true and definite meaning of the exception seems at this day unsettled in Westminster Hall. It does not appear that the points presented in this case have been settled in more than three of the states in the union, viz. Massachusetts, Pennsylvania and South Carolina. Under these circumstances we are called upon in this action to give a construction of it and pronounce our judgment, which must decide the rights of the parties, and be our guide for the future. In doing this, we must avail ourselves of all such lights as can be derived from the opinions of learned courts and learned judges in England and in the United States. As the reported decisions cannot be reconciled, we know of no other safe course to pursue, than to search for the intentions of those who framed the statute of limitations, as originally passed in England, of which ours is almost an exact copy, and thus ascertain, as well as we are able, how far the various constructions which different parts of it have received are in unison with those intentions, and how far they have a tendency to defeat them. In doing which, it will be found, unless we labor under mistake and misapprehension, that the restraining parts of the act, and the exception of merchants' accounts, have frequently been construed on principles in opposition to each other; and that too much latitude of construction has led to that doubt and perplexity which now exist.

The language of the exception in the statute of limitations of 21 *Jac.* 1, *cap.* 16, and of our statute on the subject is this, viz. " other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants." Whatever the " accounts" are which were intended to be described in the above exception, they are in express terms excluded from the operation of the restraining clause; and as effectually as if they had been contained in a proviso at the end of the section, declaring that as to such accounts the statute should have no operation or effect whatever. Hence the first inquiry is, what we are to understand by the above mentioned descriptive word " accounts." We apprehend there is no difficulty in giving a satisfactory answer to this question. It has been correctly answered by a course of decisions. By that word are intended open or current accounts, as distinguished from

stated accounts. Stated accounts are those which have been examined by the parties, and where a balance due from one to the other has been ascertained and agreed upon as correct. The case of *Sandys Ex'r. v. Blodwell, Sir W. Jones,* 401 shews this. The parties, *Freeman,* (the testator) and *Blodwell,* disputed as to the balance; and *Freeman* died before any was agreed upon. The justices to whom the subject was referred, certified that the account was not barred, because it was not finished; and also because it was an account between merchant and merchant. In the above case the statute of limitations was pleaded. Now, what is the true reason on which the above mentioned construction has been given so uniformly, making the distinction between open and stated accounts? We apprehend it is simply this; while an account remains open, each party is depending for the recovery of the balance he may consider due to him, upon the promise which the law raises on the part of him who is indebted, to pay that balance; but when the parties have stated, liquidated and adjusted the accounts, and thus ascertained the balance, it ceases to be an account; it has lost the peculiar character and attributes of an account; what was before an implied promise to pay what should be found to be a reasonable sum, by such liquidation and stating of the account, at once becomes an express promise to pay a sum certain. Such an adjustment will support a count on an *insimul computassent.* Such balance is a result in which previously existing accounts have become merged, and lost their character and existence. This view and this reasoning seem clearly to be sanctioned by decided cases. Thus in *Martin v. Delboe,* 1 *Mod.* 70, the court say, "accounts within the statute," (that is, within the exception of the statute) "must be understood those that remain in the nature of accounts; now this is a sum certain." So in *Farrington v. Lee,* 1 *Mod.* 268, the plaintiff declared on an *insimul computassent*; the statute of limitations was pleaded, and merchants' accounts replied; to which there was a demurrer. *Scroggs J.* observed, "As this case is, there is no account betwixt the parties; the account is determined, and the plaintiff put to his action on the *insimul computassent,* which is not within the exception. In *Webber v. Tivill,* 2 *Saund.* 124, *Jones* for the defen-

dant, (whose reasoning was fully confirmed and adopted by the court) observes, " Here it appears that the account for £55, 11, 7 was stated and agreed ; and then it immediately became a debt certain, being ascertained by the account ; and for this debt, after the account was stated, the plaintiff might have brought his action of debt, which would without doubt have been limited to six years by the statute." If the view we have thus taken, and the course of reasoning we have pursued, are correct ; and if we have ascertained the true meaning of the language of the exception in the statute, it would seem to follow, that nothing but a statement, liquidation and adjustment of accounts by the parties, their agents or representatives, could take merchants' accounts out of its protection, and place them under the power and operation of its limitations. Whether the inference thus stated is the correct one, is the question to be considered. On this point *dicta* and decisions are numerous and contradictory. Before examining them, it may be well to observe here that by the course of the pleadings it is admitted that the accounts in question in this cause are those which " concern the trade of merchandize between merchant and merchant." This obviates some questions which have arisen in several of the decisions in the courts of law and equity. The inquiry then is, upon the general ground,

I. Whether the death of both or either of the original parties, *Waite* and *Dunn*, has operated so as to subject the accounts to the limitations of the statute.

II. Whether the cessation of dealings and termination of charges, more than six years before the commencement of this action, has produced the above effect on the accounts.

III. Whether the foregoing questions are, or either of them is, open to examination by the defendant, upon the special issue joined by the parties.

As to the first question. Independently of all authority, it seems to the court to be a difficult task, by any reasoning from analogy, to establish the principle that the death of one of two merchants, who for years have been dealing together, should, in legal contemplation, have the same effect upon their mutual accounts as a liquidation and adjustment of them. An adjustment implies the operation and as-

sent of two minds, at least; because, in its very nature, it is a contract of itself. How then can the death of such merchant give such sanctity to his books and accounts, as to render them as conclusive evidence of their truth and accuracy, and of the correctness of the balance appearing thereon to be due him, as if that balance had been struck by both, and agreed to by the survivor? But if the death of A. one of the merchants, is to have such an effect on his books and accounts, why should not the death of B. the other merchant, immediately afterwards, have the same effect on his books and accounts? And if the apparent balance on A's books and accounts essentially vary from that appearing on B's books and accounts, what is to be done in such case? Both cannot be true and correct; to which is credit to be given? We cannot respect a doctrine leading to such consequences and such confusion: nor do we perceive that such a principle is established by decided cases. The case mentioned in 5 *Dane's Abr. ch.* 161, *art.* 5 *sec.* 4, as having been decided in Massachusetts in 1800, of which notice is also taken in *Story's* pleadings, 91, is so loose, and stated with so much brevity, that the grounds of the decision are not very distinctly perceived. The learned author has merely said, "Held that in account current between merchants, the act does not begin to run till settlement, or till one dies; because mutual charges on their books, is a mutual admission of their debts." Now, the reason assigned has no necessary connexion with merchants' accounts more than with any other species of accounts; nor with the accounts of deceased more than living merchants. The principle stated is well settled and very familiar; in respect to which the case of *Catling, Ex'r. v. Skoulding & al.* 6 *D. & E.* 189, is a leading one. This court has adopted the same in *Davis v. Smith*, 4 *Greenl.* 337. We do not perceive, from the foregoing brief note, that the death of one of the merchants had any influence with the court; but we are rather led to a different conclusion, from the assignment of mutuality of accounts as a reason which guided them. *Ballantine*, in his treatise on the statute of limitations, page 76, observes that "if between merchant and merchant dealings betwixt them have ceased for several years, and one of them die, and the surviving merchant bring a bill for an account, the court will not de-

cree an account, but leave the plaintiff to his remedy at law. This does not prove that such death or cessation of dealing has changed the nature of the account, but only that it may induce a court of equity to make no decree on the subject. By leaving the plaintiff to his remedy at law, we are left to draw the conclusion that such a remedy is considered as existing, notwithstanding such decease. In support of the above observations, *Ballantine* cites a case from 1 *Vern.* 456, where there had been a cessation of dealing, and one of the parties had died; yet as there had been a long acquiescence without a settlement, the bill was dismissed, and the plaintiff left to her remedy at law. So also in the case of *Sandys v. Blodwell*, before cited, the plaintiff's testator was one of the merchants whose accounts were the subject of investigation. The statute was pleaded to the bill filed, but the death of the testator was not considered as having the effect which is contended for in the case at bar. So also in the above case of *Catling Ex'r v. Skoulding & al.;* the defendants pleaded the statute of limitations, and the plaintiff replied a new promise; and contended that there was such mutuality of accounts, and some charges within six years, as would bring the case within the exception in the statute. The defendant's counsel objected that the case did not come within the exception, and if it did, it should have been replied specially, as was the case in *Webber v. Tivill*, where there was a replication of merchants' accounts; and Lord *Kenyon* admitted the validity of the objection, as to the necessity of a special replication, where there is no item within six years; but considered in that case such a replication unnecesary, as there were such items. If the testator's death had subjected the account to the limitations of the statute, would counsel have urged the necessity of such a replication, when it would have been needless, and Lord *Kenyon* have approved it? We apprehend that, in a legal point of view, the only effect produced on the accounts of two merchants, dealing together, by the death of one of them, is, that it necessarily causes a cessation of dealing, and terminates the accounts. This brings us to the consideration of the second question.

The second inquiry is whether a cessation of dealings is equivalent and amounts to a liquidation and closing of the accounts, and that

after the lapse of six years, it subjects them to the statute of limitations, and bars a recovery. According to the view which we have taken of the exception in the statute, and its fair construction, we cannot avoid the same difficulty in arriving at the conclusion, by any process of reasoning, that such cessation has the effect contended for by the defendant's counsel, which we encountered in considering the first question. Lapse of time seems to furnish no proof of an agreement of the parties as to the truth of an apparent balance; certainly no more proof after the expiration of six years, than at the end of five years. Still we are aware that the books of reports, especially many of the English books, contain a number of cases in which the exception in the statute has been the subject of consideration and construction, in various forms, and on various principles; yet it remains unsettled, as we have before observed.

We will now proceed to a brief examination of the principal cases on the subject; commencing with those which have been considered as supporting the defence upon the point now in question. Most of these have been collected by Chancellor *Kent* in *Coster & al. v. Murray*, 5 *Johns. Ch.* 522, as well as by *Ballantine* and *Angell*. The collection by Mr. *Angell*, being the most recent, is the most full and satisfactory. The first case we notice is *Webber v. Tivill* before cited, which was *assumpsit*; one count being for monies had and received and goods sold, and another on an *insimul computassent*; plea, the statute of limitations; replication, merchants' accounts; and demurrer. The court gave judgment for the defendant; but it was expressly stated to have been given on the ground that the parties had stated the account and agreed on the balance. It was not an open account. No one doubts the correctness of this decision. The case of *Bridges v. Mitchell*, *Gilb. Eq. R.* 224, merely states the undisputed principle, that the exception in the statute applies only to open accounts. The case of *Welford v. Liddel*, 2 *Ves.* 400, was a bill for an account, and the statute was pleaded; but it does not appear to have been an account between merchant and merchant. The plea was allowed. Lord *Hardwicke*, in giving his opinion, recognizes the distinction between running accounts, and accounts closed and concluded, and the application of the statute to those of the latter

description; but the case seems to establish nothing as to the point under consideration, it not appearing that they were merchants' accounts. If they were, then the decision is in direct opposition to one made by this same lord chancellor in the year 1737; in which he declared his opinion that between merchants, an open account was within the exception, and protected by it, though there had been no dealings within six years. The case of *Martin v. Heathcote* 2 *Eden* 169, is in point for the defendant. Lord Chancellor *Northington*, in that case, which was a bill filed for an account, and the statute pleaded, observed that merchants' accounts, after six years total discontinuance of dealing, were as much within the statute as other accounts. In *Jones v. Pengree*, 6 *Ves.* 580, a case was cited by counsel as having been decided by Lord *Roslyn*, between *Crawford* and *Liddel*, upon principles in accordance with those on which Lord *Northington* proceeded. The above case of *Jones v. Pengree* was decided on a point foreign to the one we are now considering. In *Duff v. E. India Company*, 15 *Ves.* 198, the question was discussed, and, as Chancellor *Kent* observes, treated as an open question; but the cause was decided on another ground. In *Barber v. Barber* 18 *Ves.* 286, to a bill for an account, the statute was pleaded. All dealings had ceased more than six years before the filing of the bill; and Sir *William Grant*, the master of the Rolls, decided that the case was within the statute. The cases of *Ramchander v. Hammond*, 2 *Johns.* 200, and *Cogswell v. Dolliver*, 2 *Mass.* 257, relate only to the well known distinction between open and stated accounts, and the effect of mutual accounts. The court of appeals of South Carolina, according to the decision in *Van Rhyn v. Vincent*, 1 *Mc Cord* 150, may be considered as an authority in favor of the defendant. In the case of *Union Bank v. Knapp*, 3 *Pick.* 96, the court intimate an opinion that open accounts are barred after six years; but the same court have since expressly overruled that case, as will be noticed particularly hereafter. The opinion and statements of *Maddock* and *Beame*, can only be founded on the contradictory decisions of the English courts. Distinguished judges and chancellors have entertained and pronounced with firmness contending opinions; and it would be singular indeed if such great and excellent

men, and such eminent jurists as Sir *Samuel Romilly* and Chancellor *Kent* should not have drawn their own conclusions, and reposed with confidence in the opinions they had formed; opinions, most certainly entitled to the highest respect. In the case of *Coster & al. v. Murray*, 5 *Johns. Ch.* 522, though the learned chancellor intimated his opinion that the weight of authority seemed in favor of applying the statute to open merchants' accounts, when the last item is more than six years before the commencement of the suit; yet he did not decide the cause on that ground; nor was the decree affirmed in the court of errors upon that ground, but expressly on another. See 20 *Johns.* 576. We believe we have noticed all the authorities relied on by the defendant's counsel, except those which we shall consider in reviewing the cases cited in support of the action.

We will now proceed to the examination of those authorities which have established or recognized a different construction of the exception in the statute relating to merchants' accounts, and on which the counsel for the plaintiff place their reliance.

The first is the case of *Sandys v. Blodwell*, which has been twice cited before. The facts of the case we shall not repeat, but merely state that the justices certified that an open and unsettled account between two merchants was not barred by the statute, though more than six years old when the action was brought. The next is the decision of Lord *Hardwicke* in 1737, referred to by Lord *Eldon* in *Foster v. Hodgson*, 19 *Ves.* 180. The next is the before cited case of *Catling Ex'r. v. Skoulding*, in which Lord *Kenyon* states the principle to be that "where there is no item of account at all within six years, the plaintiff, to the plea of the statute, must reply specially, as was done in *Webber v. Tivill*, in order to bring his case within the exception. In that case the plaintiff replied that "the accounts wholly concerned the trade of merchandize."

The next is the case of *Foster v. Hodgson*, above cited, in which Lord *Eldon* considers the question as still open and unsettled in England, notwithstanding the several decisions which we have mentioned, as well as some others; but as the bill did not expressly state the accounts then before him, to be accounts between merchant and merchant, his lordship did not undertake to decide this long contes-

ted question. The principle as contended for by the counsel for the plaintiff is plainly, though incidentally, recognized by this court in the case of *Davis v. Smith*, 4 *Greenl.* 337. The decision was on another ground.

The principle contended for by the plaintiff seems to have been conceded to be correct in the case of *Godfrey v. Saunders*, 3 *Wils.* 94. The defendant's second plea was that there was not any open account between the plaintiff and defendant, at any time within six years before the commencement of the action. The plaintiff replied to this plea that the account concerned trade and merchandize, which was never adjusted or settled between them. The defendant rejoined that the account did not concern trade and merchandize, and thereupon issue was joined to the country. Now why did not the counsel for the defendant demur to the replication, if accounts between merchants, though open and unadjusted, are barred by the statute of limitations?

The next case is that of *Stiles* plaintiff in error *v. Donaldson*, 2 *Dal.* 264. In an action on bond, the defendant filed in offset an account between the plaintiff and himself as merchants, and concerning the trade of merchandize. The account had remained unliquidated and unsettled for seventeen years. The plaintiff contended that it was barred by the statute of limitations, by such long delay and acquiescence. The court decided that the account was not affected by the limitations of the act, and affirmed the judgment below.

We next proceed to the case of *Mandeville & Jameson*, plaintiffs in error, *v. Wilson*, 5 *Cranch* 15. This was an action of *assumpsit* for goods sold and delivered; pleas, the general issue, and statute of limitations; replication to the latter plea, that the money "became due and payable on an account current of trade and merchandize had between the said plaintiff and defendants as merchants, and wholly concerned the trade of merchandize." The defendants rejoined that "in *January* 1799 the partnership between *Mandeville* and *Jameson* was dissolved, and all accounts between them ceased; and that since that time no accounts have existed or been continued between the plaintiff and the defendants." The plaintiff surrejoined that the goods were sold and delivered before *January* 1799; de-

murrer, and joinder. The opinion of the court delivered by *Marshall C. J.* was—"that the exception in the statute applied as well to actions of *assumpsit* as actions of account; that it extended to all accounts current which concern the trade of merchandize between merchant and merchant; that an account closed by the cessation of dealings between the parties, is not an account stated; and that it is not necessary that any of the items should come within the five years; that the replication was good, and the rejoinder bad." The judgment below, which was for the plaintiff, was affirmed. The statute of limitations in Virginia, which governed the court in the above case, bars actions of *assumpsit* on accounts, &c. after the lapse of five years, instead of six years as with us. The judgment rendered in this case goes the full length of establishing the doctrine laid down by the presiding judge at the trial, and puts a distinct and decisive negative upon the defence, and removes all the grounds on which it has been placed. Indeed the facts are essentially the same as those in the case at bar. In both, there was a cessation of dealings and termination of accounts, and that was all; in neither was there any statement, liquidation or adjustment of them whatever by the original parties, their agents or representatives. In the case of *Murray & al. v. Coster & al.* 20 *Johns.* 576, *Vielie*, one of the senators, goes into a broad investigation of the numerous cases on the construction of the exception in the statute, as Chancellor *Kent* had before done, on the trial before him in chancery. The senator was fully of opinion that the accounts and concerns between the parties related to the trade of merchandize between merchant and merchant, and on that account were within the exception; and he concludes his remarks on this branch of the cause with these emphatic words: "I consider such of the English decisions as contravene the construction I have given to the statute, as little better than judicial usurpation of legislative authority."

In commenting on the case of *Union Bank v. Knapp*, cited by the defendant's counsel, we noticed that it had been overruled by the same court. Since the trial of this cause, the case of *Bass, ex'r. v. Bass*, has been published in 6 *Pick.* 362, in which it was explicitly decided that merchants' accounts, as described in the statute of

limitations, are excepted from the operation of that statute; and in another report of the same cause, appearing in 8 *Pick.* 187, the court say that upon a revision of the above decision, they are satisfied with its correctness.

From the foregoing review of the decisions on the questions immediately before us, we cannot persuade ourselves that the weight of authority is in favor of the construction for which the counsel for the defendant have so ably, anxiously and strenuously contended; especially when we consider that in the last English decision which we have seen, Lord *Eldon* expressed his opinion that the question was then open and unsettled in that country; and considering also that where the courts in our own country have professed to decide it, (with the exception of the court of appeals in South Carolina, which inclined strongly the other way) the decision has been unequivocally against such a construction; and one of those courts is the supreme tribunal of the nation; one peculiarly entitled to the highest consideration and respect of all other courts of law. It may be proper to observe that the learned Chancellor *Kent*, in his review of the cases on the subject in *Coster & al. v. Murray*, (in which he expresses his own opinion,) has omitted the cases we have cited from *Wilson*, *Dallas*, and *Cranch*.

We have now done with the citation of authorities, and shall conclude with some general observations respecting the statute of limitations, and the construction that has been given to the different parts of it, and the changes of opinion which have taken place at different periods in regard to it. In the early part of this opinion we alluded to this subject. In the beforementioned case of *Martin v. Heathcote*, Lord *Northington* decided that "merchants' accounts, after six years discontinuance of dealing, were as much within the statute as any other accounts;" and in *Barber v. Barber*, Sir *William Grant* adopted and proceeded upon the same principle. In both these cases the distinction between merchants' accounts and others is abolished. With all due respect, we must say that this doctrine, if admitted, virtually amounts to a complete judicial repeal of the exception in the statute, and is in direct opposition to its declared intention, and to the unequivocal language in which the intention is

expressed. It may be useful to take a glance at the different principles on which the different parts of the section of the act in question have been construed. For a long time we may perceive in the reports an evident effort on the part of judges to save actions from the effect of its limitations, though clearly embraced in the language of those limitations; and at the same time to narrow the exception, and refuse protection to accounts and actions, distinctly embraced in the language of the exception. In both the foregoing instances the tendency and object of such decisions seems to counteract, and, to a certain extent, explain away both provisions of the statute; to rescue accounts of one kind from the embraces of it, and subject those of another kind to its power and paralysing effect, though expressly placed beyond its control. In the case of *Bell v. Morrison*, 1 *Pet.* 351, *Story J.* in delivering the opinion of the court, observes that "it has often been a matter of regret, in modern times, that in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had received such support as would have made it, what it was intended to be, emphatically a statute of repose." There was, at times, much ingenuity discovered in construing doubtful or unmeaning expressions into promises or acknowledgements; but as to merchants' accounts, they were treated with little kindness or indulgence. As they are expressly excluded from the operation of the statute, we cannot perceive any thing but the pure magic of construction which has been or can be prayed in aid, to place such accounts, while open and unliquidated, under the limitations of the act, and on the same level with all other kinds of accounts. There seems to be as much reason for regret on account of this construction of the exception, as was expressed by the court in the case of *Bell v. Morrison* for that which the statute itself, as to its limitations, had unfortunately received; and we apprehend there is as much reason and good sense in correcting opinions which may be found to be erroneous as to one part of the statute as another; the object should be to ascertain the true intent and mean-

ing of both, and then with plainness and independence give them what we believe to be their intended operation and effect.

In respect to the restraining part of the statute, this has already been done. By a series of decisions, in England and in this country, former errors have been corrected; and it is now perfectly settled that nothing short of an unqualified, unambiguous and explicit acknowledgement of an existing debt, by words or acts, will take a case out of the limitations of the statute; and to preserve consistency in the application of principles, it is, in our humble judgment, proper to go back to the plain language of the exception, and rest contented with giving to it its legitimate operation. Under the influence of these impressions, and guided by the authorities and reasoning which we have presented to view in the investigation of this cause, we have been conducted to the conclusion, that the accounts between *Waite* and *Dunn* cannot, on legal principles, be considered as barred by the limitations of the act, by reason of the cessation of dealings between them more than six years before the commencement of the present action; nor by the death of one or both of them, as mentioned in the pleadings. In the state of the facts, and in our application of legal principles to those facts, it is of no importance to decide on whom the burden of proof was imposed by the form of the issue. The affirmative, however, seems to be on the part of the defendant. This leads us to the last point to be considered.

This third point, namely, whether the general question which we have been so long examining under the two former heads is open to examination on the special issue joined, has become of minor importance, in consequence of our decision of those questions, in the manner above stated; because, if we were dissatisfied with the instructions given to the jury, as to the effect of the special form of the issue, as being exclusive of the general question, still it would be no ground for setting aside the verdict, when the legal principle and legal result would be the same under any form of the issue. But we do not perceive any incorrectness in the instructions given on the point. The question on the pleadings was whether the accounts had been liquidated and closed more than six years before the commencement of the action. And, as the judge observed, it was the duty of

the defendant to establish the truth of the affirmative to the jury; this he undertook to do. A liquidation of an account cannot mean any thing less than a statement and adjustment of it by the parties interested; and this question, whether the account had been so liquidated and closed, was a question of fact, and properly referred to the jury for decision; whereas, the question, whether a cessation of dealings for more than six years, or the death of one of the parties, subjects merchants' accounts to the limitations of the statute, is a question of law; and the pleadings in the case disclose all the facts necessary to present those points to the view of the court. Upon examining the cases which have been cited and commented upon, in the course of this opinion, it will be found that no such special issue was joined as in the case at bar. In the cases in the courts of law, the discontinuance of dealings was alleged in some part of the pleadings; and the effect of it for more than six years, became the subject of inquiry and decision upon demurrer; and in chancery cases, sometimes the fact appeared on the bill, and sometimes in the answer; but no case has fallen under our observation which presents an issue of fact on the contested question of liquidation and adjustment. The parties in this case have formed their own issue; but the jury have discovered no evidence which could authorize them to find that issue in favor of the defendant.

The great degree of interest which this cause, in all its stages, has excited on the part of those immediately engaged in it, and the unusual length of the argument of the defendant's counsel, as well as the number of questions made on the exceptions and in the ample discussion of all the merits disclosed to us, have led the court to a full examination of the whole subject in all its bearings; and after a long and wearisome investigation of facts and authorities, and careful attention to the arguments of counsel, we are all of opinion that the defendant has not succeeded in sustaining either of his motions: and the consequence is that there must be

Judgment on the verdict.

PALISTER *vs.* LITTLE.

In *scire facias* against the indorser of a writ, the sheriff's return that he could find no property of the original defendant *within his precinct*, is not conclusive evidence of his inability to pay.

Where the defendant, in a *scire facias* against the indorser of a writ, pleaded that the original judgment debtor was of sufficient ability, and had sufficient real estate within this State to satisfy the execution; to which the plaintiff replied by setting forth the issuing of execution, and the sheriff's return thereon that he could find no property within his precinct; the replication was held bad.

IN this case, which was *scire facias* against the indorser of a writ, the question turned upon the point presented in the fourth set of pleadings. The plaintiff, in his writ, set forth in the usual manner the recovery of a judgment in his favor, for costs, against the *Pejepscot* proprietors, in a case in which the defendant had indorsed the origina lwrit; and alleged the suing out of execution, with the sheriff's return thereon in these words:—"*Cumberland, ss. Nov.* 3, 1823. Pursuant to the within precept to me directed I have made diligent search for the property of the *Pejepscot* proprietors, sufficient to satisfy this execution, but could find none. I have also demanded of *Edward Little*, Esquire, the attorney of said proprietors, the property of said proprietors to satisfy the same, which said property he refused to deliver. I have also called on *Josiah Little*, Esquire, the proprietors' clerk, and demanded said property, which he also refused to deliver. I therefore return this execution in no part satisfied." It was further alleged that the judgment was still unsatisfied, and that the proprietors had neglected, and were wholly unable to pay the same.

The fourth plea of the defendant was that "said *Pejepscot* proprietors are of sufficient ability, and hold and possess sufficient real estate in this State to pay and satisfy said execution,"—and concluded to the country. To this the plaintiff replied by stating the issuing of execution on the judgment, its delivery to the officer and his return thereon at large, as in the writ, concluding with a verification. And the defendant hereupon demurred, because the plaintiff attemp-

ted in his replication to put in issue to the jury a question of law, viz. whether the defendant was not precluded, by the sheriff's return, from alleging that the proprietors were of sufficient ability, and held real estate in this State sufficient to satisfy the execution; and because the replication was "in other respects" defective.

Little, pro se, argued in support of the demurrer.

Fessenden and *Deblois, e contra*, contended that the plaintiff, having shown a return of *non est inventus* on the execution, was entitled to judgment. The officer's return, they argued, was conclusive in this case, as in all others where he is not a party; and by this return the inability of the proprietors, which is now confessed by the demurrer, is apparent. *Ruggles v. Ives*, 6 *Mass.* 494; *Bean v. Parker*, 17 *Mass.* 601; *Bott v. Burnell*, 9 *Mass.* 96; *Estabrook v. Hapgood*, 10 *Mass.* 313; *Slayton v. Chester*, 4 *Mass.* 478; *Purington v. Loring*, 7 *Mass.* 392; 6 *Com. Dig.* 242 *Retorn.*

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

In the decision of this cause we found our opinion altogether upon the fourth set of pleadings, ending in a general demurrer; and accordingly shall take no notice of the others. In the writ, the plaintiff, after setting forth the judgment against the *Pejepscot* proprietors, the issuing of the execution, and delivery of it to the officer for service, and his return thereon *in hæc verba*, stating that he had made diligent search for the property of the proprietors sufficient to satisfy the execution, but could find none; and that he had also demanded of the defendant, and also of the clerk of said proprietors their property; he concludes his averments by alleging that they are wholly unable to pay the amount of said judgment. In the plea under consideration, the defendant says that the proprietors are of sufficient ability, and hold and possess sufficient real estate in this State to pay and satisfy the judgment and execution; and tenders an issue to the country. To this plea the plaintiff replies by a restatement of the judgment, execution and the return thereon in the same manner as in the writ. To this replication there is a demurrer. Is this a good replication? Does it traverse or avoid the plea? It ought

certainly do one or the other. The plea expressly denies the allegation of inability contained in the declaration; and also avers that the proprietors have sufficient estate in this State. If double, or improperly concluded, it should have been demurred to specially, for such cause. The only reply to this plea is the officer's return, which only alleges that he could not find any property sufficient to satisfy the execution. The legal import of this is, that he could not find such property in his precinct, that is, in this county. He had no official powers beyond the limits of his precinct. In terms, therefore, the replication does not confess and avoid the plea, nor traverse the facts stated in it. It is true the return cannot be contradicted; but, though true, it does not disprove the plea; for though no property of the proprietors could be found in this county, there was sufficient real estate belonging to them within the State. This is admitted by the replication, because it is not therein denied. These are all plain principles of pleading. 1 *Chit. Pl.* 549, 570, and cases there cited. In certain cases, a search for property, and a return of *nulla bona*, are sufficient to lay the foundation of an action. So a mere demand and refusal; as for instance, a demand of a sum decreed to a creditor by the Judge of Probate. But a question of inability to pay, is a question of fact, which must be proved, in order to render the indorser of a writ liable. As to avoidance, it seems to be a term which, though used in the statute, is totally inapplicable to such a corporation as the *Pejepscot* proprietors. They cannot avoid, nor be arrested and committed. The success of this action must depend on the question of inability merely. According to *Ruggles v. Ives*, a return of *non est inventus* is conclusive evidence of avoidance; but even an arrest and commitment is only *prima facie* proof of inability, which may be rebutted. In the present case there could not be a commitment of the proprietors; and surely when the only proof of inability is, that none of their property could be found in this county, it never can be considered as conclusive evidence that they do not own sufficient property in some other part of the State.

But it is said that if the replication is bad, still the first fault is in the plea, because it does not allege in what part of the State the property of the proprietors is situated, and the nature of such property.

No case is cited in support of this objection, and we know of none. Had the plaintiff joined the issue tendered, the defendant, in support of his plea, must have proved those facts on the trial, or failed in his defence. We cannot perceive how, upon the correct principles of pleading, the replication can be adjudged good.

Replication adjudged insufficient.

HOWARD *vs.* CARD, *& Trustee.*

A creditor, whose debt is secured by the pledge of goods in his hands of greater value than the amount of the debt, but without power to sell, cannot be holden as the trustee of the debtor for the surplus, in the absence of any fraud.

THE facts in this case appear in the opinion of the Court which was delivered by

MELLEN C. J. *Kent*, the supposed trustee, states that *Card* was indebted to him in the sum of $70,56; and that prior to the service of the process, he had pledged to him certain articles of furniture, valued at about $164, but which he thinks would not bring at auction one half of this amount. There was no agreement that *Kent* might sell the furniture, thus pledged to him as collateral security for the debt due from *Card*. Is *Kent* on these facts a trustee? It is said that he is, on his own calculation, as *half* the value of the furniture, as estimated, is more than the amount of the debt. He declares, however, it is not worth so much as half, in his opinion. But he contends that he cannot be adjudged trustee, until it shall be known that there is a surplus; which can only be ascertained by a sale; which he has no right to make. In *Stevens & al. v. Bell*, 6 *Mass.* 339, *Parsons C. J.* says, "Goods may be pledged to a creditor, with liberty to sell the pledge, pay himself, and account for the surplus to the debtor; when the creditor exercises this liberty he becomes a trustee." In *Badlam v. Tucker & al.* 1 *Pick.* 389, it is said that where, by agreement of parties, the pledge is sold, the trustee process may afford a remedy to a creditor; "but where there is no

agreement that the mortgagee shall sell the mortgaged property, he cannot be compelled to do it, and would not be chargeable as trustee." In the case of *Swett & al. v. Brown & al.* 5 *Pick.* 178, the court held that the trustee had no lien on the property ; though at the same time the Chief Justice observed that if he had a lien, he was nevertheless liable to the process, so that the plaintiff's attachment would hold. This observation, however, has no connexion with the point decided. Besides, according to the case of *Maine Fire & Mar. Ins. Co. v. Weeks & tr.* 7 *Mass.* 438, *Card* could not maintain any action against *Kent* at the time the writ was served ; and on this general ground the trustee relies. This principle has several limitations. *Staples v. Staples & tr.* 4 *Greenl.* 532, and cases there cited. If, in case of property pledged, without authority to the pawnee to sell, the rights of creditors are not sufficiently secured, where such property is of much more value than the amount of the debt, it is a subject deserving legislative consideration. Such consideration it has received in Massachusetts, and atthe last session of the legislature there a law was enacted for the purpose of better defining and securing the rights of creditors insuch cases. We can only administer the law as we find it.

Trustee discharged.

RICHARDSON *vs.* BROWN.

That part of *Stat.* 1786, *ch.* 10, *sec.* 4, which provides that when one or more parishes shall be set off from a town, the remaining part shall constitute the first parish, is still in force in this State.

The grant of land to a town for the use of the gospel ministry, is to be taken to refer to the town in its parochial and not in its municipal character.

In the private statute of 1815, *ch.* 115, *sec.* 6, which requires the trustees of the ministerial fund in *Baldwin* to apply the interest of the fund to the support of the gospel ministry in *Baldwin* "in such way and manner as the inhabitants thereof, *in legal town meeting*, shall direct;" the word "town" is to be construed in a limited sense, as referring to its parochial character only, in which capacity alone it was interested in the fund. And on the division of the town into several parishes, this power to designate the application of the money remains in the first parish.

If not so construed, it would be unconstitutional, as impairing the obligation of a contract.

THIS action, which was a general *assumpsit*, was brought by the agent of the Methodist society in *Baldwin*, against the treasurer of the trustees of the ministerial fund in that town, to try the title of the society to a portion of that fund, or of the interest thereof, by virtue of a vote of the town.

In a case stated for the opinion of the court, it was agreed that in the original grant of the town in the year 1774, there was the usual reservation of one sixty-fourth part for the use of the ministry; that this part was duly designated and set out; that in 1816 the legislature of Massachusetts, by special statute, [1815, *ch.* 115,] authorized the sale of these lands by a board of trustees; directed them to put the money at interest; and, by the sixth section, provided that they should annually apply the interest arising from the fund to the support of the gospel ministry in that town, in such way and manner as the inhabitants thereof, in legal town meeting, should direct; and that in default of such annual direction, the accruing interest of that year should be added to the principal. It was further agreed that the lands were sold, and the money put at interest, as the act directed; that from the year 1819 to 1823, the town voted not to appropriate

the interest for those years respectively; that in 1824, *May* 3, the Methodist society was regularly incorporated; that on the 13th day of *September* in that year the town, at a legal meeting, voted to distribute the interest of the fund among the several societies in the town, according to their rateable polls; the Methodists voting with the other inhabitants; that in 1825 and 1826, the town refused to appropriate the interest arising in those years; and that in 1828, at a legal town meeting, the inhabitants of *Baldwin* voted to allow the Methodist society one half the interest accruing from the ministerial fund for that year; the town of *Sebago*, however, which was formerly a part of *Baldwin*, not voting on this question.

Greenleaf, for the plaintiff, argued in support of the claim of the society; contending that the legislature of Massachusetts had originally made the grant for the benefit of all the inhabitants of the town; that the corporate town received the legal estate in the land as a trust for that purpose, the object being the religious instruction of all the people, for the general and public good; that the fee remained thus, when, in 1816, at the request of the inhabitants, the lands were ordered to be sold and the proceeds funded; that the terms of the act were clear, explicit, and intelligible, giving to all the inhabitants, in legal town meeting, the right to determine in what manner this benefit should be enjoyed; and that the town had accepted and ratified this statute, giving it the construction now contended for, by their repeated votes on the question of the appropriation of the interest. If this construction needed any support, it might be derived from the spirit of the statute of 1824, *ch.* 254, though in terms this statute is applicable only to lands unsold.

Longfellow argued for the defendant, citing *Harrison v. Bridgton*, 16 *Mass.* 16.

The opinion of the Court was read at the ensuing *November* term as drawn up by

Mellen C. J. In this action the plaintiff demands, in behalf of the Methodist society in *Baldwin*, a proportion of the annual interest of the fund, created by the sale of certain real estate

reserved and set apart, by the grantees of a tract of land now composing the towns of *Baldwin* and *Sebago*, for the use of the ministry. The Methodist society was incorporated *May* 3, 1824; prior to which time there was but one parish in *Baldwin*; and since that time a part of the town has been incorporated by the name of *Sebago*. Upon the facts agreed on by the parties, the question is whether the Methodist society is entitled to any portion of the interest of the abovementioned fund.

The 4th section of the statute of Massachusetts, of 1786, *ch.* 10, which is still in force in this State, provides that when one or more parishes shall be set off from a town, the remaining part of such town shall be the principal or first parish; and the court observe in the case of *Brown v. Porter*, 10 *Mass.* 93, that "independently of the interposition of the legislature for the purpose, the estate in lands appropriated to the benefit of a parish or religious society, by whatever description incorporated, remains with the residue of the original parish or society, and is not in any manner transferred or distributed, by a separation or change among its members, in the territorial limits of the corporation." In the case of the first parish in *Brunswick v. Dunning & al.* 7 *Mass.* 445, the court say, "Every town is considered to be a parish, until a separate parish be formed within it; and then the inhabitants and territory, not included in the separate parish, form the first parish; and the minister of such first parish holds by law, to him and his successors, all the estates and rights, which he held as minister of the town before the separation;—and in case of a vacancy in the office, the town or parish is entitled to the custody of the same, and for that purpose may enter and take the profits, until there be a successor." In *Jewett v. Burroughs*, 15 *Mass.* 464, the court say, "Every town in this Commonwealth, which acts as a town in the settlement and maintenance of a minister, and in erecting and keeping in repair a house for public worship, may lawfully be considered a parish as well as a town, to all essential purposes; the duties incumbent upon parishes being required of them by the laws, and all parochial property being held by them in their corporate capacity. It is competent, we apprehend, for the inhabitants of towns thus situated to proceed parochially, in all matters

touching the support of public worship and the settlement and maintenance of ministers." In some few instances such may have been the practice; but, generally, towns have transacted, in such case, both the municipal and parochial business, acting as a town.

We have stated the foregoing principles thus particularly, not because they seem to have been contested in the argument, but that, by reference to them, we might with more clearness give our construction of the act of Massachusetts of *February* 15, 1816, on some of the provisions of which the counsel for the plaintiff relies.

