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.
The Hon. ALBION K. PARRIS, } *Justices.*

Attorney General, ERASTUS FOOTE, ESQUIRE.

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ERRATA.

The following errors occur in some copies, which the reader is requested to correct.

Page 42, for *Falley* read *Griswold.*

Page 330, line 28, for *Hayman* read *Hegman.*

Page 168. *Memorandum.* The absence of *Parris J.* was occasioned by his holding the sittings after *June* term at *Machias.*

In *Vol.* 6, *Index*, under the head of *Foreign Attachment*, there should be a reference to the case of *Jewett v. Barnard & tr.* page 381.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF KENNEBEC, JUNE TERM, 1830.

JUDKINS *& al. vs.* EARL *& al.*

Where one conveyed "four clapboard machines and two shingle machines," then being in a certain place in the town of L. "and likewise *the patent right* for L. and J.—during the term of *the patent*, which is fourteen years from *Sept.* 3, 1813" —this was held to be a conveyance of a patent right to use *both* the clapboard and the shingle machines.

And the vendor, having no such patent right to the clapboard machine, was held liable to refund to the vendee so much of the consideration money as he had paid him therefor.

THIS was an action of *assumpsit* on a written contract, signed by the defendants, *Sept.* 2, 1818, and expressed in these terms:—"This may certify that we the subscribers have this day sold to Messrs. *John & Daniel Judkins*, four clapboard machines and two shingle machines, and all their apparatus thereunto belonging, water wheel and drums, in Messrs. *Dwight & John Stone's* building in *Livermore*, on *Androscoggin* river; and likewise the patent right for *Livermore* and *Jay*, all that is east of the *Androscoggin* river, and the town of *Dixfield* in the county of *Oxford;* in consideration of nine hundred dollars paid in notes for clapboards; we sell all the above

machinery and right for the above towns, to make, use, and vend to others to use, during the term of the patent, which is fourteen years from the third day of *Sept.* 1813; provided the above named *John & Daniel* pay or cause to be paid two notes for clapboards which they have signed this day to be paid in *Hallowell*, to the amount of nine hundred dollars," &c. In the declaration a promise of the defendants was alleged, by this writing, that there was a patent right for the clapboard, as well as for the shingle machine; and a breach was stated in the fact that there was no such patent right for the former, though there was one for the latter.

At the trial before *Weston J.* he ruled that the writing ought to be construed as an undertaking to convey a patent right for both kinds of machines. And it was proved that the defendants had no patent for the clapboard machine, unless the patent for the shingle machine could be so applied.

The defendants proved that soon after the sale, by reason of the new and improved invention of a circular saw, the machines for sawing clapboards were so far superseded as to become of very little value; and were never imitated in the territory described in the contract; but that the plaintiffs always had the exclusive use and enjoyment of them.

The plaintiffs proved that on calculating the value of the machines and the value of the patent right for the shingle machine, the latter would amount to about 475 dollars; leaving the residue as paid for the purchase of a patent for the clapboard machine.

Hereupon the counsel for the defendants contended that to ascertain the damages, the jury ought to find how much the plaintiffs would have been benefitted had there been a patent for the clapboard machine, more than they had been by the purchase without a patent; and to award this difference alone, as the plaintiffs' damages; and that to entitle them to the consideration actually paid, the clapboard machines should have been returned. But the judge instructed the jury to find in damages for the plaintiffs to the amount of such part of the original consideration as was paid for the supposed patent right for the clapboard machine; which they accordingly did. And the verdict was taken subject to the opinion of the court

upon the correctness of these opinions of the judge who sat in the trial.

Allen, for the defendants, contended that by the language of the contract only one patent right was intended to be conveyed. The singular number being employed, and the date of the patent being given, no reasonable man could mistake the intention of granting one right, to be applied, so far as it was applicable, to both the kinds of machine sold. This construction satisfies the words of the contract; and avoids the necessity of presuming that the party fraudulently undertook to sell what he knew he did not own.

As to the damages, the rule ought to be the same which should be applied to the plaintiffs had they been sued for a violation of the patent right,—viz. the damages actually sustained. Here the plaintiffs had the benefit of any enhanced value of the right; and they alone ought to bear the loss occasioned by its diminution. But whatever may be the rule, the machines themselves should have been returned, before any damages can be claimed. *Chitty on Contr.* 137; *Conner v. Henderson*, 15 *Mass.* 319; 2 *Stark. Ev.* 604; 5 *East.* 449; 1 *Taunt.* 566; 3 *Stark. Rep.* 32; *Kimball v. Cunningham*, 4 *Mass.* 502.

R. Williams, for the plaintiffs.

PARRIS J. delivered the opinion of the Court.

We are first called upon to give a construction to the written contract. The defendants conveyed "four clapboard machines and two shingle machines and all their apparatus thereunto belonging, water wheel and drums in Messrs. *Dwight* and *John Stone's* buildings in *Livermore*, on Androscoggin river, and likewise the patent right for *Livermore* and *Jay*, all that is east of the Androscoggin river, and the town of *Dixfield*."

By this instrument we think it is manifest that the defendants undertook and intended to convey, and the plaintiffs supposed they purchased, not only the clapboard and shingle machines in *Stone's* building, and the right to use them, of which the defendants professed to have a patent; but also the exclusive right to use similar

machines within the territory described in said contract. The words "patent right" must refer to some invention or improvement of which the venders were, or professed to be, the proprietors, and we perceive nothing in the contract to which such invention or improvement could be applicable, except clapboard and shingle machines.

The obvious meaning is the right, secured by patent, to construct, use, and vend to others to be used, machines of the description specified, within the towns of *Livermore*, &c. The argument of the defendants' counsel, that the machines were to be used in conjunction, in the same mill, applies, perhaps, with some force to the machines actually sold, but it is not perceived that it can affect the right to construct and use other similar machines in other situations. That the sale and purchase of such a right was contemplated by the parties, is manifest from the language of the contract. It cannot be presumed that the machines in *Stone's* mill were to be removed to *Jay* or *Dixfield*, and that the right, mentioned in the written contract, extended no further than to use these particular machines.

The next question is as to the rule of damages. The counsel for the defendants contend that the jury should have found how much the plaintiffs would have been benefitted in case there had been a patent right for the clapboard machine, more than they were by the purchase of said machine without a patent, and that this sum ought to be the measure of damages. The error here is in considering the term "patent right" as applying exclusively to the particular machines sold, and not giving it that enlarged construction to which it is fairly entitled, and which the parties undoubtedly intended, viz. the right to construct and use similar machines within the territory described.

When a patentee makes sale of a machine, for use, constructed according to his patent, we are not aware that it is usual for him formally to convey the right to use such machine. The sale would perhaps be considered as carrying with it the right to use the particular article sold, without any formal stipulation to that effect; the right to use being incident to the machine.

The defendants conveyed to the plaintiffs four clapboard machines

and two shingle machines; that conveyance has not been repudiated by the plaintiffs; they still hold the property, and, for aught that appears in the case, are content with the execution of the contract thus far. In the same instrument, the defendants pretend to convey the patent right exclusively to make, use, and vend to others to use certain machines, the exclusive right to make and use which is not in the defendants.

It is manifest, therefore, that nothing passed by the conveyance, and that in such cases the rule of damages is the consideration paid.

But the defendants contend that, to entitle the plaintiffs to that rule of damages, they ought to have returned the machines which they received of the defendants instead of retaining them as they did. Such unquestionably would be the law if this action were founded upon a breach of the contract in relation to the machines. The case of *Conner v. Henderson*, and the other authorities cited in defence, would be applicable to such a case.—But in the case before us, nothing passed, and of course the plaintiffs have nothing to return. They contracted with the defendants for the exclusive legal right to make, use, and vend certain machines;—they paid a fair consideration for that right; and the jury have found that the defendants had no such exclusive right, and of course, could convey none. We are clearly of opinion that the jury were properly instructed, and that there must be judgment on the verdict.

BAMFORD *vs.* MELVIN.

The offices of justice of the peace, and of sheriff, deputy sheriff, or coroner, are not compatible with each other.

Therefore a deputy sheriff, holding a commission of the peace, and extending an execution on real estate, cannot lawfully administer the oath to the appraisers.

Where the officer, in his return of the extent of an execution, states that the appraisement was made under oath, but does not refer to the certificate of the magistrate; the court, in an action between other persons touching the title acquired by the extent, will not look beyond the officer's return to take judicial notice of any defect in the administration of the oath, though apparent on the face of the magistrate's certificate indorsed on the execution.

THIS was an action of the case against the defendant as a deputy sheriff of this county, for violation of his duty in relation to the extent of an execution in favor of the plaintiff against one *Lovejoy—first*, in falsely returning that he had caused the appraisers to be sworn, whereas they were not sworn; and *secondly* in not causing them to be sworn.

It was admitted, at the trial before *Weston J.*, that the plaintiff had caused the land to be attached on the original writ in her suit; that within thirty days after judgment, which was recovered in *April* 1822, the execution had been duly delivered to the defendant for service; that after the attachment, and before judgment, the debtor had mortgaged the land to *R. Williams, Esq.* who demanded the same of the plaintiff, claiming to hold it against her; that *Lovejoy* had died insolvent; and that in making the extent, the defendant, holding a commission as justice of the peace, *had himself administered the oath to the appraisers.* The execution and extent being made part of the case, it appeared that the administration of the oath was certified on the back of the execution, in common form; and that the officer's return stated that the appraisement was under oath, without referring to the certificate as part of his return.

Upon these facts the judge directed a nonsuit, subject to the opinion of the court.

Emmons, for the plaintiff, argued that the extent was void. The acquisition of title by extent depends wholly on positive enactments, each of which must be strictly pursued. One of these is, that the appraisers be duly sworn. The person administering the oath must be authorized, by common law, or by statute. But we have no statute authorizing the defendant to administer oaths in cases like the present. Nor could he derive such power from his commission of justice of the peace; for he was legally disqualified to act in this office, by simultaneously holding and subsequently continuing to act under his commission of deputy sheriff. This is the doctrine of the common law;—1 *Bl. Com.* 344; 3 *Bac. Abr.* 737;—and of the Constitution of Maine. 3 *Greenl.* 484. In this view of the point, it is not material to inquire whether the administration of oaths is a judicial or a ministerial act; the power in either case being wanting.

Nor can the objection that the certificate of the oath is no part of the return, and therefore not judicially before the court, be sustained; because here the whole proceedings under the execution are made part of the case, and must all be taken together. Thus it is apparent that what is meant by "appraised upon oath" in the officer's return, is, that the oath was administered by the officer himself; and this being merely void, the appraisers were not sworn, and the action is maintained.

Sprague, for the defendant, in reply to the argument drawn from the Constitution of Maine, *art.* 3, *sec.* 1, 2, distributing the powers of the government, and inhibiting persons, belonging to one department, from exercising any of the powers properly belonging to another, conceded that the defendant belonged to the executive department, but denied that the administration of oaths was an exercise of judicial power. Otherwise, it could not be done, in similar cases, by the debtor himself. *Barnard v. Fisher*, 7 *Mass.* 71. Notaries public, town clerks, qualifying officers, even the chief Executive, and the President of the Senate, are in various instances authorized to administer oaths; yet this has never been deemed an exercise of judicial power. So coroners are authorized by statute to administer oaths to jurors of inquest; yet the

constitutionality of this law has never been doubted. Even a justice of the peace, when issuing an execution, or taking a recognizance, has been held to act, not judicially, but ministerially. *Albee v. Ward*, 8 *Mass.* 84; *Briggs v. Wardwell*, 10 *Mass.* 356.

The legislature itself has acted on this principle in authorizing the Governor and Council to administer oaths of office to the judges of this court. *Stat.* 1821, *ch.* 104. Are not the judges of this court constitutionally qualified?

But if it were a judicial act, it is not an exercise of "judicial power," within the meaning of the constitution. For this power, by *art.* 6, *sec.* 1, is exclusively vested in such "courts" as shall be established. But a justice of the peace, in administering oaths, does not hold a court. Nor can this court, in the opinion cited from 3 *Greenl.* 484, be understood to mean that every act of a justice of the peace is a judicial act; for the question propounded to them was general, whether a person belonging to the executive department could "of right exercise the office," that is, *all* the powers, of a justice of the peace. And the answer must be taken in as general a sense, that such person could not exercise *all* such powers; but it must be subject to such limitations and exceptions as may be indicated by the application of other principles. If it means more than this, it might not be indecorous to ask the court to revise that opinion, given, as it must have been, without argument and without consultation.

But if it is a binding decision, it ought not to govern the case at bar, since it was pronounced three years after the levy was made; and it partakes of the character of a legislative act, no parties having ever been heard upon the question.

And if the inhibition extends to this case, yet the proceedings are not necessarily void. The administration of the oath may be classed among those acts, which, like a levy made by a coroner who has not given bond, or a marriage solemnized without consent of parents, or the publication of banns, may be good, though the officiating officer is censurable for a misdemeanor. *Dillingham v. Nason*, 15 *Mass.* 170; *Bucknam v. Ruggles ib.* 180; *Fowler v. Bebee*, 9 *Mass.* 231.

MELLEN C. J. delivered the opinion of the Court at the adjourned term in *Cumberland*, in *August* following.

By the agreement of the parties, if the levy is void, the nonsuit is to be set aside and a default entered. In the extent of the execution the defendant assumed to act both as a justice of the peace, and a deputy sheriff of the county of *Kennebec*. If by law he was then disqualified to perform those acts which he did perform in either of those capacities, then the levy is a nullity. The first act which he did on the occasion was that of choosing an appraiser. In this he acted as a deputy sheriff. The second act was that of administering an oath to the appraisers. This he did as a justice of the peace. The third was that of delivering seisin and possesion to the creditor. This he did as deputy sheriff. It is contended by the counsel for the defendant that there was no legal or constitutional incompatibility in the performance of the above mentioned official acts: that the administration of the oath to the appraisers was not a judicial act, but merely a ministerial one: and that, therefore, he had a right to perform that act, though acting as a deputy sheriff in other respects. The correctness of this position must be tested by the constitution. The second section of the third article declares "that no person or persons belonging to one of those departments, shall exercise any of the powers properly belonging to either of the others, except in cases herein expressly directed or permitted." The departments mentioned are the Legislative, the Executive, and the Judicial. Laws passed under the authority of the constitution have designated the powers to be exercised by the respective departments, where any particular designation has been found necessary; and where such designation has been made, the power thus designated becomes one properly belonging to the department to which it has been given. It will not be denied that a justice of the peace belongs to the judicial department. He exercises a portion of the judicial power. From this view of the subject it is perceived that whether the act of swearing the appraisers was a judicial or ministerial one, is an immaterial inquiry. No person is by law authorised to perform that duty but a justice of the peace. He was, therefore, when performing it, exer-

cising a power properly belonging to the judicial department; because by law it is given to him, as an officer belonging to that department; and he certifies that he administered the oath in the capacity of a justice of the peace. This question is not a new one. The justices composing this court in 1825, were called upon by the Senate for their opinion; a majority of whom gave their answer, that "the office of justice of the peace is incompatible with that of sheriff, deputy sheriff or coroner." And "that no person can, according to the third article of the constitution, of right hold and exercise at the same time the several offices of deputy sheriff and justice of the peace," or "the several offices of sheriff and justice of the peace," or "the several offices of coroner and justice of the peace." We hold the same opinion now; and we apprehend that since the construction was given to that part of the constitution as abovementioned, it has been invariably adhered to in practice: and though the execution in question was levied as early as 1822, we are bound to consider it in the same light, as if levied since the above opinion of the court was given.

It may be proper here to observe that the constitution of Massachusetts contained no provision so explicit as ours in relation to the subject under consideration. The language there is, "The Legislative department shall never exercise the Executive and Judicial powers, or either of them: The Executive shall never exercise the Legislative and Judicial powers, or either of them: The Judicial shall never exercise the Legislative and Executive powers, or either of them." In Massachusetts the prohibition applies to the departments; in Maine it applies to persons belonging to the respective departments. The distinction is worthy of observation. Placing the defence of the cause upon the ground on which the counsel for the defendant has placed it, our opinion is that it cannot be sustained.

But there is another view of the cause which we have taken, and which seems to have escaped the critical eye of the learned counsel. The plaintiff demands damages of the defendant for the alleged falsity of his return, in which he states that the appraisers appraised the lands upon oath, or else for his neglect in not causing them to be sworn. Her claim for damages is based on the principle that the levy is a nullity; and, of course, that

Williams, to whom *Lovejoy*, the debtor, conveyed the premises prior to the levy, may maintain an action for the land and recover the same from her, and thus at once divest her of property, equal to the amount of her judgment against *Lovejoy*, and the expenses of the levy. Is this a correct view of her claim to damages, or of her title to the premises on which the execution was extended? Suppose we were now examining *Williams's* title to the land in question, in a writ of entry against the present plaintiff, in which he relied on his deed from *Lovejoy* as evidence of his title. *Bamford* in defence would rely on the levy, in connexion with the attachment of the land, thus deriving title from *Lovejoy* from a date prior to the title of *Williams*. In the defence of such action one incontestible principle of law would be relied upon, and contended to be applicable, namely that the return of a sheriff can never be contradicted, except in an action against the sheriff who made such return. An objection founded on that principle would lead us to the examination of *Melvin's* return on the execution. This return makes no reference to any of the previous proceedings which appear on the back of the execution. It professes to be an independent return of itself: and on examination it is found to contain a statement of all those anterior facts and proceedings necessary to constitute a perfect and legal levy; and when recorded, sufficient to convey the estate to *Bamford* the creditor, unless a different result is produced by the circumstance that *Melvin's* certificate of his having sworn the appraisers, is entered on the back of the execution. What effect that circumstance would have, in such a case, upon the legality and effect of the levy, is the next question to be examined. In *Barnard v. Fisher*, 7 *Mass.* 71, it appeared by a certificate, entered on the back of the execution that the debtor himself swore one of the appraisers, and signed the certificate as a justice of the peace. *Parker J.* in delivering the opinion of the court says, in reply to the objection on that account, "We are of opinion that this does not make the levy void. The counsel for the defendant has argued that he, being interested, is not a proper certifying officer of the fact that the appraisers were sworn. It is a sufficient answer to the objection that the return of the sheriff is the

proper evidence that the appraisers were sworn : and it has been decided, and we think correctly, that although there should be no certificate from the magistrate who swore the appraisers, yet if it appeared by the return of the sheriff that they were duly sworn, the levy would be valid." In *Shove v. Dow*, 13 *Mass.* 529, there was an error in the date of the officer's return, by which it appeared that he delivered seisin and possession about twelve days before the appraisers performed their duty as appeared on their certificate and by the date of it. *Jackson J.* in giving the opinion of the court says, " The certificate signed by the appraisers, is not a part of the return, excepting as it is made so by the officer, by referring to it in the part which is signed by him. The officer alone is authorised to certify what is done by force of the execution : and as it is apparent from his return, that he delivered seisin after the appraisement of the land, although by the dates it would appear to be done before, we must reject one of those dates." In *Williams v. Amory*, 14 *Mass.* 20, *Parker C. J.* in delivering the opinion of the court says, " The statute requires that the doings on the execution shall be returned by the sheriff. If he certify that the appraisers were duly chosen and sworn, and that they performed the duty assigned them, it is sufficient." In this last case the name of one of the appraisers was *Edward Davis:* but in the certificate of the justice it is stated that *Benjamin Davis* was sworn. Thus it appears that in all the three cases above mentioned, the defective or false certificates were entered on the back of the execution; but yet the return of the officer only was considered as the legitimate and decisive proof, and the certificate of the justice, or the appraisers, on account of its insufficiency or evident imperfection or mistakes, was wholly disregarded. Now, in principle, what distinction is there between the case of *Williams v. Amory* and the case at bar? In the former, it did not appear by the certificate of the magistrate that more than two of the persons who made and signed the appraisement had been sworn : and in the latter, taking the certificate of *Melvin*, as a justice of the peace, in connexion with the facts showing that he had no authority to administer such an oath, it does not appear that any of the appraisers were sworn. Still the defendant as deputy sheriff

certifies that they were sworn : and nothing appears on the back of the execution shewing but that some person duly authorised administered the oath, whose certificate need not be annexed. Therefore, in the case before the court, why should not the certificate of *Melvin* that he swore the appraisers be disregarded, and the officer's return be believed ? In this return he says the appraisers performed the duty assigned them upon oath : and the law says that between third persons, his return is conclusive as to the facts which he states in his return. According to the foregoing principles, applied to the facts of the present case, we perceive no ground on which *Williams* could maintain the supposed action against Mrs. *Bamford.* Why then should she maintain this action ? She has suffered no damage : she has a legal title to the land on which her execution was extended, according to the facts stated in the return signed by *Melvin* as deputy sheriff. Should *Williams* see cause to contest the question of title with Mrs. *Bamford* and be defeated on account of any neglect or falsehood in *Melvin's* return, he is perfectly competent to judge for himself whether he could not maintain an action against *Melvin* if not barred by the statute of limitations, and recover damages equal to the loss sustained in consequence of his alleged misconduct in his office. We are all of opinion that this action cannot be maintained.