We apprehend, and indeed it is admitted by the parties, that the decision of this cause depends on the construction of the sixth section of the above mentioned act; this provides that the trustees, who by the act were authorized to dispose of the ministerial lands and place the proceeds on interest, as a fund, shall annually apply the interest of it to the support of the gospel ministry in *Baldwin*, "in such way and manner as the inhabitants thereof in legal town meeting shall direct." By examining the several sections of the act, we perceive that wherever *Baldwin* is mentioned, it is as a town. On the 13th of *September* 1824, the town voted to appropriate the interest of the fund among the several societies, according to the rateable polls in said societies. In *March* 1828, at the annual meeting, the town of *Baldwin* voted to appropriate and divide the interest of the fund according to law; and *April* 19, 1828, the same town voted to allow one half the interest for that year, to the Methodist society. If we sanction the construction given to the sixth section by the counsel for the plaintiff, we are met by a constitutional objection; for it is contended, and we think correctly, that the legislature had no authority to give a new and different direction to the bounty given by the legislature in 1774, without the consent of all those interested in the grant. It has been settled by the Supreme Court of the United States, in the case of *Fletcher v. Peck*, 6 *Cranch* 87, that a grant is a contract; and the constitution of the United States declares that no State shall pass a law impairing the obligation of contracts. On this point, see also *Proprietors of Kennebec Purchase v. Laboree & al.* 2 *Greenl.* 275, and cases there cited. Long before this act was passed, the title of the ministerial lands had vested in

those by law entitled to them, for the purpose designated in the original grant; and no rights were impaired or changed by the mere sale of the lands and conversion of them into a cash ministerial fund. But we are not obliged in this case, and surely we are not disposed, to pronounce the act in question as unconstitutional. In conformity with several decisions, and in reference to well known and general usage, we apprehend that the section relied on by the plaintiff, and indeed the whole act, may be understood and construed, as intended to effectuate, on correct principles, a legitimate and beneficial purpose. As has been before observed, at the time the act of 1816 was passed, the town of *Baldwin* constituted but one parish; and when the legislature was enacting a law for the protection and preservation of ministerial property, we ought not to presume that they intended to disturb vested rights, or change the character and destination of such property, in a manner which had been invariably considered, by courts of law in Massachusetts, as not warranted by settled principles. To preserve consistency, and at the same time give effect to all the provisions of the act, without violation of the rights of any one, we need only to consider the legislature as using the word "town" in a limited sense, and granting to it the specified powers, in its parochial, and not its municipal character; because, in its latter character, it had no interest in the property in question. At that time the town was also a parish, exercising two different kinds of corporate powers. The natural construction is that the direction to be given as to the appropriation of the interest of the fund, by the inhabitants, in legal town meeting, had reference to the town in its parochial character; because in that character only was the town interested. As a parish, the town might legally appropriate the interest of the fund, during a vacancy, because, during such period, they are entitled to the profits. As all persons are bound to know what the law is, and to govern themselves accordingly, surely a legislature must be considered as subject to the operation of the same principle, in respect to the constitution. Until 1824, when the Methodist society was incorporated, we are to presume, in the absence of all direct proof on the subject, that the town of *Baldwin* acted according to the general usage, and in town meeting transacted all their business both of

a municipal and parochial nature; but after the incorporation of the Methodist society, the residue of the inhabitants at once, by law, became the first parish in *Baldwin*, and as such, and under that name, it was their right, and the more proper course for them, to assemble and transact all parochial concerns. But the votes of appropriation of interest were all passed in town meeting, and after the division of the town into two parishes, as the legal consequence of the incorporation of the Methodist society; of course, those votes were passed by a corporation which had no authority to pass them. The same discriminating principle was recognized and applied in the case of *Harrison v. Bridgton*, 16 *Mass.* 16. A ministerial fund, similar to that in the case before us, belonged to *Bridgton*, and when *Harrison* was incorporated, it was composed of part of the towns of *Bridgton* and *Otisfield*. In the act, it was, among other things, provided "that all property, rights and credits, of said towns of *Otisfield* and *Bridgton* should be received and enjoyed by said town of *Harrison*, according to their proportion of the taxes of said towns, as assessed in the last tax bills." Neither of those towns had been specially incorporated as a parish, and no parish had ever been created within the town of *Bridgton*. The case is almost exactly like the case at bar. *Harrison* claimed a proportion of the fund, under the clause above quoted. The court nonsuited the plaintiff, saying that the fund could not be considered town's property, and could not be disposed of by a vote of the town. The ministerial fund belonged to it *quasi* a parish, and is to be appropriated only to parish uses. The case also supports the principles laid down in *Brunswick v. Dunning*, *Brown v. Porter*, and *Jewett v. Burroughs*.

Whether the construction of the section in question of the act of 1816, which we have given, is the true one or not, does not affect the decision of this cause; for if the language of the section is not to be construed subject to the limitations, as stated in this opinion, we should feel ourselves bound to pronounce the section unconstitutional; but we prefer the course we have taken, as more respectful in itself, and in accordance with sound principles, and the presumed intention of the legislature. *Plaintiff nonsuit.*

KNIGHT *vs.* SAWIN.

Where one requested permission to bring an action for his own benefit, in the name of another, against a third person, to recover a debt supposed to be due, promising to indemnify the nominal plaintiff against all damages; such promise was held lawful and binding, being neither against good morals nor public policy, nor within the statute of frauds.

Assumpsit, on a promise of indemnity. The plaintiff declared, in his writ, that the defendant, in consideration that the plaintiff would permit him to commence and prosecute an action for his own benefit, but in the plaintiff's name, against one *Eunice Warren*, promised the plaintiff to indemnify him against all costs and damages which he might thereby sustain; and alleged that the defendant did thereupon commence such suit, which terminated against the plaintiff, and subjected him to the payment of a large bill of costs.

At the trial before the Chief Justice, it appeared that the defendant, being the proprietor of a stage coach, had occasionally transported a minor son of Mrs. *Warren*, living with *Knight*, and whose fare amounted to four dollars. Afterwards the defendant settled an account with her, and passed receipts; but forgot to charge her with her son's stage fare; and thereupon applied to *Knight* for leave to bring an action against her in his name for the amount, as money paid by him; to which *Knight*, after some objection, consented, upon *Sawin's* promise of indemnity. But the defendant in that suit prevailed.

The counsel for the present defendant contended that the consideration of the promise was illegal; but the Chief Justice ruled otherwise; and the jury under his direction returned a verdict for the plaintiff, which was taken subject to the opinion of the court upon the point taken at the trial.

R. Belcher, for the defendant, argued that the promise was void for want of sufficient and legal consideration; because, 1st, the prosecution was of the nature of a malicious suit. *Commonwealth v. Judd*, 2 *Mass.* 526; *Commonwealth v. Warren*, 6 *Mass.* 74; *Com-*

monwealth v. Davis, 9 *Mass.* 415; *Commonwealth v. Fisher*, 5 *Mass.* 106; *Denny v. Lincoln ib.* 385; 4 *Mass.* 93; *Swett v. Poor*, 11 *Mass.* 549; *Worcester v. Eaton ib.* 369. 2. It was a fraud on a third person. *Boynton v. Hubbard*, 7 *Mass.* 112. 3. It was against public policy. 16 *Mass.* 322; *Churchill v. Perkins*, 5 *Mass.* 541; *Barbour v. Porter*, 5 *Mass.* 395; *Wheeler v. Russell*, 17 *Mass.* 258; *Thurston v. Percival*, 1 *Pick.* 50; *Coolidge v. Blake*, 15 *Mass.* 429; *Russell v. Degrand ib.* 35; 8 *Mass.* 46; 14 *Mass.* 322. 4. The promise was without any consideration, and amounted to a wager. *Balkham v. Craigin*, 5 *Pick.* 295; 7 *Mass.* 112. 5. It was not in terms, nor of necessity, to be performed within a year; but was unlimited; and so was void by the statute of frauds.

Longfellow, for the plaintiff.

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

There seems to be neither fairness nor justice in the defence of this action; and the question is whether it is founded on legal principles. We are called upon to decide whether the action could be maintained, which the defendant brought against Mrs. *Warren* in the name of the plaintiff. It seems it was not maintained; and in consequence of its failure a bill of costs was recovered by her against the plaintiff, which he has been compelled to pay; and by the verdict it is found that the defendant promised to indemnify and save him harmless from the loss he has sustained. This promise the defendant contends was never binding upon him. It is said to have been made without any consideration; or if on any, that the consideration was illegal, or not binding; also that the promise is within the statute of frauds. This last objection needs no answer; and the same may be said as to the objection that the contract amounted to a wager. Neither can it be pretended that there was no consideration; because the permission given to the defendant by the plaintiff to commence and pursue the action in his name against Mrs. *Warren* amounted to one. It is a sufficient consideration to support a contract, if the party, in whose favor the contract is made, forego some

advantage, or incur an expense, or suffer some loss, in consequence of his placing confidence in the undertaking of the other party. *Sumner v. Williams & al.* 8 *Mass.* 200; *Lent & al. v. Padelford*, 10 *Mass.* 230; *Foster v. Fuller*, 6 *Mass.* 58. The remaining inquiry is whether the consideration is illegal, or against good morals or public policy. It is said that the contract amounts to champerty; but the facts disprove this. It is contended that the action to which the contract related amounted to a malicious prosecution. If it did, a malicious prosecution is not an indictable offence; though it is good ground for recovering damages in a civil action. But if it was a malicious action and without probable cause, it was commenced and prosecuted by the defendant himself, and for his own exclusive benefit, under a permission reluctantly given at his special request; and with a view of assisting the defendant to recover a sum supposed to be justly due from Mrs. *Warren*. Considering the motives of the plaintiff in the transaction, the defence is made with an ill grace by the very man who has been the cause of all the unpleasant consequences which have followed. We have not, however, any *data* on which we can pronounce the action against Mrs. *Warren* as an intended malicious prosecution; if there was not probable cause, it is a question of fact whether a malicious suit was the object, and no such fact appears in the case. The cases cited by the defendant's counsel essentially differ from this. In those, the promise declared on was directly against law, or made to indemnify an officer for a breach of duty, or to do some act contrary to good morals, or as a compensation to another for doing such action. Suppose A fairly sells a lot of land to B, of which A was at the time of conveyance disseised, though he was not then aware of the fact; and A permits B to bring an action in his name to recover the land, on B's promise to indemnify A and save him harmless from all costs; is such a promise unlawful? Is it not binding? "All contracts fairly made, upon a valuable consideration, which infringe no law, and are not repugnant to the general policy of the law, or to good morals, are valid, and may be enforced, or damages recovered for the breach of them." *Lord v. Dale*, 12 *Mass.* 115. There must be

Judgment on the verdict.

SCHILLINGER *vs.* MCCANN.

S. being the owner of a farm called the *Hall*-farm, consisting of the lot *No.* 60, and being indebted to *W*, mortgaged to him the lot *No.* 66 in the same town, without any other description, the parties supposing it to be a mortgage of the *Hall*-farm. Afterwards *S* sold the *Hall*-farm to *M*, taking, as part of the consideration, *M's* obligation to "cancel the mortgage given by *S.* to *W.* of the *Hall*-farm;" which obligation he assigned to *W*, the mortgagee. In a suit brought on this obligation, by *W.* in the name of *S*, he declared, first, for money had and received; and in two other counts on the promise to cancel a mortgage, first as on the *Hall*-farm, called by mistake lot *No.* 66; and secondly as on lot *No.* 66, called by mistake the *Hall*-farm.

Hereupon it was *held*, that the written promise was not applicable to either of the special counts, the plaintiff not being at liberty in this respect to contradict his deed:—

But that the transfer of the contract to the mortgagee was an assignment of all the indebtedness of the promissor arising out of its subject matter; so that the assignee, in an action for money had and received in the name of the original promissee, might recover to his own use the money thus left in the hands of the promissor.

The acknowledgment of payment of the consideration-money in a deed of conveyance, does not estop the grantor from showing that a part of the money was left in the hands of the grantee, to be applied to the grantor's use.

The defendant, in a suit in which his lands were attached, having granted the same lands pending the attachment; his grantee cannot be a witness for him in that suit, his title being directly affected by a verdict for the defendant.

If the interest of a witness be discovered in any stage of the cause, even after an unsuccessful attempt to prove it, his testimony will be rejected.

IN this action, which was *assumpsit*, the plaintiff, in the first count, charged the defendant with money had and received. In the second count, he alleged that whereas he and one *John Schillinger* had long before given their promissory note to *William C. Whitney*, secured by their mortgage deed of the *Hall*-farm, so called in *Poland*, but by mistake in said deed called lot *No.* 66; the defendant, in consideration that the plaintiff had then and there paid him $390,79 for that purpose, by his memorandum in writing promised the plaintiff to cancel said mortgage-deed, meaning that he would procure the discharge of said mortgage deed by the payment of said note in a

reasonable time; which he had not done. The third count was like the second, except that it described the mortgage as of lot *No.* 66, called by mistake the *Hall*-farm.

At the trial before the Chief Justice, it appeared that the mortgage deed was of lot *No.* 66, in *Poland*, without any other description; and it was agreed that the *Hall*-farm was a lot of a different number, being *No.* 60. In support of the second and third counts, the plaintiff offered in evidence a paper signed by the defendant, of the following tenor;—"*Poland, March* 10, 1829. I *David McCann* do agree to cancel the mortgage deed which was given by *William* and *John Schillinger* to *William C. Whitney* Esq. of the *Hall*-farm, so called. *David McCann.*" On the back of this paper was the following transfer. "*June* 3, 1829. I hereby assign this writing to *Wm. C. Whitney*, for his security collateral for the payment of my notes to him, which were to have been supported by a mortgage of the *Hall*-farm; and of which I have given him a mortgage, unless there is a mistake in the deed. I also empower him to make use of my name to enforce the same. *Wm. Schillinger.*" But the Chief Justice instructed the jury that this contract did not support either of those counts.

In support of the first count, the plaintiff read the copy of a deed from himself to the defendant, dated *March* 10, 1829, conveying a certain farm in fee, for the consideration of eleven hundred dollars therein acknowledged by him to have been received of the defendant. And he offered to prove by witnesses that about four hundred dollars, part of said consideration, had never been paid, but was left in the hands of the defendant, to pay the mortgage on the *Hall*-farm. The admission of this proof the defendant resisted, as contradicting the plaintiff's own acknowledgment in the deed; but the Chief Justice overruled the objection.

To rebut this evidence the defendant offered one *William McCann* as a witness; to whose competency the plaintiff objected, stating that he held a deed of one of the parcels of land which had been previously attached in this suit as the property of the defendant; and so had a direct interest in having the lien, thus created on his land, discharged by a judgment for the defendant. But it ap-

pearing on examination that this deed was executed prior to the attachment, the objection was given up, and the witness was examined. After the examination, it appeared that the witness held a deed from the defendant of another parcel of land attached in this suit, and executed subsequent to the attachment. Whereupon the counsel for the plaintiff renewed his objection to the competency of the witness; and the Chief Justice sustained the objection, and instructed the jury to disregard his testimony. A verdict was taken for the plaintiff, subject to the opinion of the court upon the competency of the testimony offered by the plaintiff under the first count; and upon the rejection of the testimony of the witness offered by the defendant.

Fessenden and *Deblois*, for the defendant, argued that the testimony offered by the plaintiff to support the first count was inadmissible, as it went to contradict his own deed, by which he is estopped. And they relied on *Steele v. Adams*, 1 *Greenl.* 1. They said that *Rex v. Scammonden*, 3 *D. & E.* 474, did not contradict this decision; as in that case the evidence offered went to support the deed, and beyond it, by proving the payment of a further sum. They contended against the authority of *Wilkinson v. Scott*, 17 *Mass.* 249, as an unwarrantable usurpation of chancery powers; as running counter to well settled principles, and decisions long acquiesced in; as destroying the symmetry of the law; and as founded on false assumptions respecting the course of transactions between the grantor and grantee. And it has been subsequently overruled in Massachusetts in *Griswold v. Messinger*, 6 *Pick.* 517; and is contradicted, in its main point, by *Powell v. The Monson & Brimfield Man. Co.* 3 *Mason*, 347. In this State, too, the principle of *Steele v. Adams*, has been reiterated in *Linscott v. Fernald*, 5 *Greenl.* 496. In Maine, Maryland, and North Carolina, the decisions are uniformly with the defendant. In New York and Pennsylvania, and sometimes in Massachusetts, they have been otherwise. 3 *Stark. Ev.* 1002, *note*. But the English decisions have been always in accordance with the old and sound rule, laid down in *Shep. Touchst.* 87, that a deed is one entire thing, to *all* parts of which the same rules of construction are equally applicable. *Baker v. Dewey*, 1 *Barn.*

& Cresw. 704; 5 *Dane's Abr. ch.* 160, *art.* 1, *sec.* 24. *Rowntree v. Jacob*, 2 *Taunt.* 141.

To the point of admissibility of the witness offered by them, they contended that if he had any interest, it was equipoised, and thus rendered him indifferent as to the result of the suit; since if the land should be taken from him, he would have his remedy over on the covenants in his deed. *Cushman v. Loker*, 2 *Mass.* 106; *Millwood v. Hallett*, 2 *Caines*, 77; *Staples v. O'Kines*, 1 *Esp.* 332; *Emerson v. The Providence hat manuf. co.* 12 *Mass.* 237; *Shuttleworth v. Stevens*, 1 *Camp.* 407; *Roberts v. Whiting*, 16 *Mass.* 186; *Bent v. Baker*, 3 *D. & E.* 27; *Rice v. Austin*, 17 *Mass.* 197; *Gifford v. Coffin*, 5 *Pick.* 447. Or, it was a contingent interest, which forms no ground of rejection. 2 *Stark. Ev.* 745; *Lewis v. Manley*, 2 *Yeates* 200; *Union Bank v. Knapp*, 3 *Pick.* 96. It was not like the case of bail, where the judgment against the principal is evidence against the bail; for here the witness is liable to no action whatever. *Carter v. Pierce*, 1 *D. & E.* 163.

Greenleaf and *J. C. Woodman*, for the plaintiff, to the admissibility of parol evidence touching the consideration in the deed, cited *Sheppard v. Little*, 14 *Johns.* 210; *Wilkinson v. Scott*, 17 *Mass.* 249; *Bowen v. Bell*, 20 *Johns.* 338; *Hamilton v. Ex'rs. of Mc Guire*, 3 *Serg. & Rawle*, 355; *Jordan v. Cooper*, *ib.* 564; *Mare v. Miller*, 1 *Wash. C. C. R.* 328; *Weigley's adm'rs, v. Weir*, 7 *Serg. & Rawle*, 309; *Thompson v. Faussat*, 1 *Pet. C. C. R.* 182; *Ensign v. Webster*, 1 *Johns. Ca.* 145; *Duval v. Bibb*, 4 *Hen. & Munf.* 113; *Garrett v. Stuart*, 1 *McCord* 514; *Oneal v. Lodge*, 3 *Har. & McHenry* 433; *Kipp v. Denniston*, 4 *Johns.* 23; *Rex v. Scammonden*, 3 *D & E.* 474. They took a distinction between the cases where the grantor sought to defeat his own deed as a conveyance of title, or to limit and impair its operation in that respect; and those in which he claimed the money as still due and payable to him, notwithstanding the receipt of payment in the deed; contending that the doctrine of estoppel applied only to the former, and not to the latter; and that on this principle nearly all the cases might be reconciled. And they examined the cases cited in *Steele v. Adams*, particularly *Wilkes v. Leuson Dy.* 169, cited from 2 *Shep. Abr.* 93,

insisting that they did not, in principle as thus distinguished, support the decision in that case.

To the other question they cited *Evans v. Eaton*, 1 *Pet. C. C. R.* 338; *Baldwin v. West, Hardin* 50; 2 *Stark. Ev.* 757, *note*; 1 *Stark. Ev.* 122; *Fisher v. Willard*, 13 *Mass.* 379; *Turner v. Pearte*, 1 *D. & E.* 717.

MELLEN C. J. delivered the opinion of the Court at the adjournment in *August* following.

We are of opinion that the special contract which was offered in support of the second and third counts, was properly rejected, as not applicable to either of them. If the plaintiff can maintain the action, he must recover on the first count for money had and received. The case presents two questions, as to the correctness of the decisions of the judge who sat in the trial. 1. Whether the parol evidence which was objected to by the defendant should have been excluded. 2. Whether *Wm. McCann*, who was offered by the defendant, and whose testimony the jury were instructed to disregard, was a competent witness. As the more convenient course, we will reverse the order in which the objections were made, and in the first place examine the question respecting the competency of *McCann*. The principle of law on the subject of incompetency is stated in these words. 2 *Stark. Ev.* 744. "The interest to disqualify must be some legal, certain and immediate interest, however minute, in the result of the cause, or in the record, as an instrument of evidence acquired without fraud." In the leading case of *Bent v. Baker*, 3 *D. & E.* 27, and in *Smith v. Prager*, 7 *D. & E.* 60, the rule as laid down was "that no objection could be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict, so as to give it in evidence on any future occasion, in support of his own interest." These are two distinct kinds of interest. *Starkie* says, page 746, "A party has such a direct and immediate interest in the event of a cause as will disqualify him, when the necessary consequence of a verdict will be to better his situation, by either securing an advantage, or repelling a loss; he must be either

a gainer or loser by the event." So in *Buckland v. Tankard*, 5 *D. & E.* 578, Lord *Kenyon* says, "The whole question turns upon this, whether the witness's situation would not be bettered by the event of the verdict in this case. I am still of opinion that it would; for if the plaintiff should succeed, the witness would be put to much greater difficulties to get back the money, than if the plaintiff should be foiled by means of his testimony." It is true this case has been doubted. Ch. Baron *Gilbert*, in his law of Evidence, *vol.* 1, *p.* 106, 107, says, "The law looks upon a witness as interested, where there is a certain benefit or disadvantage to the witness, attending the consequence of the cause one way." In *Marquand v. Webb & al.* 16 *Johns.* 89, *Spencer J.* says, "My opinion proceeds upon the principle that whenever a fact is to be proved, and such fact be favorable to the party calling him, and the witness will derive a certain advantage from establishing the fact in the way proposed, he cannot be heard, whether the benefit be great or small." In *Bull. N. P.* 284, the same rule is laid down, that the witness must be excluded, if there is a certain benefit or advantage to the witness, attending the determination of the cause one way. It is admitted that an interest merely contingent, as that of an heir at law, is no disqualification of a witness; it must be a certain interest. Thus a creditor of an insolvent estate cannot be admitted as a witness for the administrator, in a suit brought by or against him; because his testimony would go to increase or prevent the diminution of the fund, from which the creditors are to receive their dividends. So an indorser of a writ cannot be a witness for the plaintiff; for if by his testimony the action can be maintained, he can never become liable for the costs; his testimony would tend to repel a loss, as *Starkie* expresses it. Now in the case before us, it appears that since the commencement of the action, *McCann*, the witness, has received a deed from the defendant of a piece of land which the plaintiff attached in this very suit, and that attachment now binds the title; if the witness, therefore, can by his testimony foil the plaintiff and defeat the action, he can thereby at once dissolve the attachment, and perfect the title under his deed; he is therefore directly interested in the event of this cause. It is said, however, that perhaps the plaintiff, if he should recover, would not

levy his execution on the land attached, and so the interest of the witness is not certain. Neither is it known whether an indorser of a writ will be called upon for payment of the costs which the defendant may recover; the plaintiff may be a man of fortune; still the indorser cannot be a witness, even though indemnified. The present case is one of those in which a witness is excluded on the ground of his interest in the event of the cause, and not an interest in the record. The case of *Carter v. Pearce*, cited by the counsel for the defendant, is expressly distinguished by the court from that of bail, whose interest is direct and immediate; and his interest is not more direct than that of an indorser of a writ, or that of *McCann* the witness. We have examined the cases cited by the defendant's counsel on the subject of competency, and find that they materially differ from the case at bar. In *Roberts v. Whitney* the court considered the testimony as equally favorable to both parties. In *Cushman v. Loker* the witness was liable at all events to one person or another; and to which of them, was an immaterial question to him. In *Gifford v. Coffin*, the witness was not interested in the event of the suit directly, and the court observed that the verdict could never avail him in a suit of his own. In *Union Bank v. Knapp*, the witness, on the *voire dire*, stated facts which the court decided would not render him liable to the bank, and, of course, he was not interested. In the other cases cited, the interest of the witness was balanced; he stood indifferent between two claimants. For the reasons we have given, we are all of opinion that the testimony of *McCann* was not admissible, and that the instruction of the judge to the jury, wholly to disregard it, was correct and proper.

The next question is of more difficult solution. As doubts have often been expressed with respect to the decision of this court in the case of *Steele v. Adams*, in consequence of the ruling of the judge at the trial, we have been called upon to review that decision, and the principles and authorities on which it was made, and those also opposed to it. And we have listened with much pleasure and profit to the re-examination of the subject at the argument, with an earnest desire to correct whatever should be found erroneous in our former opinion. The question is by no means free from difficulties; and

authorities are certainly in many instances, in opposition to each other. Several new decisions have been made, and several new authorities been cited in relation to the point, since the decision of *Steele v. Adams*. The decisions in Massachusetts seem not to be in perfect unison. In *Eveleth v. Crouch*, no consideration was in fact received for a piece of land conveyed with covenants of seisin and warranty; yet the court would not allow that parol evidence should be received, even by way of reducing damages for breach of the covenants; but decreed payment in full of the sum stated as the consideration of the deed. In *Wilkinson v. Scott* the court decided that acknowledgment of the payment and receipt of the consideration, on the face of the deed, is no estoppel; but that the truth may be shown; and such acknowledgment may be as well contradicted or explained as a common receipt. It is admitted that this case is different, in some important facts, from that of *Eveleth v. Crouch*. The case of *Griswold v. Messinger*, 6 *Pick.* 517, has been relied on by the defendant's counsel as overruling the decision in *Wilkinson v. Scott*. The language of the reporter in giving the judgment, does by no means necessarily lead to that conclusion. It is stated that the parol evidence was rejected as inadmissible. It might have been so, as contradicting the deed, or as not supporting either of the counts in the declaration, but clearly varying from them in all essential particulars. The cases cited from New York reports, and those of several other States, seem to be in unison with *Wilkinson v. Scott*. In Maryland and North Carolina, evidence of the kind offered in *Steele v. Adams* is considered as inadmissible. On the other hand the cases of *Rowntree v. Jacob*, *Powell v. The Providence Hat Manufactory*, 5 *Dane's Abr.* 160, *art.* 1, *sec.* 24, and the case of *Baker v. Dewey*, decided in England so late as the year 1823, have been cited in support of the case of *Steele v. Adams*. In the review of all these authorities, there seems to be no small degree of uncertainty still attending the subject. On the one hand, arguments founded on analogy and decisions conforming thereto, are urged and relied on; on the other, it is contended that a receipt for and an acknowledgment of the payment of the consideration in the deed, though under the seal of the party, is to be considered as an exception from the general principle

of estoppel, which is admitted to be applicable to all other facts stated or recited in a deed. Such being the state of the question, and such being the ground on which we place the decision of the present cause, we have not deemed it advisable on this occasion to disturb the case of *Steele v. Adams*. We do not find it necessary so to do; and shall therefore leave it as it stands, until some case shall present itself, distinctly requiring us to overrule or affirm it.

Our continued inquiry is, whether, in the case at bar, the parol proof objected to was properly admitted, and, when admitted, forms a basis which will support the verdict. In *Steele v. Adams*, the deed was delivered—no part of the consideration was paid, nor any security given—the defendant merely promised to settle for it, and then violated his promise. The facts of the case before us are in several respects different. The plaintiff was permitted to prove, and did prove, that the whole consideration of the conveyance from the plaintiff to the defendant was $1100, (about $700 of which was paid at the time,) and that about $400, part of the consideration, had never been paid to the plaintiff, but was left in the hands of the defendant to pay the mortgage on the *Hall* farm; and at the same time, when the deed was so made, the defendant signed the agreement of the 10th of *March*, 1829, thereby agreeing to cancel the mortgage deed which was given by *William* and *John Schillinger* to *William C. Whitney*, of the *Hall* farm, so called. Thus the whole transaction in relation to the conveyance of the title, and the payment of part and security for the residue of the consideration, was closed at the same time. Now, what is the fair construction which this transaction and the defendant's agreement ought to receive? This was accepted in part payment of the consideration, and as an equivalent for the sum left in the hands of the defendant, for the express purpose therein stated. It certainly must be competent for either party to show such facts as these, or the most gross injustice may be done in a thousand instances. Suppose A sells a tract of land to B, and makes a deed to him in usual form, containing an acknowledgment of having received the consideration of $500; and suppose also that at the time the deed is delivered, B gives A a promissory note for the $500. And suppose also that A should bring an action for the price

of the land, declaring upon the contract of sale in *assumpsit*. Surely in such case B might, in New York or Massachusetts, show that he gave the note to A, and that he received it in full for the consideration. Again, suppose that A should sue B on the $500 note, and B in defence should contend that the consideration was acknowledged in the deed to have been paid; and that A was estopped to deny it; and that therefore the note was given without any legal consideration; could the defence be availing? No;—the plaintiff A, by proving that he received and accepted the note as payment of the consideration, would defeat the defence, and recover. Therefore, as *McCann* might have proved in defence, that his agreement of *March* 10, was accepted as payment of the consideration, or that part of it which was left in his hands; and as such a defence would have been good against the claim of the $400 as an unpaid part of the consideration; so on the other hand, the plaintiff might well prove, as he did on the trial, the foregoing facts, arrangement and special agreement of the defendant, for the purpose of showing that he does not, in this action, claim the payment of the $400, as an unpaid part of the consideration in the deed mentioned, but as a sum of money left in his hands and misappropriated by him, and for which he ought to account to the plaintiff, in consequence of the violation of his engagements. The before mentioned case of *Baker v. Dewey*, on which the defendant's counsel has placed so much reliance, upon a careful examination, will be found to warrant the construction we have given to the transaction between the parties on the 10th of *March*—a construction in full harmony with their declared intentions, and the justice of the case. In that case it appears that *Baker*, by deed, conveyed to *Dewey* certain real estate, for the consideration of fifty pounds, the receipt of which sum was acknowledged in the deed, and the defendant therefrom acquitted and discharged. Parol evidence was given at the trial, that at the time of the execution of the deed no money in fact passed; and that *Dewey* stated that he was to work out the consideration money, in his trade as plumber and glazier. On a subsequent day *Baker* conveyed another piece of real estate to *Dewey*, in consideration of two hundred and fifty pounds, which was also by the deed acknowledged to have been received.

About eight months afterwards, both parties signed an agreement, not under seal, by which it was stipulated that *Dewey* was to retain sixty pounds out of the purchase money, and work it out as before mentioned. The question was whether, on such evidence, the plaintiff could recover. *Bailey J.* said "a party who executes a deed, is estopped in a court of law from saying that the facts stated in that deed are not truly stated." He observed, "he, *(Baker)* is precluded from saying that any part of the money remains due as purchase money. He might be at liberty, however, to show that, after the execution of the deed, part of the purchase money was returned on the terms of doing certain work for the plaintiff. Assuming that that could be considered as the legal effect of the agreement of the parties—the declaration does not contain any count to meet such a case." *Holroyd J.* said, "I incline to think, at present, that the parol agreements are not inconsistent with the deed. Both parties are estopped, by the deed, from saying that the whole purchase money was not paid. I doubt whether the true nature of the transaction may not be taken to be in effect, the purchase money's being stated and considered by the deeds to have been paid, as if after the execution of the deeds, and after the vendor had received the purchase money, as the deeds import, he returned to the vendee a part, in consideration of the latter's doing the work mentioned in the agreement—but assuming it to be so, there is no count applicable to such a case." The court accordingly set aside the verdict; but it is easy to perceive that, had there been a proper count for the purpose, they would have sustained the verdict, in support of the plain justice of the case.

We proceed now to examine the remaining facts, and ascertain whether the action is maintainable on the general count for money had and received. The sum of $400 was left in the hands of the defendant, to pay the mortgage on the *Hall* farm. Now it is alleged in the second and third counts that the land mortgaged to *Whitney* was lot No. 66, which was not the *Hall* farm, though it was supposed to be. It does not appear, nor is it pretended, that there was any other mortgage to *Whitney* than of the lot No. 66. There never was any mortgage of the *Hall* farm; and the defendant's agreement of *March* 10, has no reference to any other, and it

did not bind the defendant to cancel the mortgage on any other. Of course, no action could or can be maintained on that agreement, unless parol evidence could be admitted to shew the alleged mistake, by contradicting the express language of the mortgage deed; and we have already given our opinion that such evidence could not legally be admitted. In this view of the case, it appears that the $400 were left in the hands of the defendant for the purpose of paying and cancelling a non-existing mortgage; in other words, to be applied, appropriated and accounted for, in a manner which is impossible. The supposed consideration on which the money was left in the hands of the defendant has, therefore, wholly failed; and being bound to pay it to no other person, why should he not be compelled to restore it to the plaintiff, instead of withholding it, and against equity and good conscience, appropriating it to his own use? We are all of opinion that there must be

Judgment on the verdict.

After the foregoing opinion was delivered, *Fessenden* produced a release from the plaintiff to the defendant, of this suit and all demands; which had been executed since the verdict; and moved to have it entered of record as a discharge of the action; contending that as *Whitney*, the assignee, had no right of action on the written promise, and the count for money had and received was now the only foundation of the suit, the money found due by the verdict was not within the terms of the assignment, and so belonged to the nominal plaintiff.

Sed per Curiam. The promise was to pay off a non-existing mortgage. The assignment was not only of the paper, but of the indebtedness of the man who signed it, so far as relates to its consideration and subject matter; and if the assignee cannot recover on the written promise, yet he may on any money counts, properly framed upon that transaction. Mr. *Whitney* therefore is the plaintiff in interest as to the money count also. The money was left in the hands of the defendant, for a purpose which cannot be accomplished; and the plaintiff recovers it for the use of his assignee.

Motion denied.

Brigham *vs.* Welch.

Where the purchaser of a right in equity of redemption, at a sheriff's sale, had demanded possession of the mortgagor, who still remained on the land, and who answered that "if he thought he had a better right to the land than he, the occupant, had, he might get it when the law would give it to him;" and thereupon the purchaser brought a writ of entry against the mortgagor, who pleaded non-tenure in bar;—it was held that this evidence showed a claim of right on the part of the tenant, and disproved his plea;—and that the demandant was therefore entitled to judgment, though the mortgagee had previously entered for condition broken, and the debt was still unpaid.

This was a writ of entry on the demandant's own seisin, and a disseisin by the tenant; who pleaded in bar that he was not tenant of the freehold.

In a case stated by the parties, it appeared that the tenant had mortgaged the premises to one *John B. Lord*; that afterwards the demandant, being a judgment creditor of the tenant, had caused his right in equity to be seised and sold on execution, and had himself regularly become the purchaser at the sheriff's sale, *Aug.* 20, 1827; that in *February* 1828, *Lord* commenced his action against the tenant upon the mortgage deed, in which he had judgment in *May* following; and in the same month entered for condition broken, under his writ of possession. *Welch* continued to remain in possession as before, nothing having been said to him on this subject by the mortgagee. The present action was commenced *Feb.* 3, 1829; on the day previous to which, the demandant went to the house of the tenant on the premises, and demanded possession of the farm; to which the tenant replied that "if the demandant thought he had a better right to it than he had, he must get it when the law would give it to him." The demandant had never paid nor tendered the money due to the mortgagee.

Deblois, for the tenant, read an argument to the following effect. The general principle that the mortgagor is owner of the fee, as against all persons but the mortgagee, is conceded; but this principle does not hold after entry by the mortgagee for condition broken.

By such entry, the legal estate of the mortgagor is gone; nothing remaining to him but a remedy in equity. *Erskine v. Townsend*, 2 *Mass.* 495; 8 *Mass.* 554; *Maynard v. Hunt*, 5 *Pick.* 240. And therefore he cannot be considered as having any legal seisin of the land. *Penniman v. Hollis*, 13 *Mass.* 432; *Hill v. Payson*, 3 *Mass.* 559; *Parsons v. Welles & al.* 17 *Mass.* 419; *Gray v. Jenks*, 3 *Mason*, 520. The entry for condition broken has had the effect to render the mortgagor a mere stranger, as it respects any legal title to the estate; and to vest a sole seisin in the mortgagee. *Wellington v. Gale*, 7 *Mass.* 138; *Porter v. Millett*, 10 *Mass.* 101; *Goodwin v. Richardson*, 11 *Mass.* 474. Therefore *Lord*, the mortgagee, having entered under the mortgage, must be considered as the sole owner of the estate in question. Had the right in equity remained in *Welch*, and a stranger entered upon him, he could have maintained no action against such stranger on his own seisin, because he had none. The same distinction has been recognized in New York. *Jackson v. Willard*, 4 *Johns.* 41; *Hitchcock v. Harrington*, 6 *Johns.* 290; *Collins v. Torrey*, 7 *Johns.* 278. So in *Bolton v. Ballard*, 13 *Mass.* 227; *Groton v. Boxborough*, 6 *Mass.* 50; *Hatch v. Dwight*, 17 *Mass.* 299; *Fitchburg C. M. Corp. v. Melvin*, 15 *Mass.* 268; *Gibson v. Farley*, 16 *Mass.* 280. If then the mortgagor cannot maintain even trespass against a stranger, after entry by the mortgagee, he himself being a mere stranger to the land; neither can the demandant, standing in his place, maintain the present action.

Though in contemplation of law, *Welch's* remaining on the land was wrongful; yet every trespass is not a disseisin. At all events, his possession could amount to a disseisin only at the election of *Lord*. But it is not for a stranger, like the demandant, to make that election for *Lord*; much less to make it a disseisin of himself. Against the demandant, therefore, as against a stranger, without right, *Welch* has a right to say he is tenant at will to the mortgagee; leaving the demandant to recover on the strength of his own title; and having none, he must fail in the action.

Greenleaf, for the demandant.

MELLEN C. J. delivered the opinion of the Court at the ensuing *June* term in *Kennebec.*

In this action the defendant pleads non-tenure; and the question is whether, on the foregoing statement, the action is maintainable. The defendant does not deny the alleged seisin of the demandant, but in his plea relies upon a fact which, if true, constitutes a good defence, though the premises may be the property of the demandant. In relation to the merits of the plea, the facts are these, viz. that at the time of the commencement of the action, on the third day of *February*, 1829, the defendant was in possession of the premises; that on the day preceding, the plaintiff demanded of him possession of the same; to which he replied that if the demandant thought he had a better right to the land than the tenant had, he must get it when the law would give it to him. Here is a direct claim of right on the part of the defendant; a plain refusal to surrender the possession, and a distinct defiance of the demandant's title, until he could establish it at law. These facts show that the defendant was tenant of the freehold, and of course the defence must fail. The argument of the defendant's counsel, as applied to a part of the case, is a correct and able one, and well sustained by authorities; and if the defence had been placed on some other plea, which would have rendered his argument distinctly applicable to the point in issue, we should have felt its force, and probably have yielded to it. But as the case stands we are all of opinion that the defendant must be defaulted.

PURINTON *vs.* HUMPHREYS.

Where the jury, after they retired to deliberate on a cause, received and were influenced by the declarations of one of their fellows, discrediting a material witness of the plaintiff; it was held to be no good cause to set aside the verdict.

Neither will a verdict be set aside because the jury, without the privity of the prevailing party, and being fatigued and exhausted with the length of the trial, were furnished with some refreshments at their own expense, during their deliberations on the cause; however liable the jurors might be to personal admonition from the court for such misconduct.

But if ardent spirits constitute part of such refreshments, and appear to have operated upon any juror so far as to impair his reasoning powers, inflame his passions, or have an improper influence upon his opinions, the verdict would probably be set aside.

AFTER a verdict for the defendant in this cause, the plaintiff moved the court to set it aside;—*first*, because the jury, after being charged with the cause, and having retired to deliberate upon it, received and were influenced by the declarations of one of their fellows, discrediting a material witness for the plaintiff; and *secondly*, because after they retired, and before the verdict was agreed upon, they were furnished with divers refreshments, in meats and drinks.

In support of the motion, it was proved that during their deliberations they procured, at their own expense, by means of the officer who had them in charge, a quart of rum, a bottle of gin, and some herrings, apples and cheese; and that a small part of the rum, and about half the gin, was not consumed.

Mitchell, for the plaintiff, abandoned the first cause assigned. But on the second point he contended strongly that the verdict ought to be set aside. He argued from the necessity of preserving the purity of jury trials; the right of every citizen to have the benefit of the unclouded mind and calm judgment of every juror; the grossness of their misbehavior in the present case; the danger of suffering ardent spirits to be introduced into the jury-room under any circumstances; the quantity here consumed; and the extreme probability, almost amounting to certainty, that some of the jurors must have been improperly excited.

Fessenden and *Deblois*, for the defendant, cited *King v. Freeport*, 13 *Mass.* 218; *St. John v. Abbot, Barnes*, 441; 7 *Bac. Abr.* 12, *Verdict H*; *Vicary v. Farthin, Cro. El.* 411; *Bull. N. P.* 308; *Co. Lit.* 227, *b*; *King v. Burdett*, 2 *Salk.* 645; 1 *Sty. Pr. Reg.* 641; 4 *Bin.* 150.