Nonsuit confirmed.

NASON *& al. vs.* READ.

In an action for contribution, between the sureties of a collector of taxes, for money paid by one of them without suit, the town treasurer is a competent witness to prove the collector's delinquency.

Where the collector of a town had given bond with sureties, conditioned for the faithful collection of the town taxes; and afterwards had given another bond, with other sureties, for the faithful collection of a school-house tax; after which he paid over a large sum of money to the treasurer, taking his receipt, in which he promised to account for that sum to the town; it was held,—in an action for contribution between the sureties on the first bond, one of whom had voluntarily paid the amount of an alleged delinquency,—that parol testimony was admissible to prove that the sum thus paid included the amount of the school-house tax, which had accordingly been paid over by the treasurer, by direction of the collector; and that therefore the deficiency existed only in the first bond.

THIS was an action of *assumpsit* brought by the plaintiffs, who were sureties in an official bond given by one *Bartlett Lancaster* as collector of taxes in the town of *Augusta*, for the year 1823, against their co-surety, for contribution; they having paid $298,34 for his alleged delinquency. The defendant denied the fact of the delinquency.

It appeared at the trial before *Weston J.* that the amount of taxes committed to the collector and expressed in the condition of the bond was $3386,60. Soon after these bills were received by the collector, another bill was committed to him for the collection of a sum of money to build a school house for the use of a school district in the same town; for the faithful performance of which latter duty he gave another bond, with other sureties.

To show that there was no delinquency in the collector, the defendant produced a receipt given *Jan.* 3, 1824, by the town treasurer to the collector, for $3549,83 in money, notes and orders, being money collected by him for the town of *Augusta*, for the year 1823; for which the treasurer promised to account to the town on demand. It appeared that about 800 dollars of this sum was paid in money, and the residue in town notes and orders, and some prior receipts then taken up; one of them having been given *Oct.* 22, 1823, for

$400,67 in cash, and $403,56 in orders. The defendant contended that the whole amount was to be applied to the taxes mentioned in the first bond.

It was insisted, however, by the plaintiffs, that $400 of this sum was paid on account of the school-house tax; and they proved by the treasurer, whose admission, as well as the admissibility of any parol testimony to the point was opposed by the defendant, that when he gave the receipt, the collector directed him to pay over $400 of the money to the committee of the school district, which he forthwith did. This fact was contradicted by the collector, who testified that he paid over the school-house tax to the treasurer in *October* preceding. If the appropriation was made as testified by the treasurer, and the school-house tax was included in the receipt of *Jan.* 3, 1824, the plaintiffs' case was made out. And whether it was so or not was left to the jury, who returned a verdict for the plaintiffs; which was taken subject to the opinion of the court upon the points raised at the trial.

Allen, for the defendant, argued against the admissibility of the treasurer, on the ground that he was interested in the matter of the suit, being responsible to the town for the money in question, if the case of the plaintiffs was not made out. *Emerton v. Andrews*, 4 *Mass.* 153.

He further contended that the testimony itself was inadmissible, as it contradicted the written contract of the treasurer to account for that money to the town;—a contract too, in which other persons had an interest from the moment it was made. It was an official admission of a fact, on which the sureties might rely; and to change it by parol testimony would operate to defraud them. 3 *Stark. Ev.* 1002, 1005, 1272, 1275; *Small v. Quincy*, 4 *Greenl.* 497.

Emmons, for the plaintiffs, cited 1 *Stark. Ev.* 186, 191, 196; 4 *Mass.* 441; 13 *Mass.* 199; 16 *Mass.* 118; 4 *Maule & Selw.* 479; 5 *Pick.* 447; 3 *Stark. Ev.* 1273—5, 1044; 9 *Johns.* 310; 1 *Johns. Ca.* 145; 2 *Johns.* 378; 5 *Johns.* 58; 5 *Ves.* 87; 3 *Johns.* 316; 11 *Mass.* 27; 5 *Mass.* 101, 353; 7 *Mass.* 261; 10 *Mass.* 39; 6 *Mass.* 350.

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

This case presents two questions. 1. Was the treasurer properly admitted as a witness? 2. If so, was it competent for him to testify as he did in relation to his receipt of *January* 3*d*, 1824?

As to the first question; it is a well settled principle of law, that if a person has a direct interest in the event of the cause depending, or if the verdict in such case can be used in evidence for or against him, he is not a competent witness. Now it is perfectly clear that in the event of this cause he has no direct interest, nor does it appear that the town of *Augusta* has any. The plaintiffs have paid the amount which the collector ought to have paid; and, of course their claim is satisfied, in respect to the deficiency of the collector, in the discharge of his duty. To whom then can the treasurer be responsible? The event of this cause does not render his situation better or worse, it gives him no rights, it relieves him from no liability. Nor can the verdict in this case ever be used for or against him in any other action in which he may be a party. Such a cause must be tried on its own facts and merits. Our opinion, therefore, is that he was properly admitted as a witness.

As to the second point; the authorities cited establish the principle that a receipt for a sum of money is not conclusive evidence as to the facts it imports. It may be explained where its language is in any degree ambiguous, or where, by mistake, it imports more than the truth. It is not contended in the present case that there was any mistake, but the testimony of the witness was admitted to explain the receipt so far as to show that $400, part of the sum therein expressed, was received by him on account of the school house tax and that he had paid it over accordingly: and that in one sense, it was the town's money, being designed for the benefit of the town by being expended under the control of one of the school districts in the town. We do not perceive any principle of law which forbids such explanation.

But it is further urged that the paper dated *January* 3*d*, 1824, is not merely a receipt, but also a contract. It is only a promise to account for the sum received to the town; and amounts to nothing

more than to do that which the law required of him without any such promise; and he did account for it in the manner before mentioned.

On the whole, we see no good reason for sustaining the motion.

Judgment on the verdict.

GILMAN *vs.* WELLS.

A promissory note payable in *specific articles* is not within the meaning of the *proviso* in the statute of limitations, (1821, *ch.* 62,) by which promissory notes for the payment of *money*, if attested by a subscribing witness, are excepted from its operation.

THIS case, which was briefly spoken to by *Hutchinson* for the plaintiff, and *Wells* for the defendant, is stated in the opinion of the Court afterwards delivered by

MELLEN C. J. In this action the plaintiff declares on a promissory note made by the defendant whereby he promised to pay to the plaintiff the sum of $50 in corn, within a certain time, which had elapsed more than six years before the commencement of the suit. The note was attested by one subscribing witness. These facts appearing on the pleadings, ending in a demurrer, the question made by the plaintiff is whether the note in question is saved from the operation of the statute of limitations of 1821, *ch.* 62, by virtue of the 10th section of the statute, which is in these words, viz. "That this act shall not extend to bar any action hereafter brought upon any note in writing, made and signed by any person or persons, and attested by any one or more witnesses, whereby such person or persons has promised or shall promise to pay to any other person or persons any sum of money mentioned in such note; but all actions upon such note or notes, brought by the promisee, his executor or administrator, shall and may be maintained as if this act had never been made; any thing herein contained to the contrary notwithstanding." It is admitted that the note in suit is not negotiable; but why

is it not, if in legal contemplation it is a note for the payment of a sum of money? It is not payable on any contingency. It is said that as it was not paid when it fell due, it then became payable in money, and not in corn, and that the plaintiff could recover his damages in money, by reason of the breach of the contract. This is true; but the section above cited has reference to the nature and effect of the promise at the time it is made, not when it is broken. The defendant had a legal right to pay the amount of the note at the appointed time in corn; and a tender of that article would have been good; but a man cannot tender corn in satisfaction of a promissory note payable in money. A promise to pay fifty dollars in corn is in law the same as a promise to pay fifty dollars worth of corn. We are not aware that the section in question has ever received a judicial construction different from the one we have now given. The action cannot be maintained.

Replication adjudged insufficient.

GETCHELL *admr. vs.* HEALD *& als.*

The acknowledgment of a debt by one of several joint defendants, is sufficient to take the case out of the statute of limitations as to them all.

THIS was an action of *assumpsit* brought to recover the balance of an account for a quantity of pine timber. The defendants pleaded the general issue, and the statute of limitations.

It appeared, at the trial before *Weston J.* that prior to *Nov.* 10, 1817, the plaintiff's intestate and the defendants, who were brothers, proposed to purchase a timber lot on joint account; and that on that day the plaintiff's intestate took the deed in his own name, giving his own note for the purchase-money. In the winter following all the brothers united in taking the timber from the lot, which was sold in the spring for their joint benefit. In 1825, *James Heald*, one of the defendants, presented his claim to the commissioners on the es-

tate of the plaintiff's intestate; and a note being at the same time presented to them for allowance, by the trustees of *Monmouth* Academy, against the intestate, *James* stated to the commissioners that he ought to pay part of that note, saying it was given for the timber lot which they had bought together; and directed them to allow one quarter of the sum, by deducting it out of his own claim against the estate; which was accordingly done, to the amount of $181,97. This sum was credited in the account sued in this action.

The defendants also produced a receipt given by the plaintiff to *James Heald*, *Nov.* 19, 1825, purporting to be in full of all demands which the estate of the intestate had against him.

A verdict was hereupon taken for the plaintiff, subject to the opinion of the court upon the effect of this evidence to sustain or bar the action.

Boutelle, for the defendants, objected to the sufficiency of the evidence to take the case out of the statute of limitations, it being an admission of the sole liability of the party making it, and therefore binding on him alone. *Doug.* 651; 2 *Stark. Ev.* 44, 45; *Holmes v. Green*, 1 *Stark Rep.* 397; *Brandram v. Wharton*, 1 *Barn. & Ald.* 463; 1 *Stark Rep.* 53; 2 *H. Bl.* 340. And the receipt, he contended, was a discharge to all the defendants, if they were joint debtors; and if not, it was equally fatal to this action, being a discharge of one of them.

R. Williams, for the plaintiff, cited 2 *H. Bl.* 340; 5 *Dane's Abr. ch.* 161, *art.* 9, *sec.* 1; 2 *Stark.* 897.

Mellen C. J. delivered the opinion of the Court in *Cumberland*, at the adjournment of *May* term in *August* following.

It is admitted that the timber, for a balance of the proceeds of which this action is brought, was cut on the land or timber lot for which the intestate gave his note: that the lot was purchased, as *Heald* acknowledged; and that he and the other defendants, with the intestate, jointly cut the timber on the land and took it off, and sold the same on joint account. Such being the facts, *Heald*, one of the defendants, within six years before the commencement of the action, acknowledged that he ought to pay a part of the note given for the

land and timber, which he did by allowing $181,97 to be deducted from his claim against the estate of the intestate. Now it is very clear that if several persons, whether in partnership or not, are jointly indebted, the explicit acknowledgment of one of them, who is still liable himself, of the existing indebtedness, or a new promise by him, will take the case out of the statute of limitations as to all. 2 *Stark. Ev.* 897, 898, and cases there cited. The case of *Jackson v. Fairbanks* cited and commented upon in *Brandram v. Wharton*, 1 *Barn. & Ald.* 463, differs from the present essentially. This ground of defence, therefore fails.—As to the receipt in full, it cannot bar this action against several defendants: it is in terms in full of all demands of the estate against *Heald* only.

Judgment on the verdict.

FISHER *vs.* BRADFORD.

The payee of a negotiable promissory note, having indorsed it in blank and delivered it in pledge to another, as collateral security for his own debt, has still the right to negotiate it to a third person; who may maintain an action upon it in his own name as indorsee, the lien of the pledgee being discharged before judgment.

Assumpsit by the indorsee against the maker of a promissory note, dated *December* 4, 1827, payable to *Henry Rice & Co.* or order, on demand, with interest after six months. The action was commenced *January* 10, 1829, and was tried before *Weston J.*; the question being whether the note was legally transferred to the plaintiff, before the commencement of the action.

It appeared that on the 5th day of *March*, 1828, *Rice*, being alarmed for the safety of his debt, induced the plaintiff, for a premium of five per cent, to guaranty the payment of the amount in one year from that day, by a written stipulation on the back of the note. In *September* following *Rice* lodged the note in the *Globe* bank as collate-

ral security for monies loaned to himself, and it was put on the list for collection. About the first of *January* 1829, *Fisher* called on *Rice* and wished to take up the note, substituting his own; but this *Rice* declined, because it was out of his possession. *Fisher* then asked *Rice* if he would consider the note as his, and look to him for it; to which *Rice* assented; agreeing to render the plaintiff every facility in his power, for the collection of the note, consistent with his own remedies, as they then existed, against both the maker and guarantor. And on the 7th day of *March* following, the note was withdrawn from the bank by *Rice*, and paid and taken up by the plaintiff, the former then writing the words, "without recourse to," over his own name, which had been placed on the back of the note when it was lodged in the bank.

Upon this evidence the defendant contended that *Rice* had no power to transfer the note while it was in the custody of the bank; and that if he had, yet it had not been exercised in the present case till long after the action was commenced. The former of these points the Judge overruled; and the latter he left to the jury; instructing them to find for the plaintiff, if they should be satisfied that *Rice*, having previously placed his name on the back of the note, authorised the plaintiff to commence this action. And they found for the plaintiff; the question of law being reserved for the consideration of the court.

Allen, for the defendant, argued that the bank alone had the right to sue for the contents of the note while it remained in its own possession as a pledge; and that *Rice*, during that period, had only an equitable interest, which was not negotiable. *Knight v. Gorham*, 4 *Greenl.* 492.

H. W. Fuller, for the plaintiff, cited *Little v. O'Brien*, 9 *Mass.* 423; *Marr v. Plummer*, 3 *Greenl.* 73; *Bowman v. Wood*, 15 *Mass.* 534; *Wilson v. Codman*, 3 *Cranch*, 208; *Chitty on bills*, 175; 2 *Dal.* 396; *Lovell v. Everton*, 11 *Johns.* 53; *Ball v. Allen*, 15 *Mass.* 433.

WESTON J. delivered the opinion of the Court.

There is nothing in the law which forbids the holder of a negotia-

ble promissory note, after it has been indorsed, from suing it in the name of another, with his consent; provided it is unattended with any circumstances of fraud or oppression. Nor is it unlawful for another person to institute such suit in his own name, with the privity and consent of the party beneficially interested. Every facility is afforded to the circulation of negotiable paper, after indorsement. It may pass from hand to hand, either with or without consideration; or may be sued by one in trust for another. The party ultimately liable, is not thereby injured. By the terms of the contract, he is answerable to the payee or his order, and according to its legal effect, the order of any other holder. The jury have found that the note in question, after indorsement, was sued by the plaintiff, with the consent of the payee. It might not then have become his property; although he was deeply interested in its collection; having guarantied its amount, which he has since paid. He had then an authority coupled with an interest; but the former without the latter was sufficient for his purpose, he having produced the note at the trial.

But it is contended that the Globe bank, being possessed of the note when sued, as collateral security, could alone bring or authorize the suit. They had a special property, which, accompanied as it was by possession of the instrument, would have justified and enabled them to sue and recover thereon. But the general owner might sue, although liable to be defeated in his suit, if the bank, not being otherwise satisfied, thought proper to retain the note to their own use. And so might any other person, authorized to sue by the general owner, be subject to the same contingency. The arrangements between the bank and the payee, afford no defence to the maker. The pledge, having been given up, is, as to him, as if it had never existed. He is not liable to the bank; and when he has paid and satisfied the plaintiff, he is completely discharged and exonerated from the note; and no one, who is or ever was interested in it, can have any cause of complaint.

Judgment on the verdict.

WING *vs.* DAVIS *&* *al.*

Where the mortgagee, after entry for condition broken, conveyed the premises in fee, in distinct parcels, to two others, it was held that they were properly joined as defendants in a bill to redeem.

In computing the three years after entry for condition broken, within which a mortgagor may redeem, the day of entry is to be excluded.

Where a mortgage has been assigned, and the assignee has entered and is in possession, the tender, under *Stat.* 1821, *ch.* 39, is to be made to him, and not to the original mortgagee.

Tender of money in a bag, made at the window of a house, to redeem a mortgage, the creditor being at the window, and not admitting the debtor within the house, is sufficient.

But such tender, made after day light is gone, is too late.

THIS was a bill in equity to redeem certain lands mortgaged. The plaintiff was purchaser of the mortgagor's right in equity of redemption, at a sheriff's sale. The defendants held under deeds from the mortgagee.

It appeared that one *Bangs* mortgaged the premises to *Rufus Gay*, *July* 5, 1824, to secure the payment of two hundred dollars in one year, one hundred dollars in two years, and one hundred dollars in three years, with interest; and that one year's interest had been paid. *Gay* entered for condition broken, *Aug.* 15, 1825; and on the sixth day of *December* 1826, made absolute conveyances of the premises in fee, in distinct parcels, by several deeds, to the defendants, *Davis* and *Plummer*. These deeds were not recorded, and their tenor was unknown to the plaintiff.

On the 15th day of *August*, 1828, between the hours of nine and nearly eleven in the evening, the plaintiff tendered four hundred and seventy-five dollars to *Gay*, and four hundred and eighty dollars to *Davis*, and afterwards to *Plumer*, at their several houses, in discharge of the mortgage. These persons were all in bed, and the lights extinguished, when the plaintiff called to make the tender. *Gay* declined receiving the money, because he no longer held the mortgage. *Davis* said he could not attend to the business at that

time of night, and would rather that *Plumer* should be present when he settled; and *Plumer* replied that it was rather late, and he could not attend to it that night; but did not say that he could not count the money, for want of a light. At *Gay's* house, the bag containing the money was laid on a table. *Davis* conversed with the plaintiff from his chamber window, and *Plumer* at his door; the plaintiff having the bag of money in his hand. After the tender, the money was forthwith deposited in the *Gardiner* bank, for the use of the person entitled to receive it, and notice given to *Gay*, and the two defendants.

Allen, for the plaintiffs contended that the defendants were properly joined in the bill, though claiming distinct moieties of the land; because the plaintiff had no means of knowing that fact, the deeds not having been placed on record. And in any case, all the assignees of a mortgage ought to be joined, because of their privity in estate. 6 *Johns. Ch.* 149; *Brinkerhoff v. Brown, ib.* 157; 8 *Mass.* 554. If not, the objection cannot now avail the defendants, not having been taken by demurrer.

And the sum tendered, he said, was sufficient, being the amount of principal and interest then due. If the defendants would claim more, for costs, expenses or repairs, they should have declared it at the time, and also have rendered an account in their answers; which has not been done.

In point of time, also, it was seasonably made, the day of the entry for condition broken being excluded. *Bigelow v. Wilson*, 1 *Pick.* 485; *Windsor v. China*, 4 *Greenl.* 298. The objection that it should have been made before sunset, or during daylight is not sustained by the authorities. To save a forfeiture, a tender may be made at any time before the last instant of the day. *Co. Lit.* 202; 1 *Bac. Abr.* 428, *Condition P.* 3; 2 *Bl. Com.* 141; *Greely v. Thurston*, 4 *Greenl.* 480; *Duppa v. Mayo*, 1 *Saund.* 287. The "uttermost convenient time of the day," mentioned in the books, refers not to the tender of money, but to specific articles.

And in form it was good, though the money was contained in a bag. *Chitty on Contr.* 306; *Breed v. Hurd*, 6 *Pick.* 356; *Harding v. Davis*, 2 *Carr & Payne* 77; *Borden v. Borden*, 5

Mass. 67. For the plaintiff did all in his power; and the defendants refused to receive the money at all.

Evans, for the defendants, denied that there was any privity in estate between them; and cited 12 *Mass.* 479, and *Jackson on real actions*, 72, to show that they were improperly joined; contending that the inconveniences arising from wrong joinder were as great in equity as at law. To the point that the tender was made a day too late, he cited 1 *Ld. Raym.* 280; 3 *East* 407; *Presbrey v. Williams*, 15 *Mass.* 193;—or if on the proper day, yet at too late an hour;—6 *Bac. Abr. Tender D.; Aldrich v. Albee* 1 *Greenl.* 120; *Duppa v. Mayo*, 1 *Saund.* 287, *note* 16.

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

MELLEN C. J. From the bill and answers it appears that *Gay* entered for breach of the condition of the mortgage *August* 15, 1825. Before that time the first note described in the deed had become due: and on the 6th of *December*, 1826, he made an absolute deed to *Davis* of one moiety of the premises in severalty, and of the other moiety to *Plumer* in the same manner. Still, as at that time the premises were redeemable by the mortgagor or his assigns, those conveyances could only operate as an assignment of the mortgage, in respect to the owner of the equity, whose rights could not thus be affected. We are therefore of opinion that they are properly joined in the bill. We are also of opinion that if a legal tender of a sufficient sum was made on the 15th of *August*, 1828, it was within the three years by law limited for redemption: or in other words, that the day on which the entry to foreclose was made, must be excluded in the computation. For the reasons and authorities on which this opinion is founded, we refer to the case of *Winslow v. China*, 4 *Greenl.* 298, and the cases there cited. We are also of opinion that where a mortgage has been assigned, and the assignee has entered and holds the title and possession, the tender for the purpose of redemption must be made to him. The language of our statute of 1821, *ch.* 39, first section, is, "upon payment or tendering of payment, &c.—to such mortgagee, vendee, or person claiming and

holding under them and in possession as aforesaid," &c. Such is the character and situation of the defendants. We may, therefore, lay out of the case all which relates to the tender made to *Gay*. The remaining questions are to be decided upon the proof introduced by the plaintiff to control and disprove so much of the answers of the defendants as relates to the character, legality and sufficiency of the tender made to them. Was it in due form? Was it at a seasonable hour of the day? Was a sufficient sum tendered? By the evidence it appears that what the plaintiff relies on as a tender, is the fact, that he, late in the evening, stood outside of *Davis's* house, in the dark, holding some conversation with *Davis*, at a chamber window, as to his wish to pay the amount due on the said mortgage, and urging *Davis* to accept it, who declined doing any thing about it at that time of night: during which time, *Wing* held in his hand a bag, containing 475 dollars in specie. Two witnesses testify to these facts; and to the same facts as to the alleged tender to *Plumer*, with the exception that they did not hear him say he could not count the money for want of a light.

In *Wade's case*, 5 *Co.* 115, it was decided that an offer of money in a bag is a good tender, if it contains sufficient: though in *Noy*, 74, *Suckling v. Cony*, it was decided that where the mortgagor said to the mortgagee, "I am here ready to pay you the money due on the mortgage," but at the same time kept the money in a bag, under his arm, it was a good tender. In the case before us, *Wing* could not place the bag within the reach of either of the defendants, as he was not admitted into the house: but he did all in his power to induce them to receive the money, and they made no objection, except as to the time and circumstances in which the offer was made: other objections, perhaps, may be considered as waived, as to the manner. 3 *D. & E.* 683. *Peake's cases*, 88. 4 *Esp.* 68. 5 *Esp.* 48. *Perkins v. Dunlap*, 5 *Greenl.* 268. Was the tender made at a seasonable time of the day? The law upon this subject is found in our ancient books. In *Wade's* case before cited, the court lay down the law in these words: "Although the last time of payment of the money by force of the condition, is a convenient time, in which the money may be counted before sun-set, yet, if the tender be made to

him who ought to receive it, at the place specified in the condition, at any time of the day, and he refuse it, the condition is forever saved, and the mortgagor, or obligor needs not make a tender of it again before the last instant." See also, *Co. Lit.* 202. In *Hill v. Grange*, 1 *Plowd.* 172, the condition was to pay rent within ten days after certain feasts, in which case the Justices unanimously held that the lessee had liberty during the ten days ;" and therefore, they observe—" the lessee is in no danger as long as he has time to come and pay it ; and he has time to come and pay it as long as the tenth day continues ; and the tenth day continues until the night comes ; and when the night is come, then his time is elapsed. So that his time to pay it continues until the separation of day and night. And, in arguing this point, *Robert Brook*, Chief Justice and *Saunders*, said that if the rent reserved was a great sum, as £500 or £1000, the lessee ought to be ready to pay it in such convenient time before sunset, in which the money might be counted ; for the lessor is not bound to count it in the night, after sun-set, for if so, he might be deceived ; for *Brook* said *qui ambulat in tenebris nescit qua vadit.*" The language of the court in the case of *Greely v. Thurston*, does not advance a different principle. The question is, what is the whole day in relation to a tender in contracts of this character. We are not aware that modern decisions have changed the law as established by the old cases ; or the facts necessary to be proved to support a plea of tender ; except so far as the conduct of the creditor may in certain cases amount to a waiver of objections against the formality of the tender, or in case of his artful avoidance or evasion. In the case before us there is nothing like a waiver as to the unseasonableness of the hour ; in fact this was the objection made by the defendants at the time of the alleged tender ; which was attempted to be made, not long before midnight, when the defendants and their families were asleep, and all the lights extinguished. No reason has been assigned why a payment or a tender was delayed to so unusual an hour ; and if a loss to the plaintiff is the consequence of this strange delay, he must thank his own imprudence.

We do not mean to decide that a tender may not, in any circum-

stances be good, though made after the departure of day light: it is not necessary to intimate any opinion on the point. Our decision is founded on the facts of this case: and the tender not having been made in due season, we need not inquire as to the sufficiency of the sum which was offered.

Bill dismissed, with costs.

STEVENS *vs.* MORSE.

Where the brother of one of several judgment debtors advanced the amount of the execution to the officer, in order to obtain the control of it, and to satisfy it out of the property of another debtor, which was done; the brother for whose relief the money was advanced being absent, but afterwards approving the act, and reimbursing the money;—it was held that by such payment the execution was satisfied and *functus officio;* and that therefore the subsequent levy was void.

In this case the officer delivered up the execution, undertaking thereby to assign it, to the person advancing the money; and it was extended on land attached on the original writ; the creditor subsequently ratifying this arrangement. But it was held that the officer had no authority to make the assignment; and that this ratification, even if the execution had remained in force, could not so relate back as to defeat a *bona fide* conveyance made after the attachment.

THIS was a writ of entry, brought by *William H. Stevens*, in which both parties claimed title to the premises, under one *Joshua Stevens*.

The demandant's title was by deed from *Stevens*, dated *July* 15, 1817, and immediately registered.

The tenant's title was under an attachment made *July* 7, 1817, on a writ in favor of the *Gardiner* bank against several defendants, of whom *Joshua Stevens* was one; which was followed by a regular judgment and execution, extended *Jan.* 15, 1818, being within thirty days after the judgment, and seasonably recorded and returned. The premises thus taken were assigned by the *Gardiner* bank, *Jan.* 25, 1819, to *Cyrus Carlton*, for the consideration of one dollar;

and by him conveyed, through several mesne conveyances, to the tenant.

To defeat this apparent title of the tenant, the demandant proved, by the officer who had the execution, that within fifteen days after judgment he called for certain goods of one *Henry Carlton*, another of the judgment debtors, which had been attached on the original writ, and were sufficient to have satisfied the execution;—that to liberate these goods, *Cyrus*, by advice of the officer, procured the money by loan from the *Kennebec* bank, and paid it to the officer, taking his receipt for the amount of the execution and all fees; and thereupon the officer delivered the execution, without any indorsement thereon, to *Cyrus*, in order that he might cause it to be satisfied out of the property of the other debtors. *Cyrus Carlton* was not one of the debtors; and his brother *Henry* was absent at this time; but on his return approved what *Cyrus* had done; and paid the note given by him to the *Kennebec* bank, when it fell due. The money received by the officer was paid over to the creditors within forty-eight hours; but he had no authority from them, except to collect the money.

It further appeared that the goods attached belonged jointly to *Cyrus* and *Henry*, who had been partners in trade, but had dissolved partnership, the goods being left in the hands of *Cyrus*, undivided; that the object of *Cyrus* in advancing the money, as avowed by him, was to liberate his brother's property, and obtain the control of the execution; that the directors of the *Gardiner* bank, after the money was paid over to their attorney, appointed an appraiser, by a vote passed *Jan.* 14, 1819, and authorised *Cyrus Carlton* as their agent to receive seisin of the land extended upon;—and that after the extent, *Joshua Stevens* called on his co-sureties for contribution, from two of whom he received it.

Upon this evidence, by direction of *Weston J.*, before whom the cause was tried, a default was entered against the tenant, subject to the opinion of the court upon the sufficiency of his title; the question of increased value being provided for by a special agreement of the parties.

Allen, for the tenant, argued that the transaction between the

officer and *Cyrus Carlton* did not amount to payment of the execution, so as to render it *functus officio*; because it was not the act of one of the judgment debtors, but of a stranger; and was done without authority at the time; and not on the credit of the debtor, however satisfactory to him afterwards, It was therefore merely a purchase and assignment of the execution, intended as such between the purchaser and the officer at the time, and so treated subsequently by the bank. *Allen v. Holden*, 9 *Mass.* 133; *Norton v. Soule*, 2 *Greenl.* 341; *Cheesborough v. Millard*, 1 *Johns. Ch.* 409; *Atto. Gen. v. Tyndal Ambl.* 614; *Amory v. Williams*, 14 *Mass.* 20.

R. Williams, for the demandant, cited *Clerk v. Withers*, 11 *Mod.* 34; 5 *Dane's Abr. ch.* 136, *art.* 13, *sec.* 2, 3, 4; 3 *Dane's Abr. ch.* 75, *art.* 12, *sec.* 10; *Reed v. Pruyn*, 7 *Johns.* 426; *Sherman v. Boyce*, 15 *Johns.* 443; *Brackett v. Winslow*, 17 *Mass.* 153; *Hammatt v. Wyman*, 9 *Mass.* 138.

MELLEN C. J. delivered the opinion of the Court in *Cumberland*, at the adjournment of *May* term in *August* following.

Both parties claim under *Joshua Stevens*. The deed to the demandant was dated and executed eight days subsequent to the attachment in the suit of the bank against *Stevens*, but about six months prior to the levy of their execution. Therefore, if the levy was an ineffectual one, the title of the demandant is good. The officer to whom the execution was delivered for service, had no authority or direction from the bank, except to collect the contents. *Cyrus Carleton*, a brother of *Henry Carleton*, one of the execution debtors, paid him the contents, which the bank received within forty-eight hours: and the officer, at the time of receiving the amount, gave a receipt to him for the same and for his fees; and delivered to him the execution, without any indorsement thereon. In view of all the circumstances of this case, as detailed in the report, the question is, What was the legal effect of this payment and delivery over of the execution to *Cyrus Carleton*? It is admitted that the delivery of an execution to a third person for a full and valuable consideration paid, is a legal assignment of the contents of

such execution. *Vose v. Handy*, 2 *Greenl.* 322, and cases there cited. But no one can make such assignment, but the creditor or some person by him duly authorized; and it appears by the testimony of the officer himself that he had no such authority, nor did the bank ever make any assignment or release of their supposed right to *Cyrus Carleton* until *January* 25, 1819; and then in consideration of one dollar only. If this is contended to be a ratification of the act of the officer in undertaking to assign the execution to *Cyrus Carleton*, without any authority at the time, the obvious reply is that it can never be construed to have this effect, when the rights of third persons are interposed, and which would thus be defeated. Now, before the levy of the execution, and before the unauthorized assignment of the execution by the officer to *Cyrus Carleton*, the deed to the demandant had vested the title in him. The release of the bank, therefore, was too late to affect the title thus vested. But it is further contended on the part of the tenant, that the bank sanctioned the proceedings of the officer respecting the execution, by the vote of the directors, passed on the 14th of *January*—the day before the levy—appointing an appraiser, and authorizing *Cyrus Carleton*, as their agent to receive seisin. This was several days after the bank had received full payment of their execution, and at a time when they had no interest in it, nor claimed to have any; and this appears evident from the fact above stated, namely, their afterwards releasing all title to *Cyrus Carleton* for the consideration of one dollar.

But there is another ground on which we more especially place our decision. The cases of *Reed v. Pruyn*, 7 *Johns.* 426, and *Sherman v. Boyce*, 15 *Johns.* 443, cited by the counsel for the plaintiff, have a strong bearing on the present case, as giving the legal character of the acts of an officer in receiving payment of an execution, and at the same time endeavoring to continue the judgment and execution in force as against the debtor.

The marginal abstract of the former case is, that "a sheriff cannot with his own money pay the plaintiff on an execution, and afterwards levy the execution out of the property of the defendant; nor can he take a bond or other security, and detain the execution in his hands, and use it afterwards to enforce the payment of the money advanced

by him." In the latter case the officer joined with the defendant in a note to raise money to pay the execution, with an express agreement that the execution should remain in force. The officer being called on for the money, which he paid, sold the defendant's property on the execution. It was held that the execution was satisfied and *functus officio*, by means of such previous payment. The case of *Hammett v. Wyman*, and *Bracket v. Winslow*, are also strong to the point that a payment by one of the execution debtors is a complete satisfaction of an execution to all intents and purposes; and from that moment it ceases to exist as a legal precept. By examining the facts in this case, it appears that the execution was paid and satisfied out of the property of *Henry Carleton*, one of the execution debtors. He and his brother *Cyrus* had been partners, and though they had dissolved, their property had not been divided, and the goods which had been attached, were left in the hands of *Cyrus*, either as partner or as his agent. In either case they were under his control; and though *Cyrus* raised the money to pay to the officer the amount of the execution, yet *Henry*, as soon as he returned, approved of the course he had pursued, and reimbursed to him all he advanced, so that *Cyrus* lost nothing. On these plain facts it appears that *Cyrus* has at most paid one dollar, and perhaps not that, for the land which he conveyed to the tenant, who now insists that he has a better title than the demandant. It further appears that the personal property of *Henry*, which was attached, was sufficient to satisfy the judgment; and the professed object in view in making the above arrangement between the officer and *Cyrus Carleton*, was effectually to release that property, and procure satisfaction of the debt *in toto* out of the estate of *Joshua Stevens*, another judgment debtor. The particular reasons for this course of proceeding are not disclosed; and as it has not succeeded, it seems not material for us to ascertain. We do not perceive that the arrangements between *Stevens* and two of the co-sureties, as to a contribution and the partial indemnity of *Stevens*, can have any effect upon the demandant's title; for as the levy of the execution was rendered wholly ineffectual and inoperative by means of the payment of its amount in full to the officer, no after transactions would give it validity or any legal effect.

The case of *Allen v. Holden*, relied on by the counsel for the tenant, does not oppose those cited by the demandant's counsel. That suit was avowedly prosecuted by *Wyman* for his own benefit, in the name of *Allen*, who had assigned the judgment to him in consideration of his having settled an action which *Allen* had before commenced against the sheriff, for *Wyman's* neglect in not collecting the contents of an execution of *Allen's* against *Holden*. The court in their opinion say "The suit against the sheriff was not for the debt, but for damages for his non-performance of his duty. Nominal damages only might have been recovered; and had the suit proceeded to judgment and execution, it would have been no legal discharge of the original debtor from the judgment recovered against him." The case of *Norton v. Soule* presented a question different from the present. That was an assignment of a mortgage deed by the mortgagee; not of an execution by a sheriff, after receiving payment of one of the debtors.

There must be judgment for the demandant on the default already entered; and the question of increased value of the premises must be subject to the written agreement of the parties on file.

SMITH *vs.* EUSTIS *& al.*

The wife of a mortgagor is dowable of the equity of redemption; and may enforce her claim by writ of dower at common law, against all persons but the mortgagee. Against *him*, her remedy is by bill in equity.

And though she joined with her husband in the mortgage, releasing to the mortgagee her right of dower, yet the release enures only to the benefit of the mortgagee and his assigns.

THIS was a writ of dower *unde nihil habet*, and came before the court upon a case stated by the parties.

The premises were purchased of *John Sewall*, by the husband of the demandant, *Jan.* 3, 1817, and at the same time mortgaged to

Sewall to secure payment of the purchase-money ; the demandant joining with her husband in the deed of mortgage, by releasing her right of dower, in the usual form. The husband paid more than half the purchase-money ; his right in equity was then taken and sold on execution at a sheriff's sale, under which the tenants claimed title ; after which the husband died insolvent. The tenants had subsequently paid three hundred dollars of the money due on the mortgage ; which is still in force, the balance remaining unpaid.

W. W. Fuller argued for the demandant, citing *Pixley v. Bennett*, 11 *Mass.* 298; *Bancroft v. White*, 1 *Caines* 185 ; *Gibson v. Crehore*, 3 *Pick.* 481 ; 5 *Pick.* 149 ; *Fish v. Fish*, 1 *Conn.* 560 ; *Collins v. Torrey*, 7 *Johns.* 278.

Allen, for the tenant, insisted—1st. That the husband was not seised of any estate of which the wife could be endowed, his seisin being merely instantaneous. *Holbrook v. Finney*, 4 *Mass.* 566.—2d. That if he had been, yet her remedy in this case is not by action at common law, but by bill in equity. *Gibson v. Crehore*, 3 *Pick.* 483.—3d. That she has no right to dower till she has paid off the mortgage. Until that event, the tenants have a right to set up the mortgage deed against her, by way of estoppel. *Popkin v. Bumstead*, 8 *Mass.* 491 ; *Snow v. Stevens*, 15 *Mass.* 278 ; *Barker v. Parker*, 17 *Mass.* 564.