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

The first cause assigned in support of the motion is very properly abandoned. The second, it is urged, furnishes a legal ground for setting aside the verdict. There is no question that the conduct of the jury and of the officer attending them was highly improper, though the court have no reason for believing that any disrespect to the laws was intended by either of them. It is admitted by the parties that the refreshment was furnished to the jury at a time when they were fatigued, and somewhat exhausted by their labors. Still nothing of the kind should have been allowed without permission from the court. The example is injurious in its operation, and repetition of it must be prevented. If we had any grounds for believing that the ardent spirit which they procured had so far operated upon any one of the jury, as to impair his reasoning powers, inflame his passions, or have an improper influence upon his opinion, the case would wear a very different complexion, and might be decided in a different manner. But it appears that the refreshment was furnished at the expense of the jury, and without any privity on the part of the defendant; he stands perfectly innocent, and claims the benefit of the verdict which has been returned in his favor. The authorities cited by his counsel seem clearly to establish the principle that many instances of misconduct in a jury, which would justly subject them to censure and punishment, will not vitiate the verdict, where the party claiming the benefit of it is not blame-worthy. We are aware of the importance of preserving our jury trials as pure as possible; and where a case presents to the court an instance of wilful misconduct, or gross misbehaviour, or intentional misdemeanor, on the part of the jury in the discharge of their official duty, the court will surely take care that the laws shall be promptly vindicated. In the circumstan-

ces of the present case, we peceive no reason for sustaining the motion, and accordingly there must be

Judgment on the verdict.

JEWETT *vs.* BARNARD *& Trustees.*

Where an insolvent debtor makes a general assignment of his effects, in trust for the benefit of such of his creditors as should, within a certain time, become parties, and release their demands; a recusant creditor, who attaches the property in the hands of the assignees by a foreign attachment, is entitled to payment in preference to those who executed the assignment subsequent to such attachment, notwithstanding the covenant of the assignees to pay, *pro rata*, all the creditors who might become parties to the assignment.

IN this case the question was upon the liability of *French* and *Harrod*, the trustees, who were assignees of *Barnard*, the principal debtor. It appeared from their answers that *Barnard*, being insolvent, made to them a general assignment of all his effects, in trust, first for the payment of certain favored creditors; secondly, for the payment, *pro rata*, of all such creditors as should become parties to the assignment within ninety days; and thirdly, to pay, in like manner, all his debts demanded within six months. The assignees covenanted to execute the trusts and dispose of the property accordingly. The indenture was executed by the debtor, the assignees, and the preferred creditors, when the assignees were summoned by a foreign attachment in the present suit. Afterwards, and within the ninety days, the other creditors became parties to the assignment. And there was money in the hands of the assignees, applicable to the second class of trusts, unless the plaintiff had a right to intercept it by this attachment. Whether he had such right, was the question submitted to the court.

Greenleaf, for the defendant, maintained the negative. The property, he contended became vested in the assignees as soon as the instrument was executed by them and the debtor, and one creditor; *Hastings v. Baldwin*, 17 *Mass.* 552; leaving to the debtor only a

right of action upon the covenants; which were express and unambiguous, to pay all the creditors who might become parties within the terms of the assignment, and account for the surplus to the debtor. *Stevens v. Bell*, 6 *Mass.* 339; 7 *Mass.* 438. The attaching creditor, in a foreign attachment, succeeds only to the rights of his debtor. He cannot place himself in a better situation, if the transaction is not fraudulent. Nor can he change the nature of the debtor's contract. His process only affects the remedy; it creates no new rights.

Here the assignees are bound at all events to pay over to those creditors who became parties within the ninety days. They could not prevent them from becoming parties. Nor could such creditors know of the pendency of this process. By executing the assignment they entitled themselves to a remedy on the covenants, and a *pro rata* distribution. It is only after such distribution that the debtor can call for any surplus. His creditor, therefore, can call for nothing more.

It is like money paid by *A* to *B*, who has promised to pay it to *A's* creditor *C*, and refund the surplus, if any, to *A*. Here *C* may have an action against *B* for the money. 1 *Com. Dig.* 206, *Assumpsit E*; *Arnold v. Lyman*, 17 *Mass.* 400; *Hall v. Marston*, *ib.* 575. Now wherever the garnishee is liable over to a third person at all events, he cannot be adjudged trustee; for this would be to expose him to pay twice. *Van Staphorst v. Pierce & tr.* 4 *Mass.* 258. Nor where, "by any reasonable probability," he may be liable to pay to a third person. 6 *Dane's Abr.* 494, *sec.* 8. He must be so situated as to be able to retain, against his principal, the effects disclosed. 6 *Dane's Abr.* 493, *sec.* 7. But here they could not retain, nor protect themselves against subsequent creditors.

In *Parker v. Kinsman*, 8 *Mass.* 486, the indenture was only of two parts, between the debtor and creditor, on which no action would lie in favor of a third person. Nor does it appear that any creditor had assented to the assignment; and without such assent, it is well settled that no property passed. The title therefore, in that case, was not changed. The case of *Ward v. Lamson & tr.* 6 *Pick.* 358, very recently reported, does not appear to have been well considered. The only reason there assigned, that without such lia-

bility of the assignees, the property would be locked up from the creditors, is not true. It would go to the other creditors, by the express terms of the indenture, which is undeniably a legitimate application of the funds. If any surplus remained, it would be liable to attachment.

Fessenden and *Deblois*, on the other side, relied on *Ward v. Lamson*, 6 *Pick.* 358, and *Marston v. Coburn*, 17 *Mass.* 454.

PARRIS J. delivered the opinion of the Court at the adjournment in *August* following.

The whole question in this case as to the liability of *French* and *Harrod*, as trustees, depends upon the effect of the assignment by them disclosed, made by *Barnard*, the principal defendant, in trust for the purpose of enabling them, as assignees, to discharge certain debts due to his creditors, he being, at the time of the assignment, an insolvent debtor. It is admitted by the disclosure that the just debts of those creditors who had assented to the assignment at the time of the service of the trustee process, would be insufficient to absorb the whole amount of property assigned; but they contend that the surplus passed to other creditors provided for in the assignment, who signified their assent and became parties to it subsequent to the service of this process; so that at that time *Barnard* had no remaining interest which could be the subject of attachment. To what extent the property passed is then our only inquiry.

It is true that deeds of trust, when made for the undoubted benefit of persons who are absent, have been considered as vesting the legal estate in the trustee, without any expression of the assent of the persons for whose benefit such deeds are made. The assent of the *cestui que trust* has been presumed, inasmuch as the conveyance was made entirely for his benefit. It is rather upon the principle of gift, than of contract, that such acceptance has been presumed. So when property is conveyed in trust absolutely and unconditionally for the payment of debts, as in case of preferred creditors, perhaps the assent of such creditors, whose debts are thus absolutely and unconditionally provided for, might be presumed, upon the common law principles applicable to trusts; although the case of *Widgery v. Has-*

kell, 5 *Mass.* 153, would seem to render even such a position questionable.

The case supposed is one of an absolute, unconditional conveyance. Even in such a case, the assent of the creditors for whose use the conveyance was made would seem to be necessary to give it validity, inasmuch as it would be optional with such creditors to accept or resort to other, and, as they might believe, more effectual means to ensure an earlier payment. But when, by the very terms of the indenture, the creditors are required to discharge their whole demands in order to become entitled to any benefit from the property, can the instrument be operative in their favor until they assent to the condition? If A offer B a bale of goods, upon condition that B discharge his demand against A, does the property in the goods pass until the condition is complied with? Or, which is nearer this case, if A convey the goods to C, to sell and pay the proceeds to B, upon condition that B discharge his note against A of twice the amount, can the assent of B be presumed, or will it be contended that any thing passed for the use of B, until he assents to the condition? And if not, who has the equitable interest in that property? Is it locked up, or is it liable for the debts of A?

What was the situation of the property described in the assignment from *Barnard* to *French* and *Harrod*, at the time of the service of the trustee process? The indenture, at that time, had been executed by *Barnard*, by the assignees, and by three only of *Barnard's* creditors. The instrument had become operative; the property had passed to the assignees, for the benefit of such creditors as had signified their assent to the terms, to the amount of their debts. Those who had not were still strangers to the transaction. They had not, in the language of the indenture, "accepted the provision made for them, and released, acquitted and forever discharged the said *Barnard* from all their debts, dues and demands;" and it was not to be presumed that they ever would so compound; and of course, neither upon the principles of law applicable to trusts, nor by the terms of the assignment, could they have any interest in the property. It follows that at the time of the service of the trustee process on the assignees, the property assigned was liable, by virtue of the indenture, for the pay-

ment of such creditors only as might be presumed to have assented or had actually assented to its terms and conditions, and whatever surplus might remain, after discharging these demands is liable to such dissenting creditors of *Barnard* as attached it by this form of process in the hands of the assignees.

In this opinion we are confirmed by the case of *Halsey v. Whitney*, 4 *Mason* 217, where Mr. Justice *Story* says, "if the assignment be assented to by any creditors, and be in other respects free of fraud, to the extent of the debts due to those creditors, it is valid, and subsequently attaching creditors can only avail themselves of the surplus. This is the doctrine in *Hastings v. Baldwin*, 17 *Mass.* 552, and it appears to me founded in the strongest legal sense and public convenience." The same learned judge, in speaking of the necessity of creditors becoming parties to the conveyance, says, "I did not understand that any local decisions have gone the length of requiring that the creditors should assent to it at the moment of its execution. If they sign the instrument afterwards, the conveyance is good against all persons but intervening attaching creditors." The same principle is recognized as sound by Chancellor *Kent*, in his commentaries, *vol.* 2, *p.* 420, who says "the assent of the creditors, to be benefitted by the assignment, had been held to be essential to its validity, and the intervening attachment of another creditor, who is no party to the assignment, issued before such assent be given, has been preferred." In *Ward v. Lamson & tr.* 6 *Pick.* 350, the Supreme Court of Massachusetts say, "the question made in another case this term meets us likewise in this, namely, whether the plaintiffs will hold the funds by virtue of their trustee process in preference to the creditors who signed the indenture subsequently to this attachment. We did not anticipate that such a question would have been made. For twenty years it has been considered to be law that if an attachment is made before any creditor has become a party to the assignment, the attachment will hold. So, if it is made after some have signed the indenture, the attaching creditor will have a priority to subsequent signers. Otherwise, as it cannot be known whether creditors will or will not execute the assignment, the property would be locked up"—and the court add, "we think this is not now an

open question." Accordingly in the discussion of *Lupton v. Cutter & tr.* 8 *Pick.* 298, the question is considered as at rest, and is so treated by the counsel and the court.

Neither do we perceive that the liability of *French* and *Harrod* in this case depends upon any contingency. They disclose that they have the property of *Barnard* in their hands, and the question is to whom shall they pay it over? If by law it is to be paid to the plaintiff, in preference to such creditors as become parties to the assignment subsequent to the service of this process, the assignees are exonerated *pro tanto* from the claims of the latter. In *Thorndike v. DeWolf & tr.* 6 *Pick.* 123, the court say, "by the term contingent is intended an uncertainty whether any thing will ever come into the hands of the trustee, or whether he will ever be indebted, the uncertainty arising from the contract, express or implied, between the debtor and the trustee."

We are all clearly of opinion that the facts disclosed by *French* and *Harrod* shew them to be trustees of *Barnard*, at the time they were served with the plaintiff's writ, and they are accordingly so adjudged.

Flagg *vs.* Willington.

To impeach the title of the demandant in a writ of entry, on the ground of fraud, evidence of the fraudulent intent of his grantor in the conveyance of other lands, to another person at a prior time, though with the connivance of the demandant, who was his brother-in-law, is not admissible.

In this case, which was a writ of entry on the seisin of the demandant, both parties claimed title under one *David Lovering*; the demandant claiming by deed from him, dated *Aug.* 26, 1820; and the tenant by virtue of the extent of an execution in his own favor against *Lovering*, *April* 5, 1823. The judgment was recovered upon a promissory note, made in 1812.

At the trial before *Parris J.* the tenant impeached the title of the

demandant, as fraudulent and void against creditors; and proved that the demanded premises were conveyed to *Lovering* by one *Briggs*, by deed dated *June* 5, 1819, and recorded *Aug.* 26, 1820, in exchange for other real estate, which *Loverin g*, on the same day, conveyed to *Briggs*. And the tenant offered to prove by *Briggs*, that when he and *Lovering* were about to exchange deeds, the legal title to *Lovering's* real estate, for which the demanded premises were exchanged, was found to be in one *Lane*, by deed given by *Lovering* to him in 1814; that *Lovering* said he put the farm into *Lane's* hands for his own security, as "he was owing a man at the west a considerable of a sum." And he further offered to prove by *Lane* that *Lovering* applied to him to take the deed, giving as a reason, that "a man at the westward, by the name of *Willington*, had a note or notes against him; that he had paid the notes, but had forgotten to take them up; and he was afraid *Willington* would come upon him, and make him pay them over again." To the admission of this evidence the demandant objected; but the judge, intending to reserve the question, admitted it as tending to prove the fraudulent intention of *Lovering*, in his deed to the demandant; but instructed the jury to give it no weight, unless they should be satisfied, from other testimony, that the demandant had knowledge of this fraudulent conveyance to *Lane*, and that the same property was exchanged for the demanded premises. It was also proved that *Lovering* was insolvent, and that he executed the deed to the demandant, his brother-in-law, while he was in prison, and soon after took the poor debtor's oath.

The jury returned a verdict for the tenant, which was taken subject to the opinion of the Court upon the admissibility of the evidence objected to.

Fessenden and *Deblois* for the demandant, cited *Somes v. Skinner*, 14 *Mass.* 360; *Clark v. Waite*, 12 *Mass.* 439; *Kimball v. Morrell*, 4 *Greenl.* 368.

Emery and *Longfellow*, for the tenant, argued in support of the verdict, on the ground that the testimony showed the original conception of a fraudulent intent against this very creditor, of which the demandant was conusant at the time, and which he afterwards assisted

to carry into more complete effect. *Bridge v. Eggleston*, 14 *Mass.* 245; 3 *Taunt.* 303; *Bauerman v. Radenius*, 7 *D. & E.* 663; *King v. Harwich*, 11 *East.* 578.

MELLEN C. J. delivered the opinion of the Court at the adjournment in *August* following.

The demandant's title, as disclosed, is elder than the tenant's; and, therefore, as both parties claim under *Lovering*, unless his deed to the demandant is impeached on the ground of the alleged fraud, he is entitled to a verdict. The premises demanded were once the undisputed property of *Briggs*; and while he was the owner he conveyed them to *Lovering* by his deed bearing date *June* 5, 1819, in exchange for other lands which *Lovering* on the same day conveyed to *Briggs*. There is no evidence in the case, nor is it intimated, that in the above transaction between *Briggs* and *Lovering*, there was any thing fraudulent, except that the deed to *Lovering* was not registered till about fourteen months after its date, viz. *August* 26, 1820, the same day on which the deed from *Lovering* to the demandant is dated. It is so common a practice for grantees to neglect to place their deeds on record in due season, that such delay in the present instance furnishes of itself no evidence of fraud. We may as well suppose that it was recorded on the day when the demandant purchased of *Lovering*, in consequence of a suggestion from the purchaser, so that the title might regularly appear on record; but we need not presume either way. It does not appear in the case that this point was presented to the consideration of the jury. The defence was grounded on the evidence of the transactions between *Lovering* and *Lane* in the year 1814, and of the motives which governed them on that occasion. On these points the cause was submitted to the jury, as appears by the instructions of the judge. The evidence, in relation to those transactions was introduced and admitted for the purpose of proving, or as tending to prove, the fraudulent intention of *Lovering* in making his deed to the demandant. The instruction to the jury was that they would give no weight to this evidence, unless they were satisfied, by other evidence, that the demandant had knowledge of *Lovering's* conveyance to *Lane*

for the purpose of defrauding his creditors. This was evidently an instruction to them to find for the tenant on this evidence, if they were satisfied of a *scienter* on the part of the demandant. Was this evidence properly admitted, and were these instructions correct?

The cases of *Loker v. Haynes*, 11 *Mass.* 499; *Hill v. Payson*, 3 *Mass.* 559, and *Bridge v. Eggleston*, cited in the argument, do not carry the principle so far as this. It is in the last case laid down in these words; "the conduct and declarations of the grantor, respecting the estate conveyed, and tending to prove a fraudulent intention on his part, before the conveyance, are proper evidence for the jury, upon an inquiry into the validity of such conveyance, by a creditor or subsequent purchaser, who alleges it to be fraudulent." We know of no case which has extended the principle farther than this decision. Injustice may be the consequence of sanctioning a verdict founded on the reported evidence. The proof in *Bridge v. Eggleston* applied to the deed under which the tenant claimed, and to no other; but in the case at bar such was not the fact. Its application was to a deed of another farm, executed about six years before, to another grantee; which deed must have been re-delivered to *Lovering* prior to his conveyance of the same land to *Briggs*, who now holds the title of it, unmolested and unquestioned. The defence is nothing more than this; *Willington* says to *Flagg* "you have no title to the premises demanded; your title deed from *Lovering* is fraudulent, and was made by him and accepted by you, for the purpose of cheating his creditors. My proof of the fraud is this. Six years before *Lovering* made his deed to you, he fraudulently conveyed a farm, which he then owned, to one *Lane*, for the purpose of protecting it from my reach. It is true *Lane* never attempted to retain the land; and about six years afterwards he re-conveyed it to *Lovering*, and then *Lovering* conveyed it to *Briggs*, and *Briggs* conveyed to him a farm in another town; and this last farm he conveyed to you, and therefore your title amounts to nothing." To us this appears to be very inconclusive reasoning. A man may at one period of his life, actuated by fraudulent motives, convey his farm to his neighbor, who knows the grantor's design; and he may afterwards repent of this improper and dishonest proceeding, and obtain

a reconveyance of the farm. Can he not after this, honestly and fairly convey the farm to me, for a valuable consideration, though I did know of his having, years before, made a fraudulent conveyance? Or must I lose the farm, in consequence of my grantor's former misconduct? We apprehend not. In the present case, however, the fraud practised by *Lane* respected another farm, now owned by another man; and nothing in the case has been disclosed which, in any degree, contaminates the title conveyed by *Briggs* to *Lovering*; and that is the title which the demandant claims and holds, under the contested deed from *Lovering*. Our opinion is that the testimony of *Briggs* and *Lane* was improperly admitted; and even when admitted, is not sufficient to sustain the defence.

Verdict set aside, and new trial granted.

ADAMS *& al. vs.* CARVER *& als.*

The indorser of a note over-due is competent, in an action by the indorsee against the maker, to testify to the time when the note was negotiated, and to any other facts which happened prior to that time, and not affecting the original validity of the note.

Assumpsit on a promissory note, made *Sept.* 12, 1826, for $870, 21, payable to *Elijah D. Harris* or order in twelve months, with interest after six months, and by him indorsed to the plaintiffs. No payments were indorsed on the note.

In a case stated by the parties it was agreed that if *Harris* was a competent witness for the defendants, they could prove by him that the note was indorsed to the plaintiffs in *May* 1828, as collateral security for an unliquidated balance of current accounts, due from him to the plaintiffs; that at the time of the transfer he told them that there had been several payments, not specifying the amount, made on the note, but not indorsed; but that there was enough due, as he said, to cover what he owed them at that time; that it was then understood between them that they should not sue the note without giv-

ing him notice, because he had received such partial payments; and that he received as such, of the defendants, $650 before the transfer of the note, and $240 afterwards.

It was further agreed that the defendants had no knowledge of the transfer of the note, till after the last payment had been made; and that *Harris*, in *Oct.* 1828, had demanded payment of the defendants by letter, representing the note as still in his hands.

Upon these facts the case was submitted to the judgment of the Court, the plaintiffs denying the admissibility of *Harris* as a witness, for the purposes sought.

Willis, for the plaintiffs, resisted the admission of *Harris*, on the ground of public policy; and also because he was interested in the event of the suit; being liable to the defendants as well for the costs of the suit, as for the money by them paid to him. *Barnes v. Ball*, 1 *Mass.* 73; *Buckland v. Tankard*, 5 *D. & E.* 578; *Mainwaring v. Mytton*, 1 *Stark. R.* 83, *Scott v. McLellan*, 2 *Greenl.* 199; *Manning v. Wheatland*, 10 *Mass.* 502; *Butler v. Damon*, 15 *Mass.* 223; *Knight v. Putnam*, 3 *Pick.* 184; 1 *Ld. Raym.* 575; 3 *D. & E.* 83; *Mead v. Small*, 2 *Greenl.* 211; *Meaghan v. Mills*, 9 *Johns.* 64; *Churchill v. Suter*, 4 *Mass.* 156.

But if he was competent to testify, it is only to facts occurring prior to the transfer. *Webster v. Lee*, 5 *Mass.* 334; *Baker v. Wheaton*, *ib.* 509; *Holland v. Makepeace*, 8 *Mass.* 418; *Sargent v. Southgate*, 5 *Pick.* 312; *Sanford v. Mickles*, 4 *Johns.* 224; *Collenidge v. Farquharson*, 1 *Stark. R.* 259.

Greenleaf, for the defendants, cited *Hartford Bank v. Barry*, 17 *Mass.* 94; *Warren v. Merry*, 3 *Mass.* 27; *Barker v. Prentiss*, 6 *Mass.* 430; *Parker v. Hanson*, 7 *Mass.* 470; *Powels v. Waters*, 17 *Johns.* 176; 2 *Stark. Ev.* 298, *note*; 2 *Phil. Ev.* 13, 14; *Woodhull v. Holmes*, 10 *Johns.* 231; *Baker v. Arnold*, 1 *Caines* 258; *Olmstead v. Stewart*, 13 *Johns.* 298.

WESTON J. delivered the opinion of the Court at the adjournment in *August* following.

The admission of *Harris*, the original payee and indorser of the

note, as a witness, is objected to; first, on the ground of public policy, and secondly, as answerable to the defendants for the costs, as well as for the amount which will be due to them from him, if they fail in this action. *Churchill v. Suter* is the leading case upon the first ground, which has been recognized and practised upon in Massachusetts and in this State. In that case it was decided, upon a review of the authorities, that a party to a negotiable instrument, should not be received as a witness to prove it to have been originally void. This is the extent and limit of the objection to testimony of this kind. It is true, that in the case of *Butler v. Damon*, 15 *Mass.* 223, the court say, that such party shall not be received to show facts antecedent to the transfer, whereby the holder is to be defeated of his recovery. Giving full effect to the generality of this language, it might go to support the objection taken to the witness, in the case before us. But that case did not require a language so broad; and it may be regarded as limited by the case of *Churchill v. Suter*, which was cited and relied upon by the court. And doubtless the principle of that case did apply; for the attempt was, to show by the payee and indorser, against the plaintiff the indorsee, that the note was given without consideration, which rendered it void in the hands of the plaintiff, to whom it was indorsed, after it became due.

It may be more difficult to reconcile the ground, upon which one of the points raised in *Knights v. Putnam*, 3 *Pick.* 184, was decided, with the limitation in *Churchill v. Suter*. It was not the main point in the cause, which was very elaborately discussed and clearly settled in the opinion of the court, by Mr. Justice *Wilde*. It was an action by the indorsee of a negotiable promissory note against the maker, the indorser was introduced as a witness to prove usury, as between himself and the indorsee, in the transfer of the note; and also that it was pledged to the indorsee for a debt less than the amount of it, the testimony was rejected as irrelevant, and a verdict was taken for the plaintiff, subject to the opinion of the court, as to the admissibility of the witness. It was decided that usury in the transfer, the note being originally free from the taint of usury, was no objection to a recovery by the indorsee against the maker. If the plaintiff held the note as a pledge for less than its amount, he

might, notwithstanding, recover the whole, as the court had expressly decided in *Butler v. Damon*; so that the testimony rejected was upon this ground clearly irrelevant. But the judge, in his opinion, sustained the rejection upon another point; that the indorsement being unqualified, the indorser could not be received as a witness to qualify it, by establishing an interest in himself. If the effect of such testimony would be to establish a title in the witness to any part of the note, he would be incompetent, not upon the ground of policy, but of interest. But the verdict and judgment in that case could not avail the witness, as proof to sustain any claim of his own. Conceding however the correctness of the reason given in *Knights v. Putnam*, and rightly understood, perhaps the judge intended to hold the testimony inadmissible, as tending to vary the legal effect of written testimony; yet it would form no objection to *Harris* as a witness, in the case under consideration. He testifies to no facts, tending to prove an interest in himself, in any part of the amount due on the note, at the time of the indorsement.

There is nothing in the rule laid down by *Parsons C. J.* in the case of *Churchill v. Suter*, which would exclude the indorser from testifying that he indorsed the note after it became due. This being established, the maker is let in to every defence, available between the original parties. This point has been settled by numerous authorities, which, as there are no conflicting decisions, it is unnecessary to cite. This principle is not regarded as tending to check the circulation of negotiable paper, the party receiving it when over due, being put upon his guard, and being presumed to rely upon the credit of the indorser. The indorsee thereby becomes entitled to whatever may be due at the time of the transfer. All payments, which can be proved to have been previously made, are to be allowed in favor of the maker. The holder is apprized that he takes such dishonored paper, subject to offsets intended to be applied thereto, between the original parties. Testimony of this kind, proving matter of discharge, either in whole or in part, is no impeachment of the validity or efficacy of the instrument at the time of its execution, and may therefore in our opinion be received from the indorser, not otherwise interested, without violating the principle established in *Churchill v.*

Suter. That the law is so understood in New York, which adopts the same principle, is proved by the cases cited for the defendants. In the *Hartford Bank v. Barry*, 17 *Mass.* 94, *Parker C. J.* admits that the New York cases establish the point, that a party to a note, who is otherwise competent, may be a witness to prove any fact, having a bearing upon the note, happening after it is made. He finds no fault with this position, makes no intimation that the law is otherwise understood in Massachusetts, but shows that the witness rejected in that case was offered to prove a fact which happened when the note first passed from the promissor, and that it was to be regarded as having been then made.

As to any balance of interest which might incline the witness in favor of the defendants, it does not appear to us to exist. He is answerable at all events to the one party or the other, for the payments by him received; and allowing to the defendants all the payments proved by the witness, a balance remains due to the plaintiffs, sufficient to carry costs. But payments made by the defendants to the witness, after the transfer, cannot be allowed. By the transfer, the amount then due passed to the plaintiffs. The liability of the makers to them, arises from the nature and legal effect of the instrument; and no notice is necessary to charge them. No affirmation or conduct of the indorser could affect the rights of the plaintiffs. If the defendants confided in the assurance of the witness, the payee, in his letter of *October*, 1828, that he still held the note, and were deceived, they must look to him, and not to the plaintiffs, for the money subsequently paid to him. Allowing to the defendants the sums by them paid on the note prior to the transfer, and rejecting those which were made afterwards, a balance is due on the note of two hundred eighty-seven dollars and ninety-seven cents, for which the plaintiffs are to have judgment.

The President *&c. of the* Canal Bank *vs.* Cox *& trustees.*

An insolvent debtor having made an assignment of his effects, in trust for the payment of such of his creditors as should assent to it within a certain reasonable time; it was *held* to be no good objection to its validity, that it contained, on the list of preferred creditors, one who was only a surety, and who had not yet been damnified, but was named as a creditor to the amount of his liabilities :—

Nor, that it contained an exception from the general conveyance of his property, in these words ;—" saving only his necessary and proper household furniture, family apparel, and means of paying his small debts under fifty dollars, and ordinary family expenses;" the excepted property being thus left open to attachment, as it was before; it never having passed to the assignees :—

Nor, that it provided for the previous payment of the expenses and commissions of the assignees, before any distribution to creditors :—

Nor, that it contained a provision for the discharge of the debtor's sureties, as well as of the debtor himself.

The persons summoned as trustees in this case were the assignees of *John Cox*, in a general assignment of his property for the benefit of his creditors; and the question was upon the validity of the assignment.

The instrument contained a general sale and conveyance of all the property mentioned in certain schedules annexed, which were understood to include all his goods, estate, credits and effects, with an exception in these words—" saving only his necessary and proper household furniture, family apparel, and means of paying his small debts under fifty dollars, and ordinary family expenses."

The conveyance was upon trust for the payment of certain classes of the creditors of *Cox*, mentioned in other schedules annexed; and among these was the name of *Joseph Harrod*, as a creditor, in the sum of $34,405,90, as being the amount of his liabilities as *Cox's* indorser and surety.

There was also inserted in the indenture a covenant by the creditors for the release of *Cox* as drawer, and *Harrod* as indorser, and all other persons as acceptors of any bills or drafts holden by such creditors, drawn by *Cox* upon the house of *Gurney & Packard*, and by them accepted.

But before any distribution of the effects, the expenses of the assignees in the execution of the trusts were to be deducted from the gross fund. The estimated value of the property assigned was $81,133,84, and of debts due, including liabilities of *Harrod*, was $96,280,99.

The residue of the indenture was in the common form of an assignment of an insolvent debtor's effects, in trust for the payment of his debts; the creditors constituting the third party, and having generally signified their assent by executing the assignment.

The trustees disclosed that all the property assigned to them would not be sufficient to pay the creditors for whose use and benefit it was assigned, and who had become parties to the indenture before they were summoned as trustees.

Todd and *Fessenden*, for the plaintiffs, argued that the assignment was fraudulent against creditors, and therefore void. 1st. Because *Harrod* was not a creditor of *Cox* when the assignment was made; but was only a surety, who had not then sustained damage. And such liability formed no legal ground for an absolute assignment, as this is. He may never be compelled to pay the drafts and bills he has indorsed; nor has he stipulated at all events so to do. *Gorham v. Herrick*, 2 *Greenl.* 87.

2. Because of the reservation of the assignor's household furniture, family apparel, means of paying his small debts, and family expenses. The statute of the State having fixed the legal limit to the amount of household furniture which a debtor may retain free from attachment, every reservation beyond that, is a fraud upon the law. The other reservations in the indenture are dependent, in their amount, upon the will and pleasure of the assignor; he being under no covenant to disclose the number of his small debts, and no limit being fixed to the amount of his family expenses; nor any designation of the fund out of which they were to be paid. Such provision for the debtor vitiates the whole transaction. *Harris v. Sumner*, 2 *Pick.* 129; *Riggs v. Murray*, 2 *Johns. Ch.* 577, 580; *Widgery v. Haskell*, 5 *Mass.* 151; *Marston v. Coburn*, 17 *Mass.* 454; *Drinkwater v. Drinkwater*, 4 *Mass.* 357.

3. The provision for payment of all the costs and expenses of the assignees, and a reasonable compensation for their services, is also

illegal, and goes to the foundation of the assignment. By the operation of this clause the creditors are made chargeable with salaries to the extent of the debtor's discretion; and even with the costs of an unsuccessful resistance at law against the payment of their own debts.

4. The provision for the discharge not only of *Cox*, but also of *Harrod* and *Gurney & Packard*, his indorsers, who have brought nothing into the common fund, is an unreasonable condition, to which no creditor ought to be compelled to assent, as the condition of any participation in the benefits of the assignment.

5. On general principles, it is void, as a fraud upon the common law, and the statutes of *Elizabeth* against fraud; and upon our law of attachment. *Devon v. Watts, Doug.* 91; *Worseley v. Dematos,* 1 *Burr.* 474; *Cadogan v. Kennett, Cowp.* 433; *Rust v. Cooper, Doug.* 629; *Harmon v. Fisher, Cowp.* 117; *Truman v. Fentor, ib.* 548; *Martin v. Pewtress,* 4 *Burr.* 2477; *Hatch v. Smith,* 5 *Mass.* 52; *Stevens v. Bell,* 6 *Mass.* 342; *Burlingame v. Bell,* 16 *Mass.* 324; *Alderson v. Temple,* 4 *Burr.* 2238; *Mackie v. Cairns,* 5 *Cower,* 547; *How v. Ward,* 4 *Greenl.* 195; 1 *Pick.* 358; 1 *Bl. Com.* 141, 142; 2 *Bl. Com.* 471; *Linton v. Bartlett,* 3 *Wils.* 47.

Longfellow and *Greenleaf*, on the other side, cited *Stevens v. Bell,* 6 *Mass.* 342; *Maine F. & M. Ins. Co. v. Weeks,* 7 *Mass.* 438; *Halsey v. Whitney,* 4 *Mason,* 206; *Marbury v. Brooks,* 7 *Wheat.* 556; *Brooks v. Marbury,* 11 *Wheat.* 78; *Murray v. Riggs,* 15 *Johns.* 571, overruling the same case in 2 *Johns. Ch.* 577; *Mackie v. Cairns,* 5 *Cower,* 547; *Fox v. Adams & tr.* 5 *Greenl.* 245.

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

Mellen C. J. The counsel for the plaintiff contends that upon the disclosure of the trustees, they ought to be charged, on the ground that the assignment by *Cox* to them, which forms a part of the disclosure, is fraudulent and void, for reasons appearing on the face of it. No actual fraud is imputed to any of the parties; so that the question for our decision is whether it is to be adjudged fraudulent and inoperative, as against the plaintiffs and the other credi-

tors, who have not assented to it. If it is, the trustees must be charged; if not, they must be discharged; because it appears on their disclosure "that all the property assigned, will not be sufficient to pay the creditors for whose use and benefit it was assigned, and who had become parties to said assignment before the writ was served" upon them in this action.

Several objections have been urged by the counsel for the plaintiffs against the validity of the assignment; in the examination of which, the principles of law deemed applicable to them, will be considered and applied. Before entering into particulars, it may be useful to bestow a few observations, of a general character, upon the nature of an assignment made by an insolvent debtor in trust, for the payment of his debts. Such an assignment, when completed, is made by a deed, whereby the debtor transfers his property to some assigneee or assignees in trust, for the payment of his debts, in such order as may be agreed upon, and to such creditors as shall, within a limited time, assent to the terms of the assignment. Such deed of assignment contains also the assent of the assignees, to perform the duties of their appointment and their covenants to perform them with care and fidelity, according to the conditions therein expressed; and also the agreement of a portion of the creditors to accept of the terms of the assignment, and a release to the debtor of their several demands. When signed and fully executed by such debtor, assignee or assignees, and such creditors, without any fraud on the part of the debtor, it becomes a binding contract on all who have thus executed it; and other creditors may, if they see cause, also assent to the same within the time limited for the purpose; which must be a reasonable time, according to the circumstances of every case. Such an arrangement is a compromise among those interested; and being made with pure motives, must be honestly observed and executed. A debtor may offer to assign every particle of his property for the purpose above mentioned; or he may offer to assign all, excepting certain portions for his own immediate use and comfort; the creditors may reject or accept such an offer at their pleasure; and they will of course, before deciding, inquire and ascertain whether the offer is a reasonable one; and whether the excepted portions are more than may be fair-

ly retained, to relieve or prevent the wants or sufferings of a destitute person or family. In forming their conclusion, they will be governed also in some measure by their knowledge of the integrity and fairness which have marked the debtor's character and conduct. Those creditors who do not incline to assent to such an assignment, having had a reasonable time for so doing, have no reason to complain; for as to them, the excepted property remains liable to attachment by them, in the same manner as though no assignment had been made. And if the property assigned is not more than sufficient to pay and satisfy the demands of the assenting creditors, there can be no more ground of complaint on the part of others, than if, instead of one assignment, in trust for the assenting creditors, the debtor had made several assignments, one to each creditor, of property sufficient to satisfy his particular demand, in whole or in part. Such a proceeding could never be pronounced fraudulent and illegal.

The first objection to the assignment is that *Harrod* was not a creditor at the time, but only a surety or indorser for *Cox*, and had never paid the debts, or relieved *Cox* from his liabilities. This is true; but the obvious answer is that the assignment was in trust to secure him as far as practicable from eventual loss by reason of his suretyship. He was then to all equitable purposes, a creditor, fairly entitled to protection and indemnity; and as such, the provision was made for him. The cases of *Stevens v. Bell* and *Halsey & al. v. Whitney & al.* cited by the defendant's counsel, are direct and decisive authorities against the objection.

Several objections which have been urged, are founded on the clause in the assignment, by which *Cox* saves and excepts "his necessary and proper household furniture, family apparel, and means of paying his small debts under fifty dollars, and ordinary family expenses." To this clause the observations we have already made upon the nature of assignments in trust, have a general application. The excepted furniture, so far as by law attachable, must be considered as within the reach of such creditors as might incline to attach and remove it. The exception, therefore, in respect to the furniture, has not impaired the rights of any one. The reservation of the means of paying small debts is made for a commendable not a fraudulent pur-

pose. The assenting creditors must have reposed confidence in the integrity of *Cox* and in his professed intention to appropriate the means to the payment of those small debts. It is contended, however, that those small creditors have no power to compel *Cox* to pay those debts by the means excepted for the purpose. The answer is, they have the same power over those means which they possessed before the assignment was made. If those means were then of a visible and tangible nature, they might at once have been attached. If they were not, the exception of them left them as much within the reach of a trustee process as they ever were. The exception or saving of means of paying ordinary family expenses, has been urged as constituting a fatal objection to the validity of the assignment. No definite amount is mentioned; nor limit as to time. We do not mean to say that an assignment may not be pronounced fraudulent and void, where the exception is of such a character or amount as at once to appear extravagant, and the dictate of an unprincipled disregard of the claims of creditors; for though assented to by the creditors, who became parties to it at the time of its execution, it might furnish evidence of collusion between such creditors and the insolvent, and bring it within the principle of the decision of *Harris v. Sumner*, though the provisions of the assignment might essentially vary from the one in that case. But, be that as it may, the circumstances under which the assignment in the case before us appears, do not authorize such a conclusion; especially when we consider the amount of property assigned, and the known residence in *Portland* of most of the preferred creditors, who must have been acquainted with the character of *Cox*, the probable amount of his ordinary family expenses, and the time in which his assistance might be necessary in the adjustment of the concern. A limited allowance, both as to time and amount, must have been in the contemplation of the parties to the assignment; in addition to all which we may subjoin the remark which we have already made, as to the exception of the furniture, apparel and means of paying small debts, viz. that as to such excepted means, and the mode of approaching them by some legal process, the rights of non-assenting creditors have not been in any manner changed or impaired.

The objection to the above mentioned exception is not to be considered in the same light as that which was successfully made to the assignment in the case of *Harris v. Sumner.* In that case all the debtor's property was conveyed to the assignees; but they covenanted to sell and dispose of it, and, after paying certain creditors, to pay to the assignor $1000. So also in the case of *Mackie v. Cairns,* 5 *Cowen,* 547, *Cairns* assigned all his property to *Sedgwick* and *Lord* " in trust that the said *Sedgwick* and *Lord* shall first pay to the said *William Cairns* out of the proceeds of the assigned premises, from time to time, for the support of the said *William Cairns* and his family, at the rate of $2000 per annum—not exceeding the period of four years" from the date of the assignment. In both these cases the assignments were adjudged void, on account of the abovementioned provisions for securing the stipulated payments. All the property was placed under the control of the assignees; and by their covenants, they were aiding in, as well as assenting to a fraudulent arrangement for the debtor's benefit. All this appeared on the face of the assignments. But in the case at bar, nothing was conveyed to or was placed under the control of the assignees, but the property described in the schedules annexed to the assignment; and no part of the furniture, apparel, or means of paying his small debts, and ordinary family expenses, are mentioned in any schedule. These means, whatever they were, *Cox* retained in his own power and possession, and the assignees never had or can have any thing to do with them. This distinction is not to be forgotten or overlooked; it is important in principle and in its consequences. It is one by which the assignees in the present case must be governed; for should they appropriate any portion of the funds, received by them from the property assigned, to and for the use of *Cox* for the payment of his small debts or ordinary family expenses, it would be a violation of their covenants, and a fraud upon *Cox's* creditors. We use this cautionary language here, on account of the generality of the term " means" made use of in the assignment, which, however, we have considered as a portion of his unassigned property.