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

Smith, by the operation of *Sewall's* deed to him and the mortgage to *Sewall*, had only an instantaneous seisin of the legal estate, which, according to the decision in *Holbrook v. Finney*, 4 *Mass.* 561, and *Stow v. Tifft*, 15 *Johns.* 458, does not entitle a woman to dower ; and so the law seems to have been understood and administered in Massachusetts until the year 1816, when it was decided in the case of *Bolton v. Ballard*, 13 *Mass.* 227, that a woman was dowable of an equity of redemption. Since which time the same principle has been recognized, and is now established law in that Commonwealth. *Snow v. Stevens*, 15 *Mass.* 278 ; *Gibson v. Crehore*, 3 *Pick.* 475 ; *Walker v. Falley*, 6 *Pick.* 416. This be-

ing the settled law in Massachusetts before our separation and independence as a State, and the statute respecting dower having been re-enacted by our own legislature, without any alteration in the above particular, we may and ought to consider the re-enactment as a legislative adoption of the construction given by the Supreme Judicial Court of Massachusetts five years before. We have generally governed ourselves by this principle. It appears then that the plaintiff's late husband, during the coverture owned the equity of redemption of said estate, until it was sold for payment of one of his debts.

The next question is whether, according to the facts of the case, the plaintiff is entitled to maintain the present action. According to several of the cases cited, it is settled that a woman may enforce at law her claim of dower of an equity against any one, except the mortgagee and those holding under him; but against such mortgagee and those claiming under him, her only remedy is by a bill in equity. In the case before us, the defendants have no connexion with the mortgagee or his executors; they hold only under the deceased husband.

The remaining inquiry is whether her relinquishment of her right of dower to *Sewall* the mortgagee, interposes any objection to her maintaining the present action. In the before mentioned case of *Walker v. Griswold*, the wife had released her right of dower to the mortgagee. The court say "This release was co-extensive with the mortgage; it extended no further; and consequently the right of dower continued, subject only to that incumbrance." The mortgage was then existing, in that case, as it is in the present. In the case of *Barker v. Parker*, 17 *Mass.* 564, a case almost exactly similar to the one we are considering, the right to redeem the equity which had been sold was gone by lapse of time; but the court say, "When the husband has been seised of such an estate" (an equity of redemption) "during the coverture, his widow is dowable, and she may have a right to redeem the same."

Upon the grounds, and for the reasons before-mentioned, our opinion is that the action is maintainable.

Judgment for demandant.

MORTON *vs.* CHANDLER.

Parol evidence is inadmissible to show a mistake in the computation of the amount for which a recognizance of debt was taken, under the statute; so as to enable the conusor, after having paid the money, to recover back the excess.

IN this action, which was case for money had and received, a new trial having been granted, [see 6 *Greenl.* 142.] the plaintiff sought to recover against the defendant the amount of a mistake committed in computing the sum due from him to the defendant, for which he had given a recognizance, pursuant to the statute; which had been satisfied by an extent on his land.

Weston J. before whom the cause was tried, admitted parol testimony to prove that the recognizance was accidentally taken for more than was due from the conusor; and the jury, being satisfied of the fact, returned a verdict for the plaintiff; which was taken subject to the opinion of the court upon the admissibility of the testimony.

R. Williams and *A. Belcher*, for the defendant, cited *Hunt v. Adams*, 7 *Mass.* 518; *Townsend v. Weld*, 8 *Mass.* 146; *Stackpole v. Arnold*, 11 *Mass.* 27; *Emery v. Chase*, 5 *Greenl.* 232; *Albee v. Ward*, 8 *Mass.* 79; 2 *Stark. Ev.* 30; 1 *Phil. Ev.* 458; *Shelly v. Wright*, *Willes* 9; *Peake's Ev.* 32; *Newland v. Douglas*, 2 *Johns.* 63; *Legg v. Legg*, 8 *Mass.* 99. 9 *Johns.* 38.

Allen, for the plaintiff, argued that not to allow a mistake like this to be corrected in this mode, would be giving such instruments greater force than judgments at law. For if the excess in a recognizance cannot be recovered in *assumpsit*, it cannot be recovered at all; and the error is thereby perpetuated; which is contrary to the principles of the law. If, after the mistake has been pointed out to the creditor, he refuses to correct it, the refusal is evidence of fraud; which may be shown by parol, in any transaction, whatever may be its solemnity. 3 *Stark. Ev.* 995, 1017, 1019, 1020, 1045, 1054. *Barndaller v. Tate*, 1 *Serg. & Rawle* 160; *Fleming v. Gilbert*, 3 *Johns. Ca.* 528; *McMeans v. Owen*, 1 *Yeates*, 135; *Lyman v.*

U. States Ins. Co., 2 *Johns.* 630 ; *Lazell v. Miller*, 15 *Mass.* 207 ; 4 *Pick.* 228 ; *Chandler v. Morton*, 5 *Greenl.* 379 ; *Rex. v. Scammonden*, 3 *D. & E.* 470 ; *Wilkinson v. Scott*, 17 *Mass.* 249 ; *Gillespie v. Moore*, 2 *Johns.* 585 ; 2 *Stark. Ev.* 894 ; *Bull. N. P.* 149 ; 2 *Burr.* 1099.

PARRIS J. delivered the opinion of the Court in *Cumberland*, at the adjournment of *May* term, in *August* following.

That money paid by mistake can be recovered back in this form of action, is a general doctrine, too well established now to require the citing of authorities to support it. This general principle is however subject to limitations ; as where money is paid by mistake to an agent, who has paid it over. The agent is not liable to an action by the person who mispaid it, because it is not just that one should be a loser by the mistake of another. So if money has been paid upon a *forged* bill of exchange to a *bona fide* holder, who had given value for it ; the money cannot be recovered back from him, and this exception is founded upon the policy of the law in relation to negotiable paper. Again, where money has been recovered by the judgment of a court having competent jurisdiction, the matter can never be re-examined in this form of action ; for until the judgment is reversed or annulled, it is conclusive as to the subject matter of it. Money paid under the compulsion of legal process cannot, therefore, be recovered back, though it be afterwards discovered not to have been due. So long as the judgment remains in force, it is sufficient to protect the amount in the hands of the judgment creditor ;—and the only mode of obtaining relief, where money has been thus unconscionably obtained through the forms and judgment of law, is to procure a reversal of such judgment, and thereby dissolve the authority by which it is unjustly withheld.

Was not this money paid under the compulsion of legal process? It was paid upon an execution, legally issued, upon what may, not improperly, be considered a judgment entered by consent ;—for wherein are the proceedings under the act, by virtue of which the magistrate takes a recognizance, of a less solemn or formal nature, than in a civil suit wherein he enters a default ;—or how can the

rights of the conusor be more insecure than those of the defendant? In the one case, the magistrate can never act unless the debtor be present, and by an instrument of the highest character known in law, acknowledge his indebtedness;—then, and not till then, the transaction becomes matter of record, partaking of many, if not all of the qualities of a judgment.

In the progress of a civil suit, a judgment may be entered upon default, and the rights of the defendant be entirely concluded, so long as the judgment remains unreversed, when in fact he may be wholly ignorant of the pendency of the suit. It may be difficult to perceive any good reason why the record of a confession regularly made under the provisions of our statute, should not be considered of as high a character as a record of a judgment at common law. It is made the basis upon which the magistrate is to issue an execution in the same manner as upon a judgment. The proper officers of the county are required to execute it, and declared liable for any malfeasance or misfeasance of which they may be guilty in relation to it;—and the statute provides that the conusee may have his action of debt on the same, in the same manner as a judgment creditor is entitled to have his action on any judgment of any court of record;—thus treating it throughout like a judgment, and giving it the same legal validity and effect.—If this view of the case be correct, and the money now sought to be reclaimed, by the plaintiff, was paid by him under legal process, then according to settled law this action cannot be maintained.

But there is another view which may be taken of this case, and upon which we ground its decision. The confession, upon which the money was paid, was a sealed instrument. Now the plaintiff, in order to maintain the present action, attempts to prove by parol evidence that, by mistake, the sum secured by this instrument was too large. Can he do this? It is a well known rule of law that parol evidence is not admissible to vary the meaning of a deed, or to explain that which is apparent upon the face of it. A recognizance is a deed, and something more. It is a contract of the most solemn nature, and the execution which issues upon it, as to the power which

it confers and the duty which it imposes, is of the same nature as an execution which issues from the highest court of record.

It is very clear that in an action of debt on the recognizance, as provided for by the statute, the conusor would not be permitted to introduce parol evidence to shew a mistake, and thus vary the effect of the sealed instrument.—Can he accomplish, indirectly, what he could not do directly ? Can he in this action shew what he would have been estopped to deny in an action on the deed ? Such a practice would be encouraging, instead of discountenancing, circuity of action, and could not be sanctioned. It would be defeating the manifest object of the statute, which is declared, by its title, to be for providing a speedy method of recovering debts, and for preventing unnecessary costs attending the same. If such could be the practice, no man would resort to what was intended by the legislature as a relief from litigation. The plaintiff might undoubtedly prove fraud by parol, and thereby the legal effect of the instrument would be avoided.—Fraud, whenever it exists, may be always proved by parol, and when proved, so pollutes every thing with which it is combined, as to render the whole completely nugatory.

It was contended for the plaintiff, in the argument, that inasmuch as the recognizance had been paid, it had spent its force, and that its origin is now open to inquiry. So it might be contended that the force and power of a judgment were exhausted, upon satisfaction and discharge ; but it would hardly be contended that a judgment debtor could, after satisfying the judgment, turn round and reclaim the amount paid, by controverting the foundation upon which such judgment was predicated. Under such a course of practice, what cause of action would ever be at rest ?—After a recovery by due process of law there must be an end of litigation.

Upon an attentive examination, we are all satisfied that the testimony introduced to shew a mistake in the confession was incompetent, and that the verdict must be set aside and a new trial granted.

Doe *vs.* Warren *& al.*

The law does not allow interest upon interest; not even where a promissory note is made payable with interest annually.

In this case,—which was *assumpsit* upon two promissory notes made *Jan.* 23, 1823, payable in six and seven years, with interest annually, but on which no interest had been paid nor demanded, for years,—the question was whether, in computing the sum now due, interest should be cast upon the accruing interest of each year, from the time it became due.

This question was briefly spoken to by *Boutelle*, for the plaintiff, and *W. W. Fuller* for the defendant; and the opinion of the Court was delivered in *Cumberland*, in *August* following, by

Weston J. Upon an examination of the English authorities, it will be found difficult to deduce any general principles, for the allowance of interest, which have been uniformly practised upon. It has been allowed in some cases, and denied in others; without any apparent reason for a distinction. But no case has been cited, where compound interest, or interest upon interest, has been allowed by their courts. In *LeGrange v. Hamilton*, 4 *D. & E.* 613, it was decided, Lord *Kenyon* dissenting, that an express contract of that kind was not usurious. And this judgment was affirmed in the exchequer chamber. 2 *Hen. Black.* 144. But the condition of the bond in that case, with the explanatory memorandum thereon, upon which the question arose, will not be found to authorize or require that the interest should be added to the principal, and that both should carry interest. It merely provided that a portion of the sum, stipulated to be paid quarterly, should first be applied to keeping down the interest.

Chancellor *Kent*, in a case cited for the defendants, is very clear, upon a review of the authorities, that an express agreement to pay compound interest could not be sustained in chancery, and he expressed strong doubts, whether it would be valid at law. In the

case before us, there is no express contract to this effect; and it is even contended that there being an express contract on the subject of interest, no other can be implied. The promise is, to pay interest annually. That must be understood to mean, and indeed it can have no other meaning, on the principal in the notes. This was the construction given to a similar note in *Pierce v. Rowe*, 1 *N. Hamp. Rep.* 179. There is therefore weight in the position taken by the counsel for the defendants, that a right to claim compound interest is not only not implied but excluded; upon the legal maxims *expressio unius est exclusio alterius*, and *expressum facit cessare tacitum.*

But we do not place the decision of the cause upon this point. What is the ground of liability to pay compound interest? Because it is insisted that it is just, right and equitable that interest should carry interest, after it becomes due. But chancery denies a claim of this sort as inequitable, unjust and oppressive, as has been shown by Chancellor *Kent.* Can these terms have one meaning in chancery, and another at law? Is the standard of morality so uncertain, that what is wrong on one side of the hall of justice, may become right on the other? It must be remembered that this is a construction, upon which both systems of courts are left free to act, upon the great principles of justice. It is upon these principles alone, that promises are ever implied, or duties raised, at law. What is interest? It is an accessary or incident to principal. The principal is a fixed sum; the accessary is a constantly accruing one. The former is the basis or *substratum* from which the latter arises, and upon which it rests. It can never, by implication of law, sustain the double character of principal and accessary. Whatever the plaintiff recovers beyond the face of the notes, the sum originally due, he recovers as interest. No part of it then has yet become principal, nor can it be so regarded. After interest however has accrued, the parties may, by settling an account, or by a new contract, turn it into principal. It is then in the nature of a new loan; but it does not become principal, by operation of law, merely because it is due; which is what is contended for on the part of the plaintiff.

In the opinion cited from *New York*, the learned Chancellor states that the Roman law was constant in its condemnation of compound

interest; referring to the code and to *Voet* on the pandects. And this is deservedly high authority, in whatever relates to private rights and personal contracts. In *Lane v. Cotton*, 12 *Mod.* 482, lord *Holt* says that the laws of all nations were raised out of the ruins of the civil law, and that the principles of the English law were borrowed from that system, and grounded upon the same reason.

Compound interest was allowed by the court in *Greenleaf v. Kellogg*, 2 *Mass.* 568, but the point raised by the defendant in that case, was, that no action could be maintained for the interest, until the principal fell due. The court decided otherwise; and gave judgment for the interest, with interest thereon from the time it became due, until judgment was rendered. It does not appear that there was any discussion or argument, as to the correctness of this mode of computation. This part of the case was overruled in *Hastings v. Wiswell*, 8 *Mass.* 455, at a term of the court where *Parsons C. J.* presided, who was counsel for the plaintiff in the former case, and had cited it with approbation in *Tucker v. Randall*, 2 *Mass.* 284, as to the main point decided.

The mode of computing interest was settled by the court in *Dean v. Williams*, 17 *Mass.* 417, in which they say the law does not allow compound interest, and that the interest is never allowed to form a part of the principal, so as to carry interest. It is true, it does not appear that the note in that case was made payable with interest annually; and it may, and perhaps ought, to be presumed to have been drawn in the common form. But if interest ought to carry interest when due, and because it is due, the rule should be uniform. Suppose a note is made payable in one year with interest, and it remains several years, without payment of either principal or interest. If then put in suit, it never has been pretended that more than simple interest can be recovered. And yet at the end of the year, the sum due and detained was the principal and interest; and there would be the same reason for claiming interest on both, as there would be, if the note had been made payable with interest annually. So if a note was made payable in five years with interest, and remained eight years without any payment, only simple interest could be recovered; although the amount due and detained, the

last three years, would be the principal and five years interest. And there would be the same reason for regarding the latter as an addition to the principal, as there would be for adding the accruing interest of each year to the principal, where, by the terms of the note, interest is to be paid annually. The only difference between the two cases is, that rests would be made in the one, more frequently than in the other.

But although the law does not allow compound interest; it has not been inattentive to the rights of creditors. It does not permit the debtor to detain the interest he has promised to pay annually; but furnishes a remedy, if not paid to the creditor at the end of each year, to recover it, if he chooses to exact it. The debtor then is sufficiently in his power; and if he is disposed to indulge him, he must be contented to receive simple interest.

Upon these principles interest must be computed, in the case before us, and judgment rendered accordingly.

MILLER, *Warden of the State Prison, vs. The trustees of the* MARINER'S CHURCH.

A witness, upon the *voir dire*, may be examined respecting contracts, records or documents not produced at the trial, so far as relates to his interest in the cause.

A member of a corporation who is its surety for the payment of a debt not in controversy in the suit on trial, is not on that account an incompetent witness for the corporation.

A member of an eleemosynary corporation, having no pecuniary interest, is a competent witness, in a suit in which the corporation is a party. *Semble.*

If the party entitled to the benefit of a contract, can protect himself from a loss arising from the breach thereof, at a trifling expense, or with reasonable exertions, it is his duty to do it. And he can charge the delinquent party with such damages only as, with reasonable endeavors and expense, he could not prevent.

THIS was an action of *assumpsit* brought under a special resolve of the legislature, passed *March* 5, 1829, for the price of a quantity of hammered stone; the defendants having leave to claim in offset the amount of damages occasioned by any breach of the contract.

At the trial, before *Weston J.* the defendants offered Mr. *Cutter*, one of the trustees, as a witness. The counsel for the plaintiff proposed, with a view to show his interest in the cause, to ask him if he was not responsible as surety for the defendants for the payment of money which they owed. Before this question was answered, the defendants' counsel asked him if he was so responsible by reason of any verbal contract; and he stating that he was not, they objected to any parol evidence of his liability, insisting on the production of the written contract. This objection the judge overruled; and the witness thereupon testified that he was surety for the defendants on certain promissory notes given for monies borrowed. But notwithstanding this liability, the judge admitted him as a competent witness.

Several witnesses on the part of the defendants positively testified that the late warden of the State prison agreed that the stones, which he contracted to furnish for the use of the defendants, should be delivered at *Portland* by the fifteenth day of *June*, 1828. But the late warden as positively testified that he did not and would not agree absolutely that they should be delivered at that time; but promised that he would endeavor and do the best he could to cause them to be delivered as early as that.

The stones not having been wholly furnished till *November* following, the counsel for the defendants insisted that, from the evidence adduced, they were entitled to damages, whether the contract was found to be such as was testified by their witnesses, or by the late warden. If according to the former, then they were entitled to large damages arising from loss of labor, loss of rents, and the defective character of the work. If by the latter, they still contended that the contract had been violated, but claimed damages upon a basis less definite and extensive.

The judge instructed the jury that if they believed that the contract was such as was testified by the defendants' witnesses, they ought to allow to the defendants the whole or such parts of their claim for damages, as the parties, bestowing proper attention upon the subject, at the time of making the contract, might have contemplated as likely to result from its nonfulfilment. At the request of

the counsel for the plaintiff, he further instructed them that if the contract was for delivery of the stones by a fixed time, the defendants would, in that case, be entitled to no more damages than they had or would have sustained, if, when the time of delivery had expired, they had stopped the receiving of any more from the warden, and had proceeded, with due diligence, to furnish themselves elsewhere;—and that had the materials been bricks or boards, which could readily have been procured at short notice, in the place where their building was being erected, the measure of damages would have been to estimate what would have been sufficient for the necessary delay and additional price, if any. The counsel for the defendants objecting to this instruction, the judge added, at their request, that if the defendants were prevented or deterred, by the conduct or assurances of the plaintiff after the breach of the contract, from stopping the further receipt of stones from him, and proceeding to supply themselves elsewhere, there ought to be no mitigation of damages upon the ground suggested by the counsel for the plaintiff. He further proceeded to instruct the jury, that from the encouragement which the defendants received from the plaintiff, after the alleged breach of the contract, that the stones should be furnished with all possible despatch, and the time which would necessarily be required to prepare them if they had then ordered them from another quarter; it did not seem that common prudence or a due regard to their interests, or the interest of the plaintiff, required them to have taken any other course than they did take.

The jury, under these instructions, allowed certain damages to the defendants, and returned a verdict for the plaintiff for the balance of his account; which was taken subject to the opinion of the court upon the correctness of the instructions given, and the admissibility of the parol testimony received from Mr. *Cutter*.

The cause was submitted without argument by ***R. Williams*** and ***Allen*** for the plaintiff, and ***Sprague*** and ***Evans*** for the defendants; and the opinion of the Court was delivered in this term by

Weston J. The first witness, offered by the defendants, was admitted as competent, notwithstanding the interest attempted to be

shown by the parol testimony objected to by them. The interest is nothing more, than every surety has in the solvency and ability of his principal; or a creditor in that of his debtor. It is an interest going to his credibility. But the fact from which it arises, like every other fact proved in the trial of a cause, should not be made out from testimony liable to legal objection. And if the parol testimony received to prove the interest of the witness was of this character, the verdict cannot be supported. The examination of the witness to ascertain his interest, was in effect upon the *voir dire*. It was a preliminary inquiry, not a part of the issue on trial, which is to be proved by the best evidence; a rule well known, and with which every party is, or ought to be, prepared to comply. But an objection to a witness on the ground of interest, is often unexpectedly made. Neither the witness therefore, nor the party producing him, can be reasonably required to have with them written papers or documents, which may happen to be referred to upon such an inquiry. The witness is to make true answers to such questions as may be put to him; and his mouth is not to be stopped, as to any fact within his knowledge, by a technical rule, which is altogether just and proper, with respect to facts involved in the issue. Has he given a note? Has he given a deed? Is he a member of a certain corporation?— Doubtless the production of the note, the deed, and the books of the corporation, would be the best evidence of these facts. But they are within the knowledge of the witness; and the party objecting has a right to appeal to him upon the *voir dire*. A different rule would not only be unnecessary, but exceedingly inconvenient in practice, as it would occasion the delay or the continuance of a cause from time to time, as objections of this sort might successively arise, in the progress of a trial. It is laid down in the text of *Starkie* on evidence, *part* 1, 121, and *part* 2, 756, that a witness upon the *voir dire*, may be examined as to the contents of documents not produced. If however the witness produces the written document upon the *voir dire*, it must be read. *Butler v. Carver*, 2 *Starkie's cases*, 433. But the exception proves the rule; which was in that case admitted to exist. And we are of opinion the testimony objected to was admissible.

By the common law, the estimation of damages is within the province of the jury. Courts may, and often do, in cases of manifest excess, interfere by granting a new trial. Where the injury affects the personal feelings, this is rarely done. And in cases of fraud or wanton trespass, considerable latitude has been allowed. But where there exists a fixed standard or scale, by which damages may be calculated, a jury will not be permitted to depart from it. Thus *assumpsit*, instead of debt, is now the remedy universally resorted to, upon simple contracts for the payment of money. By the form of the action, damages are sought for the nonperformance; but the measure of damages is the debt due, with interest for the detention, for a longer or shorter period, according to circumstances. In other cases, arising from the nonperformance of agreements, the standard is less definite; and necessarily attended with greater uncertainty. In general, the delinquent party is holden to make good the loss occasioned by his delinquency. But his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof, and deducible from the nonperformance, are not allowed.

And if the party injured has it in his power to take measures, by which his loss may be less aggravated, this will be expected of him. Thus in a contract of assurance, where the assured may be entitled to recover for a total loss, he, or the master employed by him, becomes the agent of the assurer to save and turn to the best account, such of the property assured, as can be preserved.

The purchaser of perishable goods at auction, fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish, and throw the entire loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and if they bring less, he may recover the difference, with commissions and other expenses of resale, from the first purchaser.

If the party entitled to the benefit of a contract, can protect himself from a loss, arising from a breach at a trifling expense, or with reasonable exertions, he fails in social duty, if he omits to do so, re-

gardless of the increased amount of damages, for which he may intend to hold the other contracting party liable. *Qui non prohibet, cum prohibere possit, jubet.* And he who has it in his power to prevent an injury to his neighbor, and does not exercise it, is often in a moral, if not in a legal point of view, accountable for it. The law will not permit him to throw a loss, resulting from a damage to himself, upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage, might by common prudence have prevented. For example; a party contracts for a quantity of bricks to build a house, to be delivered at a given time; and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks of an equal quality, and for the stipulated price, can be at once purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party, damages for the workmen, and the amount of rent, which might be obtained for the house, if it had been built. The party, who is not chargeable with a violation of his contract, should do the best he can in such cases, and for any unavoidable loss occasioned by the failure of the other, he is justly entitled to a liberal and complete indemnity.

The instructions of the judge to the jury objected to by the counsel for the defendants at the trial, were in conformity with these principles, and in the opinion of the court not liable to legal objection. *Judgment on the verdict.*

CAYFORD'S *case.*

In an indictment for lewd cohabitation, adultery, or bigamy, the prisoner's confession of the fact of his marriage, if the marriage was in another State or country, is sufficient proof of the fact.

And *it seems* that such evidence might be received if the marriage were in this State. *Sed quære.*

Whether, in the absence of better proof of marriage in this State, evidence of long continued cohabitation, birth of children, and uniform reputation of a lawful marriage, is admissible in criminal cases,—*quære.*

THIS was an indictment for lewd and lascivious cohabitation, tried before *Parris J.* To prove the marriage, the government relied on evidence of the following facts. The prisoner removed from New Hampshire into Maine about twenty years since. Soon afterwards he sent a person after "his wife and family;" who brought to him a woman and two children, whom he received and treated as his wife and children, calling the woman his wife. They continued to live together as man and wife, upwards of ten years; during which time he went to England, where he said they were married, to obtain the property inherited there by his wife, which, on his return, he said he had obtained to a large amount.

The counsel for the prisoner contended that this evidence was insufficient to prove the marriage; but the Judge ruled it sufficient; and the prisoner being convicted, the point was reserved for the consideration of the Court.

Emmons and *Boutelle*, for the prisoner, cited *Commonwealth v. Littlejohn*, 15 *Mass.* 163; 2 *Stark. Ev.* 437—8, 937—8 and *notes*; *Morris v. Miller*, 4 *Burr.* 2057; *Bull. N. P.* 27; *The People v. Humphrey*, 7 *Johns.* 314.

The *Attorney General*, *e contra*, cited *Commonwealth v. Drake*, 15 *Mass.* 161; *Commonwealth v. Calef*, 10 *Mass.* 153; *Mary Norwood's case* 1 *East's P. C.* 337.

The opinion of the Court was delivered in *Cumberland*, at the adjournment of *May* term in *August* following, by

MELLEN C. J. The question is whether the evidence of the defendant's confessions as to his having been married in England, accompanied by proof of his having lived ten years with the person whom he called his wife, and with children whom he treated as his own; and his declarations that he had, during their cohabitation, been to England, where he received property to a large amount, which she inherited; was competent evidence to be submitted to the jury for the purpose of proving the marriage.

Nothing is more clear than that proof of the voluntary confession of a man on trial for adultery or lascivious cohabitation, that he is guilty of the crime charged, is legal evidence; and, in the absence of controling evidence, is abundantly sufficient; and the reason why his confession that he was a married man at the time of committing the offence charged, should not be good also, is not very apparent. In several books, however, there seems to have been some distinction, though not a very clear one. Neither do we perceive why, in the case of a libel for divorce, the marriage of the libellant and libellee may be proved by a regular certificate; and yet a second marriage of the libellee with the person with whom the alleged crime of adultery was committed, must be proved by the oath of some person present when the marriage was solemnized; as was required in the case of *Ellis v. Ellis*, 11 *Mass.* 92. It was intimated, if not stated by Lord *Mansfield* in *Morris v. Miller*, 4 *Burr.* 2057, that in case of bigamy, as well as an action for criminal conversation, it is essential to prove a marriage in fact, as distinguished from the acknowledgment of the parties. The cases, however, are not alike. In the civil action, the plaintiff demands damages, which he has no right to recover, unless there has been a legal marriage between him and the woman with whom the defendant is charged to have committed the adultery; and in such a case the confession of the defendant, who may be a total stranger to the marriage, will amount only to an acknowledgment of a marriage by reputation. In that light the court viewed the confession of *Miller* as to the alleged marriage between

Mr. and Mrs. *Morris*. But in a prosecution against a man for bigamy, adultery or lascivious cohabitation, the confession of the defendant is of a different character. It is a confession from one who must certainly know whether the fact confessed is true or false. Justice *Buller*, speaking of the case of *Morris v. Miller*, says the evidence of the defendant's confession, was not sufficient; "for it was only a confession of the reputation that she went by the name of the plaintiff's wife; and not a confession of the marriage." *Bull. N. P.* 28. 2 *Phil. Ev.* 152. This case, instead of proving that a full and voluntary confession of the marriage, was not sufficient to prove it, seems clearly to justify a different conclusion; and such a conclusion *Phillips* has drawn. In *Trueman's* case, *East's P. C.* 471, the cohabitation of the prisoner with *Mary Russell* was proved; and it was also proved that he had admitted that he had married her in *Scotland*. The prisoner was convicted; and all the judges, except three, who were absent, held the conviction to be proper. There were some circumstances in the case, corroborating the confession, but not stronger than those in the case before us. *Trueman* was indicted for polygamy. Mr. *Starkie*, in his learned treatise on evidence, *Vol.* 3, *page* 1186, observes in reference to the above case,—"It is not easy to say on what principle a direct and deliberate admission of the prisoner, of his marriage, should not be evidence against him of the fact in this case as well as in any other." In *Norwood's* case, *East's P. C.* 470, confession and cohabitation were admitted as evidence to prove the relation of husband and wife in a case of petit treason. So also in a case of bigamy, the prisoner was convicted upon proof of his admission, deliberately made, of both marriages, in the presence of his first wife, before a magistrate. 3 *Stark. Ev.* 1186 in a *note*. So in *Farray v. Hallacher*, 8 *Serg. & Rawle*, 159, it was decided in a case of *crim. con.* that the declaration of the defendant that he knew the woman was married to the plaintiff, and that with this knowledge he seduced her, might be given in evidence in proof of the marriage. To this point see also, *Rigg v. Curgenven*, 2 *Wils.* 395. In the present case, the proof of the defendant's confession was on oath, and he had the benefit of cross examination. He certainly knew whether he had been mar-

ried; and as he stated that he was married in England, we ought to presume that he was legally married, in the absence of all proof of an opposing character; especially after a cohabitation of ten or more years, and the birth of several children. And if any thing more is necessary to shew the legality of the marriage, there is proof of his having received property inherited by her, which he could not have obtained unless he had been lawfully married to her. Cases of foreign marriages stand on different ground from domestic. The latter may generally be proved with ease by record evidence, or by the oath of some person or persons who were present at the solemnization; they being within the reach of the court's process; not so in case of marriages in a foreign country, or even in another State in the Union. We do not mean to say that the deliberate and unequivocal confession of a man charged with adultery, that he was then a married man, though married in this State, and without any corroborating circumstances, would not be sufficient for a conviction. The present case does not require us to decide that point; nor how far long continued cohabitation, with the birth of children and a uniform reputation of a lawful marriage, might be considered, as competent or sufficient, where other evidence could not be obtained. In such cases public policy might justify and require a relaxation of the general principle, in order to prevent the open violation of our laws with impunity. By the law of the land, if a man is indicted for counterfeiting a bill of a bank of this State, or knowingly passing such a bill as true, the president or cashier of such bank must be called as a witness to deny his signature, and prove the bill a forgery; but if the bill forged or passed, purports to have been issued by a bank in any other State, the court dispense with the testimony of the president and cashier, because the process of our courts cannot compel their attendance; and accordingly proof of a secondary character is constantly received; namely, the testimony of any person or persons acquainted with the genuine bills and signatures. In cases where it may be necessary, there may be the same reason for admitting evidence of marriage less clear and direct than that on which the conviction of the defendant was founded. This conviction we are all of opinion was correct, upon the evidence in the case.

In the trial of libels for divorce, the court do not pass a decree upon the mere confession of the party charged with the adultery. To prevent collusive arrangements between husband and wife to obtain a divorce, and the success of such arrangements, it is necessary that such proof should be disregarded. A default in such case is in some degree in the nature of a confession, but the libellant must still prove the allegations in the libel.

Motion for a new trial overruled.

ESMOND *vs.* TARBOX.

Where the plan and the monuments made by the original surveyor of a tract of land do not correspond, the monuments are to be resorted to, in order to ascertain the true location.

And if the monuments were made by one surveyor, and the plan drawn by another, and the plan alone is referred to in a deed of conveyance, yet the monuments govern and control the plan.

THIS was a writ of entry, tried before *Weston J.* The parties were owners of adjoining house-lots in *Gardiner*. Both claimed title under the same grantor; and both deeds referred to *Adams's* plan of the lots granted. It was merely a question of boundary between them.

It appeared that a tract containing the premises had been originally surveyed into lots by one *Hobart*, who fixed monuments at the corners of the lots, and made a plan of the whole survey. Afterwards *Adams* was employed by Mr. *Gardiner*, the general proprietor, to survey some adjacent land, and to make a plan of the whole, including *Hobart's* survey in his plan, for greater convenience; and was directed to adopt *Hobart's* monuments wherever he could find them. The plan, which he thus made, embraced *Hobart's* plan, laid down upon a reduced scale to conform to his own; and was the plan referred to in the deeds. By measuring the lots as they were laid down on the plan, without reference to any monuments,

the case was with the demandant; who insisted upon this rule, because *Adams* made no monuments, and his plan was to be taken as part of the deed. But by the monuments set up by *Hobart*, the case was with the tenant.

The judge instructed the jury that the principle contended for by the counsel for the demandant was the true and legal principle for the location of the lots, if no intervening monuments made by *Hobart* could be found; but that whenever such monuments were proved, the location must conform to them, whether this accorded with the plan, or not. And the jury returned a verdict for the tenant; which was taken subject to the opinion of the court upon the correctness of the judge's instructions.

The point was submitted without argument by *Evans* for the demandant, and *Allen* for the tenant; and the opinion of the Court was delivered in this term by

Weston J. This is an exceedingly plain case. The deeds both of the demandant and tenant, refer to *Adams's* plan. And that is *Hobart's* plan, upon a reduced scale. *Hobart* surveyed the ground and set up monuments. *Adams* made no survey of the land in question; but adopted *Hobart's* survey and monuments, as he was directed to do. The jury have, by their verdict, established the line between these parties, according to these monuments; the location of which was proved to their satisfaction. The plan and the monuments do not exactly coincide; but this is no uncommon case; and where a difference is found to exist, it has been long the settled practice, both of Massachusetts and of this State, to give effect to the latter, rather than the former.

The monuments adopted, or placed upon the face of the earth, are the best evidence of the lines and corners actually made by the survey. Of this the plan is intended to be an accurate delineation. The survey is the original work, and the plan is derived from it, and intended to represent it. If it fail to do so, the survey, if it can be ascertained, and not the erroneous delineation of it, is to govern.— Purchasers look to actual monuments, which they are, or should be, careful to preserve; and public policy, as well as the principles of

law, requires that their titles and posessions should be protected and secured by them.

It makes no difference that the plan referred to was made by one man, and the survey by another; or that a plan upon a larger scale intervened. Both were intended to be coincident, and derived from one source, the survey. The legal construction of what is done in these cases, is not affected by the number of agents employed. One may make the survey, and locate the monuments, and another may delineate the plan from his field book or minutes, and the actual survey will be equally conclusive, as if all had been done by the same hand.

Judgment on the verdict.

WARREN *vs. The inhabitants of* LITCHFIELD.

After verdict, the court will support the declaration by every legal intendment, if there is nothing material on record to prevent it.

Therefore where the plaintiff declared against a town, that a certain bridge in it was out of repair, by reason whereof *his* horse, of the value of seventy five dollars, harnessed in *a* chaise, was drowned, and the harness injured to the value of fifteen dollars; and the jury found for the plaintiff, with damages to the amount of seventy two dollars and fifty cents;—the declaration, after verdict, was held well enough, the damages being taken to refer to the horse which the plaintiff alleged to be his, and not to the harness, to which he did not set forth any title.

Whether the merits of a motion in arrest of judgment, made in the court below for defects apparent on the face of the declaration, can be brought before this court by summary exceptions, under *Stat.* 1821, *ch.* 93, *sec.* 5,—*dubitatur.*

THIS was an action of the case, in which the plaintiff declared that a certain bridge in *Litchfield*, which the inhabitants were bound to maintain, on a certain time was out of repair; "by reason whereof the plaintiff's horse, harnessed in a chaise, and under the care of a careful driver, in attempting to pass over said bridge, was, with

said chaise and harness, precipitated therefrom into the water beneath, and the said horse was drowned, and the said chaise greatly injured, and the life of the driver greatly endangered. And the said plaintiff avers that the value of the horse was seventy five dollars, and the injury to the chaise and harness equal to fifteen dollars more. And the plaintiff says that said inhabitants had due notice of said defect and want of repair. Whereby an action hath accrued to recover of said inhabitants the amount of damages by him sustained as aforesaid," &c.

It was proved at the trial before *Smith J.* in the court below, that the defendants had undertaken to rebuild the bridge, a short time before the accident mentioned in the declaration; and had made some progress in the work, with all reasonable despatch. On the day alluded to, the bridge appeared safe, as usual, except that the railing was taken away. But the planks had been ripped up, and one of the outside string-pieces removed; after which the planks were laid down as before, but not fastened. The bridge in this condition could be safely passed, and had been so passed a day or two before, by travelling over the side where the string-pieces remained; but the plaintiff's servant, inclining a little towards the weak side, was precipitated into the river, the planks on that side being destitute of support. There was nothing to draw his attention to the unsafe condition of the bridge; nor did he make inquiry on that day as to its situation; though it appeared that he was informed about a fortnight previous that it was then unsafe, and that it probably would not be finished under four or five weeks.

The judge instructed the jury that if they were satisfied, from the evidence, that the deficiency was concealed from observation by the planks placed over it; that the plaintiff's servant had conducted with ordinary care and prudence when he attempted to pass the bridge; and that he had no notice, or had no reason to conclude, from the appearance of the bridge and other circumstances, that the same was unsafe and dangerous to be passed; they ought to find for the plaintiff; which they did, assessing his damages at seventy-two dollars and fifty cents.

The defendants then moved in arrest of judgment, because it was

not alleged in the declaration that the chaise, for the injury to which damages were claimed, was the property of the plaintiff, nor did it appear therein that the plaintiff had any title to damages for that injury.

But the Judge overruled the motion. Whereupon the defendants filed exceptions to this opinion; and also to his instructions to the jury; and brought the cause up pursuant to the statute.

Sprague and *Robinson*, in support of the exceptions, contended that the judgment ought to have been arrested; because this was not the case of a title defectively set out; but of a want of any title. It was a defect inherent in the elements of the plaintiff's case, and was incurable. There is no allegation of property, general or special, in the chaise; yet the damages are general, applying to the whole declaration; and this being bad in part, the judgment must be arrested *in toto*. For the plaintiff's title in the chaise should have been stated expressly, and not left to be made out by implication. It does not even appear that the driver was the plaintiffs servant. He might, in perfect consistency with the truth of the declaration, have been the bailee of the horse for hire, and travelling in his own chaise. 5 *Dane's Abr. ch.* 146, *art.* 7, *sec.* 7; 1 *Chitty's Pl.* 367; 2 *Saund.* 379 *note* 13; 1 *Ld. Raym.* 239; *Cas. temp. Hardw.* 118; 2 *Stra.* 1023; 5 *Com. Dig. Pleader*, 3 *M.* 9; *Cro. Jac.* 46; *Joce v. Mills*; 2 *Salk.* 640; 2 *Ld. Raym.* 890; *Little v. Thompson*, 5 *Greenl.* 228; *Trevor v. Wall*, 1 *D. & E.* 153; *Hancock v. Haywood*, 3 *D. & E.* 435; *Williams v. The Hingham Turnpike*, 4 *Pick.* 341; *Stanwood v. Scovel*, *ib.* 422.