The objection to that part of the assignment, which provides for the allowance of the expenses and commissions of the assignees out of the

property assigned, cannot be sustained. It is usual to allow them; and without such allowance no assignees will ever accept such an appointment. *Andrews v. Ludlow & tr.* 5 *Pick.* 28. Another objection made to the assignment is, that it provides for the discharge and release of the sureties and indorsers of *Cox*, as well as of *Cox* himself, from all liabilities. The very object of the assignment was to procure a release from his creditors, on giving up his property for their use. No objection has been made to the assignment on account of this condition; and in order to complete the discharge of *Cox*, it was necessary that a release should be given to the indorsers; otherwise, on payment of the debts by them, they would have a right of action against *Cox*, to compel a reimbursement; so that instead of being completely discharged, he would only be relieved from his liability as principal, to the original creditor, and become immediately liable for the same amount to his indorsers. Besides, we do not perceive what interest the plaintiffs have in the release which the assenting creditors have given to *Cox* and his sureties; or why the extensiveness of such release should be considered as having any operation upon their rights. It is a subject with which they have no concern whatever.

Again it is said that the assignment is a fraud on the law of attachment. This same objection was made in the case of *Halsey & al. v. Whitney & al.* Mr. Justice *Story* observed that he had never been able to understand precisely what was intended by this language; and after commenting upon it, he overruled the objection. An attachment of property is the commencement of a title to the property attached; and it may be perfected by a seasonable levy or sale, according to the character of the property; or a title may originate by the levy or sale, without a previous attachment. This is one mode of acquiring a title. A deed made by a debtor to his creditor is another mode. In this view of the subject, the law of attachment may as well be considered a fraud on an assignment, as an assignment can be considered a fraud upon the law of attachment. The truth is, in the cases supposed, there is no fraud on either side. Priority in the procurement of the title, where no improper or dishonest means are used, settles the question of right. Mr. Justice

Story in the above case observes, "Every conveyance by which an insolvent debtor conveys his whole property to a few preferred creditors, not being more than sufficient to pay their debts, and they being parties to the deed, necessarily tends to delay and defeat all other creditors; but however strong the intention is, thereby to defeat or delay the latter, still it has never been supposed that the conveyance was void on that account. The law allows such preference to any one creditor; and I am unable to perceive why it does not equally allow a like preference of the whole creditors to one. It is assuming the whole question in controversy, to say that a general assignment is a fraud upon the attachment law, and therefore void. If a fraud, it is doubtless void; but whether a fraud or not, is a point to be proved."

The last objection urged is, that the assignment is void by the statutes of *Elizabeth*, against fraud. We see no fact or principle, in this case, which can sustain this objection. There is no pretence that there was any actual fraud in the case. All parties appear to have acted openly and in good faith. In the absence of proof to the contrary, we cannot presume that they acted otherwise; neither is there any question as to the consideration on which the assignment was made; for it is stated explicitly in the disclosure, that the property and effects assigned are not sufficient to satisfy the debts of those creditors who had become parties to the conveyance before the service of the present trustee process. We are all of opinion that the trustees are entitled to their discharge.

Deering *vs.* Cox.

The creditor of an insolvent debtor, becoming party to a general assignment of his effects in trust for the payment of his debts, which contained a clause of general release of all demands, may lawfully qualify his assent to the assignment, by limiting his signature to a certain class of his demands, excepting others from its operation.

This was an action of *assumpsit* on a promissory note, dated *March* 10, 1829, for $625, payable by the defendant to the plaintiff in four months with grace. The defendant pleaded a general release, in bar of the action; to which the plaintiff, after *oyer*, demurred.

It appeared that the release was a discharge of all demands, contained in a general assignment of *Cox's* effects for the benefit of his creditors mentioned in the preceding case; and that the plaintiff, on becoming party to the assignment, qualified his assent thus:—"*N. F. Deering* agrees to this assignment, so far as it regards all demands which he holds against said *John Cox;* with the exception, however, of one note, dated *March* 10, 1829, signed by said *Cox*, payable to said *Deering* in four months from date, with grace, for six hundred and twenty five dollars, which note he entirely excepts from the effect of this assignment."

N. Emery and *Longfellow*, for the defendant, being called on by the court, argued that the exception, not being contained in the body of the instrument, was void; 4 *Dane's Abr. ch.* 109, *art.* 4; and that to give it effect, would be to sanction a fraud against the other creditors.

But the Court held it otherwise; and accordingly gave judgment for the plaintiff.

Greenleaf and *Deblois*, for the plaintiff.

GREENWOOD *vs.* FALES *& tr.*

Where all the trustees in a foreign attachment live in one county, and the defendant in another, and the action is brought in the latter county, the writ is abateable, within *Stat.* 1821, *ch.* 61; notwithstanding the defendant was regularly summoned in the action, and the plaintiff had discontinued as to all the trustees. And in such case costs will be awarded to the defendant.

IN this case, which was *assumpsit*, the plaintiff and defendant both lived in this county, but the trustees all lived in the county of *Lincoln;* and the defendants pleaded, in abatement of the writ, that it was not brought in the county where the trustees dwelt, as required by *Stat.* 1821 *ch.* 61. The plaintiff hereupon discontinued as to all the trustees, who had judgment for their costs; and he then demurred to the plea. The writ appeared to have been duly served on the principal defendant, by attachment of his property, and summons.

Willis, for the plaintiff, argued that the *Stat.* 1821 *ch.* 61. on which the plea was founded, was virtually repealed by the *Stat.* 1821, *ch.* 59. which was passed twenty days later in the same session, and which requires that when the parties are citizens of this State, all personal actions shall be brought in the county where one of the parties lives. And this action is strictly within the provisions of the latter statute.

But if both acts are to be taken together, as equally in force, then the provision respecting trustees is one of which they only can take advantage, it being introduced for their benefit alone. By the fifth section, the action may proceed against the principal, after the trustees are all discharged by judgment of court; and, by parity of reason, after the plaintiff has himself discharged them, by discontinuance, or *nolle prosequi*. In the former case, the defendant is still held to answer, though neither he nor the plaintiff dwell in the county; much more ought he here, where he is properly called into court, even had no trustees been named in the writ. The first section may be reasonably expounded by limiting its operation to those

actions in which the defendant is not a citizen of the State; in which case the trustees stand in the situation of principal defendants, who ought to be sued only in the county where some of them dwell. And this view accords with the spirit of the adjudged cases. *Blake v. Jones*, 7 *Mass.* 28; *Jacobs v. Mellen*, 14 *Mass.* 132; *Gardiner v. Barker*, 12 *Mass.* 36; *Wilcox v. Mills*, 4 *Mass.* 218. If the court have no jurisdiction, the defendants cannot have judgment for costs. *Williams v. Blunt*, 2 *Mass.* 216.

Megquier, for the defendant, cited *Gould v. Barnard*, 3 *Mass.* 199; *Brown v. Gordon*, 1 *Greenl.* 165; to the matter of the plea; and to the point of costs he cited *Stat.* 1821, *ch.* 59. *sec.* 17; *Haines v. Corliss*, 4 *Mass.* 660; *Hart v. Fitzgerald*, 2 *Mass.* 513; *Thomas v. White*, 12 *Mass.* 370.

WESTON J. delivered the opinion of the Court.

By the act, regulating judicial process and proceedings, *Stat.* 1821, *ch.* 59, *sec.* 9, it is provided, that when the plaintiff and defendant both live within the State, all personal or transitory actions shall be brought in the county where one of the parties lives. As in the case before us, all the parties live within the State, the plaintiff being an inhabitant of this county, the action is rightfully brought here, unless it is controlled by the act concerning foreign attachment, *Stat.* 1821, *ch.* 61. By the first section of the statute last cited, after prescribing the mode in which the process of foreign attachment shall be served, both upon the principal and the trustees, it is provided that when the trustees, named in such writ, do all dwell in one county, such writ shall be made returnable in the county where all the trustees dwell. As the clause which immediately precedes this provision in the same section, directs the manner and effect of service, where the principal has not been an inhabitant or resident within the State, the trustees only residing therein, it has been insisted that the term, "such writ," which follows, must be limited to cases where the principal has not been a resident within the State. But upon an examination of the whole section, we are satisfied that the meaning of this term cannot be so restricted, upon a just construction. It is a term repeatedly used in the section; and is

manifestly intended to refer generally to the process provided for in the statute. The provision in question was introduced for the benefit of the trustees, whom it was deemed unreasonable to call out of their proper county; as there was no privity between them and the attaching creditor; and they had violated no obligations to him. Whether the principal resided within or without the State, there would be the same reason for extending this indulgence to the trustees.

It is further urged, that this provision is modified by the fifth section of the same statute. This section allows costs to the trustees, where the attaching creditor does not support his action against the principal; but authorizes him to proceed against the principal, notwithstanding he may have discontinued his suit against the trustees, or they may have been discharged by the court, after having submitted themselves to an examination under oath. But as in certain cases, in virtue of the first section, service might be made upon the trustees alone, the fifth section further prescribes that where the plaintiff shall have discontinued his suit against the supposed trustees, or they may have been otherwise discharged, he shall not prosecute his suit against the principal, unless there shall have been such service of the original writ upon him, as would authorize the court to proceed against him, in an action brought and commenced, in the common and ordinary mode of process. Such service having been made upon the principal in the case under consideration, the plaintiff claims a right to sustain his process under this provision. But we are of opinion that this construction cannot prevail. This part of the section was plainly introduced for the sole purpose of protecting the principal from having judgment rendered against him, where he had no notice of the suit, and was not represented or defended by any one, whom he had entrusted with his property. Where a statute prescribes in what county a writ shall be returned, if it is made returnable elsewhere, it is abateable. Although the plaintiff may discontinue his suit against the trustees, the character of the process remains, and if made returnable to a wrong county, may be abated, whatever course the plaintiff may subsequently pursue. The authorities, cited by the counsel for the defendant, fully maintain this position.

It is lastly urged, that the provision upon which the defendant relies, was introduced for the benefit of the trustees, and that they alone can take advantage of it. This point was otherwise adjudged in the case of *Jacobs & al. v. Mellen & tr.* Indeed it is there stated that if it had appeared, by the writ in that case, that all the trustees lived in a county other than that where it is made returnable, the court must, *ex officio*, have abated the writ. We are all of opinion that the plea in abatement is good, and that judgment must accordingly be rendered for the defendant.

Judgment for the defendant for costs.

The inhabitants of CUMBERLAND, *plaintiffs in error vs.* PRINCE, *admr.*

Where the legislature divided a town into two, and provided that all persons dwelling on lands adjoining the division line should have liberty to belong, with their lands, to either town, at their election, made within a limited time ;—it was *held* that this election was not merely a personal privilege, terminating at the death of the party; but was a definitive and perpetual change of the line of territorial jurisdiction.

THIS was a writ of error *coram vobis*, to reverse the judgment of the court of Common Pleas in this county, in an action brought by *Prince* as administrator of the estate of *Cushing Prince*, deceased, to recover damages against the town of *Cumberland*, for the amount of certain taxes illegally assessed.

It appeared that the original plaintiff's intestate was an inhabitant of *North Yarmouth*, at the time it was divided, and the westerly part incorporated into a separate town by the name of *Cumberland* ; his farm adjoining the divisional line, and being within the limits of *Cumberland* as described in the act of division; *Sp. Stat.* 1821, *ch.* 78. The eighth section of that act was in these words;—"That all persons dwelling on lands adjoining the division line described in the first section of this act, shall have liberty to belong, with their lands adjoining said line, to which of said towns they may elect; provided

they make such election in writing, describing such lands, and file the same in the office of the Secretary of State, within ninety days after the passing of this act. And one half the highway adjoining said division line, as the same shall be after such election made as aforesaid, shall belong to each of said towns." The plaintiff's intestate, under this provision, made his election to belong to *North Yarmouth*, in which town he enjoyed town-privileges, and paid taxes, during his life time. After his decease, the town of *Cumberland* taxed his real and personal estate, on the ground that the election, given by the eighth section of the act, was merely a personal privilege, ceasing with the life of the party; and that on his decease the line of territorial jurisdiction was the line described in the first section. And whether it was so or not, was the only question in the cause.

The court below decided that the line was definitively and forever settled by the election of the parties, once made, agreeably to the eighth section; and accordingly gave judgment for the plaintiff, against the legality of the tax. Whereupon *Cumberland* brought this writ of error.

N. Emery, for the plaintiffs in error, contended that where a permanent change of boundary was designed, the legislature had always designated the land as "farms;" or used some language denoting perpetuity; or specially described the land. But that in the absence of such language, and especially where only the persons are mentioned, the privilege was merely personal and for life. *Sp. Stat.* 1802, *ch.* 9, 37; 1803, *ch.* 16, 21, 38; *Dillingham v. Burgess*, 16 *Mass.* 58; *Attleborough v. Harwich*, 17 *Mass.* 398; 2 *Montesquieu Sp. Laws* 183, *b.* 26, *ch.* 20; *Year book*, 12 *H.* 7, 25.

Eastman, for the defendant in error, cited *Kingsbery v. Slack & al.* 8 *Mass.* 154; *Dillingham v. Burgess*, 16 *Mass.* 58.

MELLEN C. J. delivered the opinion of the Court at the adjournment in *August* following.

The opinion we have formed in this case renders it unnecessary for us to make any discrimination between that portion of the tax

which was assessed on the real estate of the intestate, and that which was assessed on the personal. We decide the cause upon the construction of the eighth section of the act incorporating the town of *Cumberland*. The first section distinctly describes the divisional line between that town and *North Yarmouth*, subject only to such variation as might be made in virtue of the eighth section. The language of that is to be carefully considered. The intestate, within ninety days, elected to belong to *North Yarmouth*, and filed his certificate with the Secretary of State accordingly; and the only question is whether this election was merely personal, continuing him an inhabitant, and his lands a part, of the town of *North Yarmouth*, during his life only, or whether it constituted a permanent change of the division line, as described in the first section. And we are all of opinion that such line was permanently changed by such election, so far as that election extended. Several reasons have readily conducted us to this conclusion.

1. The language of the eighth section dictinctly indicates this. It provides that by the election which any adjoining owner of lands within the ninety days should make, he and his lands were to belong to the elected town, without any limitation of time. When once belonging to *North Yarmouth* by his election, the intestate could not, by his own act, dissolve his connexion with one town, and constitute himself an inhabitant, and his lands a part, of another town. Such an effect must be produced by an act of the legislature. If his death could have such an effect, for the same reason he might have made a second election, and return to *Cumberland*. But surely the legislature could never have intended such a succession of changes in the division line, as would be the consequence of adopting the construction of the town of *Cumberland*. The deaths of all the owners of lands adjoining the line described in the first section, might for half a century keep that line in fluctuation and uncertainty.

2. Unless permanency was intended, why should the privilege of election have been limited to ninety days? And why should a certificate of such election, and a description of the lands of the person electing, have been required to be deposited in the Secretary's office, unless for the purpose of showing to all concerned the ultimate course

and position of the line, at the end of the ninety days, during which it was liable to alteration?

3. Again, unless a permanent line was to be established by the elections which might be made, why was this privilege of election confined to those whose lands adjoined the line described in the first section?

4. Again, one half of the highway adjoining the division line, as the same should be after such election, was to belong to each town; but how is it to be owned, and to which town does it belong, if such election is only personal and temporary?

The case of *Kingsbery v. Slack & al.* cited by defendant, was different from this. A single individual was annexed to another town, from considerations merely personal in their character, and there was no description of his estate. Both these circumstances were the professed grounds of the decision. The argument of the counsel founded on the words "forever belong," "forever after," "they and their successors," &c. used in several acts of incorporation or annexation, seems to have little weight. In the act in question, the word "belong" is used, and without limitation; and in such case it seems to mean as much as though the word "forever" was connected with it. The case of *Dillingham v. Burgess* bears no resemblance to the present. The language of the act in that case will admit of no other construction than that which was given. Personal convenience, and a spirit of accommodation, dictated the provision. We perceive no error in the record and proceedings before us.

Judgment affirmed, with costs for the defendant in error.

MERRILL *vs.* CROCKET.

This court, in the exercise of its general power to grant reviews in all cases, will not sustain an application for the review of an action in a justice's court, where the party grieved may have redress in the court of Common Pleas.

THIS was a petition for the review of an action in a justice's court, in which the petitioner alleged that he had discovered new and material evidence. On a hearing of the merits, it appeared that the newly discovered evidence was merely cumulative; but THE COURT, in addition to this objection, observed that the petition would not be sustained here on any ground, inasmuch as it was clearly within the jurisdiction of the court of Common Pleas, to which tribunal it seemed to be the intent of the legislature that applications of this sort should be preferred.

LUNT'S *case.*

The legislature has a right to impose reasonable limitations and duties upon the sale of spirituous liquors, and the exercise of certain trades, and public offices, as sheriff, coroner, and the like. And therefore the *Stat.* 1821, *ch.* 133, prohibiting the sale of certain liquors, except in certain modes, and upon license first obtained and duties paid, is not repugnant to the general rights and liberties of the citizen, secured by the constitution.

All acts of the legislature are presumed to be constitutional; and will not be pronounced otherwise, except where their unconstitutionality is free from just doubt.

THE defendant was indicted for undertaking and presuming to be a common seller of strong liquors by retail, without license or allowance therefor; contrary to *Stat.* 1821, *ch.* 133; and being convicted, he moved in arrest of judgment, on the ground that the statute itself was unconstitutional.

Fessenden and *Deblois*, in support of the motion, argued that the statute infringed the constitutional right of "acquiring, possessing and

protecting property." *Art.* 1, *sec.* 1. It operated unequally upon the citizens of the State, by subjecting them to double taxation; once for their stock in trade, under the general tax-act; and again for the liberty of selling it, under the statute in question. In the case of the *Portland Bank v. Apthorp*, 12 *Mass.* 252, the bank tax was sustained on the ground of a provision in the constitution of Massachusetts, without invoking the aid of which, it was admitted that the constitutionality of the tax could not be supported. Yet that provision has been carefully excluded from the constitution of Maine; and this exclusion, subsequent to that decision, is strong proof that such power was not intended to be given. The statute, moreover, is repugnant to *art.* 9, *sec.* 7, of the constitution, which secures equality in the public pecuniary burdens. And it is against the constitution of the United States, *art.* 1, *sec.* 10, prohibiting any State from laying duties on merchandize.

Adams, for the State, cited *The Federalist*, *No.* 33; and *Brown v. Maryland*, 12 *Wheat.* 419.

MELLEN C. J. delivered the opinion of the Court at the adjournment in *August* following.

The object of the defendant, in submitting the motion in arrest of judgment in this case, is to obtain the opinion of the court on the question, whether the section of the revised statute, *ch.* 133, for the violation of which he has been convicted, is a constitutional one, or a violation of the constitution. All acts of the legislature are presumed to be constitutional; and the court will never pronounce a statute to be otherwise, unless in a case where the point is free from all doubt. So far as long continued practice of successive legislatures in Massachusetts, pursued also in this State, has a tendency to sanction the act in question, and others similar in principle, such practice is unquestionably in favor of their constitutionality. We have never before heard the question agitated, or a doubt expressed, in a court of law, concerning the subject. In the constitution of Massachusetts, at least as originally formed, there was, and we presume there is now, an enumeration of specific powers granted to the legislature, and among them is the power of laying duties and excises, which were

the subjects of particular examination in the case of *Portland Bank v. Apthorp*, cited in the argument. It does not appear to the court that the decision of that cause has any direct bearing upon the case at bar; because, in the constitution of this State, *art.* 4, *part* 3, *sec.* 1, the power given to the legislature is general, "to make all reasonable laws and regulations for the defence and benefit of this State, not repugnant to this constitution, nor to that of the United States." In all cases where the legislature have a constitutional authority to pass a law, the reasonableness of it seems to be a subject for their decision. We do not say that there may not possibly be exceptions to the generality of the above proposition; but we are not disposed to consider them as among the probabilities of legislation. In the case before us, the legislature, in the exercise of their constitutional power, have judged it reasonable and proper to impose duties on certain classes of persons in the community, such as justices of the peace, sheriffs, coroners, clerks, attornies, innholders, retailers, &c. On payment of these duties, they may exercise certain powers. No doubt, such a law must be general in its operation; including all persons of the classes specified. Of this character is the statute on which the conviction of the defendant is founded. The legislature have deemed it reasonable and proper, in most of the modes abovementioned, to add to the revenues of the State. It would appear strange that a law should be deemed unreasonable, because it prohibits the retailing of ardent spirits, without special license; that it should be an unreasonable restraint upon the liberty of the citizens, to check those measures which are known to have a direct tendency to promote intemperance, and multiply evils and crimes in society. The idea is not admissible for a moment. But though this law imposes the duty, it provides no mode by which the collection of it can be enforced, in any case, without the consent of the person on whom it is imposed; for no person, appointed to any of the before mentioned offices, or licensed for either of the purposes before mentioned, can be compelled to accept the appointment, or the license; and till such acceptance, the duty does not become payable. So that in all these cases, the person appointed or licensed, does, in effect, tax himself with the duty, and voluntarily pay it. In such cases, a man

surely has no reason to complain of the law; it only authorises him, on payment of a certain sum, to enjoy what he deems a privilege, and a source of profit; and prohibits the exercise of such privilege, for public reasons, unless such payment be previously made. We are all of opinion that there is no legal ground that can sustain the motion. The proper legal sentence must be awarded against the defendant.

WRIGHT *vs.* WRIGHT.

An error in the taxation of costs, by the omission of an item, may be corrected, after the issuing of execution, if there is any thing in the case to amend by; it being the misprison of the clerk.

IN this case judgment was rendered in this court at *May* term, 1829, upon a report of referees appointed under a rule of court. In making up the costs, the costs of reference were accidentally omitted; and execution was duly issued in *May* 1829.

Willis now moved that the judgment might be corrected as to the costs, by adding the costs of reference; and produced the execution, unsatisfied except by some partial voluntary payments.

Greenleaf opposed the amendment as irregular, and going to alter a judgment, which, after term, could be corrected only by review or writ of error.

But THE COURT sustained the motion, observing that the mistake, being a misprision of the clerk in the taxation of costs, might be amended by the award.

HALE *vs.* SMITH.

Where *M* had conveyed goods to *C*, who afterwards sold them to *H;* it was *held*, in a suit between *H* and the creditors of *M*, who attached the goods as his,—that the declarations of *C*, made two months before the sale from *M* to him, were admissible in evidence to impeach the consideration of the former conveyance.

The vendor of goods as his own, being therefore bound to warrant the title, is inadmissible as a witness for his vendee, in an action touching the title of the same goods; being directly interested to establish the title, for the purpose of protecting himself from all accountability on his implied warranty.

The account-books of an interested witness are inadmissible evidence.

THIS was an action of replevin of five horses and certain furniture, chair and cabinet stock, &c.; brought by *John Hale* against *James Smith*, a deputy sheriff; who pleaded property in one *March*; against whom he held certain precepts, on which he had attached the property in question. The issue was upon the property in the plaintiff.

At the trial before *Parris J.* the plaintiff read in evidence a bill of sale dated *Jan.* 21, 1829, by which *March* conveyed the property in question to *John B. Cross* and *John K. Hale*; and a further conveyance on the back of the same instrument, dated on the following day, by which these vendees did "grant, assign and set over" the same property to the plaintiff.

The defendant offered evidence tending to prove that the conveyance by *March* to *Cross* and *John K. Hale* was without consideration, and not *bona fide*, but made for the purpose of hindering, delaying and defrauding the creditors of *March*.

It appeared that *Cross & Hale*, the vendees of *March*, were commission merchants and auctioneers in copartnership; that *March* was a manufacturer of household furniture; that for some months previous to *Jan.* 21, 1829, he had consigned to them for sale large quantities of furniture, and had received from them in return, at various times, since *May* 1828, cash and supplies for his establishment.

The plaintiff contended that a balance of about eight hundred dol-

lars was due from *March* to the firm of *Cross & Hale*, at the time of the original conveyance to them, and formed part of the consideration. The defendant insisted that nothing was due, and that the conveyance was collusive, to defeat creditors. And for the purpose of showing that *March* was not so indebted to *Cross & Hale*, the defendant, in addition to other evidence, offered to prove the declarations of *Cross*, made in *November* 1828, in a conversation with the witness, in which he stated the amount of property they had then received of *March*, observing that they had sent some to *New York* for sale, and expected soon to be in funds for him to the amount of four hundred dollars; and that he was desirous that the whole proceeds of *March's* factory should be turned into their establishment. To the admission of this testimony the plaintiff objected; but the judge permitted it to go to the jury.

To rebut the testimony offered by the defendant, and to prove the validity of the sale by *March* to *Cross & Hale*, the plaintiff offered *Cross* as a witness; but the judge ruled that he was inadmissible. The plaintiff then offered the books of *Cross & Hale* for the same purpose; but these also the judge rejected; it appearing that checks had been given by *March*, from time to time as he happened to be in town, for all their advancements; which checks were produced at the trial, and were said by the plaintiffs to correspond with the entries on the books.

The jury returned a verdict for the defendant; which was taken subject to the opinion of the court upon the admissibility of the declarations of *Cross*, and of the testimony rejected.

Greenleaf and *Neal*, for the plaintiff, contended that the declarations of *Cross* should not have been received, because he himself was a competent witness. They were not the declarations of the fraudulent grantor, nor relative to any conveyance made, or to be made. On the contrary they were uttered months before any conveyance appears to have been contemplated by the parties; and therefore are not within the principle of *Bridge v. Eggleston*, 14 *Mass.* 245, which is thought to go to the verge of settled rules. Nor do they go to impeach the conveyance to the plaintiff; but are offered to

show that a prior sale, to which he was not a party, and of which he does not appear to have been conusant, was invalid.

But *Cross* himself should have been admitted. The vendor is always a good witness, to affirm or disaffirm a sale by himself, in a suit between third persons. 3 *Stark. Ev.* 1648, 1659, 1661; 4 *Taunt.* 19; 1 *Stra.* 445; 5 *Johns. Ch.* 29, 79. And he was not interested in the event of the suit. The verdict could not be evidence for or against him in another suit. If the plaintiff should fail here, and should sue him on any supposed warranty, the whole case would be open for him to defend; and if the plaintiff was conusant of any fraud, without proof of which the present defendant cannot succeed, then manifestly *Cross* would not be liable over, the parties being *in pari*. But here was no warranty of title by *Cross*. His conveyance imports no covenant; *Stearns*, 126; for the whole contract is in writing, and no warranty is expressed. *Burgess v. Lane*, 3 *Greenl.* 169. And if here is an implied warranty in the one conveyance, there is also in the other, from *March*; upon which *Cross* would have his remedy over.

The books also should have been admitted, as part of the *res gesta*, to show that the checks were not a subsequent fabrication, as was pretended at the trial.

Longfellow, for the defendant, cited *Bridge v. Eggleston*, 14 *Mass.* 245.

Mellen C. J. delivered the opinion of the Court at the adjournment in *August* following.

According to the facts reported, the only question was whether the sale from *March* to *Cross* and *John K. Hale* was fair and honest, and for a valuable consideration, or a fraudulent one, made with intent to defraud the creditors of *March*. If that sale was valid, nothing appears to impeach the second sale, from *Cross* and *J. K. Hale* to the plaintiff; though, as the jury have returned their verdict in favor of the defendant, they must have found the first sale fraudulent, and the plaintiff conusant of the fraud. If the decisions of the judge were correct as to the admission of proof of *Cross's*

declarations, and also as to the rejection of *Cross*, when offered as a witness, judgment is to be rendered on the verdict.

On the whole we think the proof of *Cross's* declarations was properly admitted, in connexion with other evidence, as tending to show that no valuable consideration was paid by *Cross* and *J. K. Hale* to *March*, for the property in question. In the case before us, *Cross* appears in the character of a vendee and a vendor of this property; and the declarations proved were made a short time before the purchase from *March*. It is true that in *Bridge v. Eggleston*, the declarations given in evidence were those of a grantor before the sale, to show the fraudulent intent with which it was made; though it seemed he might have been admitted as a witness. This was so decided, on the ground that the law would not compel a creditor, in such circumstances, to resort to the testimony of a party to the fraud, for the purpose of proving it. It is evident that the above case differs from the present, in which the declarations proved were those of a *vendee* respecting facts having a tendency to show the nature, weakness and defects of his own title. It seems stronger than the case of *Bridge v. Eggleston*; for if a vendee's title may be affected, and perhaps defeated, by the declarations of a vendor before or at the time of sale, it would appear at least equally clear that it may be impaired or defeated by his own declarations; especially when such vendee is the person under whom the plaintiff claims, and who conveyed the property in dispute to him with warranty. In *Jackson v. Bard*, 4 *Johns.* 230, it appeared that one *Smith* purchased the land in dispute of *Dickenson*, and afterwards conveyed the same to *Linzey*, who conveyed to the tenant; and the court decided that the declarations of *Smith*, respecting his title and the execution of his title deed, made before his conveyance to *Linzey*, and while he himself was in possession, were admissible in evidence against the tenant. *Thompson J.* says, "These declarations would have been good against *Smith*, and are also competent evidence against all who claim under him. This principle has been repeatedly recognized, both in our own and the English courts." And he cites 1 *Johns.* 343; 1 *Esp. Ca.* 458; and 2 *D. & E.* 53. In *Binney v. Proprietors of common lands in Hull*, 5 *Pick.* 503, the declarations of the ancestor were admitted

to prove his liability to maintain a certain fence, and thus to prove the liability of the heir to maintain it. So in *Ivat v. Finch & al.* 1 *Taunt.* 141, the question was whether Mrs. *Watson* was the owner of certain personal property, (which the defendant had seized for the lord of the manor,) at the time of her death. The plaintiff was permitted to prove by her declarations that she had transferred it to the plaintiff. The court say, "The admission was against her interest, and ought to be received, because the right of the lord of the manor depended on her title." See also *Davis v. Spooner*, 3 *Pick.* 284.

The next inquiry is whether *Cross* was properly rejected. He and *J. K. Hale* were the vendors in the sale to the plaintiff; and it is a well settled principle of law that where a person sells a personal chattel as his own property, he is understood to warrant the title. 1 *Ld. Raym.* 593; 1 *Salk.* 210; 2 *Kent's Com.* 574; 3 *Stark. Ev.* 1661, 1662. Nothing appears in the case showing any defect in the plaintiff's title, except the want of title in *Cross* and *J. K. Hale*, at the time of their transfer to him. Hence, we perceive, it was an essential point with the plaintiff, on the trial, to establish a title in *Cross* and *J. K. Hale*; and *Cross* was directly interested to establish it, for the purpose of protecting himself from all accountability on his implied warranty. On this principle he was inadmissible; and, for the same reason, his books also were properly rejected.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF OXFORD, MAY TERM, 1830.

PLUMMER *vs.* DENNETT.

Where one was arrested upon a writ sued out for a pretended and groundless cause of action, with a view to compel the party to do certain things; but not succeeding, the plaintiff suppressed the writ;—it was *held* that the remedy of the party injured was not by an action of trespass *vi et armis;* but by an action of the case for malicious prosecution.

The party justifying under legal process, not being an officer, is not bound to show it returned.

THIS was an action of trespass *vi et armis* for false imprisonment; which was tried before *Perham J.* in the court of Common Pleas, upon the general issue, with leave to give any special matter in evidence.

It appeared, from the bill of exceptions filed by the defendant in the court below, that he, at the time alleged, procured a writ of attachment against the plaintiff, who was a *feme sole*, therein charging her with slander; by virtue of which he caused her to be arrested, and held in custody, demanding bail; that he went personally with the officer, and closed the doors and windows of her house, confining her therein; that not being able to procure bail, she offered to go to prison; whereupon the defendant took the writ from the officer, no return having been made thereon, and directed him to suffer her to

go at large, which he did; and that the object of the defendant in resorting to this measure, was to extort from the plaintiff a confession that she had spread false reports concerning him; which she refused to make.

It was contended by the plaintiff's counsel, that as no return was made of the writ, the defendant should not be permitted to show that the arrest and imprisonment were made under the authority of legal process. And on the other side it was insisted that proof of the arrest having been made under the authority of a writ, though it had not been returned, was sufficient to repel the charge of false imprisonment.

But *Perham J.* admitted the evidence; instructing the jury that if they were satisfied that the writ was obtained in good faith, upon a just cause of action, and that the arrest was made in order to obtain payment or security for the demand; and that the plaintiff was afterwards discharged on a settlement of the claim, by an agreement of the parties, or through the humanity of the defendant; such restraint afforded no evidence of false imprisonment, though no return was made of the writ. But that if the evidence satisfied them that the writ was obtained without any just cause of action; that the arrest under it was made to frighten and overawe the plaintiff, and thereby compel her to acknowledge certain statements she had made to have been false, when in fact they were true; and that, not having been able to accomplish this object, the defendant had suppressed the writ, permitting no return to be made of it; the whole having been a contrivance to give the transaction the semblance of a legal arrest; the restraint, under such circumstances, might be false imprisonment, though the defendant might have pretended to act under color of legal process. The jury found for the plaintiff under these instructions, to which the defendant filed exceptions, pursuant to the statute.

The exceptions were argued at *May* term, 1827, by *Howe* for the plaintiff, and *Fessenden* for the defendant.

Howe contended that where the party suppreses his own writ, and so prevents a return, he ought not to be permitted to justify under it. If the sheriff could not justify without shewing his precept returned, which in the present case could not be done, because

it was suppressed, with his consent; then he is liable in trespass. And therefore the defendant is liable in like manner, all being principals in this offence. Here the *gravamen* is, not that the plaintiff has been harassed in the law, without probable cause; but that the defendant fraudulently and colorably, under pretence of legal process, and under cloak of law, abused its instruments, to inflict upon her a much greater evil.

Fessenden, for the defendant, to the nature of the remedy, cited 6 *Mass.* 506; *Shaw v. Reed*, 16 *Mass.* 450; *Hayden v. Shed*, 11 *Mass.* 500; *Waterer v. Freeman*, *Hob.* 206; *ib.* 266; *Bull. N. P.* 11; *Belt v. Broadbent*, 3 *D. & E.* 183; *Tarleton v. Fisher*, 2 *Doug.* 677; 1 *Chitty's Pl.* 136; 1 *D. & E.* 535; 3 *Esp.* 135. And to show that a return of the writ need not be proved, he referred to *Middleton v. Pierce*, 2 *Str.* 1184; 1 *Salk.* 409.

Mellen C. J. delivered the opinion of the Court at the adjournment of *May* term in *Cumberland*, in *August* of the present year.

The single question arising on the exception alleged against the opinion and instruction of the judge to the jury is, whether the present action of trespass can be maintained for the injury done to the plaintiff; or whether her only remedy is an action for a malicious prosecution. No question of pleading is presented. The jury, under the directions they received, have found that the writ was obtained without any just cause of action; that the arrest under it was made to frighten and over-awe the plaintiff, to compel her to make certain confessions of facts as true, when they were false; and being unable to accomplish his object, the defendant had suppressed the writ, permitting no return of it to be made; and that the whole was a contrivance to give the transaction the semblance of a legal arrest. Such a course of proceeding was grossly improper and highly reprehensible; but was it, in legal contemplation, a trespass, or such an act and injury as that redress can be obtained in an action of trespass?

It is laid down in 1 *Chitty's Pl.* 136, that "whenever an injury to a person is effected by regular process of a court of competent jurisdiction, though maliciously adopted, case is the proper remedy

and trespass is not sustainable; as for a malicious arrest." And also page 187, "but no person who acts upon a regular writ or warrant, can be liable to this action (trespass) however malicious his conduct; but case, for the malicious motion and proceeding, is the only form of action." In *Belt v. Broadbent & ux.* 3 *D. & E.* 183, the same principle is recognized. That was an action of trespass and false imprisonment. The defendants justified under a bill of *Middlesex* sued out by them against the plaintiff, upon which he was arrested. The plaintiff demurred, because no cause of action was set forth in the plea. The demurrer was overruled. *Lord Kenyon C. J.* says "there is no ground for the objection; if a party be arrested without any cause of action, he has a remedy by an action on the case for maliciously holding him to bail; but it is incomprehensible to say that a person shall be considered as a trespasser, who acts under the process of the court." See also *Rowland v. Veal & al. Cowp.* 18. The same principle is stated in *Watkins v. Bayard* 6 *Mass.* 506; where *Parsons C. J.* says, "in our opinion, it is a sound principle of law, when a man shall falsely and maliciously and without probable cause, sue out a process in form regular and legal, to arrest and imprison another—such imprisonment is tortious and unlawful as to the party procuring it; and he is answerable in damages for the tort, in an action for a false and malicious prosecution; the suing of legal process being an abuse of the law, and a proceeding to cover the fraud." In *Hayden v. Shed*, 11 *Mass.* 500, the above principle is laid down with equal clearness by *Jackson J.* And he observes that trespass lies only in those cases where the process is void or vacated, set aside or superseded, as illegally, unduly or irregularly sued out; neither of which was the fact in the present case; the writ was issued in the usual form; and with usual regularity. The case of *Shaw v. Reed*, 16 *Mass.* 450, confirms the same principle, and establishes another point, viz. that trespass did not lie in the case, for the writ being good at the time, the arrest was was not tortious. In the present case the writ was good at the time, as to form and regularity; for the conclusion to abandon the prosecution of the suit and suppress the writ, was not formed until after the defendant had found his experiment was wholly unsuccessful. As

to the objection to the defence, on the ground of the non-return of the writ, we think it is not sustained. If this action had been commenced against the officer, it being a case of *mesne* process, the objection might, and probably would, have been considered a fatal one; but we do not know of any cases deciding that the party is bound to show a return of the process which he has sued out and placed in the hands of an officer for service. The case of *Middleton v. Price*, 2 *Strange*, 1184; and 1 *Wils.* 17, is decided on this distinction; so a sheriff's bailiff need not show the return of a writ; because it is not in his power. None but *officers* are bound to shew this; it is a part of their official duty; but no such duty is devolved on the party. The suppression of the writ in the present case, therefore, does not alter the principle; it was a part of the plan adopted to impose on the plaintiff and extort confessions from her, and is strong evidence, with the other facts, to prove the groundlessness of the defendant's action, and the malicious motives with which he pursued it, as far as it was pursued; but does not constitute him a trespasser in causing the arrest and imprisonment by means of that process. On legal principles, we are of opinion that the instructions were not correct; we accordingly sustain the exception. The verdict below is set aside, and there must be a new trial in this court.

Scott *& al. vs.* Whipple *& als.*

Where the plaintiff covenanted to build a certain mill-dam within three months, (unavoidable accidents excepted,) in a workmanlike manner; and the defendant pleaded in bar that the plaintiff did not, within three months, in a workmanlike manner, build the dam;—the plea, on demurrer, was held ill, both for duplicity, and for not alleging that the plaintiff was not prevented by unavoidable accidents. The latter objection may be taken on general demurrer.

This was an action of covenant on an indenture of five parts, in which the plaintiff covenanted "within the space of three months, (unavoidable accidents excepted,) next ensuing the date" of the indenture, "in a good, substantial and workmanlike manner" to build

a certain mill-dam for the defendants. The defendants after *oyer*, pleaded, among other things, in bar of the action, " that the plaintiffs did not, within three months from the date of said writing, in a good, substantial and workmanlike manner, erect, build and finish said mill-dam, according to the true intent and meaning of the said covenants and agreements of them the said plaintiffs; and this," &c. To which the plaintiffs demurred specially, for duplicity.