As to the instructions to the jury, they insisted that the knowledge which the driver had, a fortnight before the accident, was sufficient to have put him on his guard, and to have led him, as a prudent man, to have inquired into the state of the bridge, before he attempted to pass it. And as a due degree of caution on his part would have prevented the injury, the defendants were not liable; and the jury ought to have been so instructed. *Farnum v. Concord*, 2 *N. Hamp.* 392.

Allen, for the plaintiff, cited 5 *Dane's Abr.* 228; 3 *Bl. Com.* 394; *Fuller v. Holden*, 4 *Mass.* 498; *Moore v. Boswell*, 5 *Mass.*

306; *Kingsley v. Bill*, 9 *Mass.* 198; *Richardson v. Eastman*, 12 *Mass.* 505; *Colt v. Root*, 17 *Mass.* 235; *Ward v. Bartholomew*, 6 *Pick.* 409; *Pangburn v. Ramsay*, 11 *Johns.* 141; *Pinckney v. East Hundred*, 3 *Saund.* 379; 6 *Pick.* 409.

The opinion of the Court was read in the following term as drawn up by

MELLEN C. J. We will first consider the motion in arrest of judgment.

It is well observed in the case of *Bayard v. Malcolm & al.* 2 *Johns.* 550, that "it has been repeatedly decided that, after verdict, the court will do what it can to help a declaration; that the court will suppose every thing right, unless the contrary appears on the record; and the general scope of the authorities is, that, after verdict, every legal intendment is to be admitted in its support." See also, 1 *Salk.* 29; 3 *Burr.* 1725; 1 *Wils.* 255; 1 *Saund.* 128. There are numerous cases in which the question has been examined, what imperfections or omissions in a declaration are cured by verdict, and it is a vain attempt to reconcile them. There is, at the present day, less strictness than there formerly was, and an increasing disposition in courts to support a declaration, after verdict, by legal intendment. In the case of *Little v. Thompson*, cited by the defendant's counsel, we had occasion to examine several of the authorities on the subject. There a severe penalty was demanded in an action of debt; but the declaration omitted an essential averment, namely, that the defendant took and carried away the logs, and disposed of them, without the consent of *Little* the plaintiff. The case was not brought within the statute on which the action was founded. No title was set forth that would sustain an action of debt; and, according to the general principle of law, a verdict could not cure such a material defect. In such a case, the court, on a motion in arrest of judgment, would not presume the defendant guilty of an offence or wrong, not charged. In *Pangburn v. Ramsay*, 11 *Johns.* 141. *Spencer J.*, in delivering the opinion of the court, says, "Where there is a defect, imperfection or omission, yet if the issue joined

be such as necessarily required, on trial, proof of the facts defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct or the jury would have given the verdict, such defect, imperfection or omission is cured by the common law." The principle here laid down goes much further in favor of sustaining a declaration, than any of the cases cited in *Little v. Thompson* in the opinion delivered. So also in *Ward v. Bartholomew*, cited by the counsel for the plaintiff, where the demandant had omitted to allege his seisin of the demanded premises, and the jury found that the tenant had disseised him, the court declined arresting the judgment, on the ground that the jury could not have found that the tenant disseised the demandant, unless he was seised. These cases show how much the court will intend in favor of a declaration, after verdict, for the purpose of sustaining it. It is a well settled principle of the common law that where the declaration contains two or more counts, one of which is bad, and a general verdict for damages is given, the judgment must be arrested; though in this State, the abovementioned principle is done away by the third section of the statute of 1830, *ch.* 463. In the case before us, however, the declaration contains but one count; still it is contended that in that count the plaintiff demands damages for the loss of his horse and an injury done to the chaise in which he was harnessed, at the time he was precipitated from the bridge; and yet there is no averment in the declaration that he owned the chaise or the harness. This is true. And for this reason it is contended that judgment cannot be legally rendered on the verdict; as the damages must be intended as given, as well for the injury done to the chaise as for the loss of the horse. The first inquiry is whether the principle contended for is applicable to a declaration containing only one count, describing several articles of property, to some of which no title is set forth. The case of *Joce v. Mills*, 2 *Salk.* 640, seems to support the above position, and we do not perceive that the case of *Pinkney vs. Inhabitants of East Hundred*, 3 *Saund.* 379 is opposed to it. That was decided on demurrer; and there can be no question that where there is a demurrer to the whole declaration, the plaintiff ought to have judgment for that which is

well laid and be barred for the residue; and in such a case the damages will be assessed according to the right as alleged and established. It will be more useful carefully to examine the declaration, and see what its averments are, and what the plaintiff's claims are. The language employed in relation to the horse clearly amounts to an allegation of the plaintiff's ownership; but there is no averment that he owned either the chaise or harness. The averment is, "by reason whereof the said plaintiff's horse, harnessed in a chaise, and under the care of a careful driver, &c. &c. with said chaise and harness, was drowned, and the said chaise greatly injured and the life of the driver greatly endangered." The value of the horse is alleged to have been $75; and the injury to the chaise to have been equal to $15. The verdict was returned for $72 50. The concluding averment is that an action hath accrued to the plaintiff to recover the amount of damages by him sustained as aforesaid. And now from all these averments and facts, appearing on the record, what is the legal intendment, admissible in support of the verdict? The plaintiff contends that the chaise is named in the declaration, merely as descriptive of the manner in which his horse was travelling at the time of the disaster; and that the injury done to the chaise, and the danger to the life of the driver are mentioned as descriptive of the consequences of the defendant's neglect in regard to the bridge; and not as a ground of claim of damages for either of those consequences. The language will admit of this construction. The horse is called "the plaintiff's horse"—the chaise is merely called "*a* chaise." If this mode of reasoning may be called very ingenious, still we do not perceive that there is any fallacy in it; and when we consider that the alleged value of the horse was $75, and that the verdict is less than that sum; and when we consider also that the plaintiff in the declaration asserts an ownership of the horse, but not of the chaise or the harness, there is reason for supposing that the damages were assessed for the loss of the horse, being his estimated value, without any reference to the injury done to the chaise, or the danger to which the life of the driver was exposed; for neither of which had the plaintiff any legal right to recover damages. We may here properly use the language before

quoted from the case of *Bayard v. Malcolm, & al.* viz: "the court will suppose every thing right, unless the contrary appears on the record." The court will suppose that the sum expressed in the verdict was to compensate the plaintiff for the damages by him sustained, and for no other purpose. For these reasons the exception to the decision of the court of Common Pleas, overruling the motion in arrest of judgment, is not sustained.

We think it proper here to subjoin that we have serious doubts whether the merits of the motion in arrest of judgment are regularly before us on the exception alleged to the opinion of the court below, overruling that motion; the facts on which the motion was predicated appear on the record. The 5th section of *Stat.* 1822, *ch.* 193, has evidently a reference to those cases where the question to be reserved depends on facts which do not appear on record; and therefore they are to be summarily stated in an exception signed by the party excepting, and certified by the judge to be conformable to the truth of the case—a certificate perfectly useless and unmeaning where all the facts are on the record, as in this case. But as the question had been fully argued and was in fact before us, we concluded to decide it, as the court did in *Drowne v. Stimpson*, 2 *Mass.* 441, where the record was removed by writ of error instead of *certiorari.*

As to the exception to the instructions given to the jury, the facts are few and simple. The report states that the plaintiff's servant had not any notice or knowledge, or any reason to suppose, that the bridge was unsafe or dangerous, excepting that about thirteen days before the horse was drowned the driver was informed that the bridge would not be finished under four or five weeks, and that it was not considered safe to pass; but by whom it was so considered it did not appear. All the facts tending to prove want of due care on the part of the driver were properly submitted to the jury, and with guarded instructions for their regulation. We perceive no incorrectness in them. This exception is also overruled, and there must be

Judgment for the plaintiff.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF SOMERSET, JUNE TERM, 1830.

BRINLEY *vs.* TIBBETS.

If the party, entitled to repudiate a contract because it has not been performed in reasonable time, does any act which amounts to an admission of the existence of the contract, he cannot afterwards elect to treat it as void.

Thus, where one in possession of land not his own, bargained with the true owner for a title, and gave his promissory notes for the purchase-money, the owner stipulating in writing to give a deed in a reasonable time; which was not done; but the purchaser continued in possession, and afterwards sold his interest in the land, his grantee undertaking to procure and deliver up the notes;—it was held, in an action brought to recover payment of one of these notes, that the want of a seasonable delivery of the deed was cured by the subsequent conduct of the purchaser; and that he was bound to pay the notes; having his remedy still, on the contract to deliver the deed.

THIS was an action of *assumpsit*, brought to recover the amount of a promissory note dated *Oct.* 28, 1824, given by the defendant to the plaintiff, payable in one year; and it came before the court in a case stated by *Parris J.* from evidence adduced before him.

It appeared that the plaintiff was a citizen of Massachusetts, who owned land in *Starks* in this county, on a lot of which the defendant resided. The defendant contracted for the purchase of this lot, with *John Pitts*, Esq., the plaintiff's agent, giving him four promis-

sory notes for the purchase-money, amounting in all to $305 60, of which the note in suit was one. At the same time Mr. *Pitts* gave the defendant a written stipulation, signed by him as agent for the plaintiff, in which he undertook to procure from the plaintiff a warranty deed of the land, in the usual form, on the defendant's giving back a mortgage of the same to secure the payment of the purchase-money; and that if the deed should not be procured by *Pitts*, the notes should be returned to the defendant. The mortgage was accordingly prepared and executed by the defendant; who sent it, in *Nov.* 1825, with an order on Mr. *Pitts*, requesting him to receive the mortgage and his contract aforesaid, (which was also sent by the same messenger,) and deliver the deed; or else return the notes. His order was forthwith presented and demand made; but Mr. *Pitts* declined to comply with it; observing that he should have the deed ready at the register's office or at the defendant's house, by the first of sleighing, of all which the defendant had notice.

It further appeared that Mr. *Pitts* did not receive the deed from the plaintiff till late in the spring of 1826; and that forthwith, as soon as the roads were conveniently settled for travelling, he went to *Starks* to tender it to the defendant, but found that he had removed to a distant place.

The defendant continued to reside on the land till *March* 20, 1826; when he sold and conveyed all his interest in the land to one *Lovejoy*, for one hundred dollars, taking also his obligation to take up the notes held by the plaintiff, and give his own in their stead, if Mr. *Pitts* would relinquish the interest; which, however, the latter declined to do. The defendant at the same time stated to *Lovejoy* that he was to have had a deed of the lot in the *January* preceding; but for some reason or other he did not obtain it. *Lovejoy* entered under his deed, and has ever since remained in possession.

Upon the facts thus stated and proved, it was agreed that the court should enter judgment upon nonsuit or default, for the party entitled to recover.

H. W. Fuller, for the plaintiff.

Cutler, for the defendant.

The opinion of the Court was delivered in *Cumberland*, at the adjournment of *May* term, in *August* following, by

MELLEN C. J. The note in suit is one of four given on the same day, viz. *Oct.* 28, 1824, for a certain lot of land, described in the receipt, given on the same day by *Pitts*, the agent of *Brinley*. In this receipt and contract no time is specified, within which the deed therein described was to be procured by said *Pitts*, though the note in suit was made payable in one year from its date. In the absence of such limitation the law requires that performance shall not be delayed beyond a reasonable time; and what is a reasonable time depends on circumstances: and on the facts of this case, it is question of law. The deed in question had not been delivered when the action was commenced: and surely much less than two years was a reasonable time, within which the deed was to have been procured; and, unless the defendant's own conduct has taken away his defence of this action, we are clearly of opinion that it cannot be maintained. As the contract was made by *Pitts*, as agent of *Brinley*, who was well known to be an inhabitant of *Massachusetts*, we must give a construction to the contract signed by *Pitts*, so as to approach as near as we can to their understanding of it. It is not to be supposed that *Pitts* was to go to *Massachusetts* on purpose to obtain the deed; nor, when obtained, that he was bound to carry the deed to the defendant and deliver or tender it to him. He was to procure the deed from *Brinley;* and if the deed should not be procured by *Pitts*, the notes were to be returned to the defendant. The case finds that a deed, conforming to the terms of the contract, was procured of the plaintiff, though not so soon as it should have been; and when the agent of the defendant called for the deed, and could not obtain it, the defendant might at once have resisted the payment of the notes, though *Pitts* declined to deliver them up—and have considered himself as completely absolved from his engagements. But though the defendant's agent notified him of his fruitless endeavor to obtain the deed or the notes, still the defendant gave no evidence of any disposition to rescind the bargain and reclaim his notes. He continued in the peaceable possession of the premises under the contract, from the time it was made down

to the 20th of *March*, 1826, when he sold and conveyed all his right or interest in the land for one hundred dollars to *Lovejoy*, informing him that he was to have had his deed in the *January* previous, though for some reason he had not then got it. At the time of his purchase of *Tibbets*, *Lovejoy* gave him an obligation to take up the defendant's notes before mentioned, and give his own in lieu of them; it is true the exchange of notes was not made, but the fact is of importance to shew that the defendant considered the notes as in full force against him, and the bargain as unrescinded. It was in his power to waive all legal objections to the non-procurement of the deed in a reasonable time; and if he did so, he cannot now be permitted to urge it as a defence against the action. The deed is ready for him, and has been offered to him in court.—It is said that he sold only his improvements to *Lovejoy*, but as he held the possession until the sale of his interest to *Lovejoy*, under the contract of purchase made with *Pitts*, he was not entitled to the value of his improvements. This point has been distinctly settled in Massachusetts, and in this State. *Knox v. Hook*, 12 *Mass.* 329; *Shaw v. Bradstreet*, 13 *Mass.* 241; *Propr's Ken. Pur. v. Kavanagh*, 1 *Greenl.* 348. From the conduct of the defendant and *Lovejoy*, the most natural conclusion seems to be, that the subject of the transfer was the interest in the premises which the defendant had purchased of the plaintiff, or rather contracted for with *Pitts*, and for which he had given the notes; otherwise he would not have taken of *Lovejoy* an obligation to take up the notes; as they were given for $305 60. On payment of the notes, the defendant can maintain an action for damages, if the plaintiff should refuse to deliver him a deed of the land according to the terms of the agreement; but to avoid expense and circuity of action, judgment on default will not be entered, until the deed before mentioned shall have been placed on the files of this court, expressly for the use of the defendant.

WARE *vs.* WADLEIGH.

The husband of the tenant in a real action, having entered under the title of *J. C.* who was the true owner, afterwards conveyed the premises to the demandant in fee, and then died; the tenant pleaded that she was not tenant of the freehold, but was merely tenant at will to *J. C.*; whose title was traversed by the demandant; and it was held that the plea was maintained by proof of the better title of *J. C.* without any evidence of actual attornment.

THIS was a writ of entry, upon the demandant's own seisin, and a disseisin by *Elizabeth Wadleigh*, the tenant; who pleaded that one *Jacob Cilly* was the true and lawful owner of the premises, and that she was his tenant at will. The demandant traversed the title of *Cilly*, upon which issue was joined.

The tenant, in support of her plea, showed a deed of the premises from one *Kinsman* to *Jonathan Cilly* and *Enoch Butler*, made in the year 1796; and a deed of the whole tract, with general warranty, from *Jonathan* to *Jacob Cilly* made *Dec.* 4, 1801, acknowledged *October* 15, 1803, and recorded *January* 23, 1823. She also proved that her husband entered into the premises in 1822, in submission to the title of *Jacob Cilly*, of whom, as he frequently declared, previous to 1825, he intended to purchase the premises.

The demandant derived his title by a deed from *Daniel Wadleigh* the husband of the tenant, made in 1825; and he proved that *Wadleigh*, from the time of his entry, till his death in 1827, occupied the land, managing it as other farmers managed their own; that he built a house and barn, and planted an orchard thereon; and that the tenant had continued to possess and manage the property as he had done in his life time.

Upon this evidence *Parris J.* before whom the cause was tried, directed a nonsuit, subject to the opinion of the Court.

Allen, for the demandant, contended that the possession of *Wadleigh*, after his deed, was the possession of the demandant; and operated a disseisin of *Cilly*; which could not be purged but by his actual entry. 2 *Bl. Com.* 199; *Gookin v. Whittier*, 4 *Greenl.* 17. His intent to purchase of *Cilly* did not create a tenancy at

will; *Little v. Libby*, 2 *Greenl.* 242;—and if it did, it was terminated by his subsequent conveyance of the premises in fee. The possession of the tenant was merely a continuance of the occupancy of her husband; unless evinced to be otherwise by some act of attornment to *Cilly*; which the case does not find.

Boutelle and *Sprague* for the tenant.

WESTON J. delivered the opinion of the Court.

The plea in this case is substantially a special nontenure; although the issue tendered and joined does not technically present the material point essential to a plea of this sort; which is that the party sued is not tenant of the freehold. As no objection however is taken to the form of pleading, this ground of defence is sustained by, and deducible from the plea, if the averments it contains are supported by competent proof. The only averment in the plea, traversed by the replication, is the seisin of *Jacob Cilly*. In support of the issue on her part, the tenant produced a deed of warranty of the demanded premises, from *Jonathan Cilly* to the said *Jacob*, dated *December* 4, 1801, acknowledged *October* 15, 1803, and recorded *January* 23, 1823. As *Jacob Cilly* was, at the time of the commencement of this action, in possession of the demanded premises, by the said *Elizabeth Wadleigh*, his tenant at will, a fact which is averred in the plea, and not denied in the replication, and as the demandant offered no evidence of title anterior to, or going behind this, it was evidence sufficient to support the issue on the part of the tenant, and she was under no necessity to show the origin of *Jonathan Cilly's* title. She has however done this; and the evidence adduced shows that only a moiety of the premises, in common and undivided, was originally conveyed to him. *Jacob Cilly* however has a recorded deed of the whole; he is in possession of the whole; and he derives title from one who was the undoubted owner of a moiety. Upon this view of the evidence, he has a seisin of the whole; defeasible it may be, as to a moiety, but not liable to be impeached on the part of the demandant, by reason of any title by him exhibited. When *Jacob Cilly* is called upon to vindicate his right to the whole premises, by any person entitled to bring it in

question, he may be able to show a release from *Enoch Butler* to his cotenant *Jonathan Cilly*, who conveyed to *Jacob*. Or, if *Jonathan* had a valid title only to a moiety, his deed of warranty to *Jacob*, the registry of that deed, and his actually occupancy under it, divested the actual seisin of *Butler*, and by lapse of time the title of *Jacob* to the whole, may become indefeasible. At any rate, there is sufficient proof of actual seisin in him.

But it is contended that from the facts it appears that *Jacob Cilly* was disseised; and that the disseisin has not been purged by actual entry, or by judgment of law. To this it may be replied, first, that the possession of *Daniel Wadleigh* was in subordination to the title of *Cilly*, and that although his deed to the demandant may be regarded as a disseisin at the election of *Cilly*, yet that it did not constitute a disseisin in fact; and secondly, that if it did, his subsequent entry and possession, by his tenant at will, put an end to the disseisin, and restored to him the actual seisin and enjoyment of the premises. The nonsuit is confirmed; and the tenant is to be allowed her costs.

HAYDEN *vs. The inhabitants of* MADISON.

One contracted to build a road for the inhabitants of a town, for a certain sum; one half of which was to be paid when the work should be completed, and the other half in a year after. He made the largest portion of the road; having underlet a portion of it, which was not completed; and the town made the first payment, with knowledge of the facts, and without objection. Afterwards, and before the whole was finished, he sued for the stipulated price, counting upon the special contract, and on a *quantum meruit*.