The demurrer was briefly spoken to by *Greenleaf* for the plaintiffs, and *Fessenden* for the defendants; after which the opinion of the Court was delivered by

MELLEN C. J. The plea in bar in this case puts in issue two distinct and independent facts; and if either should, on an issue to the country, have been found for the defendants, it would have been a bar to the action. When such a plea is specially demurred to, as in the present case, for the duplicity, it must be adjudged bad; for if the plea may put in issue two such facts, it might also a compliance with all the terms and particulars of the contract, as to the form and position of the mill-dam, and the materials of which it was to be composed. See *Archbold's Dig.* 191; 5 *Bac. Abr. Pleading K.* 1; *Co. Lit.* 303 *a.*; *Hob.* 295; *Plowd. Com.* 140; 10 *Johns.* 400.

But there is another objection to the plea which is good on general demurrer. It does not contain an averment that the alleged nonperformance of the contract on the part of the plaintiffs was not prevented by unavoidable accidents. That exception constitutes a part of the contract; and it should have been expressly negatived in the plea. This principle was distinctly recognized in 4 *Campb.* 20. In that case the plaintiff declared on a general covenant to repair; and the covenant offered in evidence contained an exception in case of fire; and Lord *Ellenborough* held the variance essential, and excluded the evidence.

Plea adjudged insufficient.

GODDARD *vs.* BOLSTER *& al.*

The agent of the owner of a grist-mill having inserted into it his own mill-stones and mill-irons; it was *held* that they became thereby the property of the owner of the mill, as part of his freehold, so that the agent could not lawfully sever them again; nor could his creditors seize them for his debt, though the mill had been destroyed by a flood, and they alone remained.

If the plaintiff in trespass *quare clausum fregit* die after verdict in his favor, and before judgment, the court will enter judgment as of the term in which the verdict was returned.

THIS was an action of trespass *quare clausum fregit*, for entering the plaintiff's lands in *Andover*, cutting down his grass, and taking and carrying away his mill-stones and mill-irons.

At the trial before *Weston J.* it appeared that the plaintiff, who was an inhabitant of Massachusetts, purchased, some twenty years ago, the farm in question, for the avowed purpose of affording a home and subsistence, during life, to his brother *Robert*, who was in embarrassed circumstances. *Robert* entered and occupied the premises ever after, sometimes calling the farm his own, paying the taxes, which were assessed in his name, and cutting and sawing the timber at his pleasure. At the time of the purchase, a grist-mill was standing on the premises; which being afterwards burnt, *Robert* rebuilt it, with the gratuitous aid of some of his townsmen, inserting into it the mill-stones and mill-irons in question, which had belonged to a mill of his own in *Bethel*, which was destroyed by a freshet. *Robert* occupied this new mill as his own for ten or fourteen years, taking the profits to his own use, till it was swept off by a freshet in 1819 or 1820; immediately after which he took the mill-stones and irons out of the river, and deposited them at the side of the highway on the farm, offering them for sale, and disposing of part of them; where they remained till the defendants, who were judgment creditors of *Robert*, caused them to be taken and sold, to satisfy their execution. In all these transactions *Robert* acted under a contract with the plaintiff, as his agent; and there was no evidence tending to

fix on the plaintiff the imputation of fraud, or to create a doubt but that his motive was solely to assist and relieve his brother.

Upon this evidence the judge instructed the jury that the grist-mill, when rebuilt, became the property of the plaintiff, who would be holden to account to *Robert* for the value of any materials or labor furnished by him; and that it being the property of the plaintiff in its entire state, the parts and fragments, after it was broken, continued to be his property. The jury hereupon returned a verdict for the plaintiff, for the value of the mill-stones and irons; which was taken subject to the opinion of the court upon the correctness of the judge's instructions.

Fessenden, for the plaintiff, at the opening of the argument at this term, suggested that the plaintiff had died since the verdict was returned; and he moved for judgment *nunc pro tunc*; observing that the court had power to do this, by the common law, as well before as after a *curia advisare vult*. And to the principal question raised at the trial, he cited *Elwes v. Maw*, 3 *East* 38; 3 *Dane's Abr.* 145; *Lifford's case*, 11 *Co.* 46; 6 *Mod.* 187; *Penton v. Robarts*, 2 *East* 88; 1 *Salk.* 368; *Farrar v. Stackpole*, *ante p.* 154; *Goddard v. Chase*, 7 *Mass.* 432; *Union Bank v. Emerson*, 15 *Mass.* 159.

N. Emery and *Virgin*, for the defendants, contended that the severance of the stones and irons from the mill was not temporary, and for re-insertion; but for a final separation. If the debtor, as agent for the plaintiff, had put his own machinery into the mill, he had in the same character taken it away, and treated it as his own. The articles, therefore, not belonging to the soil, might well be seized and sold by creditors. *Simpson v. Hartop*, *Willes*, 516; 9 *Dane's Abr.* 273; *Ricker v. Kelly*, 1 *Greenl.* 117; *Pyne v. Dorr*, 1 *D. & E.* 55; *Van Ness v. Packard*, 2 *Pet.* 143.

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

In this case it appears by the contract referred to in the report that *Robert Goddard*, in the purchase of the farm and in the possession and superintendence of it, acted as the agent of the plain-

tiff; and the case shows that his object in the purchase of the farm was to assist his brother *Robert*, by permitting him to occupy the same and have the profits as long as he lived. As the mill on the premises essentially added to those profits, when it was burnt, it was for the interest of *Robert*, when the new mill was erected, that it should be made capable of operation; and he therefore took his own mill-stones and mill-irons from *Bethel*, which were then useless, and placed them in the new mill, where they remained until the mill was carried away by a freshet, when they were taken out; after which they were attached. To carry the designs of the plaintiff into execution, the above measure was necessary, or at least expedient, and for the immediate use and advantage of *Robert*. As agent of the plaintiff, he must be considered as having annexed the mill-stones and mill-irons to the estate of the plaintiff, whereby they became a part of the freehold; and, of course, *Robert* had no right to disannex them; and though he removed them into the road after the destruction of the mill, that act did not change the property; they, as well as the mill at the time it was swept away, were the property of the plaintiff. In our opinion the instruction of the judge was correct. Besides, the plaintiff by bringing this action has ratified the acts of *Robert* in rebuilding the mill, after the former one was consumed, and in putting the same into operation by the means and in the manner before mentioned.

And it would seem that we should arrive at the same result, if *Robert* had no permission, express or implied, to place the mill-stones and mill-irons in the plaintiff's mill; for if a man of his own accord, and without any authority, builds on another's land, the building becomes his property, as being attached to his freehold. The exceptions to this principle are found in case of erections by lessees for the purposes of trade. The case at bar, however, presents no facts which appear to bring it within the range of the principle above mentioned. The sole object of *Robert* was to continue the farm and means of income in the same situation as when he entered into possession of it, and without any intention of removing any additions he had made; expecting, as he did, to continue the occupa-

tion of the farm and enjoyment of its profits in all respects, during his life. There must be *Judgment on the verdict.*

The inhabitants of PORTER *vs.* GRISWOLD.

The usual reservation of a certain portion of lands for public uses, in a grant by the State to individuals, is a condition subsequent; imposing on the grantees the duty of impartially setting apart the quantity so reserved, for the designated uses.

When such lands are so set apart by vote of the proprietors, and designated in severalty, the fee thereby passes from the original proprietors, and becomes vested in the several parties for whose respective benefit the reservation was made, if in being, and capable of taking the estate.

Previous to the existence of such party capable of taking, the fee in such lands is not in the State, nor in the town as successor to the corporation of proprietors, for the purposes of custody; but is in the original grantees and their heirs.

THIS was a writ of entry, in which the demandants counted on their own seisin of the lot *No.* 33, in range *B.* in the town of *Brownfield*; and a disseisin by the tenant.

The controversy was upon the title of the demandants to this lot, as one of the lots reserved in the grant and designated in the division of the township of *Porterfield*, for the first settled minister.

It appeared that this township or plantation was granted by Massachusetts, *Sept.* 21, 1793, with the usual reservation of a portion for public uses, viz. for the ministry—for the first settled minister—schools —college—and future appropriation of the government. These lots were designated by the proprietors on their plan, and in their deed of partition, *March* 19, 1795; and the lot in question was assigned, with others, "to the first settled minister," without more saying.

The plantation of *Porterfield* was organized as early as the year 1803. On the 20th day of *February* 1807 a part of the plantation, including a little more than two thirds of its territory, but not including a part in which the lot demanded is situated, was incorporated into a town by the name of *Porter*. On the 27th day of the same month, the residue of the plantation, including this lot, was annexed to *Brownfield*. There had never been a settled minister in *Porter*.

Brownfield was incorporated in 1802; and the original grant of this township contained the like reservations of lands for public uses, as had been made in the grant of *Porterfield*. The Rev. *Jacob Rice* became the first settled minister in *Brownfield*, *Oct.* 15, 1806.

The title of the tenant was under certain mesne conveyances from *Joseph Howard*; who claimed title by virtue of a quitclaim deed from Mr. *Rice*, dated *May* 25, 1810, conveying all his "right, title and interest in and to all the ministerial and parsonage right of land in *Brownfield*, it being the land granted by the government of said Commonwealth to the first settled minister; meaning all the right he had in consequence of being the first settled minister in *Brownfield*."

Upon these facts *Weston J.* directed the jury to find for the tenant; reserving the legal rights of the demandants to maintain the action, for the further consideration of the court.

Greenleaf, for the demandants. The proprietors of *Porterfield* having by law ceased to be a corporation at the end of ten years after the final division of their common lands, which was *March* 10, 1795, the fee in the public lands, upon such dissolution, reverted to the Commonwealth. 2 *Kent's Com.* 246, 247; *Co. Lit.* 13 *b.* The subsequent incorporation of the town of *Porter* was a renovation of the proprietary corporation, so far as the custody of the public lands was concerned; or, the erection of a new corporation, as its successor. And such new corporation may claim all the rights of the old, against the sovereign, and all others, except the original owners. 2 *Kent's Com.* 248.

The reservation in question was for the public good; to induce the early settlement of a teacher of religion and morality. It was founded in deep considerations of public policy, and ought to be freely expounded, to effect the intent of the legislature. Any exposition, therefore, which necessarily leads to a destruction of the thing granted, or to the loss of all substantial benefit from the grant, ought to be rejected. Now in the case of the custody of school lands, and those granted for the use of the ministry, the town confessedly succeeds to the proprietors. Why not as to these also, which are always enumerated as public lands? *Stat.* 1821, *ch.* 118, *sec.* 23; *Weston v. Hunt*, 2 *Mass.* 500; *Brown v. Porter*, 10 *Mass.*

93; *Stat.* 1824, *ch.* 254. In *Shapleigh v. Pilsbury*, 1 *Greenl.* 271, the proprietors still existed as a corporation; and were themselves the original grantors.

The designation of the lots having been made by the proprietors as a corporation, and not in their individual capacities, no right could revert to their heirs; but the custody of the land necessarily went to their successors. Proprietors act together only by the tie of common interest. When that is gone, by the sale or division of their lands, they have no inducement to take care of the public lots. They are not compellable so to do. Should they divide these lands among themselves, and strip them of their timber and wood, if the fee remains in them, none can call them to account. And even if some proprietors might wish to preserve the lands; yet after the lapse of years, and the dispersion of families, it might be impossible to ascertain all who ought to join in an action. Thus the benevolent designs of the legislature must necessarily be defeated.

The subsequent annexation of this lot to *Brownfield* avails nothing, since that act conveyed no title, but merely jurisdiction, to the town. The reservation was for the first settled minister in *Porter*. On no legal principle could Mr. *Rice* claim the land, as he was not the first settled minister of this town, but of the former. Besides, his rights, as first settled minister, were perfected by his settlement in 1806; after which he could acquire no new title in that character. *Baptist Soc. v. Wilton*, 2 *N. Hamp.* 508; *Bristol v. New Chester*, 3 *N. Hamp.* 530.

Fessenden, for the tenant, contended that lands reserved for the first settled minister remained in the Commonwealth, in the same manner as those reserved for its future appropriation; and that on the annexation of this lot to *Brownfield*, no person having then come *in esse* to take, it passed as a grant to the first settled minister in that town; and from him regularly to the tenant. But that, on any principle, *Porter* was never seized of the lands. They were reserved for the benefit of one part of the plantation, as well as of another; and the part to be benefited by this lot was annexed to *Brownfield*, before *Porter* came into existence. The former town, therefore, if either, is entitled to the custody and advantage of the lot reserved.

MELLEN C. J. delivered the opinion of the Court at the adjournment of *May* term in *Cumberland*, in *August* following.

It is a well known fact, that for a long series of years, when the legislatures of Massachusetts, with the most commendable motives, made grants of tracts of land to one or more purchasers, either by special resolves, or by deeds, executed by certain constituted agents for the Commonwealth, a clause was inserted in the grant or deed, whereby certain proportions of the tract were reserved, as it was generally expressed, for the use of the ministry—for the first settled minister—for Harvard College, and for the use of schools. Though such language, so used, does not in strictness constitute a legal reservation, yet we believe it has been generally understood by all concerned to amount to a condition subsequent, imposing on the grantees the obligation to cause the specified proportions to be impartially set apart and assigned for the specified purposes; and when so appropriated in severalty, as the general usage has been, the fee in such parcels, so appropriated, has been considered as vesting in the intended grantees, if *in esse* at the time; if not, then as soon as they come *in esse* and are capable of taking the estate. This is believed to be the practical understanding of the language in which these reservations are secured, for the benefit of those for whom the bounty is intended. The vote of the purchasers or proprietors, whereby the lands reserved are set apart and designated, operates to pass the fee to the respective owners, in the manner above mentioned. In the case of *Rice v. Osgood & al.* 9 *Mass.* 38, it appeared that a grant of a township was made to one *Brown*, on condition that he should give bond to the treasurer of the then Province of the Massachusetts Bay, conditioned among other things, that he should grant out of the premises certain proportions, and for certain purposes, similar to those expressed in the deed in the present case. The court considered the fee of the township as having passed to *Brown*, and that it was his duty to grant and appropriate the specified proportions for the objects mentioned; and by neglecting so to do, he had violated the condition of the grant, and that the remedy was with the Commonwealth to enforce the fulfilment of the

condition. Though the language of the grant to *Brown* was more explicit than that which has usually been employed for similar purposes; yet we apprehend the same principles may be equally applicable to both, for the purpose of effecting the object in view. See also *Brown v. Porter*, 10 *Mass.* 93; *Harrison v. Bridgton*, 16 *Mass.* 16; 3 *Dane's Abr. ch.* 76, *art.* 10, *sec.* 20.

The law as to parsonage lands is familiar. Until a parish is formed, capable of taking and holding the assigned property or lots, the fee remains in the grantees or proprietors, and they have a right to the custody and profits. *Propr's of Shapleigh v. Pilsbury*, 1 *Greenl.* 271. When a parish or a town, acting as a parish, is formed, capable of taking, such parish is entitled to the custody and profits, and also during a vacancy, after there has been a settled minister. When there is such a minister, then he is seised of such lot or lots *in jure parochiæ*, and entitled to the profits. *Weston v. Hunt*, 2 *Mass.* 500; *First Parish in Brunswick v. Dunlap*, 7 *Mass.* 445; *Brown v. Porter*, before cited; *Shapleigh v. Gilman*, 13 *Mass.* 190; *Austin v. Thomas*, 14 *Mass.* 333. But as to such lot or lots as are set apart and assigned to the first settled minister, the principles above stated are not applicable. The parish have no control over them or interest in them. They have nothing to do with them. Such lands are in the nature of a premium; and the first settled minister immediately becomes the owner of them in fee simple. Until a minister is settled, the fee remains in the grantees, as appears also by the case of *Propr's of Shapleigh v. Pilsbury*, in the same manner as the fee of parsonage lands does till a parish comes into existence, capable of taking them; but as soon as such minister is settled, the absolute fee vests in him, as before stated. The act incorporating the town of *Porter*, and the act annexing to *Brownfield* that part of the plantation of *Porterfield*, in which the lot demanded is situate, are both of them perfectly silent on the subject of the lands intended for the ministry—the first settled minister—Harvard College, schools and future appropriation. In this case the demandants count on their own seisin in fee simple; and now, what is the proof of this alleged seisin? They sue as the inhabitants of the town of *Porter*, in their corporate capacity; but the township was not granted to them, but

to a few individuals, from whom they have not deduced any title whatever. It does not appear that the purchasers were ever incorporated. If on legal principles the Rev. Mr. *Rice* was, in respect to the lot in question, the first settled minister, then the fee vested in him, and from him has been conveyed to the defendant who is in possession; and on this ground the demandants must fail. If on legal principles Mr. *Rice* was not the first settled minister, in respect to the lot demanded, then no person has as yet existed capable of taking the same, inasmuch as there has never been any settled minister in *Porter*; of course the fee remains in the original grantees or their heirs, and on this ground also the action must fail. We may go one step further and say, that if the title to the reserved proportions for the uses specified, remains in the Commonwealth, until grantees appear capable of taking, as some have supposed to be the law, the consequence would also be equally a decisive bar to this action.

We are not able to perceive any title in the demandants, or any privity whatever between them and the original purchasers of the township; and if they or their heirs or assigns are not desirous of having the custody and profits of the demanded premises, there seems no occasion or reason for the interposition of strangers, to disturb the possession of the tenant. We are all of opinion that the action cannot be maintained; accordingly the verdict is to be set aside, and a nonsuit entered.

BLAKE & *al. vs.* CLARK.

By the conveyance of a mill, *eo nomine*, no other land passes in fee, except the land under the mill and its overhanging projections. But the term "mill" may include the free use of the head of water existing at the time of its conveyance, or any other easement which has been used with it, and which is necessary to its enjoyment.

In giving a construction to the report of commissioners appointed by the Judge of Probate to make partition of an intestate's estate, the plain intent of the commissioners, though it appears only by way of recital, will be carried into effect, if the parties concerned have acquiesced, by a seperate enjoyment of the property, corresponding with such intent.

The right of the tenant to an easement in the land, is no objection to the demandant's recovery in a writ of entry.

THIS was a writ of entry, brought by the heirs of *Samuel Blake*, in which they counted on their own seisin within twenty years, and a disseisin by the tenant. It was tried before *Parris J.* upon the issue of *nul disseisin*.

The subject of controversy was a certain mill-yard and appurtenances, originally part of lot *No.* 96, in *Turner*; and the question was whether the tenant owned it in fee, or whether he had only an easement therein.

It appeared that the real estate of the ancestor was described in the inventory returned by his administrator, as consisting of his "homestead farm in *Turner*, with the buildings thereon, a saw-mill and corn-mill," together with forty acres of out lands. In the assignment of dower to the widow, *Dec.* 1, 1802, part of the premises was set off to her in these words,—"one half of the corn-mill, and one quarter of the mill-yard."

In the division of the real estate among the heirs at law, *Feb.* 10, 1803, being all the real estate of the deceased, except the part set off to the widow for her dower, the commissioners described the property to be divided, as "the homestead farm of said deceased, except what is set off for the widow's dower, together with the saw-mill, and the one half of the corn-mill." They then set off to *Thatcher*

Blake certain property, " also the said saw-mill, in full of his share." To *Edward*, among other things, they assigned " a privilege of drawing water sufficient for carding wool, and for that use only, from the pond which contains the water for the use of the saw-mill and corn-mill, and at the place where the clapboard mill now stands." To *Joseph* they in like manner assigned " one fourth part of said corn-mill, in full of his share." And to " *Silas*, one fourth part of said corn-mill; also a piece of land being all the residue of lot *No.* 96, not before set off; excepting one acre and twenty-three rods, adjoining to and for the use and accommodation of the mills."

Joseph's " fourth part of the corn-mill" was conveyed to *Thatcher*, *March* 10, 1807; on which day, by deed of general warranty, recorded *Dec.* 7, 1807, *Thatcher*, *Samuel*, *Edward*, *Grinfill* and *Silas*, demandants, conveyed to *Oliver Pollard* " a certain corn-mill situated," &c. " known by the name of *Blake's* mill, with all the privileges and appurtenances thereto belonging. To have," &c.

On the 7th day of *December*, 1807, *Thatcher Blake* conveyed to *Samuel*, with general warranty, " a certain saw-mill situated," &c. " being the same that was set off to the said *T. B.* in the settlement of the estate of *Samuel Blake*, deceased, together with the right to the mill-yard which is set off to the said *T. B.* with the saw-mill aforesaid." This property *Samuel* conveyed by the same description, to *Oliver Pollard*, by deed of general warranty, *March* 30, 1813; and *Pollard*, in the like manner, conveyed the estates mentioned in his two deeds of purchase, by the same description, to the tenant, *March* 29, 1815.

The tenant, to show that the mill-yard had been expressly recognized by the demandants as set off with the mills, in the division of their father's estate, produced several deeds from *Samuel*, *Edward*, and *Grinfill Blake*, by which they had conveyed divers parcels of land described as bounded " on the mill-yard," and " by the line of the mill-yard as set off in the settlement of the estate" of their late father. And it appeared that this mill-yard, which contained about one acre and fourteen square rods, was known as such by the commissioners and others at the division of the estate in 1803; having always been used as a place for the deposit of lumber and logs,

and for a convenient passage to and from the mills. At the time of the division, the demanded premises contained an oil-mill, card-board-machine, and potash works, contiguous to the mill-yard defended by the tenant. On this yard he had, more than six years since, erected a store and potash works.

Upon this evidence the tenant insisted that he was entitled to hold the mill-yard in fee simple; and if not, yet that by the deeds of *March* 10, and *Dec.* 7, 1807; and the subsequent occupancy under them for more than twenty years, all the demandants, except the grantors therein named, were disseised of the premises, and had lost their right to maintain a writ of entry. Both these points the judge overruled; and instructed the jury to consider whether the premises had been actually occupied by the tenant and his grantors for more than twenty years, in a manner inconsistent with the mere enjoyment of an easement therein. This fact they found against the tenant; returning a general verdict for the demandants; which was taken subject to the opinion of the court upon the points raised at the trial. If the court, on these points, should be of opinion for the demandants, it was agreed that the premises, and their increased value by reason of the tenant's buildings, should be estimated by commissioners appointed by the parties.

Greenleaf and *W. K. Porter*, for the tenant, contended that the mill-yard passed with the mills. The original division was declared to be of all the estate. Parcels were set off to several of the heirs, in full of their respective shares. The yard was described as reserved for the use and accommodation of the mills alone. And it was so recognized by some of the demandants in their deeds. *Thatcher* declares that it was set off to him in the division of his father's estate; and *Samuel* repeats the same in his deed to *Pollard*. Others of the demandants confirm this by their deeds, bounding their grantees by the line of the mill-yard, as set off in the same division. These recitals, being of a particular fact, are sufficient to estop the parties. *Denn v. Cornell*, 3 *Johns. Ca.* 174; *Shelly v. Wright*, *Willes* 11. It is true the soil of a way used for a road to a grist-mill does not pass by a grant of the mill and appurtenances, without some farther

expression. *Leonard v. White*, 7 *Mass.* 9. But here is the "farther expression" required.

But whether this be so or not; here are deeds of the mill-yard in fee, and an occupancy under them for more than twenty years; which is sufficient evidence of a disseisin, commencing with the delivery and registry of the deeds, and the entry of the grantee. 3 *N. Hamp. R.* 27.

Fessenden, for the demandants, cited 3 *Cruise's Dig.* 471; *Stearns on real actions*, 192; *Perley v. Chandler*, 6 *Mass.* 454; *Worcester v. Greene*, *ib.* 425; *Rehoboth v. Hunt*, 1 *Pick.* 224; *Thompson v. Propr's Androsc. bridge*, 5 *Greenl.* 62; *Ken. Propr's. v. Springer*, 4 *Mass.* 416; *Propr's of No. Six v. McFarland*, 12 *Mass.* 325; *Boston mill-corp. v. Bulfinch*, 6 *Mass.* 229; 4 *Dane's Abr.* 748; *Jackson v. Wheeler*, 6 *Johns.* 272; *Adams on Eject.* 118; *Bull. N. P.* 96; 2 *Selw. N. P.* 636, *note*; *Peake's N. P.* 197.

Weston J. delivered the opinion of the Court at the ensuing *July* term in *Waldo*.

The demandants, having proved their pedigree, and that their ancestors died seised of the demanded premises, have established their title; unless they have parted with it to those under whom the tenant claims; or he has acquired a title by disseisin. The saw mill, without any further description, was set off by the commissioners appointed to divide the estate, to *Thatcher Blake*, one of the demandants. Doubtless by this term, the fee of the land, upon which the mill stood, would pass. Lord *Coke* enumerates a variety of terms, which, being used in a conveyance, carry lands; and he states to what extent. *Co. Lit.* 4. *b.* The land passes, because included in the term used. The word mill, or *molendinum*, is not among those to which he adverts; and probably no authority can be adduced, in which it has been held to convey, *ex vi termini*, any part of the adjoining land. That upon which it stands, may be regarded as including land, over and upon which the slip, if it has one, or any other necessary projection from the mill passes. The term may embrace the free use of the head of water, existing at the time of the convey-

ance, as also a right of way, or any other easement, which has been used with the mill, and which is necessary to its enjoyment. We are not satisfied that it can, or ought, to be further extended.

But it is urged that, taking the whole report of the commissioners together, it is manifest that they intended to set off the land defended by the tenant, to the owners of the corn and saw mills. If this did satisfactorily appear, in any part of their report, although it might be by way of recital; yet if the intent was plain, and the enjoyment of the property, and the acquiescence of all concerned, had corresponded with this construction, there does not appear to be any legal objection to giving it effect. In the assignment of dower to the widow, there is set out to her one half of the corn mill, and one quarter of the mill yard. This was sufficient to give her a free hold in that portion of the yard; but the tenant does not hold under her, and her estate is probably spent. The mill yard is no where mentioned by that name, nor is it any where adverted to by them; except in their assignment to *Silas Blake*. He has among other things, all the residue of lot number 96, not before set off. The commissioners seem to have been aware that this would include the mill yard; for they proceed to except from the residue thus assigned, one acre and twenty-three rods adjoining to, and for the use and accommodation of the mills. The natural and most obvious import of those terms seems to denote an easement, to continue only so long as the mills should be occupied as such; and that the owner of the fee would have a right to appropriate the land to any object, consistent with the easement, and to hold it discharged of the easement, when no longer wanted for this purpose. So to regard it, would be giving full effect to the language of the commissioners. And the jury have found that the subsequent use and occupation of the premises by the tenant and other owners of the mills, under whom he claims, has been in accordance with this construction. And we are of opinion, that the mill yard was by the commissioners attached to the mills, as an easement only.

There is nothing inconsistent with this view of the case, in the deed of *March* 10, 1807, or of *December* 7, 1807, under which the tenant claims; the former conveying the corn-mill with all the privileges

and appurtenances thereto belonging; and the other the saw-mill, with the right to the mill-yard set off to *Thatcher Blake*. If land could pass as appurtenant to the mill, which is not warranted by the authorities, it is a term much more appropriate to an easement or incorporeal hereditament, attached to a thing corporeal. *Co. Lit.* 121 *b.*; 1 *Com. Dig. Appendant and Appurtenant; Leonard v. White*, 7 *Mass.* 6. The right to the mill-yard, must be intended to be that which the party might lawfully convey. The tenant's case derives as little support from the monuments referred to, and recitals made, in certain deeds executed by some of the demandants. They do not conflict with the title of the demandants to the fee of the premises, subject to the easement. Nor does the right of the tenant to the enjoyment of the easement, interpose any objection to their recovery in this action. *Thompson v. Propr's of Androsc. bridge*, 5 *Greenl.* 62.

As to the title of the tenant to the fee, arising from disseisin, it has been negatived by the jury; and we see no reason to disturb their verdict upon this point.

Upon the principles of the common law, when *nul disseisin* was pleaded, the demandant was entitled to judgment, upon proving the title set forth in his count. But by the statute of 1826, *ch.* 344, the demandant is holden to prove that the tenant is in possession of the demanded premises, or that he withholds the same from him, which the plea was before understood to admit. The tenant by his own testimony proved himself in possession. That alone might not be sufficient to sustain the action; for it might be such a possession as was consistent with his right to the easement; but his erection of a potash building and a store upon the premises, and his claim to hold the whole in fee, which he urged at the trial, was evidence to justify the jury in finding, not only that he was in possession of the demanded premises, but that he withheld the same from the demandants. According to the agreement of the parties, the increased value of the land, by reason of the improvements, is to be estimated as in other cases. And the value of the land, subject to the easement, is to be ascertained, had no improvements been made on the same. The

verdict is then to be amended accordingly; the demandants having a right, if they shall so elect, to abandon the premises to the tenant, as the parties have stipulated.

The trustees of the parsonage fund in FRYEBURG *vs.* RIPLEY.

Where divers persons subscribed to a fund for the support of public worship, promising to pay to the trustees of the parish funds the sums subscribed, on condition that the trustees should manage the fund in a certain manner, and apply the income thereof to the support of a congregational minister, and to the payment of the parish taxes which might be assessed on the subscribers;—it was *held* that the promise was binding on the subscribers; the acceptance of it on the conditions prescribed, being an engagement on the part of the trustees to perform those conditions.

The subsequent change of the articles of faith adopted by the church, though in some essential particulars, does not absolve the parties from the obligation of such contract.

Assumpsit on three promissory notes made by the defendant, and payable to the plaintiffs; to which the general issue was pleaded. Of the sum demanded, the defendant resisted the payment of only one hundred dollars and interest, being the amount of his subscription to the congregational fund in *Fryeburg*.

It appeared that on the 6th day of *April*, 1822, the defendant availed himself of the provisions of the *Stat.* 1821, *ch.* 135, by withdrawing from the first parish in *Fryeburg*, so far as concerned his liability to pay taxes therein. On the 7th day of *March*, 1823, he subscribed his name and the sum of one hundred dollars, which was now in controversy, to a paper of the following tenor:—"To accomplish the great and important object of the stated ministration of the gospel in the first parish in *Fryeburg*, We, whose names are hereunto annexed, do hereby engage, promise and agree to secure to the trustees of the parsonage fund in said town, and their successors forever, by the first day of *June* next, the sums set against our names respectively; the interest of which is forever to be appropri-

ated to the support of a congregational minister in said parish." On the 9th day of *April* following, this subscription paper was delivered to the trustees, accompanied with the following conditions thereto annexed;—*first*, that the income of the fund thus created should always be appropriated "for the support of a learned, pious, faithful gospel minister, of the congregational order, settled and ordained over the church and society in the parish aforesaid," and preaching at a certain place, &c.;—*secondly*, that portions of the interest should be added to the principal, till certain periods, when the income should amount to certain sums;—*thirdly*, that if the parish should again resort to taxation, the trustees should apply the income, arising from each sum subscribed, to the payment of the taxes assessed on the subscriber;—*fourthly*, that the subscription-paper, with its conditions, should be recorded on their records, and in the registry of deeds, and a copy left with the parish-clerk; that they should annually report to the parish the state of these funds; and that the trustees and their treasurer should be under similar obligations respecting them, as they already were in regard to the parish funds arising from the sale of parsonage-lands;—and *fifthly*, that the donors might change the security given for the payment of the sums subscribed, by substituting certain others in their stead.

The defendant offered to prove that at the time he made the donation, his wife was a member of the church, and that they, with their family, usually worshipped with the first parish, having no other place of worship;—that under the ministry of their former pastor their articles of faith and covenant were couched in general terms, though recognizing the doctrine of the trinity, of a final judgment, and of the verity of the holy scriptures;—that since the subscription aforesaid, the Rev. Mr. *Hurd*, their present minister, who was settled in *September* 1823, with the church, had essentially changed the articles of faith and covenant used in that church, substituting others more particular, extended, and distinctly calvinistic, containing doctrines which neither the defendant nor his wife believed;—that the Rev. Mr. *Hurd* was settled with the expectation and belief, from his own preaching and declarations, that the sentiments embraced in the old articles of faith, and covenant, should be retained; but that after

his settlement, he contributed to aid the church to establish new ones; and that by this creed he preached against the will, and to the great annoyance of the defendant and his family.

This evidence was rejected by *Parris J.* before whom the cause was tried, and a verdict was returned by consent for the plaintiffs, the case being reserved for the consideration of the court.

Dana and *D. Goodenow*, for the defendant, argued that the promise was void in its creation, being merely *nudum pactum*. No act was done by the plaintiffs in consequence of the subscription; they have suffered no injury, nor has the defendant derived any benefit from the engagement. *Limerick Academy v. Davis*, 11 *Mass.* 113; *New Bedford corp. v. Adams*, 8 *Mass.* 138; *Essex turnp. corp. v. Collins*, *ib.* 192; *Farmington Academy v. Allen*, 14 *Mass.* 172; *ib.* 94; *Holmes v. Dana*, 12 *Mass.* 190; *Boutelle v. Cowdin*, 9 *Mass.* 254.

But if there was originally a good consideration, it has failed by the essential change of the articles of faith. The whole undertaking had respect to the articles and covenant then existing; and proceeded on the implied condition that they should remain. The adoption of others, contrary to this engagement, and to which the defendant cannot in conscience assent, absolves him from all obligation to the plaintiffs, who are merely the trustees of the parish and its church and minister.

Fessenden, for the plaintiffs, cited 1 *Com. Contr.* 16; 6 *Mass.* 58; *Lent v. Padelford*, 10 *Mass.* 230; *Davenport v. Mason*, 15 *Mass.* 85; *Bowers v. Hurd*, 10 *Mass.* 429; *Fisher v. Ellis*, 3 *Pick.* 322; *Pembroke v. Stetson*, 5 *Pick.* 506; *Amherst Academy v. Cowls*, 6 *Pick.* 427.

Mellen C. J. delivered the opinion of the Court in *Cumberland*, at the adjournment of *May* term in *August* following.

This case presents two questions for our decision. 1. Whether the note declared on was given upon a good and legal consideration; and if it was, 2. Whether there has been a failure of consideration, whereby the defendant has become discharged from all liability.

As to the first point. The cases cited by the defendant's counsel, have undergone a revision, at least many of them, in the case of *Trustees of Amherst Academy v. Cowls*, and that of *Boutelle v. Cowdin*, has been explained in the case of *Pembroke v. Stetson*. According to these later decisions, the consideration of the note in question can be liable to no objection; the promise is binding in law, as well as upon the principles of morality. The professed object of those who subscribed to the parsonage fund was to avoid those difficulties and divisions which arise in supporting a minister by parish taxes, and to preserve the interesting connexion between a pastor and his church and people. The subscribers have expressed, in plain terms, the conditions on which their donations are made; and by these, require of the trustees the performance of several duties, attended with labor and some expense. The acceptance of the donations on these conditions, amounts to an undertaking on the part of the trustees to perform this labor, and incur the necessary expense of recording the list of donations, and the directions of the donors, and furnishing copies as required by them. This acceptance and undertaking of the trustees at the request of the donors, form a good consideration for the note in question. It is a good consideration and sufficient to support a contract, if the party in whose favor the contract is made, forego some advantage, incur some expense, suffer loss, or perform duties in consequence of his placing confidence in the undertaking of the other party. *Sumner v. Williams*, 8 *Mass.* 200; *Lent v. Padelford*, 10 *Mass.* 230; *Foster v. Fuller*, 6 *Mass.* 58; *Davenport v. Mason*, 15 *Mass.* 85. But in addition to this, the donation and promise of payment, were for the benefit of each donor, by securing him from taxation for parochial purposes; or in case of taxation, by the agreement of the trustees to appropriate so much of the annual interest as would pay his parish tax raised for the support of preaching. The donations were made to an incorporated body capable of receiving them. The defendant made his note for the amount of his donation; to create a fund for valuable purposes was the object of all the subscribers; and the purposes were accomplished. We are disposed to adopt the ideas of the court in the case of *Pembroke v. Stetson*, when speaking of the de-

cision in *Boutelle v. Cowdin.* "We cannot believe it was intended by the court to lay down the proposition, that the contributors to a fund for a valuable object, being indulged with credit, instead of making immediate payment, their promise being made to a party capable of receiving it, and compellable by law to apply the proceeds of the fund according to the original intent of the contributors, is void for want of consideration." We would add that we cannot believe such a proposition to be law; we deem it equally binding, where the promisees are compellable by the terms of their own express or implied agreement to apply the proceeds of the fund as above mentioned. The defendant's first objection therefore fails.

But he contends that upon the facts of the case, he is relieved from all liability to pay the contested portion of the note declared on. If the defence is a good one, it must be so either on the ground that the terms and conditions on which he subscribed the $100 in question have been violated without his consent, and to his serious injury; or else that by virtue of our constitutional and statutory provisions he is discharged from such liability.

The terms and conditions on which the defendant and others subscribed to the fund in question are in writing, and compose a part of the contract created by such subscription; of course no parol proof is admissible to shew their extent or meaning, or any expectations on the part of the defendant, operating as motives at the time of signing the subscription paper, and making the contract it contains. Now, upon examination of this paper, we find that the only terms and conditions imposed by the subscribers to the fund were, that the interest should be "appropriated for the support of a learned, pious, faithful gospel minister of the congregational order, settled and ordained over the church and society in said parish," except what relates to the place of worship. Nothing is found in it which has any relation to the articles of faith and covenant then approved and in use in the church, or as to their continuance or alteration. It is not pretended that Mr. *Hurd* was not, at the time of subscription, and ever since has been, a learned, pious and faithful gospel minister, of the congretional order; but the complaint of the defendant is that since he was ordained, the articles of faith have been altered, and that his preach-

ing is in conformity to those articles, and to the great annoyance of the defendant and his family. On view of these facts, we cannot perceive in what respect any of the terms or conditions of the defendant's agreement have been violated or disregarded; and therefore on this point the defence must fail. Other conditions might have been inserted, upon a noncompliance with which the donation should be void and irrecoverable; or if paid, might be reclaimed and recovered back again; but it is not our province to make contracts for the parties, but to give effect to such as they have made.

The next inquiry is whether other circumstances, independent of the terms and conditions of the contract, furnish a valid defence. This, we think, is easily answered. Though by our statute, a man may, by a compliance with its provisions, relieve himself from the obligation into which a corporation, of which he was a member, entered; that is, may leave one parish and join or not join another, and thus free himself from his corporate contract; yet this principle is applicable only in such cases. But in the case before us there is no corporate contract; each subscriber has entered into a personal contract, binding him in his individual capacity. Having done this, he cannot absolve himself from his obligation, nor can the facts of which the defendant complains amount to an absolution. It is true the articles of faith have in some particulars been changed, and the doctrines inculcated by Mr. *Hurd* are different from such as were anticipated at the time of his settlement. Still, whatever effect such a change of sentiments, articles of faith, and inculcated doctrines might have upon a contract entered into between a minister and a parish, in its corporate capacity, it certainly has no influence upon an express personal contract. The opinions and ruling of the judge were correct, and there must be

Judgment on the verdict.

JONES *vs.* CARY.

The election of the moderator of a parish meeting will be valid, though the meeting was called to order, and the votes were received and declared, by a private parishoner, who assumed that authority to himself.

Ceasing to attend the religious and secular meetings of a parish, and attending the worship and supporting the ministers of another denomination, for any length of time, will not alone amount to a renunciation of membership in the parish thus left; the only mode of withdrawing, without a change of residence, being by notice in writing, as provided in *Stat.* 1821, *ch.* 135.

A subscription to raise money for the support of public worship whenever a minister of a particular sect could be procured, is not the formation of an unincorporated religious society, within *Stat.* 1811, *ch.* 6.

THIS was an action of the case, brought to recover damages against the defendant as moderator of a meeting of the first parish in *Turner*, for refusing the plaintiff's vote in the choice of a clerk.

At the trial before *Parris J.* the plaintiff proved that the defendant presided in the meeting, and refused his vote, as alleged in the writ. He also proved that his father was a member of the parish; in whose family he resided till he came of age in 1810; that both his father and himself were taxed by the parish in 1811, which was the last parish tax which had been assessed; which tax they had paid; and that in 1825, he, with others, applied as a member of the parish, to a magistrate, to call a parish-meeting, which was granted. It also appeared that in 1805, a universalist society was incorporated in *Turner*.

On the part of the defendant it was proved that at the opening of the meeting in question, the parish clerk was not present; that the defendant, as chairman of the parish committee, claimed and exercised the right to preside at the choice of moderator of the meeting; another member of the committee being present, and not objecting. It also appeared that the plaintiff had not been in the habit of attending public worship with the parish, since their new meeting house was built in 1819; though he had occasionally done so before; that he owned nothing in the new meeting house; that he

had not attended the parish meetings of the first parish till the meeting in 1825, at which his vote was rejected by the defendant; nor did the parishioners generally attend such meetings; that after the incorporation of the universalist society he usually attended its meetings for religious worship; that sometime previous to the year 1825, he united with others in a subscription paper to raise money to procure the stated services of a universalist preacher, professing therein their belief in the doctrine of the final restoration of all men; and that since that time he, with sundry others, had contributed to the completion of the universalists' meeting-house in *Turner*.

Upon this evidence the defendant contended that the plaintiff had become a member of an unincorporated religious society, within the meaning of *Stat.* 1811, *ch.* 6, commonly called the religious-freedom-act; and therefore had lost his membership in the first parish. And if not, that the evidence sufficiently showed such a dissent to being a member of the parish, as discharged him therefrom, under the *Stat.* 1821, *ch.* 135. But the judge ruled otherwise; and a verdict was returned for the plaintiff, subject to the opinion of the court upon the questions raised at the trial.

Greenleaf and *Fessenden* argued for the defendant. 1. The only person having authority to preside at the opening of a parish meeting, and choice of a moderator, is the parish clerk. This appears from a similar provision in *Stat.* 1821, *ch.* 114, *sec.* 1, respecting town meetings; and from the law which gives the moderator of parish meetings the same power, as in towns. He must therefore be chosen in the same manner. But in the present case the moderator was not so chosen, and the meeting was consequently illegally conducted, and the transactions merely void.

2. The parish-act of 1821 created no new corporators; but left the rights of membership as they stood before; which were regulated by the *Stat.* 1786, *ch.* 10, restricting the right of voting to those persons who paid a poll tax and a further sum equal to two thirds of a poll tax. So far as this provision is concerned, this statute is not repealed. And the case does not show that the plaintiff was thus qualified to vote.

3. If he ever was a parishioner, the acts of the plaintiff were suf-

ficient evidence of renunciation of that character, within the spirit of *Stat.* 1821, *ch.* 135. By this statute, membership is founded on contract, the party having the power of recision. The leaving of a written notice with the clerk is not made the only mode of divesting one's self of membership. It is only a method provided to avoid taxation. By any other equivalent acts, membership may be renounced. And here the conduct of the plaintiff was not to be mistaken.

4. The act of the plaintiff in subscribing to the support of a universalist preacher, is evidence, in connexion with the other proof in the case, of membership in "an unincorporated religious society," within the terms of *Stat.* 1811, *ch.* 6, sufficient to protect him against any claim of the first parish to tax him; and if so, to bar his right to vote in their parish affairs. *Waite v. Merrill*, 4 *Greenl.* 102, was a case of such a contract, in principle, as this.

N. Emery and *Dana* for the plaintiff.

Weston J. delivered the opinion of the Court, at the ensuing *July* term in *Waldo*.

The defendant objects to his liability in this action, because the parish clerk did not preside at the meeting, when he was chosen moderator. We do not find any thing in the law requiring this. The town clerk is to preside in the choice of moderator in town meetings; but there is no corresponding provision in the act concerning parishes, either directly, or by reference to the act regulating town meetings. The defendant, as chairman of the parish committee, opened the meeting, by reading the warrant, and called for and received the votes for moderator. His standing in the parish, justified his thus taking the first step, in the organization of the meeting. And if any other member of the parish had called the meeting to order, and had received and declared the votes for moderator, we doubt not the election would have been lawful. The acquiescence of the members generally in this assumption on the part of an individual, is indicated by their submission to his call, and proceeding to vote accordingly. We are all satified that this objection was properly overruled at the trial.

It sufficiently appears that the plaintiff had been a member of the first parish in *Turner*, and we find nothing in the case, by which his connexion with that parish was dissolved. He did not become a member of any other religious society, corporate or unincorporate, in the mode prescribed by the act of Massachusetts, respecting public worship and religious freedom, *Stat.* 1811, *ch.* 6, which was in force prior to the passage of the act of this State concerning parishes; nor in the mode prescribed by that act. Our statute provides that no person shall be compelled to join or be classed with any parish or religious society, without his or her consent; and the most perfect freedom in withdrawing from any such parish or religious society is given by the statute; but the mode of withdrawing is expressly pointed out; and it is a regulation which ought to be enforced; otherwise the greatest uncertainty would exist, as to the persons who may be entitled to the rights, or subject to the liabilities of membership. The mode is easy, simple and definite. It is by leaving a written notice with the clerk of the society, from which the party is desirous of seceding. We are clearly of opinion that it does not appear, from the facts reported, that the plaintiff became a member of any other religious society, under the statute of Massachusetts of 1811, or that he has withdrawn himself from the first parish in *Turner*, under the statute of this State.

It has been instisted in argument, that the right of the plaintiff to vote, in point of qualification, depends on the statute of Massachusetts of 1786, *ch.* 10, and it is contended that it has not been repealed in this State. Without going into a consideration of this question, we deem it sufficient to remark, that it was not raised at the trial, nor has it been reserved by the judge, or brought before us by any exception taken by counsel. It is a point not open to the defendant upon the report of the judge.

Judgment on the verdict.

Osgood *vs.* Howard.

Where a tenant at will erected a dwelling house and other buildings on the land, with the express consent of the landlord, and died; and his administrator sold them to a stranger;--it was *held* that the purchaser might maintain trover for them, against the owner of the land.

This was an action of trover for a dwelling house, barn and shop; and was tried before *Parris J.* upon the general issue.

It was admitted that the defendant, *Joseph Howard*, was owner of the land on which the buildings were erected; and it was proved that he had permitted his son *Henry* to occupy the land; by whom the buildings were erected, with the consent and assistance of the defendant. Testimony was adduced tending to prove that the aid thus rendered by the defendant was gratuitous, and without any intention of claiming any interest in the buildings thus erected. *Henry* being dead, these buildings were sold to the plaintiff by his administrator.

The defendant contended that this action would not lie. But the judge ruled otherwise; and the cause was committed to the jury upon the points of property in the plaintiff, and a conversion by the defendant; both which they found for the plaintiff; and the question of law was saved for the farther consideration of the court.

N. Emery, for the defendant, considered the maintenance of the action as a violation of all legal principles relating to its subject matter. The dwelling house was annexed to the freehold. It is not *bona et catalla*. Ejectment will lie for it. *Elwes v. Maw*, 3 *East*, 38. Burglary and arson may be committed on it. 1 *Lev.* 58; *Co. Lit.* 118. Things annexed to it go to the heir, and not to the executor; 2 *Com. Dig.* 130, 131; and *a fortiori* the house itself. No title, therefore, could have passed to the plaintiff; nor could this species of property be sued for in this form of action.

Fessenden, for the plaintiff, cited 1 *H. Bl.* 260, *note; Elwes v. Maw*, 3 *East* 38; *Lawton v. Lawton*, 3 *Atk.* 13; *Fitzherbert v. Shaw*, 1 *H. Bl.* 259; *Bull. N. P.* 94; *Penton v. Robart*, 2 *East*

88; *Taylor v. Townsend*, 8 *Mass.* 411; *Washburn v. Sproat*, 16 *Mass.* 449; *Wells v. Banister*, 4 *Mass.* 514; *Ricker v. Kelly*, 1 *Greenl.* 117; 3 *Dane's Abr.* 199; *Tobey v. Webster*, 3 *Johns.* 461.

MELLEN C. J. delivered the opinion of the Court, in *Cumberland*, in *August* following.

The question in this case seems to be a new one; or in other words, the decision of it requires the application of certain well settled principles to certain facts, where the application of them appears to be considered as a novelty. The facts before us are few and simple, and we wish to be understood as not extending our decision beyond those facts as they have been found by the jury. Cases, whose general character might resemble the present, may easily be imagined to involve several interesting and intricate inquiries; the solution of which might be attended with many difficulties. But the finding of the jury has excluded them all from the case under consideration. The buildings whose value is demanded in this action of trover were the absolute property of *Henry Howard*, the deceased, at the time of his death. The land on which they were erected was then, and continues to be the property of the defendant. They were erected on the land by his express consent. The buildings have been fairly purchased by the plaintiff, and they are his absolute property; and the defendant has converted them to his own use. Now, the question is, why should not this action be maintained? Almost all the cases which have been cited on both sides, are those between lessor and lessee, or heir and executor; and they were decided upon principles of policy, or the mere nature of the property in question, independently of any express contract in relation to the subject; the former, according to those usages between landlord and tenant, which were established and respected for the benefit of trade, and, in some instances, of husbandry; and the latter, accordingly as the subject in question partook most of the realty or personalty—whether attached or not to the freehold. We apprehend that such cases cannot be of much use in the determination of the case at bar; for in this, the express agreement between the defendant and his son as to the erection of the buildings converted by the defendant, places the subject

on other grounds, and at once settles the respective rights of the owner of the land and the owner of the buildings. It is not denied that if one erects a building on the land of another wrongfully, the building immediately becomes attached to the freehold, and the property of the owner of the land; but the case is different in respect to erections which are sanctioned by the relation between landlord and tenant; and for reasons still stronger, when buildings are erected by one man on the land of another, under his express license and agreement, as was the fact in the instance before us. The case of *Wells v. Banister & al.* 4 *Mass.* 514, seems directly in point. There the facts were that a son built a dwelling house on his father's land, and by his express permission. The court, then consisting of *Parsons C. J.* and *Sewall* and *Parker* justices, in giving the opinion say "the property of the house is personal property of the son, he having no estate in the land." We understand that, among the profession, this is the principle recognized and acted upon in practice; that such property is considered personal, and is accordingly always sold on execution in the same manner as all other personal estate is sold at auction. Should we decide this cause in opposition to the abovementioned principle and practice, we should open a door to innumerable frauds, which might be effectually committed with impunity. A person might erect expensive buildings on the land of a friend in whom he could confide, by his express permission; and thus, in case of failure in business, perhaps a contemplated or intended failure, he would enjoy a home and ample accommodations, at the expense of his defrauded creditors; for if the buildings became the property of the owner of the land, then his creditors could not seize them on execution; and the friend could not be adjudged the trustee of the builder, in consequence of their standing on his land, because the houses are neither goods, effects or credits of the builder. We do not perceive any reason why there should not be

Judgment on the verdict.

Fisher *vs.* Ellis *& al.*

To an action of debt on a bond taken pursuant to *Stat.* 1821, *ch.* 282, respecting poor debtors, a plea of performance in the words of the condition will be sufficient; though the condition, as prescribed in the statute, does not include all which, by the same statute, is necessary to be done for the debtor's enlargement.

This was an action of debt on a gaol-bond, taken pursuant to *Stat.* 1824, *ch.* 282; conditioned that the debtor should appear at the house of a certain justice of the *quorum* on a certain day, being the day appointed for taking the poor debtor's oath; and in case the justices to whom the notification might be returned should not allow his discharge, that he should, within ten days thereafter, surrender himself to the officer who made the arrest, or to the keeper of the goal. The defendants, after *oyer*, pleaded performance of the bond, in the words of the condition. To which the plaintiff demurred.

N. Emery and *R. Washburn*, in support of the demurrer, argued that the statute and the bond should be taken together, the latter being virtually conditioned for a compliance with all the requisites of the statute. Hence it should appear that the debtor had caused the creditor to be notified of the time and place appointed for taking the oath; that the notification was returned to two justices of the *quorum*, before whom the debtor appeared at the time appointed; that the justices made a record of their proceedings, and forthwith certified the same to the gaoler; that the officer had notice of these proceedings, and that he was thereby entitled to commit the debtor to prison; and that the execution was still in force. If the latter was not true, a surrender to the officer was nugatory and improper; it should have been made to the keeper of the prison. The plea, being silent in all these respects, is substantially bad.

R. Goodenow, for the defendants, cited *Story's Pl.* 294, *note*; *Baker v. Haley*, 5 *Greenl.* 243; 1 *Chitty's Pl.* 522; *Bailey v. Rogers*, 1 *Greenl.* 186.

WESTON J. delivered the opinion of the Court, at the ensuing *July* term in *Waldo.*

The statute of 1824, *ch.* 282, introduced certain new provisions in favor of debtors arrested on execution, who might be desirous of being discharged upon taking the oath, prescribed by the act for the relief of poor debtors. It is not uncommon that laws, innovating upon the course required by former laws, are found defective in practice; requiring subsequent explanation, or additional provisions to render them effectual. Whether difficulties of this kind led to a repeal of this act, which took place in four years after its passage, by *Stat.* 1828, *ch.* 410, or whether the legislature became dissatisfied with the policy of the act, we have no means of ascertaining. Upon examining its provisions, and comparing the act with the condition of the bond before us, we find that it conforms thereto; but it does not appear to be sufficient to secure the performance of all the duties, which the law doubtless intended to impose upon the debtor.

The statute does not in terms direct who shall cause the notification to the creditor to be served and returned; or who shall cause two justices of the peace and of the *quorum* to convene, at the time and place appointed for the caption of the oath. As the law was made for the benefit of the debtor, we have no doubt these duties were intended to be imposed upon him; and if the bond had been conditioned for their performance, which the security of the creditor required, a failure in either of these duties would have constituted a breach of the bond. To multiply or extend the conditions against a surety, would neither be legal nor reasonable. He might well say, *non in hæc fœdera veni*; and this ought to be in all cases a sufficient answer.

The defendants have pleaded a performance of all the conditions expressed, or necessarily implied, in the bond. This has been admitted by the demurrer. It is urged that this plea is insufficient, because it is not therein averred that the debtor caused the creditor to be notified, or that such notice was returned; or that he appeared before two justices of the *quorum*; or that a certificate of the justices was returned to the keeper of the gaol; or that the execu-

tion was in force at the time of the surrender. All this, except keeping the execution in force, which could not devolve upon the debtor, it might be very necessary and proper for him to do, or cause to be done; but they are duties to which the condition of the bond does not extend. If it does not secure what the legislature intended, we have no authority to enlarge its terms.

If the conditions have not been performed in good faith, or there has been any fraudulent conduct on the part of the defendants, the plea might have been avoided by a replication, containing averments to this effect. *Plea in bar adjudged good.*

PINGREE, *treasurer, &c. vs.* WARREN *& als.*

In an action by a town treasurer on a collector's bond given to his predecessor in office, such predecessor is not admissible as a witness for the plaintiff, to disprove the payment of money for which the collector held his receipt.

THIS was an action of debt, on a bond given to *Barnabas Brackett*, the plaintiff's predecessor in office, as treasurer of the town of *Denmark*, and to his successors, by *Henry Warren*, the principal defendant, conditioned for his faithful execution of the office of collector of taxes in that town, for the year 1826. The defendants, after *oyer* of the bond, pleaded a general performance of the condition; to which the plaintiff replied, assigning a breach in not paying over divers sums of money collected; on which issue was taken.

At the trial before *Parris J.* the defendants offered in evidence a receipt given by *Brackett*, as treasurer, to *Warren*, purporting to be in full of all taxes committed to him to collect, up to *March* 1827. To explain this receipt, and show that it was not intended to be in full of the assessment of 1826, the plaintiff offered *Brackett* as a witness; to whose competency the defendants objected. The judge overruled the objection, but reserved the point for the consideration of all the judges, a verdict being returned for the plaintiff.

Fessenden, for the plaintiff, contended that the witness was admissible;—1st, because he was not interested in the event of this suit, the proceedings in which could never be used in evidence for or against him. There is only a bare possibility that an action may be brought against him; which is no objection to his competency. It is only a legal and fixed interest in the event of the suit, that excludes the witness from being heard. *Carter v. Pearce*, 1 *D. & E.* 163; *Bent v. Baker*, 3 *D. & E.* 27; *Bell v. Harwood*, *ib.* 308; *Smith v. Prager*, 7 *D. & E.* 62; *Abrahams v. Bunn*, 4 *Burr.* 2251; *Revere v. Leonard*, 1 *Mass.* 93; *Bliss v. Thompson*, 4 *Mass.* 488; *Page v. Weeks*, 13 *Mass.* 199; *Stockham v. Jones*, 10 *Johns.* 21; *Owings v. Speed*, 5 *Wheat.* 420.

2. *Brackett* was merely the agent of the town; and as such is admissible, *ex necessitate rei*. *Benjamin v. Porteus*, 2 *H. Bl.* 590; 11 *Mod.* 226; 1 *Atk.* 248; 3 *Wils.* 40; 1 *Stra.* 647; 1 *Salk.* 289; 3 *Campb.* 144; *Bull. N. P.* 289; *Adams v. Davis*, 3 *Esp.* 48; *Mathews v. Haydon*, 3 *Esp.* 509; *Livingston v. Swanwick*, 2 *Dall.* 300; *Brown v. Babcock*, 3 *Mass.* 29; *Herman v. Drinkwater*, 1 *Greenl.* 27; *Gifford v. Coffin*, 5 *Pick.* 447; *Burlingham v. Dyer*, 3 *Johns.* 189; *Brownson v. Avery*, 1 *Stra.* 507; *Union Bank v. Knapp*, 3 *Pick.* 96.

Dana and *D. Goodenow*, for the defendants, cited *Bliss v. Thompson*, 4 *Mass.* 488; *Widgery v. Haskell*, 5 *Mass.* 144; *Pierce v. Butler*, 14 *Mass.* 303; *Emerton v. Andrews*, 4 *Mass.* 653.

Mellen C. J. delivered the opinion of the opinion of the Court, in *Cumberland*, in *August* following.

The only question in this case is whether *Brackett* was a competent witness to disprove the fact stated in the receipt, which he had, when town treasurer, given to *Warren* the collector. There is no question as to the right to explain the language of a receipt by proper evidence. Was *Brackett* so interested as to be an inadmissible witness for the purpose? As the receipt stands, if not falsified by proof *aliunde*, it constitutes a good defence to the action. If the defendant *Warren* is thus discharged from accountability, an action will immediately lie against *Brackett* by the town treasurer, and

Brackett's receipt will be good evidence to maintain such action, unless its accuracy and truth can be disproved by him; but if he is permitted to testify in this action, and by his own oath disprove the receipt, in whole or in part, and thereby enable the plaintiff to recover of *Warren* and his sureties the amount of the alleged mistake or falsehood in the receipt, he will, in so doing, shield himself from all pretence of liability to the town. An indorser of a note cannot be a witness for the indorsee in an action against the maker; because a judgement in that action has a direct tendency to relieve him from his liability as indorser. What but this contingent responsibility renders the indorser of a writ, the bail, or surety in a replevin bond, incompetent witnesses for those whose sureties they have become? The success of the present action will save *Brackett* harmless; the failure of it, on account of the absence of his testimony, immediately exposes and subjects him to an action on the part of the town for the contested amount. Can he then be a competent witness? Is he not directly interested? See *Schillinger v. McCann*, *ante. p.* 364, and cases there cited.

But it is contended that *Brackett* was a mere agent of the town, and that an agent or factor is by law a good witness. Such is the principle, and it is well known to be an exception from the general rule. But we do not perceive that such a character belongs to *Brackett.* He certainly is not the agent of the plaintiff; there is no privity between them; nor does there exist in this case that necessity, which can bring the witness within the exception; on which necessity the exception is founded.

Verdict set aside, and new trial granted.

DENNETT *vs.* KNEELAND, *in certiorari.*

Prosecutions under the bastardy-act of 1821 *ch.* 72, are not local.

It is essential, to a prosecution under *Stat.* 1821, *ch.* 72, that the mother of an illegitimate child accuse the putative father during her travail, and before delivery.

But it is not essential that this fact be alleged in her complaint, since this may be made before the event has happened.

THE record in this case, which was a prosecution under the bastardy-act, being brought up by *certiorari*, *Dana* and *Fessenden*, for *Dennett*, the putative father of the child, moved that it might be quashed; *first*, because the prosecutrix had not alleged, in her complaint, that she accused the respondent in the time of her travail; *secondly*, because, though it appeared that the child was begotten and born in the county of *Cumberland*, yet the prosecution was instituted in the county of *Oxford*, where only the mother resided; and *thirdly*, because the prosecutrix was admitted as a witness, when it appeared that she did not accuse the respondent as the father of the child till a short time after it was born, though before the pain and peril of her situation were over.

D. Goodenow, for the prosecutrix, replied to the *first* objection, that no such allegation was necessary, she not being a competent witness to prove that fact. To the *second*, he cited *Commonwealth v. Cole*, 5 *Mass.* 517; to show that the prosecution was not local, not being so made by statute.

To the *third* objection he argued that the mother was a competent witness, upon the principles of the common law, from the necessity of the case. The sound rule on this point is laid down by chief Baron *Gilbert*, that where a statute cannot be executed without admitting the party as a witness, there, of necessity, he must be admitted. *Gilb. Ev.* 114; 1 *Phil. Ev.* 96; *Rex v. Johnson*, *Willes* 425 *note c*; *Rex v. Carpenter*, 2 *Show.* 47. On the same principle the plaintiff was admitted in *Herman v. Drinkwater*, 1 *Greenl.* 27.

But if any accusation by the mother is necessary, here was all, in this case, which the statute can reasonably require. It must receive such a construction as will not defeat its beneficial intent. The time of travail, must therefore be taken to include the whole period of pain and danger, as well after as before the birth of the child; otherwise, its wholesome provisions will be of no avail in all casses of accident, terror, forgetfulness of the attendants, or sudden and unexpected parturition.

Weston J. delivered the opinion of the Court, at the ensuing term in *Lincoln.*

It is objected that the complainant has not alleged in her complaint, that she accused the party charged in the time of her travail. This cannot be regarded as essential, inasmuch as the complaint may be made, and the party held to answer, before delivery.

In *Commonwealth v. Cole*, 5 *Mass.* 118, *Parsons C. J.* says that these prosecutions have usually been brought in the county where the child is born; and that they may generally be there tried, with most convenience. But he adds, that the statute has not made them local, and that there has been no decision upon this point. If neither the statute, nor any judicial construction, which can be adverted to, has limited a complaint of this sort to the county where the complainant is delivered, we are not satisfied tha the objection taken on this ground can be sustained.

But we are all of opinion, as she did not accuse the respondent with being the father of the child, in the time of her travail, before delivery, that this is a defect fatal to her prosecution. After delivery, and before the removal of the after-birth, the mother may, and doubtless does, suffer much pain; and the solemnity of the crisis, and a consciousness of danger, may continue to affect her mind and conscience; although probably with less force, from renewed hopes, and apprehensions somewhat allayed. And the statute has made her a competent witness only if she accuse in the time of her travail, and before delivery. The statute of Massachusetts upon this subject, which is similar to our own, has there received a judicial con-

struction, to this effect, since the separation. *Bacon v. Harrington*, 5 *Pick.* 63.

It is however insisted that, independent of the statute, she is a competent witness from the necessity of the case. If the statute had authorized the complaint, without prescribing conditions, or the mode of proof, there would be weight in this argument. The necessity of receiving her as a witness, would be as strong as that under which the plaintiff is allowed to testify in England, in prosecutions under the statute of *Winton*; and under the statute made to prevent bribery at elections. But the right to prosecute is derived altogether from the statute, and the accusation in question is there made an essential preliminary to the adjudication, that the party charged is the putative father.

Proceedings quashed.

The STATE *vs.* SMITH.

A husband and wife having separated, pursuant to articles previously entered into, in which he had stipulated that in the event of such separation the children should remain with her; the court, on *habeas corpus* sued out at his request, ordered the children into the custody of the mother, pursuant to the articles of separation; she living with her father, and they being of an age to require her care.

But independent of such articles, the court, in such cases, in the exercise of its sound discretion, and for the good of the children, will only free them from undue and improper restraint; the father having no vested right, in any case, to the exclusive custody of his children.

THIS case is stated in the opinion of the Court, delivered by

PARRIS J. Previous to the last term a writ of *habeas corpus* was granted, by one of the justices of this court, directed to the defendant, requiring him to bring up the bodies of *Emeline Maria Hall*, *Solomon Smith Hall*, and *Aaron Oliver Hall*, minors under the age of fourteen years, and children of *Jonathan Hall*, the petitioner, alledged to be wrongfully restrained of their liberty by the defendant,

and by him held in duress, against their will and the will of their father. The writ was returned at the last term holden in this county, and the children were produced in court to await its decision. From the return it appears, that the petitioner married the defendant's daughter, and that the children, described in the writ, are the issue of that marriage; that the eldest is between ten and eleven, and the youngest between four and five years of age;—that sometime in the preceding *February*, the petitioner brought the eldest child to the defendant's dwelling house and left her there, and that in the afternoon of the same day the petitioner's wife came, bringing with her the two other children named in the writ, and that she, with her three children, have continued to live and dwell in the defendant's family ever since, without any force or restraint on his part against them, the children being under the management and direction of their mother. It further appears that by certain articles of agreement, under seal, entered into by the said petitioner and defendant, the former, some years since, conveyed a moiety of his farm in trust for the use and benefit of his wife; that the defendant was one of the trustees, and that the petitioner, by said articles of agreement, stipulated that "if, in consequence of any ill treatment by him, his wife should be rendered unhappy and unwilling to cohabit with him, and should make affidavit that she is so treated by him as that she cannot live happily with him, then she may live separately from him at her own pleasure, and shall be at liberty to take the children under her own control and custody, and keep them so long as they, the said petitioner and his wife, should live apart;" that the said petitioner's wife did on the seventeenth of *March* last make affidavit that the "ill treatment she had continually received from him, the said petitioner, is such that she cannot live with him in peace and quietness, and much less in happiness," and that they have ever since continued to live separate and apart from each other. It further appeared in evidence, that, immediately previous to this separation, the petitioner had been charged as the father of an illegitimate child, and had settled for the same, by note with sureties;—that the other moiety of his real estate and all his personal property had been conveyed by

deed of mortgage and bill of sale, to indemnify his sureties, and for the payment of his other debts.

The children being now in the custody of the mother, and in court by her permission and consent, the petitioner seeks to reclaim them through the interposition of the law, alleging his paramount right to their custody, and that the court is not at liberty, in the exercise of any discretionary power, to deny his petition.

That the father is generally entitled to the custody of his infant children, is a principle resulting from his obligation to maintain, protect and educate them. These are duties thrown upon him by the law of nature, as well as of society, which he is not permitted to disregard, and which he could not conveniently discharge, if the object of those duties were withdrawn from his control.

This right is, however, neither unlimited nor unalienable. It continues no longer than it is properly exercised; and whenever abused, or whenever the parent has become unfit, by immoral or profligate habits, to have the management and instruction of children, courts of appropriate jurisdiction have not hesitated to interfere to restrain the abuse, or remove the subject of such abuse from the custody of the offending parent. 4 *Bro. Parl. Cas.* 302; *Amb.* 301; 2 *Bro. Ch. Rep.* 500; 10 *Ves.* 52; 12 *Ves.* 492; *Jacob's Rep.* 267. The existence and origin of this power was elaborately considered in the late case of *Wellesley v. The Duke of Beaufort*, 2 *Russ.* 1, wherein Lord *Eldon* is reported to have said, that "what he was called upon to do (to deprive the father of the custody of his children) was a strong measure; that the interposition of the court stood upon principles which it ought not to put into operation without keeping in view all the feelings of a parent's heart, and all the principles of the common law with respect to parents' rights." In that case the mother was dead, and there existed no parental feelings adverse to those of the father. He was not seeking to withdraw his children from the society of their mother, but from the custody of relatives more remote, and yet his application was denied by the Chancellor, and the decision was confirmed, on appeal, by the House of Lords.

These authorities are not cited as precedents for a common law court, but they do establish the fact, that the right to control paren-

tal authority has been claimed and exercised by the appropriate court in England for more than a century.

The principle of depriving the father or the mother of the guardianship of their children, on the ground of notorious misconduct, is also distinctly recognized in the civil code of France, *art.* 444, 389; and, in cases of separation between husband and wife, the father's right to the children is altogether rejected, and the courts entrust the children to him, or to the mother, or to a third person, as the interests of the child render expedient. *Pail.* 134, *note e.*

So the father, under our statute, may waive his parental rights, and transfer his power over, and assign the services of his minor children to another, without their consent, until they arrive at the age of fourteen; and it has been holden by the Supreme Court of Massachusetts, in an opinion delivered by the late learned Chief Justice, that, at common law, he may even transfer this power for a longer period, limited only by the child's minority and the father's life; and that, notwithstanding the statute, all contracts of service, legal at the common law, still remain so. *Day v. Everett*, 7 *Mass.* 145, cited by defendant's counsel. The soundness of this doctrine, to the extent in which it is laid down in the case just cited, has been questioned by Mr. Justice *Story* in *United States v. Bainbridge*, 1 *Mason*, 78, 85; and in another court of high authority it has been decided that the statute must be considered as controlling the common law. 8 *Johns.* 328, *Ex parte McDowle.* Be that as it may, there can be no doubt but, under our statute, a father may transfer his right to the custody of his children until they arrive at the age of fourteen, without their consent. The subjects of this process are all under that age. From the articles of agreement recited in the return, and which are not controverted, it appears that the petitioner did consent that, upon a certain contingency, his wife should be at liberty to take the children under her own control and custody, and keep them so long as the parents continued to live apart from each other; and that this contingency has happened, manifestly through the misconduct and fault of the petitioner. For it could not be expected that his wife would "live happily with him," or that his conduct would fail "to render her situation unhappy," whenever it should

come to her knowledge. She therefore, separated from him as she was justified in doing, as well by law as his own agreement, and taking the children with her, returned to her father's; to whom the petitioner had conveyed property in trust for her use and support.

Upon this evidence, the decision of the cause might, perhaps, be placed on the voluntary transfer by the father of all his authority over these children to the wife, and that having so transferred his power and waived his parental rights, he ought not to be permitted now to reclaim them against her.

But there is another view of this case which seems to be supported by high and unquestionable authority. The object of the writ of *habeas corpus* is to remove illegal or improper restraint, and when that is done, the power of the court in the premises is completely exhausted. From the preamble to the act directing this process, as well as the act itself, it is manifest that its object was merely to afford relief from every wrongful imprisonment or unlawful restraint of personal liberty. The fifth section provides that if it shall appear that the imprisonment or restraint is without due order of law or sufficient cause, the person imprisoned or restrained "shall be discharged from such commitment or restraint." Now the restraint in this case is nothing more than of the parental character, exercised by the mother for the benefit of her children, and such as the law permits or even enjoins to be exercised by all who are clothed with parental authority. It does not appear that the children are dissatisfied with remaining with the mother, or that they have expressed any wish to be returned to the care of their father.

Two of them are not of such age as to render it expedient to consult their wishes. Neither does it appear that the mother is less capable or disposed than the father, properly to govern and instruct them; or that they would be better supported under his control than in their present situation. He, however, claims to have the custody and care of them as of right, and calls upon the court to enforce this right.

In *Rex v. Delaval*, 3 *Burr.* 1434, Lord *Mansfield* said "in writs of *habeas corpus* directed to private persons to bring up infants, the court is bound, *ex debito justitiæ*, to set the infant free from an im-

proper restraint, but they are not bound to deliver them over to any body. This must be left to their discretion according to the circumstances that shall appear before them." In *Rex v. Smith*, 2 *Strange*, 982, a boy under fourteen was brought up on *habeas corpus*, sued out by his father to obtain possession of him from his aunt; but the court merely left the boy at liberty to go where he pleased, and he chose to stay with his aunt. In *Commonwealth v. Addicks, & ux.* 5 *Binney*, 520, the father claimed the custody of his two children, one ten, the other seven years of age. They were brought up on *habeas corpus* by the mother, where it appeared that she had been guilty of adultery, that the father had been divorced from her *a vinculo* for that cause, that she had married the adulterer, in violation of law, and was then living with him. Chief Justice *Tilghman*, in delivering the opinion of the court, observed "we have considered the law, and are of opinion that although we are bound to free the person from all illegal restraints, we are not bound to decide who is entitled to the guardianship, or to deliver infants to the custody of any particular person, but we may in our discretion do so, if we think that, under the circumstances of the case, it ought to be done." The court, however, refused the application, and permitted the children to remain with the mother. In the case of *M. E. Waldron*, 13 *Johns.* 418, the minor was residing in the family of her maternal grandfather, her mother being dead. The case came before the court on *habeas corpus* to the grandfather, sued out upon the application of the father, who claimed the custody of his daughter.—Chief Justice *Thompson*, in delivering the opinion of the court, referred with approbation to the principles laid down in *Rex v. Delaval* and added, "in the present case the child cannot be considered under any improper restraint. The case of *Commonwealth v. Addicks* is very much in point, and a strong corroboration of the principle that it is a matter resting in the sound discretion of the court, and not matter of right, which the father can claim at the hands of the court." The application of the father was denied, and the minor permitted to remain in the family of the grandfather. The last authority to which I shall refer is *United States v. Green*, 3 *Mason*, 482. In that case a writ of *habeas corpus* had been issued upon

the petition of *Putnam*, a citizen of New-York, against *Green*, a citizen of Rhode Island, to bring up the body of *Eliza A. Putnam*, an infant daughter of the petitioner, about ten years old, alleged to be wrongfully detained in the custody of the defendant, who was her grandfather. In pronouncing the opinion of the court, *Story J.* said, "as to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of its natural protector both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interest of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint, and endeavor, as far as possible, to administer a conscientious, parental duty with reference to its welfare. It is an entire mistake to suppose that the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody."

From an examination of these authorities, I consider the law well settled, that it is in the sound discretion of the court to alter the custody of these minor children or not, and that the father cannot claim them as matter of right. In the exercise of that discretion under which I am presumed to act in this case, I cannot forget that the eldest of these children is a daughter, requiring peculiarly the superintendance of a mother;—that the others, although males, being of tender ages, may probably be as well governed and instructed by her as by the father, especially as it is in evidence, from the petitioner's witnesses, that she is a "smart, industrious woman, and a kind, good mother";—that the parental feelings of the mother toward her children are naturally as strong, and generally stronger than those of the father;—that the separation of the heads of this family has been caused by the imprudent conduct of the petitioner, and that by his voluntary act he consented, in case of such separa-

tion, to relinquish to the mother the right of custody and control of her children, and conveyed a moiety of his real estate in trust for her support, and that the residue of his property is mortgaged and conveyed to indemnify his sureties and for the payment of his debts. All these considerations seem to require that this application should not be granted; and in this opinion my brethren unanimously concur.

Fessenden, for the petitioner.

N. Emery, for the respondent.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF LINCOLN, MAY TERM, 1830.

STIMPSON *vs.* SPRAGUE *ad'x.*

Assumpsit lies against an attorney for negligence in transacting the business of his profession; and this cause of action survives against his administrator.

THIS was an action of *assumpsit*, against the administratrix on the estate of the late *Joseph Sprague*, Esq. a counsellor of this court; in which the plaintiff declared on a general undertaking and promise of the intestate, in consideration of his fees to be paid, to conduct a certain suit in a proper, skilful and diligent manner; and for the securing of the debt sued for in that action, to sue out execution upon the judgment, and deliver it to an officer within thirty days after the rendition of judgment; and alleged his neglect in this particular, whereby the attachment of the debtor's goods was dissolved, and the debt lost. The second and third counts were the general counts for money had and received, and for money laid out and expended. After verdict for the plaintiff, the defendant moved in arrest of judgment that the cause of action stated in the first count, to which alone the evidence applied, being founded in the alleged negligence of the intestate, did not by law survive.

Allen and *Farley*, for the defendant, cited *McMillan v. Eastman*, 4 *Mass.* 378; *Cravath v. Plympton*, 13 *Mass.* 454; *Todd v. Brad-*

ford, 17 *Mass.* 567; *Stebbens v. Palmer*, 1 *Pick.* 79; *Holmes v. Moore*, 5 *Pick.* 257.

Greenleaf and *Ruggles*, for the plaintiff, cited 2 *Saund.* 216, *note*; *Paine v. Ulmer*, 7 *Mass.* 317; *Troup v. Smith's ex'rs* 20 *Johns.* 33; 1 *Chitty's Pl.* 53, 91; 2 *Ld. Raym.* 973; 7 *East* 134, 136; *Hambly v. Trott*, *Cowp.* 376.

MELLEN C. J. delivered the opinion of the Court at the ensuing *June* term in *Kennebec.*

The only question for decision arises upon the motion in arrest of judgment, founded upon the first count; it not being contended that there was any evidence on trial applicable to either of the other counts. The counsel contends that the cause of action set forth in the first count does not by law survive against the defendant as administratrix. It certainly is an established principle of law that actions founded on a contract made by a testator or intestate survive against the executor or administrator. The case, however, of a promise to marry, seems to be an exception, as settled in *Stebbins v. Palmer*, cited in argument, and in the cases there mentioned. The only material inquiry, then ,to which we are required to direct our attention, is whether an action of *assumpsit* would have been maintainable against the intestate in his life time, to recover damages sustained by the plaintiff by reason of the negligence alleged; for if so, then the present action is well founded. We are not called upon to decide whether an action of *assumpsit* will lie against a sheriff or his deputy, or a coroner, or any other legal officer, for a neglect of his official duty. The usage has been in such cases to declare in a special action on the case, describing the negligence or malfeasance. In the case of *McMillan v. Eastman*, *Parsons C. J.* says, "the remedy against a public officer, for neglect or misbehaviour in executing his office, is generally by an action of the case, alleging his misdemeanor, or sometimes by an action of debt, according to the nature of his misfeasance, but not by an *assumpsit* as implied by law." *Sprague*, the intestate, was not a public officer, and therefore does not necessarily come within the limitations above specified. The general principles in relation to this

subject are clearly stated by *Archbold* in his digest of the law relative to pleading and evidence pages 23, 24. "If a man undertake an office, employment, trust or duty, he thereby, in contemplation of law, impliedly contracts with those who employ him, to perform that with which he is entrusted, with integrity, diligence and skill; and if he fail so to do, it is a breach of contract, for which the party may have his remedy by action on the case, or, in most cases, by action of *assumpsit*." Here the principle, so far as relates to an office or officer, does not accord with the doctrine as laid down by *Parsons C. J.* in the above case of *McMillan v. Eastman*. *Archbold* further observes—"So if through any gross and culpable negligence of an attorney, his client be damnified, the client may have his remedy by action of *assumpsit*, or action on the case. And in 1 *Chit. Pl.* 92, it is said that *assumpsit* lies upon contracts to serve, and perform works, and against attorneys and solicitors, wharfingers, surgeons, inn-keepers, carriers and other bailees for neglect or for breach of duty. In 2 *Chit. Pl.* 96, is the form of a declaration in *assumpsit* against an attorney for neglect and breach of duty. The case of *Church & al. v. Mumford*, 11 *Johns.* 479, supports the same principle. It was an action against an attorney for negligence in the management of certain business entrusted to his personal care. The court considered all the three counts as in *assumpsit*. *Thompson J.* in giving the opinion of the court says, "The *gravamen* alleged is a breach of duty arising out of an employment for him; and the same circumstances which shew a breach of duty, amounting to a tortious negligence, shew also a breach of promise, implied from the consideration of hire. A party may generally declare either way;" that is, in case or *assumpsit*. So in *assumpsit* against a tenant for not using a farm in a workmanlike manner, according to the customary course; the plaintiff must prove the occupation, and the promise results. 1 *Stark. Rep.* 82; *Powley v. Walker*, 5 *D. & E.* 373; *Leigh v. Hewet*, 4 *East*, 154. So in *Nelson v. Aldridge*, 2 *Stark. Rep.* 384, the plaintiff declared in *assumpsit* against an auctioneer for having recinded a contract of sale which he had made, contrary to his duty as auctioneer; it was held that the action was maintainable upon the promise implied

by law from the employment of the auctioneer, and his sale of the goods, without proof of an express promise not to rescind the contract. In *Hambly v. Trott, Cowp.* 372, the principle as laid down by Lord *Mansfield* is this—" Where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labor or property of another, or a promise of the testator express or implied ; where these are the causes of action, the action survives against the executor." The court observe in *Stebbins v. Palmer*—" where there is a duty as well as a wrong, an action will survive against the executor. He is responsible for the debts of the deceased, and for all undertakings and acts that create a debt, as far as there are assets." The distinction, as stated by the court, is, that causes of action which affect the estate, survive for or against the executor ; those which affect the person only do not.