Hereupon it was held—that the payment of the first instalment by the town, was a waiver of the terms of the special contract, and entitled the plaintiff to recover on the *quantum meruit* for as much as was completed.

The rule in such cases, it seems, is to take the stipulated price as the true value of the whole services agreed to be performed.

Assumpsit for labor and services in making a road. The first count was on a special contract; and the second was a *quantum meruit*.

It appeared, on the trial before *Weston J.* that on the first day of *November* 1824, the plaintiff contracted to build the road for five hundred and eighty dollars; one half thereof to be paid when the road was made, and the other half in a year afterwards. On the 11th day of *September* 1826, a committee was appointed by the town, to examine the road, and determine whether it was made according to the contract; which they did on the 14th day of *December* following, and reported that it was so made. But there being no article in the warrant for the town meeting which could call the attention of the inhabitants to this subject, the judge ruled that the doings of the committee did not bind the town, and could have no other effect in the case than the testimony of the individual members of the committee to the condition of the road, which they gave on the stand.

It further appeared that the plaintiff had underlet one third part of his job to another person, who proceeded accordingly to make his part. But a small piece of the road, of about eighty-six rods in length, was not completed till *June* 1829, after the commencement of this action. The making of this piece was postponed for the accommodation of a third person, by the consent of one of the selectmen; who testified that he mentioned it to his brethren, and that they made no objection to the postponement.

After the examination and report of the committee, the town made the first payment; making no objection on account of the eighty-six rods thus postponed.

The counsel for the defendants hereupon contended—first, that here having been an express contract, if the plaintiff failed to perform it without any fault or waiver of the defendants, he could not recover on a *quantum meruit*;—secondly, that if he could, yet he had no right of action till the term of credit given had expired;—and thirdly, that he could not in any case, recover for the amount he had underlet.

But the judge instructed the jury that if the plaintiff had not fulfiled his contract, yet, as the defendants were bound by law to make the road, so far as the plaintiff had relieved them of this duty, and they had availed themselves of his services, so far he was entitled to

recover whatever was just and equitable under all the circumstances of the case;—that in making this estimate, they would take care that the plaintiff should not be a gainer by the non-fulfilment of his own contract; that if he had fairly made a bargain which he found was likely to prove an improvident one, still, the sum stipulated should be taken as the value of the services agreed to be rendered;—that upon this basis they would deduct from the plaintiff's claim so much as it had or would cost to finish the road according to the contract; and if any balance was due to the plaintiff they would find it; if not, their verdict would be for the defendants;—and that neither the term of credit, nor the sub-contract, precluded the plaintiff from recovering upon the ground of a *quantum meruit*.

A verdict was thereupon returned for the plaintiff; which was taken subject to the opinion of the Court upon the correctness of the opinion and instructions given by the judge at the trial.

Allen for the plaintiff.

Boutelle and *Sprague* for the defendants.

The opinion of the Court was delivered at the ensuing *July* term in *Waldo*, by

Mellen C. J. It is admitted that this action cannot be maintained on the special contract, as the road was not completed at the time of the commencement of the suit. The only question is, whether the plaintiff, upon the facts reported, is entitled to recover on the general count for services performed. The noncompliance with the terms of the special contract was not occasioned by any fault on the part of the defendants, but still the action is maintainable if the town has in any mode waived all objections to such noncompliance. Such waiver may be either express or implied from circumstances; as if A contract to build a house for B of a certain description and complete it within a certain time, for a specified sum, but should fail in complying with the terms of the contract; still, if B should take possession of the house, or in any way accept it, and avail himself of A's labor and expense in building it, he may recover a reasonable compensation for his labor and expense.

This is no more than what is required by the plainest principles of justice. It is said, however, that in the present case, the town has done no act amounting to an acceptance of the road, either express or implied; that the public, and not the town, have made use of the road, and availed themselves of the plaintiff's labor and money, and that from such facts, no waiver of objection can be inferred; still, the town has been benefited by such labor and expense, probably to the full amount of their value. The evidence of waiver from the abovementioned circumstances, is certainly of a very equivocal character; but there is one fact in the case which, in itself, amounts to a waiver of objection on account of the plaintiff's noncompliance with the special contract. By this contract, one half of the sum of $580 was to be paid when the road should be completed, and the other half in one year from that time; and the report states that the town paid the first half, knowing that eighty-six rods of the road had not been completed, and making no objection on that account. In a case where a distinct and exclusive appropriation of the road to the use of the town, could not, from its nature, be proved, the beforementioned payment, voluntarily made when there was no legal ground on which the same could have been demanded, we must consider as an acceptance of the benefit of the plaintiff's services, and a waiver of all objection to his right to recover the remaining half of the agreed sum, on completion of the road; and as it was completed at the expense of the town, and the estimated expense of such completion was deducted by the jury, we perceive no objection to the action.

Judgment on the verdict.

KIDDER *vs.* PARLIN, *Sheriff, &c.*

The *Stat.* 1821, *ch.* 67, requiring the sheriff to notify the bail fifteen days before the return day of the execution, does not excuse the sheriff from making diligent search for the body and goods of the debtor, as before.

Where one became bail at the request of a third person, who afterwards paid him the greatest part of the judgment, which the bail had been compelled to satisfy;—this was held to constitute no defence for the sheriff, in an action brought against him by the bail, for a false return on the execution.

CASE for a false return. The plaintiff declared that he became bail for one *Holden*, who was arrested on a writ; and that a deputy of the defendant, who had the execution for service, falsely returned thereon that he had made diligent search within his precinct for the body and property of the debtor, neither of which he could find, &c. whereas in truth he had made no such search; by means of which the plaintiff had been obliged to satisfy the judgment, with additional costs. The return contained the other requisites of the statute regulating bail, which were not controverted.

At the trial before *Weston J.* it was admitted that the plaintiff became bail at the request of *Joseph Southwick*, who promised to indemnify him; and had subsequently paid him within three or four dollars of the amount of damage he had suffered by becoming bail. The falsity of the return, in the matter alleged, was fully proved.

The counsel for the defendant hereupon contended—*first*, that if he was liable at all, it was to *Southwick*, who had paid the money, and not to the plaintiff;—but *secondly*, that no sufficient cause of action was set forth; for that the statute regulating bail, having made it the duty of the officer to notify the bail to produce the debtor, fifteen days before the return day, had virtually excused the officer from making search.

Both these points the judge overruled; and a verdict was taken for the plaintiff, for his whole claim, subject to the opinion of the court.

The case was submitted without argument; and the opinion of the Court was delivered by

MELLEN C. J. In consequence of the false return made by the deputy of the defendant, the plaintiff has been compelled to pay the amount of the judgment and execution against *Holden*, and in this suit seeks a reimbursement from the defendant. Why should he not obtain it? There is no pretence that the liability on his part is to *Southwick*. He did not become bail. The promised indemnity by him, was a concern between him and the plaintiff, with which the defendant has no connexion.

But it is further contended that our statute respecting bail in civil actions, (*Stat.* 1821, *ch.* 67,) has made an essential change in the principles of law which are to govern the court in this case. A change has been made in respect to the nature and effect of the return of the officer on the execution against the principal. By the second section it is provided "that no return of *non est inventus*, made by any officer on any execution, shall be considered as evidence of the debtor's avoidance, so that the bail may be rendered liable on *scire facias*, unless such officer shall certify on such execution that he has had the same in his hands, at least thirty days before the expiration thereof;" and the first section, among other things, declares that the officer shall, at least fifteen days before the return day, notify the bail that he cannot find the principal debtor, nor any property wherewith to satisfy the execution. These provisions have been introduced into our statute for the purpose of protecting the bail from being entrapped by a return of *non est inventus*, made perhaps on the last day of the life of the execution, which had never been placed in the hands of the officer until a short time before. It was intended to prevent the success of any artful proceedings, calculated to prejudice the bail; but surely the legislature never could have contemplated that the officer was, by means of the above provision, to be excused from the performance of whatever was his duty before, and devolve such obligation on the bail. To give such a construction as is contended for by the counsel for the defendant, would be to impose a burthen, where a benefit was evidently in-

tended. The defence cannot be sustained, nor can we take any notice of the payments in part of the judgment, made by *Southwick;* the sums so paid must be refunded to him by the plaintiff, on his obtaining satisfaction of the defendant.

Judgment on the verdict.

GOULD *vs.* PARLIN, *Sheriff, &c.*

Whether, where the creditor in one execution is joint debtor with others in another execution, the officer, having both in his hands, is bound, by *Stat.* 1821, *ch.* 60, *sec.* 4, to set off one aginst the other, at the request of such creditor;—*dubitatur.*

If a party has once applied to the discretion of the court, by motion, to set off one judgment against another, which was refused, after a full hearing on the merits; he cannot afterwards maintain an action against the sheriff to whom both executions have been delivered, for refusing to set off the executions in the same manner.

Aliter, if the court declined interfering at all in the matter, in that summary mode.

IN this action the plaintiff declared that whereas he had put for collection into the hands of the defendant, being sheriff of this county, an execution in his own favor against one *Benjamin Adams*, for twelve hundred and sixty-nine dollars and forty-five cents; and *Adams* had placed for collection, in the hands of the defendant, an execution in his favor against the plaintiff as principal, and several others as sureties, for three hundred and ten dollars and ninety-five cents; and the plaintiff requested the defendant to satisfy the last mentioned execution by offseting against its amount so much of the plaintiff's execution against *Adams*; yet the defendant refused so to do; and returned the plaintiff's execution wholly unsatisfied; the plaintiff being compelled to pay the full amount of the other.

The defendant pleaded in bar that at the same term in which both said judgments were recovered, the plaintiff moved the court to allow the one to be set off against the other; upon which motion the

merits were fully heard; and the court, at the ensuing *July* term in *Washington*, made the following order:—"In the action *Benjamin Adams vs. Joshua Gould & als.* continued *nisi* from the last term in the county of *Somerset*, the clerk of this court for that county is ordered to make the following entry in his docket of that term, under said action, viz: And now, on application of said *Gould*, and a hearing of the parties, it appears that said *Adams* is equitably and beneficially interested in the sum of one hundred and fifty dollars only, in part of the penalty of said bond for which judgment is rendered; and that the sureties of said *Adams* are equitably and beneficially interested in the residue of the damages to which said *Adams* is nominally entitled, being the sum of three hundred and ten dollars and ninety-five cents. It is therefore considered by the court here that said *Adams* have execution against the defendants for said sum and no more, with costs. And it is hereby ordered by the court, that said sum of one hundred and fifty dollars be and the same is hereby set off against and in satisfaction of so much of the damages recovered at this term in the action of *Joshua Gould vs. Benjamin Adams*, which damages are twelve hundred and sixty-nine dollars and forty-five cents; leaving a balance of damages due to said *Gould*, of eleven hundred and nineteen dollars and forty-five cents; for which sum judgment is to be rendered in favor of said *Gould*. And it is further ordered by the court, that said clerk make the following entry in his docket of last term, under the action *Joshua Gould vs. Benjamin Adams*, viz: Judgment for the plaintiff, $1119,45; the residue of the damages found by the verdict, being one hundred and fifty dollars, having been set off against so much of the damages in the case of *Benjamin Adams vs. Joshua Gould & als.* this term; and costs." And that the defendant, being furnished with a copy of said order, refused to make the set-off required by the plaintiff. To this there was a general demurrer.

Sprague and *Tenney* for the plaintiff.

Allen for the defendant.

WESTON J. delivered the opinion of the Court.

We do not deem it necessary in this action, to determine the question whether the statute offset, upon which the plaintiff attempts to establish a failure of duty on the part of the defendant is, or is not, limited to executions, where the parties are identical. The cases cited for the plaintiff, decide that a several creditor in one judgment or execution, being a joint debtor with others, in another in favor of his debtor, may, if he chooses so to do, offset his judgment or execution against that wherein his debtor is creditor. The statute duty imposed upon the officer, is not made to depend upon the consent of either party. Where he has cross executions in the same capacity and trust, he is empowered and directed to offset them. *Stat.* 1821, *ch.* 60, *sec.* 4. And while the courts, in the exercise of their discretion, may offset judgments, like those now presented to our consideration, the right and duty of the officer to offset executions, issuing upon such judgments, has been doubted. Unless this was his duty, the plaintiff cannot prevail.

But without deciding this question, we are well satisfied that the defence is sustained upon another ground. The right of offset, and its limitation, has already been deliberately and solemnly decided by the court, upon the application of the plaintiff. He appealed to the superintending power of the court over their proceedings, and they, after hearing the parties, and taking time for consideration, afforded all the relief which they deemed consistent with the justice of the case. Of this he had the benefit; but because it fell short of his claims and expectations, he calls upon the officer, who has acted in accordance with the determination of the court. It would present a singular anomaly in the administration of justice, if under these circumstances, he is not to be protected. An agreement to refer an action, made a rule of court, cannot be waived or rescinded by either party, even before a hearing. *Haskell v. Whitney*, 12 *Mass.* 47. It would be very extraordinary, if the submission of a question to the court, in the regular exercise of their judicial power and authority, is without binding efficacy, after they shall have decided

The plaintiff was under no obligation to take the course he did. It was voluntary on his part; and he must be bound by it.

It is a familiar principle of law, that if a party resorts to one of several remedies, or to one of several courts of concurent jurisdiction, and there follows a determination, sentence, decree or judgment, after a trial or examination upon the merits, according to the course of judicial proceedings upon the remedy sought, and in the tribunal selected, the controversy is closed, and the determination is definitive; unless there lies an appeal to a higher jurisdiction. The equity of this rule, as applied to the party electing and pursuing the remedy, is very manifest; but it is equally binding upon the party held to answer, or who has an opportunity to be heard. And this upon a principle of public policy, that suits and controversies, once legally terminated, should remain at rest.

If the parties in the cross executions are not in the same trust and capacity, the offset is not to be made. It was the objection apprehended from this exception, which probably induced the plaintiff to appeal to the discretion of the court, and they, having the parties before them, had means of determining this question, which the sheriff had not; and possessing the jurisdiction, they could settle it effectually. There was, therefore, great convenience in the course pursued in relation to these judgments, before execution.

The courts may sometimes deem it expedient to decline interfering in a summary mode; as in *Makepeace v. Coates*, 8 *Mass.* 451. If they do, the rights of the parties remain unaffected. But in that case the authority of the court was asserted, while its exercise was refused. *Plea in bar adjudged good.*

ADAMS *vs.* MOORE.

A party is not estopped by every averment made by the other side which he does not deny; but only by averment of facts material and traversable, alleged directly and precisely, and not by way of argument, inference or recital.

Therefore where, to an action by the sheriff against a surety on his deputy's official bond, the surety pleaded that on a certain day notice was given to the sheriff by another surety that he would no longer be responsible for the official conduct of the deputy, who became insolvent; and that the sheriff still carelessly and fraudulently continued him in office; and that all his defaults happened after such notice:—to which the sheriff replied by alleging a breach previous to the notice, without denying or protesting against the other facts alleged; and had judgment upon a general demurrer to the replication:—it was held, in a *scire facias* for further execution, that the facts so stated in the plea, and not denied, did not constitute an estoppel; the fraud not being directly alleged, nor necessarily deducible from the other facts in the plea.

THIS was a *scire facias*, to have further execution of a judgment formerly recovered by the plaintiff against the defendant on a penal bond. It appeared, that the bond was signed *September* 7, 1820, by the defendant and others as sureties, to secure the plaintiff, then sheriff of this county, for the official good conduct of one *Dinsmore* whom he had appointed his deputy. The defendant pleaded that to the original suit upon this bond, commenced *October* 16, 1824, a plea in bar was filed, in which it was alleged that *Dinsmore*, the deputy, faithfully executed his office up to *April* 23, 1823; on which day *David H. Raymond*, another of the sureties, gave notice in writing to the plaintiff, with the consent, request and privity of the defendant, that he would no longer be responsible for the official conduct of *Dinsmore*; who had since become insolvent; and that the plaintiff, well knowing the same, carelessly and fraudulently suffered said *Dinsmore* to continue in said office; and that all his defaults and omissions of duty had happened since the notice given as aforesaid:—And that to this plea the plaintiff in that suit replied by alleging a breach of duty in the deputy, in the year 1821, for which, in 1825 the sheriff had been compelled to pay:—To which replication the defendant demurred in law; and the plaintiff had judg-

ment; with an award of execution for the amount of that breach :— And further alleges that the plaintiff did not traverse, nor deny, nor protest against any of the other facts stated in the plea; and that the breaches for which the present suit is brought were long subsequent to the time of said notice.

To this plea the plaintiff answered by a general demurrer.

Boutelle and *Sprague*, in support of the demurrer, cited 1 *Stark.* 295; 2 *Stark.* 29; *Crane v. Newell*, 2 *Pick.* 612.

Allen and *Bronson*, for the defendant cited 2 *Saund.* 103, *b. note*; 1 *Chitty Pl.* 589, 590, 591; 5 *Com. Dig. Pleader N.*; 6 *Dane's Abr.* 10; *Co. Lit.* 124, *b.*

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

The defendant relies, that by reason of the facts by him pleaded to the original suit, they not having been traversed or denied by the plaintiff, he was discharged from all liability, arising from the acts or omissions of *Dinsmore*, his principal, subsequent to the twenty third of *April*, 1823. And he avers that the cause of action, set forth in the *scire facias*, accrued after that period. The counsel for the plaintiff contends that no conclusion or estoppel to this effect can be raised against him, by reason of the pleadings in the original suit; and that his omission to traverse allegations there made, which constituted no defence to that action, cannot now avail the defendant, or prejudice him.

In support of this position, it is insisted that the averments or omissions in one set of pleadings cannot affect another; and that, as the law is now understood, protestations are no longer necessary; and have become obsolete in practice. Under the statute of 4 and 5 *Anne*, a defendant may, by leave of court, plead two or more distinct pleas. And the better opinion seems to be, that averments and admissions in one count in the declaration, or in one plea, where there is more than one, have no tendency to establish or controvert any other count, which is technically regarded as introducing a new cause of action; or to affect any issue, which may be joined upon

other pleas. Had it been held otherwise, the advantage arising from more pleas than one, given by the statute, would have been in a great measure defeated. It hence results, according to the text of *Starkie*, cited in the argument, that protestations have become of little use. They never affected the action, in which they were made. The intent of a protestation is, that the party may not be concluded in another action. 5 *Com. Dig. Pleader N.* No authority has been adduced to show, that this is not as necessary now as it was formerly. Sergeant *Williams*, in his edition of *Saunders*, *vol.* 2, 103, *note* 1, discusses and illustrates the doctrine of protestation, and no where intimates that there is no occasion for its use, in modern practice.

What has been once solemnly admitted on record, whether such admission be direct or implied, estops the parties to such record. This is subject to such modifications and exceptions, as are established by law. A party is not estopped by every averment made by the other side, which he does not deny. An estoppel ought to be certain to every intent. It must be upon a matter directly and precisely alleged; and not by way of argument, inference or recital. So if the thing alleged be not traversable or material, it is no estoppel. *Co. Lit.* 352, *b.* And it has been urged in argument that the estoppel, pleaded in the case before us, does not attach, because the facts relied upon were not material or traversable in the original suit. Their effect was avoided by replying a cause of action, arising prior to the matter pleaded in discharge of farther liability. Whether this objection be sufficient to rebut the estoppel, it is unnecessary to decide; for if the facts relied upon, although established by estoppel are immaterial, they constitute no defence, and if material, the ground of the objection fails.