An attorney, by presenting himself to the community as such, impliedly engages and promises to those who employ him that he will faithfully and carefully transact the business which may be entrusted to him ; and when this engagement is disregarded and promise violated by his unfaithfulness or inexcusable inattention, he, or his executor or administrator, must respond in damages to the injured party. In the present case, though Mr. *Sprague*, the intestate, sustained the fairest reputation in his private and professional life, yet in the instance stated in the plaintiff's declaration, the jury have decided that he did not exercise that care and watchfulness which his duty required ; and that in consequence of his inattention the plaintiff's loss has been sustained. We think that on legal principles the motion in arrest of judgment cannot be sustained. There must be

Judgment on the verdict.

COLSON *vs.* BONZEY.

The register or enrolment of a vessel at the custom house is not conclusive evidence of ownership.

Hence the mortgagee of a ship, not in possession, though he appears in the ship's papers as the sole owner, is not liable for supplies directed by the master.

THIS was action for supplies furnished to the defendant's vessel by order of the master; and came up by exceptions to a nonsuit ordered *pro forma* by *Smith J.* by consent of parties in the court below.

It appeared that in 1825 the vessel was conveyed to the defendant in mortgage, by *Alexander Staples*; the conveyance being apparently absolute, and a separate bond of defeazance being executed at the same time. She continued, however, in the employment and under the control of the mortgagor, and of his brother *Joshua Staples*, who was master and afterwards owner, till *August* 1828, when she was condemned and sold for a violation of the revenue laws. In 1827, when she was under a fishing license, the bounty was received by the defendant. The supplies were furnished in *April* 1828, to *Joshua Staples* the master; who testified that he then considered himself the sole owner, the defendant having previously, on the renewal and substitution of his notes for those of *Alexander*, offered to discharge his lien on the vessel; and that he then informed the plaintiff that he was the sole owner, and paid him in part for the supplies; and that he still expected and intended to pay him the residue. The defendant had not received any of her earnings, except the bounty in 1827; nor had he claimed any interest in her, after he gave up the notes of *Alexander* in exchange for those of *Joshua Staples*.

Mitchell, for the plaintiff, relied on the register as incontrovertible evidence of property; *Marsh v. Robinson*, 4 *Esp.* 98; and cited *Westerdell v. Dale*, 7 *D. & E.* 306, to show that a mortgagee, out of possession, was liable for repairs.

Allen, for the defendants, cited *Hussey v. Allen*, 6 *Mass.* 164; *James v. Bixby & al.* 11 *Mass.* 34; *Reynolds v. Toppan*, 15 *Mass.*

370; *Dame v. Hadlock*, 4 *Pick.* 458; *Perry v. Osborn*, 5 *Pick.* 422; *Frazer v. Marsh*, 13 *East* 238; *Cutler v. Winsor*, 6 *Pick.* 335; *Briggs v. Wilkinson*, 7 *Barnw. & Cresw.* 30; *Champlin v. Butler*, 18 *Johns.* 169.

WESTON J. delivered the opinion of the Court, at the ensuing *July* term in *Waldo*.

Ship owners are answerable for repairs done, or supplies furnished for their ships, by order of the master; he being their agent; and they receiving the benefit of such repairs or supplies. The defendant was the registered owner of the vessel, when the supplies in question were furnished. It appears however from the deposition of *Joshua Staples*, that at that time, the defendant held the vessel, as security for money due him from the said *Joshua*, and from *Alexander Staples*. They had a bond from the defendant for a bill of sale, whenever they paid the money, for which the vessel was pledged. Prior to these supplies, *Alexander* had relinquished all his interest to his brother *Joshua*. It further appears that the defendant never had the possession, management or direction of this vessel; but at the time of the supplies, she was under the exclusive control of *Joshua Staples*. From these facts it is manifest, that the defendant was a mortgagee of the vessel, not in possession.

In *Jackson v. Vernon*, 1 *H. Bl.* 114, it was expressly decided, that a mortgagee of a ship not in possession, is not liable for supplies furnished to such ship. The master is not his agent. He does not appoint him; nor does he receive the freight or earnings of the ship. This principle is fully supported by the cases cited for the defendant. The cases of *Westerdell v. Dale*, and of *Marsh v. Robinson*, cited for the plaintiff, turned upon the provisions of the English registry acts, wherein transfers of ships, or of any interest therein, are declared void; unless certain formalities prescribed are pursued. There is no corresponding provision in the act of Congress, concerning the registering and recording of ships or vessels. If the course required by our statute is not pursued, the transfer is not thereupon void; but the vessel loses the character and privileg-

es of an American bottom. Hence, in this country, the register is not conclusive proof of ownership, and other evidence is admissible. In later cases even in England, it has been held that notwithstanding the registry acts, which were passed for the security of the revenue, and to prevent foreign ship owners from enjoying the privileges of British subjects, the legal owner, or he who appears by the register to be such, is not liable for supplies directed by the master, if it appears that the latter was not his agent, nor the supplies furnished for his benefit. *Young v. Brander*, 8 *East*, 10; *Frazer v. Marsh*, 13 *East*, 238; *McIver v. Humble*, 16 *East*, 169; *Briggs v. Wilkin-* 7 *Barn & Cresw.* 30.

There is another point taken in the defence. From the deposition of *Joshua Staples*, it appears that the supplies were furnished exclusively upon his credit, and upon his special promise. This excludes the implied liability of the owner. But the case does not require the aid of this principle, the defence being sufficiently maintained upon the other ground. The exceptions are overruled, and the nonsuit confirmed.

See *Tucker v. Buffinton*, 15 *Mass.* 477.

GROTON *vs.* DALLHEIM.

Though the payee of a promissory note indorsed it merely to give it currency, knowing, at the same time, the insolvency of the maker; this, it seems, does not excuse the want of a demand, and notice to the indorser.

Assumpsit by the indorsee against the last indorser of a promissory note, made *Feb.* 23, 1828, payable in one year. This cause came up by exceptions to the opinion of *Smith J.* who had nonsuited the plaintiff in the court below.

It appeared from the exceptions that the note was presented to the maker for payment on the 23d or 24th of *February* 1829; but though all the parties dwelt in *Waldoborough*, no notice was given

to the indorser till *May* or *June* following; when the plaintiff after stating to him the demand and refusal, requested him to settle it, or pay the money he had advanced to him; to which the defendant replied that the maker would pay it, and he would risk it; or something to that effect. The note was negotiated to the plaintiff, for a loan of money, in *October* 1828. There was evidence showing that in *December* 1828, the maker was considered insolvent; but that in *February* following he deemed himself solvent, and actually paid some debts. A day or two after the service of the writ, the defendant told the officer he would come and settle the demand with the plaintiff, by giving his own note for the amount, saying he thought he could collect it of the maker.

N. Groton, for the plaintiff, relied on the insolvency of the maker as excusing the want of seasonable notice of the dishonor of the note; the insolvency, as he contended, being known to the indorser, whose engagement was therefore a simple and absolute promise to pay at the time. *Hopkins v. Liswell*, 12 *Mass.* 52.

Reed, for the defendant, cited 12 *Mass.* 89; *Crossen v. Hutchinson*, 9 *Mass.* 205.

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

The note in this case became due on the 23d day of *February* 1829. The evidence is that the demand was made on the maker of the note on that day, or the day following. As all the parties lived in the same town, the demand should have been made on the 23d. No reason appears that would justify the delay till the next day. The notice to the defendant was out of all time. It is said, however, that notice to him was unnecessary, inasmuch as the maker was insolvent at the maturity of the note. This does not appear; on that point the proof was contradictory. The maker testified that at that time he was able to pay all his debts. But if he was insolvent when the note became due, that circumstance would not dispense with the necesity of reasonable notice to the defendant, who is sued as indorser. *Bond v. Farnham*, 5 *Mass.* 170; *Crossen v. Hutchinson*, 9 *Mass.* 205; *Sanford v. Dillaway*, 10 *Mass.* 52; *Farnham v.*

Fowle, 12 *Mass.* 89. It is true it is laid down in *Chitty on bills* 151, that the payee of a promissory note, indorsing it to give it currency, and knowing of the insolvency of the maker at the time of such indorsement, cannot, in an action against him as indorser, insist on the want of notice. But in *Nicholson v. Gouthit*, 2 *H. Bl.* 609, and *Jackson v. Richards*, 2 *Caines* 343, a different doctrine seems to be recognized as the correct one. In this case, however, it is immaterial to inquire which is the better opinion; because the exceptions do not show that the defendant knew of the insolvency of the maker at the time of the indorsement, even if it then existed.

But it is further contended that the defendant promised, two or three days after the writ in this action was served, to pay the note, he knowing that he had not been notified in season. In the first place there is no proof that he made any such promise to the plaintiff; he was only conversing with the officer as to his intentions. Besides, if he had made such a promise to the plaintiff, it would not bind him, unless at the time he was informed of all the facts; and there is not the least evidence that he knew of the total uncertainty as to the time when the demand was made on the maker. If made on the 24th of *February*, then no liability existed on that ground, and so the promise was without consideration. The exceptions are overruled and the judgment of the court of Common Pleas confirmed.

The inhabitants of WARREN, *petitioners for review, vs. The inhabitants of* HOPE.

At the hearing of a petition for review, the petitioner will be confined to the facts and witnesses named in the petition.

No new trial or review will be granted on account of newly discovered evidence, if such evidence is merely cumulative.

Reviews and new trials will be granted, where a material witness, whose testimony at the trial was against the interest of the petitioner, has since discovered that he testified incorrectly, by mistake :—

Or, where the newly discovered evidence relates to confessions or declarations of the other party respecting a material fact, and inconsistent with the evidence adduced by such party at the trial :—

Or, where such newly discovered evidence was placed beyond the knowledge or control of the petitioner, by means of the other party, and with a view to prejudice the petitioner's cause.

AT the hearing of this case, *Allen*, for the petitioners, offered as witnesses several persons whose names, and the testimony expected from them, were not mentioned in the petition.

Greenleaf and *Ruggles*, on the other side, objected that the respondents had come prepared to meet only the facts and witnesses stated in the petition ; and that to admit new matter, or to call other persons to testify, would render the notice given to the respondents altogether illusive. The petitioners had alleged that they had " other witnesses" to the same facts. But THE COURT held them to the witnesses, as well as to the facts, named in the petition ; and afterwards delivered their opinion to the following effect.

CURIA. We must deny a review in this case. The petition does not disclose any ground for granting one. The new evidence therein referred to is all merely cumulative, and designed to strengthen the evidence given on the former trial. Proof of this kind may frequently be procured on both sides ; but to grant reviews or new trials, in such cases, would lead to unreasonable delay, and be a plain disregard of the maxim, *interest reipublicæ ut sit finis litium.* In

governing ourselves by the application of the above stated principle, we are acting in concert with the courts in New York and Massachusetts. As applications for new trials and reviews, on account of newly discovered evidence, are every year becoming more frequent, we have thought proper to avail ourselves of this opportunity to state, for the information and government of all concerned, the principles by which the court are regulated in cases of this kind.

On hearing upon a petition for review, the petitioner will not be permitted to offer testimony as to any newly discovered evidence, except that which may be stated in the petition.

No new trial or review will be granted on account of newly discovered evidence which is merely of a cumulative nature. But the following kinds of proof may be considered as exceptions to the general rule; and furnish ground for a new trial or review, viz:—

1. That a witness, whose testimony on the trial was in its tendency against the interest of the petitioner, has ascertained that he testified under a mistake, and that the facts do not exist as he testified that they did.

2. When the newly discovered evidence relates to confessions or declarations of the other party, as to some influential fact, unknown to the petitioner at the time of trial, and inconsistent with the proofs adduced and urged by such party.

3. Where such newly discovered evidence was directly or indirectly placed beyond the knowledge or control of the petitioner, by means of the other party, and with a view to prejudice the petitioner's cause.

At present we do not admit any other exceptions to the principle before stated.

REGULÆ GENERALES.

Rules as to practice in Chancery cases, established by the Justices of the Supreme Judicial Court of Maine, at Portland, November Term, 1830.

I.

Ordered, that the rules and regulations adopted by this court at York, August Term, 1820, respecting practice in chancery cases, be and the same are hereby repealed as to all future proceedings; and that the following rules and regulations in relation to the proceedings and practice in such cases be, and the same are hereby established.

II.

General outline of practice.

The Court adopt, as the outline of practice, the practice of the Supreme and Circuit Courts of the United States in chancery cases, so far as the same is not repugnant to the constitution and laws of this State, or changed and simplified by the following rules.

III.

Of prolixity and useless averments.

All unnecesssary prolixity and repetition in the pleadings, and useless or obsolete averments, shall be avoided; of which class averments as to *combination* and *pretence* may generally be considered.

IV.

Of charges and interrogatories.

All original bills shall contain a full, clear and explicit statement of the plaintiff's case, and conclude with a general interrogatory; but the plaintiff may, when his case requires it, propose specific interrogatories, and may allege, by way of charge, any particular fact, for the purpose of putting it in issue.

V.

Of the manner of the answer.

Upon the *general* interrogatory contained in the bill, the defendant shall be required to answer as fully, directly and particularly, to every material allegation or statement in the bill, as if he had been thereto particularly interrogated.

VI.

Of the *subpœna*.

The original process to require the appearance of the defendant, (when the bill is not inserted in an original writ as provided by statute) shall be a *subpœna* in the form following.

State of Maine.

——— *ss.* To A B of———(addition.)

Greeting.

We command you that you appear before our Supreme Judicial Court, next to be holden at ——,' within and for said county of ——, on the —— Tuesday of —— next, then and there to answer to a bill of complaint exhibited against you in our said Court, by C D of —— (addition) and to do and receive what our said Court shall then and there consider in this behalf. Hereof fail not, under the pains and penalties of the law in that behalf provided.

Witness P. M. Esq. the —— day of ——, in the year of our Lord 18— Clerk.

The writ shall bear teste of the Chief Justice, or first Justice of this Court, not a party to the suit, and shall be under the seal of the Court, and signed by the clerk. It shall be served by the same officers, and in the same manner, as other original writs of summons are by law to be served.

VII.

Of the return day, and time of entering appearance.

The bill may be filed in the clerk's office in vacation, and a *subpœna* shall thereupon issue of course, upon the application of the plaintiff or his solicitor, returnable at the then next term of the Court. The *subpœna* in such case, shall be served fourteen days at least before the return day. When the bill is filed in term time, the Court will order the *subpœna*, returnable on a certain day in the same term,

or at the ensuing term, as the case may require; but the defendant shall never be compelled to appear, nor subject to any penalty for not appearing, unless the *subpœna* be served upon him fourteen days at least before the day on which it is returnable.

VIII.

Of the service of a copy of the bill, and time of making answer in such cases.

The plaintiff may in all cases cause the defendant to be served with a copy of the bill, at the same time the *subpœna* is served, and by the same officer; the copy to be delivered to the defendant, or left at the last and usual place of his abode, and to be attested by the clerk, unless the bill is inserted in a writ of attachment or summons; in which case the copy shall be attested by the officer by whom the writ is served; and when such copy of the bill shall have been duly served on the defendant, sixty days or more before the day on which the writ is returnable, the defendant shall be held to demur, plead or answer, on the return day of the writ, unless, for good cause shewn, the Court shall allow further time for the purpose.

IX.

Of the time of answering, pleading, and taking testimony.

When a bill is filed in term time, and a *subpœna* is issued returnable at the ensuing term, the defendant shall file his demurrer, plea or answer in the clerk's office at such time in vacation as the Court shall order, not less than sixty days after service on him of the *subpœna* and of the attested copy of such order at the service of the *subpœna*. And when an answer is so filed, if not excepted to, the plaintiff may file his replication in the clerk's office in the same vacation; and upon giving notice thereof to the defendant, not less than thirty days before the ensuing term, the parties may proceed to take the examination of their witnesses, so that the cause may be heard and determined at the ensuing term, or if the plaintiff shall elect to proceed to a hearing on the bill and answer, he may give notice thereof to the defendant, not less than thirty days before the ensuing term, and the cause shall then be heard and determined accordingly. In the computation of time, as mentioned in these rules, the day on which service is made or notice given, is to be excluded. And all notices herein required to be given by either party to the other, may be given to his solicitor or counsel in writing.

X.

When the bill may be taken *pro confesso*.

If the defendant, after being duly served with the original process or with the *subpœna*, shall neglect to enter his appearance on the return day thereof; and if it shall appear to the Court, by the return of the officer or otherwise, that he had personal notice of the suit, fourteen days at least before such return day, his default may be recorded, and the bill may be taken *pro confesso*.

XI.

Before whom the answer may be sworn to.

The answer of a defendant may be sworn to before any Justice of the Peace, and shall be returned inclosed and sealed, to the Clerk's office, and be by him opened and filed.

XII.

Proof to be by depositions.

All proof shall be by depositions; which, after issue joined on a plea, or after answer and replication are filed, may be taken, certified, opened, filed and used, in the same manner, and under the same regulations, as depositions are which may be taken to be used in trials at common law.

XIII.

Of the trial of facts by a jury.

Whenever it shall become necessary or proper to have any fact tried or determined by a jury, the court will direct an issue for that purpose to be formed by the parties, containing a distinct affirmative of the points in question, and a denial or traverse thereof; and the issue thus formed and joined will be submitted to a jury, in the same court in which the suit may be depending.

XIV.

Of pleas in bar.

A defendant may in all cases, should he elect so to do, avail himself of the subject matter of a plea in bar, by inserting it in and as a part of his answer.

XV.

Of overruling pleas and demurrers.

Demurrers, pleas and answers shall be decided on their own respective merits. Answers are not to be considered as overruling pleas, nor answers or pleas as overruling demurrers.

XVI.

Of amendments.

Amendments may be made by leave of court, in any part of the proceedings, or stage of the cause, on such terms as they may judge reasonable and proper.

XVII.

Of depositions *in perpetuam.*

Depositions *in perpetuam rei memoriam* may be taken for and used in the same manner in the trials of cases in chancery, as in cases in the courts of common law; provided they are taken and recorded in conformity to the statute in such case made and provided.

XVIII.

Of bills of *revivor.*

In those cases where, according to chancery practice in said courts, a *bill of revivor* would be necessary, the *original bill* may be amended according to existing facts, if a change has taken place as to the person entitled to prosecute the suit; and if the change taken place relates to the person or persons proper to defend, a suggestion thereof shall be inserted by way of amendment of the bill, and a *subpœna* shall be served as before mentioned, on the person substituted or joined, to appear and answer to the bill.

XIX.

Of supplemental bills.

And when, *according to chancery practice* in said courts, a *supplemental bill* becomes necessary and proper, the same may be dispensed with; and the new facts shall be inserted by way of amendment of the *original bill, at any time before decree*; and where new parties are rendered necessary in the defence, a *subpœna* shall be served on them as aforesaid, to answer to the bill.

APPENDIX.

NO. I.

STATE OF MAINE.

House of Representatives, January 11, 1826.

Ordered, that the Justices of the Supreme Judicial Court be requested to give an opinion to this House on the following questions, viz :

1st. Has a town, having a right to choose a Representative, the power to waive the right, and vote not to choose a Representative, and would such vote bind the minority in such town ?

2d. Have towns and plantations classed in Districts for the purpose of choosing a Representative, a right to send a Representative, when a majority of the towns or plantations have voted not to send ?

To the Honorable the Speaker of the House of Representatives of the State of Maine :

THE undersigned has been furnished with a copy of the Order of the House of the 11th inst. requesting the opinion of the Justices of the Supreme Judicial Court on the following questions, viz.

1. Has a town, having a right to choose a representative, the power to waive that right and vote not to choose a representative ; and would such vote bind the minority in such town ?

2. Have towns and plantations, classed in districts, for the purpose of choosing a representative, a right to send a representative, when a majority of the towns or plantations have voted not to send one ?

These questions have been submitted to all the members of the Court, and been carefully examined by them ; but after mature deliberation they have not been able to agree in opinion. Mr. Justice Weston, having been consulted by letter, has communicated *his* answers to the questions proposed, which accompanies those of the undersigned to the same questions. These answers you are respectfully requested to lay before the Honorable House. From the opinion given by Mr. Justice Weston and myself, Mr. Justice Preble dissents.

While Maine was a part of Massachusetts, the Supreme Judicial Court, in the year eighteen hundred and fifteen, unanimously gave their opinion to the House of Representatives, pursuant to request, stating "that the right to send a representative is a *corporate right*, vested in the several towns by the constitution, and can be exercised by them only in a *corporate capacity*; and that it necessarily followed, that when a town is legally assembled for the purpose of electing a representative, if a vote pass not to send one, the minority dissenting from that vote cannot legally proceed in the choice." The Court, in giving the above opinion, allude to a similar one pronounced by *two other* Justices in the year eighteen hundred and eleven, and distinctly recognized and confirmed it. These opinions were considered as the rule of decision and proceeding in Massachusetts, at the time when Maine became an independent State; and would seem to be entitled to the *same* consideration in this State *now*, except so far as our own constitution contains provisions inconsistent with the principle on which the beforementioned opinion was founded. In Massachusetts the right of representation enjoyed by towns, is founded upon and regulated by a certain constitutional ratio of population, which ratio has no relation to any *county apportionment*. In this State, such apportionment is established; and it became necessary, in consequence of our constitutional limitation as to the number of representatives which should compose one branch of the legislature. The apportionment being made, our constitutional ratio is applied to the several towns and plantations, composing the counties respectively. In Massachusetts the right of representation is ascertained and decided by a *single process*; that is, by applying the constitutional ratio. In this State the right is ascertained and decided by a *double process*; that is, first by the county apportionment, and *then*, by the application of the constitutional ratio, to the towns and plantations in the respective counties.

The true answer to the *first* question proposed by the Honorable House, depends on *another* question; which is, whether this difference as to apportionment and ratio, changes the principle of law as to the exercise of the corporate rights of a town in relation to the choice of a representative, so far as that the vote of a *majority* can have no effect on the rights of the *minority*, *when that vote is not to elect a representative.*

If in this State the right of a town to elect a representative is a *corporate right*, then it must be exercised in accordance with those principles which regulate all *other* corporate proceedings; *one* of which principles is, that the voice of the *majority* is decisive, and binding on the rights of the *minority*.

On the 22d of *March* 1821, the apportionment of representatives was made, as nearly as it then could be made, according to the number of inhabitants which each county then contained; which apportionment remains unaltered: and it was found that by applying the constitutional ratio to the towns in the county of York, for instance, each of those towns was entitled to send one representative; and accordingly it was so declared by the resolve of the above date, in virtue of which the apportionment was made. Now, in the choice of representatives, each of those towns acts independently of all the *other* towns in the county; there is no community of interest among the people of that county in respect to the elective franchise. Each corporation decides and acts for itself, and as much so as it did formerly under the constitution and laws of the parent Commonwealth. Why then cannot any one of those towns waive the right that belongs to it, and decide not to elect a representative? Can the right be properly denominated any other than a *corporative right*. The 3d section of the first part of the 4th article of our constitution says, "Each *town* having fifteen hundred inhabitants *may* elect one representative"—and the resolve before mentioned says, "The county of York shall choose twenty three representatives, apportioned in the following manner, viz. the *town* of York one, Kittery one," &c. Thus, by the language of the constitution, and the resolve, the "town" is to choose; the right is expressly given to the *corporation*, not to the *individual inhabitants*; much less to a *minority*, to elect a representative, against the will and contrary to a vote of the majority duly passed in a legal town meeting, which is the only mode in which a *corporation* can expressly declare its will and perform its acts. The apportionment of representatives among counties is only *one process* towards arriving at a particular result: *that* being obtained, its nature and character are the same as though it had been at once declared in the constitution, without the intervention of this process. And if a town may waive the right of electing a representative by a major vote of the inhabitants, in a legal town meeting,

even though it is thereby rendered liable to a fine at the discretion of the House of Representatives, according to the opinion of the Supreme Judicial Court of Massachusetts; there is less objection, in this State, to the exercise of this corporate right, inasmuch as no such penal consequences follow. It will be observed, that in considering this *first* question proposed, the argument has reference only to the exercise of those *corporate powers*, by means of which the rights of the minority are bound, as a consequence of the *lawful waiver* of the *corporate right* of election, by a vote of the town *not to send a representative*. It is true the selectmen of a town may wilfully refuse and omit to issue a warrant for calling a town meeting for the choice of a representative; or, if a meeting be called according to law, may refuse, or wilfully or with improper motives omit to attend and preside at the meeting, and thus deprive those who may differ from them in opinion as to the candidate proposed, and who may in fact be a majority of the town, of the opportunity to give their votes and elect the candidate to office: still this is no *lawful* exercise of *corporate powers*; but a *wrongful act* of *individuals:* and it would seem that a voter, thus deprived of his right of suffrage, might maintain an action against the wrong doers, and recover his damages as well as when his rights are improperly denied and his vote illegally refused at the polls. It may be said that if *one* town may, by a major vote, decide not to elect a representative, and thus effectually bind the minority and prevent *any* choice, then *all* towns may do the same, and thus dissolve the government. So if all the States in the Union should refuse to elect senators to represent them in Congress, they could dissolve the federal government. Still there is no coercive power, by which to compel the legislatures of the several States to elect senators. Both the cases supposed, however, are *extreme cases*, and they therefore do not furnish any legitimate basis of argument, much less ground for decision. For the reasons above stated, the undersigned is of opinion that a town, having a right to choose a representative, has the power to waive that right, and vote not to choose a representative; and that such vote binds the minority in such town.

The *second* question proposed by the Hon. House seems to involve different principles and to rest on different grounds:—principles and grounds peculiar to this State, and rendered so by the spe-

cial provisions of our constitution. It is apprehended that an attention to these provisions will lead to a result that is perfectly satisfactory; being similar to that which is produced in some other cases, in virtue of *other* provisions of the constitution, and one with which all have long been familiar. The provisions now alluded to are those which have reference to the election of Governor and Senators; in both which cases, though the votes are given and declared in open town meetings, yet *town* majorities, *as such*, are of no importance; because a majority of *all the votes thrown* is necessary to a choice of any candidate. In these cases it is evident that the elective franchise is not a *corporate right*, which is exercised by the inhabitants of the several towns voting; if such were the case, the election would be decided by the aggregate of *corporate majorities*. In these elections we know that the right of suffrage is an *individual right*, enjoyed by each voter independently of all others; and for the greater convenience and certainty, the votes of all who give them are collected and received in town meetings, by certain officers designated by the constitution for the purpose; but without the exercise of any of the *proper corporate powers* and *rights* of the town. The constitution might as well have designated any *other* mode of collecting the sense of the qualified voters throughout the *State*, in one case; and throughout the *senatorial district* in the other. Such being the well known principle in the two instances stated, the next inquiry is whether the same principle is to be applied in the election of a representative in a district, consisting of two or more towns or plantations, *classed* according to the before mentioned section of the constitution. In such a case, *independent corporations* form the district, as they do a senatorial district; and in the same manner, the members of each corporation, qualified as electors, vote in their own respective public meetings, as is prescribed in the 5th section of the first part of said 4th article; but the same section provides how the whole number of votes thrown in *both* or *all* the town or plantation meetings shall be ascertained; and declares that a *majority of all the votes* shall be necessary to a choice. Here also, it is seen, that *town* or *plantation majorities*, are of no consequence *as such*; because each voter acts independently of all others, in the exercise of *his own individual right of suffrage*; and of this he cannot be *lawfully* deprived by any *corporate* act of the town or plantation where he has

a legal right to vote. Whatever course the majority may incline to pursue, *he* has a right to give his vote for the candidate he may prefer; and it is the duty of the presiding officers to receive and dispose of it as the constitution has directed; and, as has been before observed, when such officers violate their duty, and thus improperly deprive a citizen of his right of suffrage, they are answerable in damages to the party injured. As, therefore, the right to vote for a representative of a district, composed of two or more towns or plantations, is not a *corporate right*, to be exercised *exclusively* and *decisively* by each corporation in the district, but in a *common concern*, in which each elector has an interest of his own, which is not subject to the control of others, in the enjoyment of it; it follows, as a natural consequence, that the only legitimate mode in which a voter can be legally deprived of the intended *effect* of *his* vote, is by a vote of the *majority* in favor of *another candidate*; or by such a *scattering* of votes as that *no* majority can be obtained, and, of course, no election made. For these reasons the undersigned is of the opinion that towns and plantations, classed into a district for the purpose of choosing a representative, have a right to send a representative, though a majority of the towns and plantations have voted not to send one.

The undersigned is the more satisfied as to the correctness of the answers given to *both* the questions proposed by the Honorable House, because the principles on which those answers repose, preserve inviolate that doctrine, which seems sacred in a Republican Government, namely, that the will of the *majority*, constitutionally or legally expressed, is to be considered and respected as decisive of the rights of the *minority*:—Or, in that plain and unequivocal language, which is applicable to the subject under consideration, that the *majority* of the legal voters in a *town*, entitled to elect a representative, and who are *exclusively* authorized to vote in such choice, must decide the question whether a representative shall be elected; and, if so, who he shall be; and the *majority* of the qualified voters of a district of classed towns or plantations, who incline to vote in favor of any candidate, must decide the question whether a representative of such district shall be elected; and if so, who shall be that person. It seems to the undersigned that the adoption of a different principle is *in itself*, unnecessary; and in its *consequences* might lead to the disturbance of that harmony and peace which are

such essential blessings in a town; and, in addition to this, would in no small degree, defeat the design and impair the symmetry of the representative system, by permitting a small and inconsiderable minority in a town, to elect a person to represent its *interests*, and *feelings*, and *principles*, who may be obnoxious to seven eighths of the qualified electors in the town; and disposed at once to sacrifice all those interests, feelings and principles to his own personal wishes, or the views of the few who elected him.

PRENTISS MELLEN.

To the Speaker of the House of Representatives, of the Legislature of Maine:

THE undersigned, a Justice of the Supreme Judicial Court, having considered the questions submitted by an order of the House of Representatives, passed January 11th, 1826, which have been communicated to him through the Chief Justice, with a desire on his part that the undersigned would transmit his opinion, with his reasons, requests you to make known the following as his answer.

It may fairly be presumed that the framers of the constitution of Maine, and the people in adopting it, although having before them the constitutions of the United States and of other States, which were then members of the federal compact, had more especially in their contemplation that of Massachusetts; with the practical operation and effect of which they were familiar. By the frame of government adopted by that Commonwealth, it is provided that every corporate town, containing a specified number of rateable polls, may elect one representative; with the privilege of increasing the number, in a certain ratio prescribed, depending upon the number of rateable polls.

In 1811, the Justices of the Supreme Judicial Court of Massachusetts, in their answer to certain questions propounded by the House of Representatives, state that, "because the right of sending a representative is corporate, if the town, by a legal corporate act, vote not to send a representative, none can legally be chosen by a minority, dissenting from that vote." As this was a subject upon which their opinion had not been requested, this intimation had not

the weight, which belongs to a deliberate judgment upon the point in question; although, considering the high character of those by whom it was made, it was justly entitled to respectful consideration.

In June, 1815, the House of Representatives submitted the question directly to the same Court, "whether a town, having by the constitution a right to send a representative or representatives to the General Court, can constitutionally and legally vote not to send a representative; and whether such vote would be binding on a minority of voters, dissenting therefrom, in such town." The Court, all the Justices concurring, gave their opinion "that when a town is legally assembled for the purpose of electing a representative, if a vote pass not to send one, the minority dissenting from that vote cannot legally proceed in the choice." They added that, but for the provision which authorizes the House to impose fines upon such towns as neglect to choose; to send a representative, would seem to be a right or privilege, which a town might waive at pleasure, rather than a corporate duty. Their reasoning is to be found at length, at the close of the 15th volume of the Massachusetts Reports. In both constitutions the language is optional, not imperative; and the power to impose a fine upon negligent towns is not given by the constitution to the House of Representatives of Maine. This construction of the constitution of Massachusetts, was well known to the framers of our constitution and to the people; having been originally communicated to their representatives, published in the newspapers of the day, and also in the Massachusetts Reports, which, besides being in the hands of legal gentlemen, were by law distributed to every town in the Commonwealth. If therefore, those who were deputed to the high office of preparing and presenting a constitution to the people of Maine, had deemed it expedient to impose an obligation upon the towns to choose representatives, which was not to be evaded, as well as to grant to them the privilege of doing so, it was easy for them to have used language indicative of such intention, which could not have been misunderstood. But when, with a full knowledge of the construction which had obtained in Massachusetts, they use language of the same import, the undersigned is constrained to infer that they intended that, in this particular, our constitution should receive the same construction. Nor does it appear to the under-

signed that the variation in the rule, by which our representatives are apportioned, can fairly tend to justify a different conclusion.

But although a town or plantation may thus possess the power to waive their own privileges, it has no legal or constitutional control over those of others; and in order to bring a class or district, composed of several towns or plantations, within the rule adopted in Massachusetts, it would seem that all should concur in their corporate capacity, in the vote not to send a representative. Whenever one town or plantation, belonging to such district, deem it expedient to exercise their privilege, the undersigned is not aware that there is, derived from the constitution, any power or authority in the other towns or plantations in the district to deprive them of it. Their own rights are not thereby impaired; nor have they any just ground of complaint.

In answer to the first question, the undersigned, for the reasons before stated, would respectfully submit it as his opinion, that a town, having a right to choose a representative, has the power to waive that right, and to vote not to choose a representative, and that such vote does bind the minority in such town.

And to the second; that where towns and plantations are classed into districts, for the purpose of choosing a representative any one or more of such towns or plantations have a right to send a representative, although a majority of the towns or plantations have voted not to send one. NATHAN WESTON, Jun.

IN THE HOUSE OF REPRESENTATIVES, January 27, 1826.

"Ordered that the Honorable William P. Preble, one of the Justices of the Supreme Judicial Court, be respectfully requested to favor this House with his opinion and his reasons therefor, on the questions submitted by the House to the Justices of said Court, on the 11th instant."

To the Speaker of the Honorable the House of Representatives of the State of Maine:

IN compliance with the request, which the Honse did me the honor to express in their order, passed on the 27th inst. the undersigned now respectfully submits to them the opinions he has been led to form, on the questions, proposed to the Justices of the Supreme Judicial Court by another order of the House, passed on the 11th in-

stant, with the principal reasons, on which his opinions have been predicated.

The answer to the questions proposed by the House, depends upon that to another question, whether the right to be represented in the House belongs to the town in its corporate capacity of a town, or whether it belongs, as a personal right, to the individual electors, residing within the boundaries of such town : in other words, whether it be the corporation that is represented, or the citizens, who reside within its territorial limits. This is a distinction, which, though it may at first appear to be nice, is not only palpable, but important. A corporation is a mere creature of the law; and there is no such thing as a corporate right of representation, independent of positive institution. The right of the citizen, on the contrary, to act by himself or his representative, is one of the first and fundamental principles of a free government. It is undoubtedly competent to the citizens to surrender this right, and to vest it in corporations, of which they may or may not be members. But such a surrender is inconsistent with the spirit of a free government. It is not therefore to be inferred from expressions of doubtful import; and, unless it plainly appear, from the language of the constitutional charter, that it has been done, the surrender has not been made.

The idea of a corporate representation was derived in this country from the constitution of the British Parliament; and our ancestors nearly fifty years ago, when the nature of free and representative governments had not been so much the subject of discussion and inquiry, and was not perhaps so fully understood, engrafted it, as it has been held, into the constitution of Massachusetts. When the people of Maine abrogated that constitution, in so far as regards this State, the corporate right of representation ceased to exist, unless it was revived by the constitution of Maine. Prior to the separation of Maine a construction had been given to the constitution of Massachusetts, in relation to the right of representation, by the Judges of the Supreme Judicial Court of that State. It was a construction, operating as a partial check to a growing evil, the increasing number of representatives. But the construction, thus given, was not readily acquiesced in. The Judges expressed their opinion to the House in 1811, and in 1815 we find the House solemnly calling upon the Judges for their opinion upon the same clause. As however a construction had

been thus given, if the language of the constitution of Maine is the same, on the same subject matter, as the language of the constitution of Massachusetts, it must be presumed to have been used with a view to that construction. But if the language used be essentially variant, then the construction, given to the language of the constitution of Massachusetts, is no guide; on the contrary the difference of expression implies an intention to avoid that construction, and to convey a different meaning.

The language of the constitution of Massachusetts on this subject is uniform and consistent. "EVERY CORPORATE TOWN may send," "each town *now incorporated* may send one," "no place shall hereafter be *incorporated* with the privilege of electing unless" &c. *Incorporation was thus made an essential prerequisite to representation.* Still treating the matter as a town right and town duty, the House of Representatives itself was vested with authority to impose fines on towns, neglecting to send one or more representatives. Contemplating also the probability, that towns would to a very great extent neglect to exercise their right, though the House might consist, and actually has consisted, of more than six hundred members, *sixty only* made a quorum for doing business. Moreover, with the single exception that members should be chosen by written votes, no provision whatever is made in relation to the manner in which the town meetings shall be conducted, who shall preside, or what proceedings shall be had. Excepting also in the solitary case of vacancy occasioned by appointment to office, no provision was made for a vacancy to be filled. Their representation therefore was a representation, properly speaking, not of the electors, as such—*not of the people directly*, but of *corporate towns acting in their corporate capacity*—not even of all corporate towns, but of such only, as had the requisite number of rateable polls. As a part of the same system also, their representation in the Senate was predicated not on *the electors or people*, but simply on taxation.

If now we advert to the constitution of Maine, we find the whole principle changed, the representation in the Senate and in the House is not a representation of taxation and corporate towns, but of electors—of the people themselves. The House of Representatives "*shall consist*" of a fixed number, to be determined within certain limits by the legislature, "*to be elected*," not by the corporate towns

acting in their corporate capacity, but in the same manner, and at the same time, and by the same persons as the Governor and Senators, "*by the qualified electors.*" Nothing less, than "*a majority*" of the whole number, as fixed and determined by the legislature, "*shall constitute a quorum.*" If a vacancy happen "*by death, resignation, or otherwise,*" provision is made that "*it may be filled by a new election.*" The principle of incorporation, as a prerequisite to the right of representation, is no where recognized. On the contrary the words "*corporate*" and "*incorporated,*" which so often occur in the constitution of Massachusetts, *are studiously omitted.* The number of representatives is to be "*fixed* and apportioned *among the several counties* as near as may be, according to the number of inhabitants." But, as the number of representatives, fixed and assigned to any county, would be large, and as it was desirable that a member should be elected from every considerable section of the county, so that the house might be enabled to derive from its own members all necessary local knowledge; and in order that the people in every such section might act with greater intelligence in the choice of their representative, and elect a person from among themselves, with whom they were personally acquainted, the counties were subdivided into districts, each town, having the requisite population, to constitute of itself a representative district, and towns and plantations, not having the requisite population, to be classed into districts containing the requisite population. And here the undersigned would beg leave to quote the language of the "Address," published by order of the convention that framed the constitution. "Thus the great sections of the State, the several counties, actuated to a certain extent by a community of interests, have their due weight according to their population." "On any practicable system there will be fractions, and the representation of course partially unequal. If, under the system adopted by the convention, the large towns have not their full representation, it is preserved in the county of which they are a part. They have their representatives; and *even their fractions*, which would otherwise be lost to them, *are represented through the smaller towns of their county*, who can seldom have an interest at variance with their own." In accordance with the same views is the language of the Resolve of March 22, 1821, apportioning the representatives on the several counties, towns, and

plantations, and classes. "Resolved, That *the county of York shall choose twenty three representatives*, apportioned in the following manner." "*The county of Cumberland shall choose twenty five representatives*," &c. Hence it is manifest, that, if the majority of electors present at a constitutional meeting, held for the election of Governor, Senators, and Representatives, can, by a mere *vote not to proceed in the election*, deprive the individual electors of their personal constitutional right to give in their votes for Governor, Senators, and Representatives, such majority thereby not only waive their own right to vote, but debar the minority from exercising their individual electoral privileges; and in regard to the election of representatives, they also, at the same time, waive the rights of the electors in other towns and districts, and deprive the county of a portion of its representation. In all our reasonings upon this subject, we should never lose sight of the consideration that the voter sustains two relations, that of an inhabitant of the town, &c. and that of an elector under the constitution. Because these two relations are sustained by the elector, he sometimes mistakes the capacity in which he is acting; and sometimes attempts to bring the power he possesses as an *inhabitant*, to control or neutralize the power of his neighbor, possessed by that neighbor in his *electoral* capacity. But these two classes of powers are essentially distinct, and never can be brought to bear the one against the other. Hence it is, that in constitutional meeting a majority of the electors cannot vote '*not to vote for Governor*,'—'*not to vote for Senators*,'—'*not to vote for a Representative*,' *so as to debar the minority* from casting their votes for either of those officers. This position will be readily granted, it is presumed, so far as relates to the choice of Governor and Senators, but it is denied, as it relates to Representatives. If there be a distinction, the undersigned has not been able to discern it, nor can he perceive any adequate reason why such a distinction should have been introduced. Every individual elector has a deep interest in being represented in the House of Representatives, to whom is confided the pursestrings of the people, and in whom is vested so large a portion of the state sovereignty, in the faithful, and judicious, and wise exercise of which, every individual of the community is concerned. That provision therefore of the constitution, as already intimated, *must be plain*, which authorizes one or more electors, by combining, not only to waive

their own right, but to preclude others, contrary to their wishes, from the exercise of theirs. It is not in the power of the whole legislature, though representing the sovereignty of the State, to take away the electoral right, or to prevent its exercise, or even to modify it. These principles may be admitted, but their application to the questions under consideration denied; because, as it has been said, the electors in voting for representatives act in their capacity of inhabitants of towns or plantations. But that is assuming the very question at issue. If the right of representation is the corporate right of towns and plantations, for plantations too, it has been said, have their corporate right of representation, why is not the right of the several counties to their representation in the Senate the corporate right of the counties? "The counties are but larger corporations," nay, like representative districts, they are districts, composed of towns and plantations. Why then may not each town and plantation in the senatorial district vote in their corporate capacity not to choose Senators, and thereby prevent and preclude the minority in such towns and plantations from casting their votes for Senators? The electors are assembled in town and plantation meeting, the same officers preside, the same proceedings are had in receiving, sorting, and counting the votes, the same declaration is made in open meeting, and the same record of the proceedings is made in the town and plantation books. Does the distinction, said to exist, arise from the circumstance, that in a town, possessing the requisite population to entitle the qualified electors within its limits to elect a representative, all the electors attend at the same place, in the same town meeting, and have their proceedings independent of the proceedings in other towns? This cannot be the ground of the supposed distinction, because it does not apply to the case of classed towns and plantations; nor, if it did apply, would it have any bearing upon the questions proposed by the House. It had long been an established law and usage in this State, for the people in their primary assemblies to meet, and act, and vote, in town and plantation meeting; and towns and plantations had their municipal officers, whose duty it was by law to preside in and regulate these meetings. The convention therefore, which framed the constitution, wisely availed themselves of this long accustomed and familiar mode of proceeding in our primary assemblies, and this organization of our towns and plantations, not for

the purpose of vesting in towns and plantations in their corporate capacity the right of representation, but for the purpose of collecting in a manner, the most convenient, expeditious, and unexceptionable, the votes of the qualified electors for Governor, and for Senators, and for Representatives. It was for the same obvious reasons, that towns, possessing the requisite population, were made representative districts by themselves without being associated in the election with other towns. With the same views and policy, we find, they have inserted a provision, that in making a representative district, no town shall be divided. That towns, having the requisite population to entitle the qualified electors to choose one or more representatives, are regarded as representative districts, with the same privileges and the same powers as other representative districts, and possessing, as districts, no other or greater privileges and powers, would seem to be a position, which we might take for granted; for otherwise, there is a grant of special privileges to one town in its corporate capacity as a town, which are denied to all other towns, classed into representative districts, and the qualified electors in some towns are laid under special disabilities, which are not imposed on the electors in other towns. Further, if the language of the constitution must be construed to vest the right of representation in unclassed towns in their corporate capacity; as the same, *identically the same* language, is used in regard to districts, "*each town may elect*," "*each district may elect*," representative districts would seem also to become for this purpose corporations, clothed with the corporate right of representation. The analogy, existing between senatorial districts and representative districts, has already been noticed. That analogy holds in a still more important particular. In both cases the choice is determined by a majority of all the votes thrown, without the least regard to the circumstance whether they were thrown in this town, or plantation, or that. It is manifest therefore, that the electors vote in their individual electoral capacities, and not in the capacity of corporators, or inhabitants of towns and plantations. When voting in their capacity of inhabitants or corporators, *the vote of the majority is the voice of the town or corporation*; and no inquiry whether the majority was great or small is instituted, because, whether great or small, its legal effect and efficacy is the same. If then the towns and plantations, constituting a representative district, were to vote each in their respective

corporate capacities, he only would be elected, who should obtain a majority of votes in a majority of those towns and plantations; for then, and then only, would he have a majority of the corporate voices. The moment we depart substantially from this mode, and ascertain the result of the election in the manner *prescribed by the constitution* as already mentioned, we, as a necessary and inevitable consequence, *totally depart* from the doctrine, that in a representative district the right of representation is vested 'in common in the several towns and plantations in that district, in their corporate capacity.' In a representative district therefore, if the right of representation be a corporate right, it is vested in the district itself, as a corporation, and not in the several towns and plantations, of which that district is composed. That the right of representation in the Senate is not vested in a senatorial district in its corporate capacity, and that the right of representation in the House is not vested in a representative district in its corporate capacity, where that district is composed of several towns or plantations, are positions, which the undersigned presumes he may take for granted; and on these points he forbears attempting any farther elucidation.

No inference, it is believed, can be drawn in favor of the position, that the right of representation is a corporate right, vested in towns, from those provisions of the constitution, which require the votes to be given in by the qualified electors in *town meeting*, that '*the selectmen shall preside*,' and that the votes shall be recorded by the "*town clerk*," and "*in the town books*;" for the same argument would prove, that the electors acted in their capacity of inhabitants or corporators, when voting for Governor and Senators. Nor can any such inference be drawn from the use of the word "*town*" in such expressions, as '*each town may elect*;' for this is only an abbreviated mode of expression in common and familiar use, meaning *the qualified electors in the town may elect*; as it is said *the town gave so many votes for Governor*, the *county chose its Senators*, the *district a Representative*, and the parallel expression, *each district may elect*.' And, as has already been suggested, if that expression proves that an unclassed town in choosing a representative acts in its corporate capacity, the same expression would prove that a representative district, in choosing a representative, acts also in its corporate

capacity; whereas, so far from acting in that capacity, it is not even a corporation.

It may perhaps be said, that the constitution, by the word "*may*," in the expression '*each town may elect*,' leaves the town at liberty to elect or not to elect, as it may please; and hence, it is inferred, the town in determining the question whether to elect, or not to elect, must act in its corporate capacity; and so, if it proceed to elect, it does so in its corporate capacity, and the right of representation is a corporate right. That a town has, and a representative district has, in a constitutional sense and *in a constitutional manner*, a right to determine 'whether they will elect or not elect' is admitted; but the inferences, that are thus attempted to be drawn are denied. If '*to elect or not to elect*,' is at the option of the town in its corporate capacity, it is a *constitutional privilege*, and no penalty can ever be imposed, or fine exacted for declining or refusing to elect. It has already been stated, that, as by the constitution of Massachusetts it was the "*corporate town*," which had the option to elect or not to elect, and by which also the election of a member was to be made, so by an express provision of the same constitution the House was vested with power to impose fines upon any delinquent town for neglecting to choose and return a member. The *studied omission* of the epithet '*corporate*' in our constitution, shows that the word *town* is used in its *popular*, and not in its '*corporate*' acceptation. This latter acceptation of the word, it is believed, is not the most usual one even among ourselves, and at the same time is almost peculiar to the northern States. If it were important that the power to impose a fine on a delinquent town should be possessed in Massachusetts, how incomparably more important is it, that it should be possessed in Maine, where the whole number is fixed or limited, and comparatively small, and where also a majority of the whole is necessary to constitute a quorum. The total *omission* of the *clause giving the power to fine*, can only be accounted for on the position already assumed, that the word "*town*" is used, not in its corporate, but in its popular acceptation; for, the word being used in this latter sense, the town in its corporate capacity has nothing to do with the election, and therefore cannot be guilty of any neglect of duty in relation to the subject. And this leads us to the true meaning and force of the word "*may*," as used in the clauses, "*each town may elect, &c.*"

"*each district may elect, &c.*" In some of the ancient republics, it is said, every citizen, entitled to vote, was obliged to vote in questions which came before the people; but under our free governments, to compel an elector to vote, against his will, would be an anomaly in legislation. The "qualified electors" therefore may all by *common consent* or by accident absent themselves from the polls, or the electors present may cast their votes, and no one, of the candidates, voted for, receive a majority of all the votes thrown. In either case no election is made. But these, and *these only*, are the modes in which the qualified electors in unclassed towns, and in representative districts, can *in a constitutional manner* decline or refuse to elect. So also, in regard to the election of Governor and Senators, the same principles apply, saving only that in the case of candidates not receiving a majority of the votes thrown, further provision is made. The words "*may elect*" therefore merely indicate the rights and privileges of the individual electors in their electoral capacity, and have no reference to any supposed corporate right of representation. If the word "*shall*" had been substituted by the convention for "*may*" in these expressions, it would have better answered the purposes of an argument in support of this supposed corporate right; for then it might have been urged, that it was not only a corporate right, but a corporate duty to elect; and that it was competent for the legislature to enforce the performance of that duty by fines and penalties, fixed and established by law; but, as the clause now stands in the constitution, no fine, as has already been suggested, can be imposed. The phrase "*may elect*" therefore militates against the doctrine of corporate representation, rather than countenances it. Considering the modes and manner in which it must occur, if it occur at all, the constitution of Maine does not contemplate the case of a town or district declining to elect; least of all does it contemplate such a proceeding, as that of a town, in its corporate capacity, voting that the qualified electors shall not elect. Such a proceeding is contrary to some of its express provisions, and at variance, it is believed, with the spirit of all which have any bearing on the subject. Of these, two only will be noticed by the undersigned on this occasion, as deserving of more particular consideration. It is ordained, "*that the selectmen,*" the presiding officers, "*shall* receive the votes of *all the qualified electors present,*" "*sort,*

count, and declare them in open town meeting, &c." If then at a meeting for the choice of representatives, warned in due course of law, a qualified elector does present himself, and demand to be allowed to put in his vote, where is the provision that will authorize the selectmen to refuse his vote? Where is the provision, which authorizes the majority of electors present to say, that the minority shall not have the privilege of putting in their votes? Those provisions of the constitution are *identically the same*, by which the selectmen are required to receive the votes for Representatives, and for Senators, and for Governor. They are peremptory. On what principles of construction are the selectmen authorized to refuse the vote tendered, if it be for a representative, but are bound to receive it, if it be for Senators, or for Governor? As the constitution places them all upon precisely the same footing, making no distinction whatever, the undersigned can make none.

Again, it is provided by the constitution, article 4, part second, section third, that "*qualified electors, living in places unincorporated, who shall be assessed to the support of government by the assessors of an adjacent town, shall have the privilege of voting for Senators, Representatives, and Governor, in such town.*" Here then is a class of electors, residing within the limits of no town, or organized plantation, who have the right to vote for Representatives in the adjacent town. Can these electors be debarred of their electoral privileges by the town in its corporate capacity voting not to elect? They do not belong to the town in its corporate capacity, and therefore cannot be parties to such a vote of the town. And yet, if the doctrine of the corporate right of representation be sound, such a vote by the town would deprive such electors of their constitutional privilege.— This provision of our constitution is copied, with some slight necessary alterations, from the constitution of Massachusetts. There, however, the right to vote *does not extend to the voting for Representatives*; but is confined to the voting for Senators. The enlargement of this right to the voting for Representatives, while it is in perfect consistency and harmony with the other provisions of our constitution, is inconsistent with every principle of corporate representation. The undersigned has not exhausted the subject, but he forbears to enlarge farther. The constitution of Maine has few, and but few, anomalies to disfigure its features, and mar its proportions. It is be-

lieved not to be the part of wisdom, to add to the number by construction.

The undersigned is therefore of the opinion that

1st. A town, having the right to choose a Representative, has not the power to waive that right, and vote not to choose a Representative, and such vote would not bind the minority in such town. And

2dly. Towns and plantations, classed into districts for the purpose of choosing a Representative, have a right to send a Representative, notwithstanding a majority of the towns and plantations have voted not to send one.

WILLIAM PITT PREBLE.

January 31, 1826.

NOTE. The House of Representatives, in the case which occasioned the call for the foregoing opinions, acted in conformity with that of Mr. Justice *Preble*.

NO. II.

EXECUTIVE DEPARTMENT,
January 23, 1830.

To the Honorable Justices of the Supreme Judicial Court of the State of Maine:

GENTLEMEN,

In conformity to the third section of the sixth article of the constitution of said State, I request your opinion upon the following questions arising upon the construction of said constitution, they being questions which may be important to have settled by the highest authority.

Do the Executive duties of the State, when constitutionally exercised by the President of the Senate, devolve, at the end of the political year, when so exercised, on the President oft he Senate, or Speaker of the House of Representatives of the next political year, whichever shall be first chosen; or shall such Executive duties still continue to be exercised by such President of the Senate, until another Governor of the State chosen by the people or by the legislature be qualified?

NATHAN CUTLER,
President of the Senate of 1829,
and acting Governor.

MONDAY, January 25, 1830.

At a meeting of the members of the Executive Council, in the Council Chamber. Present, Messrs. SIMEON STETSON, PHINEHAS VARNUM, DAVID CROWEL, JONATHAN G. HUNTON, LEVI HUBBARD.

Hon. SIMEON STETSON was chosen President.

The following resolution was unanimously adopted, and the Secretary of State ordered to transmit a copy of the same to each of the Justices of the Supreme Judicial Court.

Resolved, That the Justices of the Supreme Judicial Court be, and hereby are required, in conformity to the third section of the sixth article of the constitution of the State, to give their opinion as soon as convenient, upon the following questions, arising upon the

construction of said constitution, which have become important in administering the government, and in the discharge of official duty in this department thereof.

When the office of Governor has become vacant and the exercise of the powers and duties of that office have devolved upon and have been exercised by the President of the Senate until the first Wednesday in January, terminating a political year, and until another President of the Senate has been chosen, and has taken upon himself that office; can the office of Governor be further exercised, according to the provisions of the constitution, by such first named President of the Senate, or ought said office of Governor to be then exercised by said last named President of the Senate while he holds that station, and until another Governor is duly qualified.

J. G. HUNTON,
SIMEON STETSON,
PHINEHAS VARNUM,
DAVID CROWEL,
LEVI HUBBARD.

CAMBRIDGE, January 30, 1830.

To the Honorable Council of the State of Maine.

Last evening on my arrival in this town, I received from the Secretary of State, a copy of your order or resolve of the 25th inst. requiring the opinion of the Justices of the Supreme Judicial Court on certain questions stated in said order. As the Secretary was directed to furnish *each* of said Justices with a copy of the same, it may at least be inferred that the Council did not expect that a *personal* interview and consultation should be had by the members of the court, distant as they now are from each other. On this presumption, and to avoid delay, I have concluded to state to the Honorable Council the opinion I have formed upon the questions submitted, and to give notice of my having so done, to my brethren, without loss of time, requesting them, if they think proper, to adopt a similar mode of proceeding.

1. The constitution provides that the Senate shall choose their President; and he is always one of the Senators.

2. A Senator, as well as a Representative, is elected "*for one*

year from the day next preceding the last annual meeting of the legislature."

3. A Senator, of course, when such year has expired, loses *that character*, on which the office of President of the Senate depends as its necessary foundation; hence both offices by lapse of time expire at the same moment, unless that of *President of the Senate* is otherwise terminated during the continuance of the *office of* Senator.

4. When a new *President of the Senate* is elected and has entered on the duties of his office, after the expiration of the year or term for which the next preceding President was elected, such election must be considered as having been made, *because* no President was then in office.

5. There cannot be *two Presidents of the Senate* at the same time, when there is only *one Senate* in existence.

6. The 14th section of the 2d article of the constitution provides that "whenever the office of Governor shall become vacant by death, resignation, removal from office or otherwise, *the President of the Senate* shall exercise the office of Governor until another Governor shall be duly qualified." This office he is to exercise *because* he *is* President of the Senate, and in virtue of his character *as such* officer at the time of such exercise of the office; and not because *he had been* President during the year next preceding.

7. Unless this construction is adopted, there may be confusion in the administration of government; for if there may be, consistently with the constitution, *two* Presidents of the Senate at the same time, to whom shall the language of the article and section before cited apply? *Both* Presidents are not intended; the provision contemplates but *one*, as in existence. A construction of the constitution leading to such consequences, and involving such inconsistencies, I cannot consider as legitimate and correct; or as ever contemplated by those who framed the constitution.

In compliance with the order of the Honorable Council, I give it as my decided opinion that "when the office of Governor has become vacant, and the powers and duties of that office have devolved upon and been exercised by the President of the Senate, until the first Wednesday in January, terminating a political year, and until another President of the Senate has been chosen and has taken upon himself that office," the office of Governor cannot be *further* exer-

cised, according to the provisions of the constitution, by such *first* named President of the Senate; but said office of Governor ought to be *then* exercised by the said *last* named President of the Senate while he holds that station, and until another Governor shall have been duly qualified. This opinion is respectfully submitted to the Council in answer to the questions proposed in the beforementioned order or resolve, by

PRENTISS MELLEN, *Chief Justice of the Supreme Judicial Court of the State of Maine.*

To the Honorable Nathan Cutler, and the Honorable Council of the State of Maine.

The undersigned having considered the questions propounded to him as one of the Justices of the Supreme Judicial Court, on the 23d ult. by the said Cutler as "President of the Senate of 1829 and acting Governor" and on the 25th ult. by the Council, by their resolve of that date, replies, that he concurs with the Chief Justice in most of the reasons by him given in his answer of the 30th ult. to the questions propounded by the Council as aforesaid, and which it is unnecessary here to recapitulate; but would add that inasmuch as the question itself implies doubt as to the construction of a portion of the constitution, it may be useful to recur to the legal rules of construction applicable in such cases. It is a well established principle of law that such construction ought to be put upon a statute as may best answer the intention which the makers had in view; and that whenever any words are doubtful, the intention of the legislature is to be resorted to in order to find the meaning of such words. To ascertain this intention, it is often necessary to consider the other parts of the statute, for the words and meaning of one part frequently lead to the sense of the other. So in the construction of the constitution, which may be considered as a paramount statute passed immediately by the people, binding upon all the departments of the government, and not subject to the power of either, the same rule of construction may be applied. The meaning of the paragraph in the 14th section of the first part of the fifth article of the constitution in these words "The President of the Senate shall exercise the office of Governor

until another Governor shall be duly qualified," may be considered doubtful. It is doing no violence to the language to consider it as referring to the officer for the time being; so that whoever should be invested with the office of President of the Senate, at any time, during the vacancy, should, during the time of his holding such office, the vacancy still continuing, exercise the office of Governor; or it may be considered as applying to the *individual* holding the office of President of the Senate at the time the vacancy of Governor occurred, and entitling him to exercise the office of Governor during the existence of the vacancy, even beyond the political year in which it occurred. The language being susceptible of different constructions, the inquiry is, which will best comport with the other parts of the instrument, and the spirit of the whole. It was manifestly the intention of the framers of the constitution, that the people should be *annually* reinvested with all the powers by them entrusted to the executive and legislative departments of the government, and that the authority to execute these powers should be *annually* derived from the people. It is therefore provided that the Governor shall hold his office *one year* from the first Wednesday of January in each year, and that the Senators and Representatives shall be elected for *one* year only. Suppose that subsequent to the election of a Governor, but previous to taking the requisite oaths, the Governor elect should die, (as was the case in Massachusetts during our connexion with that Commonwealth) or should decline accepting, the office of Governor the preceding year having been vacant and exercised by the President of the Senate. I am not aware that the constitution has provided any mode by which such vacancy can be filled by election, either by the people or the legislature. The office must then remain vacant during the year; and if it would be doing no violence to the language of the constitution to say that the President of the Senate of the preceding yar should still continue to exercise the office of Governor for the current year, and so from year to year "until another Governor shall be duly qualified," it certainly would not comport with the spirit of that portion of the instrument which provides for an *annual* Executive; and it does not seem to me that those who framed and those who ratified that instrument could ever have intended that such a result should by possibility occur. Other cases might be put which

would be equally illustrative of the effects of such a construction. It surely would not be contended that the Governor of the preceding year should hold over, in case the Governor elect should decline accepting or die before taking the oaths, or in case the office of Governor should not be filled in the manner pointed out by the constitution by reason of any other casualty, because that instrument has most manifestly provided otherwise. But if those who framed it had intended that the President of the preceding Senate, exercising the office of Governor, should hold over in case of a vacancy of Governor the succeeding year, would they not have provided also that the Governor for the preceding year, holding his office to the end of the political year, should hold over, in case of vacancy the succeeding year? What reason could be given for authorizing the President of the Senate, exercising the office of Governor, to hold over, and not authorizing the Governor himself to hold over, under circumstances precisely similar? Every argument arising from the inconvenience of withdrawing the President of the existing Senate from his appropriate duties at that board, or from the apprehensions of anarchy in case no presiding officers should be elected in either branch of the new legislature, would apply with equal force in the one case as in the other; and to my mind the inference is strong that it was never intended that there should be any holding over in either case. By construing the words "The President of the Senate shall exercise the office" &c to mean the President of the Senate *for the time being*, no violence is done to the language, the difficulties above suggested, and others that might be enumerated, are obviated, the principles upon which the Executive department is predicated are preserved, and the Executive power, in every contingency, will then annually revert to the people, and will be exercised by an officer holding his place under a new election, whether that officer be denominated Governor, President of the Senate, or Speaker of the House.

It is manifest that some clauses in the constitution will not bear a strict, literal construction; for instance, the term of office of the Governor is one year from the first wednesday of January. In many cases that period would have been fully completed a number of days previous to the first wednesday of January of the succeed-

ing year; and, unless by construing the phraseology to mean a political year, such a construction could be given as would extend the term of office to include the first wednesday of the succeeding January, the oath of qualification could not be administered by the Governor to the members elect of the two branches of the legislature. So in the case of Counsellors who are to be chosen annually, on the first wednesday of January, if practicable, for the purpose of advising the Governor for that political year. Unless such a construction could be given as would authorize the Counsellors of the preceding year to assist in administering the oath of qualification to members of the legislature, subsequent to the first wednesday of January, those Senators who should be elected by the two branches to supply vacancies, could not be qualified until after the election of a new Council, and of course could have no voice in such election, manifestly against the spirit of the 4th section of the 9th article of the constitution. Under a belief that such a construction was warranted by the obvious intention of the framers of the constitution, as indicated in other parts of that instrument, a quorum of the old Council were uniformly requested by the Governor to remain, until a quorum of the new could be qualified; but there never was any attempt to transact Executive business of any kind, by either Governor or Council, subsequent to the day preceding the first wednesday of January, until a qualification under a new election; all business of every kind being suspended, except merely to administer the qualifying oaths to the members of the legislature. So in case of vacancy in the office of Governor, the President of the Senate the preceding political year, whose term of service as Senator expires with the year, must from necessity act as Governor, and the Council of the preceding year continue to act as such, under the like necessity as above stated, in qualifying the new legislature, but the *necessity* ceases upon the election of a President of the new Senate, an officer then being in the full exercise of the office upon which, according to the provision of the constitution, the duties of Governor devolve in case of vacancy.

Upon every view of this subject which I have been able to take, my mind has come irresistibly to the conclusion that the Executive duties of the State when constitutionally exercised by the President of the Senate, devolve at the end of the political year when so exer-

cised, on the President of the Senate of the next political year, the office of Governor for that year being vacant.

ALBION K. PARRIS,
Just. Sup. Jud. Court.

Portland, Feb. 4, 1830.

AUGUSTA, February 3, 1830.

To the Honorable the Executive Council of the State of Maine.

GENTLEMEN,

After the receipt of your communication of the 25th ult. with which I had the honor to be furnished by the Secretary of State, the members of the Court proceeded to ascertain each others views by letter; not being able, from their scattered situation, to have a personal interview. My brethren are of opinion, as you are doubtless advised, that the right of the late President of the Senate to exercise the executive duties terminated upon the election of a President for the current year. A majority of the Court having thus decided a question of great political importance, although I have not been able to bring myself to concur with them, I have not deemed it expedient to express a formal dissent, and to give in detail my reasons therefor; especially as questions propounded in this manner are necessarily decided without argument, and we have not been able to meet for discussion among ourselves.

I have the honor to be,
Very respectfully,
Your obt't servant,
NATHAN WESTON, Jun'r.

NO. III.

STATE OF MAINE.

To the Honorable Justices of the Supreme Judicial Court.

GENTLEMEN,

Pursuant to the 3d section of the 4th article of the constitution of this State, I hereby request your opinion on the following questions, to wit:

1st. Can a Convention of the members of the Senate and House of Representatives be constitutionally formed for supplying deficiencies in the Senate, without the concurrence of the two branches of the legislature?

2. Can such a Convention, formed without the concurrence of the Senate, and which does not contain a majority of such Senators as are elected, proceed to supply deficiencies before the Senate has ascertained the deficiencies that exist in the Senate and designated the constitutional candidates to supply said deficiencies—and can any other body, under the constitution, other than the Senate, designate the constitutional candidates to supply such deficiencies?

JOSHUA HALL,
President of the Senate,
exercising the office of Governor.

COUNCIL CHAMBER,
Feb. 5, 1830.

To the Honorable Joshua Hall, President of the Senate, exercising the office of Governor.

To the questions contained in your letter of the 5th instant the following opinion is hereby given by way of answer.

The 5th section of the 3d article of the constitution provides that *the Senate* shall, on the first wednesday of January, determine who are elected by a majority of votes to be Senators in each district; and in case the full number of Senators to be elected from each district shall not have been so elected, the members of the

House of Representative and *such Senators as shall have been elected, shall &c.*

There are two modes of determining who are elected Senators; the one is by inspection of the returns of votes; the other is by a decision of the Senate. Cases may occur in which both modes cannot, before vacancies are filled, be adopted.

The section in question seems to contemplate *a Senate* and its acts; it seems also to contemplate merely *a number of Senators*; and that number may not amount to a *constitutional majority* for the transaction of business. An attention to this distinction may reconcile any supposed difficulties in the construction of the provisions of the section.

A Senate cannot exist for the purpose of doing business, unless composed of eleven Senators at least; and such Senate can act only by vote, and decide only by the power of a major vote of the constitutional quorum.

But in case a *less number* of Senators than such quorum shall appear *by the returns* to have been elected, though they cannot form a Senate for the transaction of business, still they have a right, by a part of the above section, to join in convention, formed for supplying vacancies. The expression is; "The members of the House of Representatives and such Senators as shall have been elected shall," &c.

When a *quorum* or more are elected, they are required, as *a Senate*, to do certain acts, particularly specified, preparatory to the formation of a convention for supplying vacancies; but when a number *less* than a quorum are chosen, they have no constitutional authority to do those preparatory acts; but, as before observed, they will have a right to vote in convention, in virtue of the evidence of the returns, and without any other evidence, or any preparatory proceedings on their part. This view of the provisions of the section seems not only justified, but required, in order that the rights of all concerned may be preserved. It also leads to a more satisfactory opinion on the points presented for decision.

All three of the questions proposed are predicated on the fact of an *existing Senate*, clothed with power to act as a distinct branch of the government; and being a constitutional Senate, it is their duty

"to determine who are elected by a majority of votes to be Senators in each district," before a convention of the two Houses can be formed for supplying vacancies.

This opinion, thus expressed, is considered and intended as a negative answer to each of the questions proposed.

The foregoing opinion must, of course, be considered as founded exclusively on the points raised by the proposed questions.

PRENTISS MELLEN, *Chief Justice of the Supreme Judicial Court.*

Portland, February 10, 1830.

To the Honorable Joshua Hall, President of the Senate, &c. &c.

The undersigned having considered the questions propounded to him as a Justice of the Supreme Judicial Court, by the Senate, on the 2d inst. as appears by an order certified by their President and Secretary, and also by yourself, as President of the Senate exercising the office of Governor, on the 5th instant, replies, that the constitution has pointed out the mode in which the Senate shall be filled, in case the full number of Senators shall not have been elected by the people. In such case the members of the House of Representatives, with such Senators as shall have been elected, are by joint ballot to elect the number of Senators required. It must therefore be first ascertained whether the full number has or has not been elected by the people, or, in other words, whether there be any deficiencies, before measures can be taken to supply such deficiencies. The constitution has also pointed out the mode by which this fact shall be ascertained. The Senate, under the 4th article, part 3, section 3, is the sole judge of the elections and qualifications of its own members, and under the 5th section of the same article, part 2, the Senate is required to "determine who are elected, by a majority of votes, to be Senators in each district," and upon this determination may arise the contingency upon which the power and duty of supplying deficiencies devolve upon the members of the House of Representatives and the Senators elect. If the Senate is the sole "judge of the elections and qualifications of its own members," how can it be

ascertained whether " the full number of Senators has or has not been elected," except on the adjudication of that body in which is vested the exclusive power of adjudicating? The validity of the elections may depend upon various facts, such as the orderly conducting the primary meetings in the several towns in each senatorial district, the qualifications of those who voted, the eligibility of the candidate having a majority of votes, and the legality of the returns. All these are facts open to controversy, susceptible of proof, and upon which, by the constitution, a decision seems to have been contemplated, as necessarily preliminary to ascertaining the deficiencies. The constitution has indeed provided that the Governor and Council shall *examine the returns* of votes, and summon such as *appear* to be elected, to attend and take their seat. But this examination is merely for the purpose of providing for the organization of the Government by the attendance of such persons as, from the *inspection of the returns*, appear to have been elected. The Governor and Council never presumed upon an inquiry into the *validity of a Senatorial election*, nor could such an inquiry, were it to be instituted by that body, have any binding effect. On the contrary it is not very unusual for the decision of the Governor and Council, even upon the legality of the returns, to be overruled by the Senate, upon a re-examination. Such was the fact in the first legislature of this State, where the officer authorized to examine the returns declared a deficiency, and the Senate, upon a re-examination of the same returns, decided that there was an election by the people, and that no deficiency existed; and the undersigned believes, (although he has now no opportunity to resort to the records,) that at a still later period there will be found a case where the Governor and Council declared an election, and summoned the members, but the Senate overruled the decision and declared the sitting member not to have been duly elected, and the deficiency was supplied in the manner pointed out in the constitution. From the language of the constitution, and from the practice under it by every legislature since this government was organized, the undersigned cannot doubt, that when a quorum of the Senate has been elected by the people, and the Senate has been duly organized as a co-ordinate branch of the legislative department, that branch has the exclusive power of determining whether the full number of Senators has or has not been elected by the people, and of

course to declare deficiencies if any exist, and from the returns, (which are under its exclusive control,) to ascertain and determine who are the constitutional candidates, from whom the deficiencies are to be supplied. Were it necessary to support this opinion by authority, the uniform practice of the legislature of Massachusetts, under provisions in their constitution similar to ours, for a period of about forty years previous to our separation from that Commonwealth, the insertion of similar provisions in our constitution, without alteration, and the practice by every legislature of this State, under those provisions, all unite in indicating the true meaning of that portion of the instrument upon which we are now called to give a construction.

So in relation to the transaction of business to be done in joint convention of the two Houses or the members thereof; established usage has confirmed, as correct, what would seem to be the necessary and only mode of accomplishing such business, by a convention formed by the concurrence of the two Houses, or a majority of the members thereof.

If a convention, formed without the consent of both Houses, or a majority of the members of each, could legally and constitutionally do those acts required to be done by joint ballot, the legislature might exhibit the singular anomaly of two conventions, sitting at the same time, to accomplish the same business, each formed of a majority of one of the branches and a minority of the other.

The undersigned is therefore of opinion that deficiencies in the Senate cannot be supplied until such deficiencies have been ascertained by the Senate, if that branch of the legislature has been duly organized; and that the constitutional candidates to supply such deficiencies must be ascertained by the Senate, from an examination of the returns, of the legality of which, that body is by the constitution the sole and exclusive judge.

ALBION K. PARRIS
Just. Sup. Jud. Court.

February 8, 1830.

AUGUSTA, February 4, 1830.

To the Honorable the Senate of the State of Maine.

The undersigned, a Justice of the Supreme Judicial Court, has taken into consideration the questions propounded by an order of the Senate, passed on the 2d instant.*

The constitution of the State, article fourth, part second, section third, has made each house the judge of the elections and qualifications of its own members. By article fourth, part second, section fifth, it is made the duty of the Senate, on the first Wednesday of January annually, to determine who are elected by a majority of votes to be Senators in each district. Upon this determination vacancies, if any are found to exist, are to be supplied in the manner provided in the same section. The Senators elected, and the members of the House, in supplying vacancies, are required to choose from the highest number of the persons voted for, equal to twice the number of Senators deficient, on the lists returned, in each district. It may, and the undersigned thinks must, be considered as incident to their power to determine the election of their own members, to determine also, where there has been no election by the people, who are the constitutional candidates, from whom the deficiencies are to be supplied. And it is believed the usage, both in this State and in Massachusetts, where vacancies in the Senate are supplied in the same manner, is in accordance with this opinion. The constitution delegates and distributes to the several departments of the government

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* The questions here referred to will be found to be substantially the same with those propounded by the acting Governor; being as follow:—

"IN SENATE, February 2, 1830.

"Whereas the Senate has not as yet determined the deficiencies that exist at the Senate board, nor the constitutional candidates to supply the same, if any exist; and whereas the Senate has not as yet concurred with the House of Representatives in their proposition for a convention, for the purpose of supplying deficiencies at the Senate board: It is therefore

Ordered, that the Justices of the Supreme Judicial Court be requested to give their opinion on the following questions, viz:

1st. Can a convention of the members of the Senate and House of Representatives be constitutionally formed, for supplying deficiencies in the Senate, without a concurrence of the two branches of the legislature?

2d. Can such a convention, formed without the concurrence of the Senate, and which does not contain a majority of such Senators as are elected, proceed to supply deficiencies, before the Senate has ascertained the deficiencies that exist at that board, and designated the constitutional candidates to supply said deficiencies?"

their respective powers, and determines generally in what manner they shall be exercised. Where the constitution is silent, much depends on precedent and usage, which is generally respected, and would not it is presumed be lightly or unnecessarily changed. A convention of the Senate and House of Representatives, is formed by concert between the two houses. Official comity, and the orderly conduct of business requires this. Probably no precedent can be found either in this State, or in that from which we have separated, of a convention of the two houses being formed, without such concert.

These intimations would not, it is believed, in ordinary cases, be controverted.

There may arise, and there have arisen, in the history of States, extraordinary periods, where the course prescribed by usage and the fundamental laws, either cannot be, or is not, pursued. What remedy shall in such cases be applied, to prevent a dissolution of the government, or to bring its powers into action, it cannot belong to those, whose duty it is to interpret existing laws, to determine.

I have the honor to be,

Very respectfully,

Your ob't servant,

NATHAN WESTON, Jr.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

CASES COMMENTED ON, LIMITED OR EXPLAINED.

CHANCERY.

See PARISH 7.
RECOGNIZANCE 1.

COMMISSIONERS.

See CONVEYANCE 2.

CONDITION.

Where one made a deed in fee, reserving to himself a life-estate in a part of the premises, and declaring further that "this deed is made, and to have effect, upon the following conditions"—viz.—the payment of money at divers times to other persons;—it was held that the fee passed immediately, on condition subsequent. *Howard v. Turner.* 106

See EXECUTORS AND ADMINISTRATORS 1.
GRANTS BY THE STATE 1.
POOR DEBTORS 4.

CONSIGNOR AND CONSIGNEE.

1. The consignee of goods for sale, is at liberty to incur upon them all such expenses as a prudent man would find necessary, in the discreet management of his own affairs. *Colley v. Merrill.* 50

2. Thus, where the owner of a vessel conveyed her to his creditor, to be sold by him to the best advantage, and after payment of the debt, the surplus to be paid over to himself, and the creditor caused her to be sold by a ship-broker;—it was held that the broker's commissions were a reasonable charge upon the gross proceeds of sale, which the owner was bound to allow. *ib.*

CONSTITUTIONAL LAW.

1. The legislature having, in the act dividing the town of *Bowdoinham* and incorporating a part of it into a new town by the name of *Richmond*, enacted that the latter town should be holden to pay its proportion towards the support of all paupers then on expense in *Bowdoinham;* which it did for two years; after which, on the petition of *Richmond*, another act was passed, exonerating this town from such liability in future; it was held that the latter act was unconstitutional and void, as it impaired the obligation of the contract created by the original act of division and incorporation. *Bowdoinham v. Richmond.* 112

2. Whether the "grants," &c. mentioned in the 7th of the terms and conditions of the act separating Maine from Massachusetts, can be extended beyond the immediate acts of the legislature, so as to include lands conveyed by the deeds of the committee on Eastern lands —*dubitatur. Lapish v. Wells.* 175

3. All acts of the legislature are presumed to be constitutional; and will not be pronounced otherwise, except where their unconstitutionality is free from just doubt. *Lunt's case.* 412

4. The legislature has a right to impose reasonable limitations and duties upon the sale of spirituous liquors, and the exercise of certain trades, and public offices, as sheriff, coroner, and the like. And therefore the *Stat.* 1821, *ch.* 133, prohibiting the sale of certain liquors, except in certain modes, and upon license first obtained and duties paid, is not repugnant to the general rights and liberties of the citizen, secured by the constitution. *ib.*

5. Whether a town, having the right to send a representative, has the power to waive that right by a vote not to send one, so as to bind the minority in such town; *quære.* *App.* 486

6. The Executive duties of the State, when constitutionally exercised by the President of the Senate, devolve, at the end of the political year when so exercised, on the President of the Senate of the next political year, if the office of Governor continues vacant. *App.* 506

7. When a quorum of the Senate is constitutionally elected, a convention of the Senate and House of Representatives cannot legally be formed for the purpose of supplying deficiencies in the Senate, without the concurrence of both these branches of the legislature. *ib.*

8. And it belongs to the Senate alone to ascertain who are the constitutional candidates to supply such deficiencies. *ib.*

9. Whether such convention may be

EXCEPTIONS.