The important question then is, upon the merits of the case, whether the facts pleaded in the original suit, absolved the defendant from further liability. And we are clearly of opinion that they did not. The obligors in the bond to the plaintiff, did not reserve to themselves the right to be absolved from future breaches upon notice; nor does any such right arise from implication of law. It was averred that at the period stated, the principal was insolvent, and unable

to indemnify his sureties for any damage, which they might sustain on his account. It is not uncommon for an insolvent man of fair character, to obtain sureties for the faithful discharge of the duties of an office, to which he may be appointed. Nor is the obligation of sureties, if they undertake for a man solvent at the time, lessened or impaired by his subsequent insolvency. It is a hazard they voluntarily assume, and within their contemplation as a contingency which may happen. In *Crane v. Newell*, cited in the argument, in addition to the notice from the sureties, it was expressly averred that the principal was entirely unfit for the office of deputy, and that this fact was well known to the plaintiff, which the plaintiff did not deny, except by protestation. But the court did not sustain the defence. The obligation of the surety remains; unless the party to whom he has become bound, without his consent, changes the contract, or puts it out of his power to enforce payment against the principal. This doctrine is fully supported by the authorities cited for the plaintiff.

If the plaintiff and the principal had conspired to defraud the sureties, or if the plaintiff had continued him in office, with the fraudulent intent to do them an injury, and this had been directly and affirmatively pleaded and proved, it might have constituted a good defence. But the averment is, that one of the sureties notified the plaintiff that he would be no longer bound, that the principal was insolvent, and that this was known to the plaintiff, who notwithstanding carelessly and fraudulently continued him in office. That this was done fraudulently, is a deduction from the facts alleged. The omission of the plaintiff to remove the principal, although he knew these facts, the defendant has denominated fraudulent. Now what depends on inference, argument or deduction, does not afford matter of estoppel. But the inference is not fairly, still less necessarily, deducible from the premises. The plaintiff might know that the surety was unwilling to stand further bound, and that the principal was insolvent, and yet continue him in office without fraud.

Judgment for the plaintiff.

The inhabitants of Fairfield *vs. The inhabitants of* Canaan.

A legitimate child, being a minor, and having a settlement derived from its father at the time of his death, does not follow any new settlement afterwards acquired by the mother.

This case, in which the question was upon the settlement of a pauper child, came up by exceptions to the opinion of *Perham J.* who gave judgment for the defendants in the court below.

The father of the pauper had his settlement and died in *Kingfield*, prior to 1821. At the time of the passage of the settlement act of *March* 21, 1821, the pauper resided and had her home, with her mother, in *Fairfield*; and by such residence both acquired a new settlement in the latter town, by virtue of a particular provision of that statute. In 1824 the mother married a second husband, who dwelt and had his settlement in *Canaan;* and whether the child followed the new settlement thus acquired by its mother, was the question. *Perham J.* ruled that she did not; to which the plaintiffs excepted.

Boutelle, for the plaintiffs.

Sprague, for the defendants.

Weston J. delivered the opinion of the Court.

The second mode of gaining a settlement, prescribed by the statute for the relief of the poor, *Stat.* 1821, *ch.* 122, *sec.* 2, is that legitimate children shall follow and have the settlement of their father, if he shall have any within this State, until they gain a settlement of their own, but if he shall have none, they shall in like manner follow and have the settlement of their mother, if she shall have any. Where the father has a settlement in the State, that of the children is derived from him, not from the mother. In the case before us, the father had such settlement. But it is insisted that the father, having deceased, and therefore having no settlement in the State, the

pauper, being a minor, would derive her's from the mother. We however must regard it as the manifest intention of the statute, that children should derive their settlement from the father only, if he had one within the State. No question is or can be made, that his settlement must be theirs in his life time. How long shall it continue? The statute has prescribed, until they gain a settlement of their own. And this is plainly put in contradistinction to derivative settlements. In a doubtful case, the suggestion that this construction might separate minor children from their only surviving parent, would have weight; but the provisions of the statute are too plain to be affected by any argument founded on inconvenience. The policy of the pauper laws generally is, to keep minors and their parents together; but not uniformly. Illegitimate children have the settlement of their mother at the time of their birth, but they derive from her no settlement subsequently acquired.

Judgment affirmed.

VEAZY *vs. The inhabitants of* HARMONY.

Where a town order, payable in corn and grain, was presented to the town treasurer, who offered to pay it in those articles, but said that if the payee would wait till a future day he would pay it in money; which was agreed;—it was held that this was a waiver of the tender; and that the treasurer had sufficient authority thus to bind the town.

When specific articles, as corn or the like, being part of a larger quantity, are tendered, it seems they should be separated and set apart from the mass in which they are contained, that the party may see what is offered, and is to be his own.

THIS was *assumpsit*, upon a town order, drawn by the selectmen of *Harmony*, on their treasurer, directing him to pay the plaintiff $44,18 in corn, wheat or rye, in *August* 1825, at specified prices; for teaching a school in their town; the plaintiff alleging a demand and refusal, in *August* 1825, when the order was payable. The defendants pleaded a tender of sufficient corn and rye on that day,

and a refusal by the plaintiff; who replied, traversing the tender; and on this point issue was taken.

At the trial before *Smith J.* in the court below, the treasurer testified that at the time stated in the plea he had on hand, in a granary, sufficient corn and rye, the property of the town, to have paid the order; that the plaintiff's agent, meeting him about forty rods from the granary, asked him if he would pay the order; to which he replied that he would pay it in corn and grain; but added further that if he would wait till the ensuing *February* he would pay it in money. This the plaintiff's agent declined, but said he would wait till *December*; to which the treasurer assented, and made a memorandum to that effect on the back of the order; and the parties separated. The treasurer did not measure out nor set apart the corn or grain for the plaintiff, at any time; nor go into the granary with the agent; who was unprovided with bags or other means to take the grain away; and soon after this time the treasurer disposed of all the corn and grain in his hands, for the benefit of the town, in payment of its debts.

The judge was of opinion that the tender was not sufficiently proved; to which the defendants filed exceptions.

Allen, for the plaintiff.

Greene, for the defendants.

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

The question in this case is whether the plea of tender is maintained by the facts reported. The accepted order was payable in *August* 1825, and payment was then demanded. In reply, the town treasurer said he would pay it in corn and grain; and it appeared that he had then in his granary more than enough of those articles, belonging to the town, to satisfy the order. At this time the plaintiff and treasurer were forty rods from the building where the grain was deposited; and during the conversation, a proposal was made to pay the amount of the order in money in the *February* following, which was not accepted; but the plaintiff's agent agreed to wait till *December*, then next, and this proposition being acceptable to the

treasurer, a memorandum to that effect was made on the order and the parties separated. The order not being paid till after *December*, the present action was commenced. We are all of opinion that the foregoing facts do not prove a tender. We are strongly inclined to adopt the principle, as the correct one, that in such a case as this the treasurer should have separated and set apart such a quantity of grain as would have been sufficient to pay the order, and have offered such quantity in satisfaction; so that the plaintiff need not to have incurred any expense himself in making the separation; and so that he might also have known what part of the quantity in the store he was to receive; but we do not decide the cause on this ground; for we cannot but see that whatever was intended or done on the occasion, in relation to a tender, was all waived by both parties, by means of the arrangements made for delay of payment till *December*. The town treasurer, as the agent of the town, had as much authority to waive as to make a tender; all was done in good faith and furnishes abundant proof that no effectual tender was contemplated as having been made, or even intended to be relied on. The disposal of the grain, soon after, by the treasurer, shews how he understood the whole business. The town had the benefit of the delay from *August* to *December*, and there is no soundness in the defence.

Judgment for the plaintiff.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF PENOBSCOT, JUNE TERM, 1830.

DREW *vs.* WADLEIGH *& al.*

Where a witness testified to certain facts, which were contrary to his own admissions in a written contract made by him with the adverse party;—it was held that such party might read this contract in evidence to impeach his testimony, without first calling the subscribing witness thereto; the witness on the stand, who signed the contract, testifying that the signature was his own.

IN an action by the payee against the makers of a promissory note, the defendants, to impeach the consideration of the note, produced an account settled between them and the plaintiff, for the balance of which the note was given; and then called one *Smith*, who testified respecting the hire and wintering of certain oxen charged in the account. The plaintiff thereupon, to contradict the facts testified by *Smith*, offered in evidence a written contract which he made with the plaintiff, touching the same hire and wintering of the same oxen. The defendants objected to the admission of the contract in evidence, till its execution was proved by the subscribing witness, who resided within the jurisdiction of the court. But upon *Smith's* testifying that the paper was genuine, and signed by himself, *Parris J.* ad-

mitted it, subject to the opinion of the court; a verdict being returned for the plaintiff.

Sprague, for the defendants, argued that this case formed no exception to the general rule, which required the production of the subscribing witness, if within the reach of process; and cited 1 *Stark. Ev.* 330, 331; *Willoughby v. Carleton*, 9 *Johns.* 136.

J. McGaw, for the plaintiff, cited 3 *Stark. Ev.* 1740—1.

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

The general principle on which the defendant's counsel rely is correct, as to the mode of proving the execution of deeds and other contracts where there is a subscribing witness. The only question is whether it is applicable to a person in the character and situation in which *Smith*, the witness, stood when he testified respecting his signature on the paper produced by the plaintiff's counsel. We admit that if *Smith* had not been introduced as a witness by the defendant, and had not testified as to certain charges stated in the account, for the purpose of proving the alleged want of consideration for the note declared on, it would not have been competent for the plaintiff to examine him as to the fact of his having signed the paper or contract before mentioned. *Smith*, being called by the defendant, testified relating to the hire of oxen and paying for wintering the same, mentioned in said account. The paper appeared to be a contract between the plaintiff and *Smith* respecting the same hire and wintering of oxen charged in said account. The object in view in introducing the agreement was to shew that *Smith* had acknowledged the facts, respecting the above charges to be different from his testimony. When, therefore, *Smith* acknowledged that the paper or agreement was signed by him, and was genuine, he acknowledged the contents of the paper, as therein stated, to be true; such an admission merely made by *Smith* was evidence on common principles, as it tended to impeach *Smith*, by shewing either his want of veracity or the incorrectness of his memory; and we cannot perceive that such admission is less proper or effectual because he was on oath when he made it. It was not offered as the basis of

any claim on the part of the plaintiff, but for the purpose of repelling the defence, by shewing the contradictions of the witness brought forward to sustain it. We place the decision of this cause on the special character and circumstances in which *Smith* was placed; considering his testimony in respect to the paper and his signature merely in the light of admissions or declarations made by *Smith*, and inconsistent with his previous testimony. We are all of opinion that there must be

Judgment on the verdict.

FAIRBANKS *& al. vs.* WILLIAMSON.

Where one contracted to build a road for the State through four of its townships, in consideration of a contract made by the State's agents to convey to him 8000 acres of land as soon as the road should be completed, the land to be surveyed and laid off in any of the State's lands through which the road might pass; and afterwards, but before any such survey or conveyance, the party having made the road sold and conveyed an undivided third part of the 8000 acres;—this was held sufficient to pass the fee; the land being afterwards designated by a survey agreeably to the contract.

And the deed of the whole tract from the State being afterwards made to the original contractor, it was held to enure to the benefit of his grantee; and to estop the grantor and all others claiming under him adversely to such prior grantee.

A covenant that neither the grantor nor his heirs shall make any claim to the land conveyed, though not technically a warranty, is a covenant real, which runs with the land, and estops the grantor. And wherever the grantor is estopped, all claiming under him are estopped also.

The extent of an execution raises an estoppel, as much as if the conveyance were made by deed.

THIS was a writ of entry on the demandant's own seisin, to recover possession of two lots of land in township No. 2 of the old Indian purchase, on the west side of the *Penobscot* river, particularly described by their numbers in the writ.

The title of the demandants was by the regular extent of an execution against *Ebenezer Webster*, upon the premises in question,

made *July* 5, 1827; and a deed of release from *Webster* on the 27th day of *August* following.

It appeared that on the 15th day of *December* 1818, one *Ebenezer Weston* made a deed to *Webster*, reciting that the agents of *Massachusetts*, in consideration of a contract entered into by himself and one *Daniel Webster* deceased, to build a certain road, had contracted to sell and convey to them 8000 acres of land, to be by them selected in lots of one hundred acres each, in any of the lands belonging to the Commonwealth in the four townships through which that road might pass; the same having been first surveyed under the direction of the agents for the sale of eastern lands; and that their contract to build the road had been completed; and thereupon conveying to said *Ebenezer Webster*, for a full and valuable consideration, one undivided third part of the 8000 acres; so that neither the grantor nor his heirs or assigns should or would make any claim or demand to said undivided third part forever; without other covenants; and authorising the grantee or his heirs or assigns to select said third part in lots of one hundred acres each, as the grantor might have done. The land was subsequently surveyed as contemplated by the original contracting parties; and a deed of the whole tract, including the demanded premises, was made to *Weston*, *June* 13, 1820, by the committee for the sale of eastern lands, in fulfilment of the contract. And on the 10th day of *May* 1821, *Weston* conveyed the demanded premises to the tenant in fee. All the deeds were recorded forthwith, upon their execution and delivery.

Hereupon, at the suggestion of *Parris J.* before whom the cause was tried, a default was entered against the tenant, subject to the opinion of the court upon the question whether the deed from the committee to *Weston* enured to the benefit of *Webster;* or estopped *Weston* and the tenant from denying the title of the demandant.

Williamson, *pro se*, argued that nothing passed by the deed from *Weston* to *Webster*. The grantor had neither seisin, nor possession, nor the right of possession; but only a future possibility of an interest. 3 *Bac. Abr.* 382, *Grant*, *D;* the fee was in the Commonwealth till *June* 13, 1820; and of such lands there can be no disseisin. *Co. Litt.* 265, *a.* 266, *a*; 5 *Johns.* 489; 4 *Dane's Abr.*

16, *sec.* 3; *Brinley v. Whiting*, 5 *Pick.* 350; *Hathorne v. Haynes*, 1 *Greenl.* 247; 1 *Bac. Abr.* 446; *Davis v. Hayden*, 9 *Mass.* 519.

But the deed itself was too uncertain to operate as a conveyance of land. It contained nothing from which the position or location of the land could be inferred. The tract was to be taken from the Commonwealth's lands through which the road might pass; and it was to pass through four townships. *Shep. Touchst.* 249, 250. It was nothing but a covenant to convey. But if it was more, it was a grant to take effect *in futuro*, and therefore conveyed nothing. 2 *Chitty's Pl.* 464; *Somes v. Brewer*, 2 *Pick.* 197; *Co. Litt.* 296 *b.*

Upon these grounds there can be no estoppel. And if there could, yet this would apply only to the parties to the deed. For here was no privity in estate, because no estate passed by the deed. The very ground of estoppels, moreover, which is to prevent circuity of action, fails in this case; for the grantor entered into no covenants, on which his grantee could found an action. 4 *Com. Dig.* 79; 6 *Mass.* 420; *Co. Litt.* 271, *a*; 352, *a.*

Sprague and *Starrett*, for the demandant, cited 5 *Dane's Abr. ch.* 160, *art.* 1, *sec.* 16; 4 *Dane's Abr. ch.* 110, *art.* 2, *sec.* 4; 2 *D. & E.* 171; 4 *Com. Dig. Estoppel, A.* 2; *Varnum v. Abbot*, 12 *Mass.* 474; 2 *Caines*, 188; 6 *Mass.* 254; *Pray v. Pierce*, 7 *Mass.* 385; *Allen v. Sayward*, 5 *Greenl.* 227; *Somes v. Skinner*, 3 *Pick.* 52; *Mayo v. Libby*, 12 *Mass.* 339; *Jackson v. Bull*, 1 *Johns. Ca.* 81; *Brown v. Maine Bank*, 11 *Mass.* 153; *Jackson v. Murray*, 12 *Johns.* 201; *Jackson v. Stevens*, 16 *Mass.* 110; *Williams v. Gray*, 3 *Greenl.* 207.

The opinion of the Court was delivered in *Cumberland*, at the adjournment of *May* term, in *August* following, by

Weston J. It is insisted that the instrument, executed by *Ebenezer Weston* to *Ebenezer Webster*, in *December*, 1818, was not a conveyance of land, but a contract to convey. It has, however, all the formalities necessary by law, for the conveyance of real estate. It was signed, sealed, delivered, acknowledged and recorded; and contains apt and proper words, to pass an estate in fee

simple. It is sufficiently apparent, that the parties intended it to have that effect; and that no further assurance was in their contemplation. It is further objected, that the deed cannot operate, by reason of uncertainty as to the subject matter of the conveyance. The deed does not describe and set forth the land conveyed by metes and bounds, nor does it designate its exact location. But it points out the mode by which it was to be ascertained; and the tract from which it was to be taken. It was first to be surveyed under the direction of the agent for the sale of eastern lands, or such other person or persons as should be authorized for that purpose; from which the grantee was to select the quantity conveyed, in lots of one hundred acres each. The deed sets forth particularly and definitely, the manner in which the land was to be located. This being followed, certainty as to the subject matter of the conveyance resulted. In *Sheppard's Touchstone*, 250, it is laid down, on the authority of *Perkins*, that if one be seised of two acres of land, and he doth lease them for life, and grant the remainder of one of them, and doth not say of which, to *J. S.* in this case, if *J. S.* makes his election which acre he will have, the grant of the remainder to him will be good. So in the preceding page, it is stated, that if one grant me one hundred loads of wood, to be taken by the assignment of the grantor, or to be taken by the assignment of *J. S.* these are good grants. There must be reasonable certainty as to the subject matter of a grant or conveyance; but this rule of law is satisfied, if the description contains that, from which certainty may be obtained. *Id certum est, quod certum reddi potest.*

At the time of the execution of this deed, the grantor had entitled himself to a conveyance of the land, from the authorized agents of the Commonwealth of *Massachusetts;* but the conveyance was not actually made, and his title thereby perfected, until *June* 1820. And it is contended that nothing passed by *Weston's* deed to *Webster*, he having then no estate or interest in the land. In the deed to *Webster*, *Weston* covenants that neither he nor his heirs, shall or will make any claim to the land conveyed. This, although not technically a warranty, is a covenant real, which runs with the land, and estops the grantor and his heirs to make claim or set up any title

thereto. The fruit and effect of a warranty in deed is, that it concludes the warrantor, so that all his present and future rights, that he hath or may have in the land, are thereby extinct. *Shep. Touch.* 181. And this to avoid circuity of action. *Co. Lit.* 265, *a.* That this is the consequence of a deed with warranty, is recognized in *Jackson v. Matsdorf*, 11 *Johns.* 97; in *McCrakin v. Wright*, 14 *Johns.* 194; in *Mason v. Muncaster*, 9 *Wheat.* 454; and in *Somes v. Skinner*, 3 *Pick.* 52. And our opinion is, that it is deducible from the doctrine of estoppels, that wherever the grantor is estopped, all subsequently claiming under him are estopped also. 4 *Com. Dig. Estoppel, E.* 10; *Co. Lit.* 352, *a.*

In *Somes v. Skinner*, *Parker C. J.* says, after reviewing the authorities, "the general principle to be deduced from all these is, that an instrument, which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor." It is true, he subsequently states, that warranty has been regarded an essential feature in the doctrine; yet we apprehend that general warranty is not necessary to create an estoppel. In the case before us, it seems very clear that *Weston* would be estopped, by the covenant in his deed, to claim the land against *Webster;* and the tenant, holding subsequently under him, is privy in estate and equally bound by the estoppel. *Co. Lit.* 352, *a.* 4 *Com. Dig. Estoppel B.* As if *A* demises the manor of *D* by indenture for years, and afterwards purchases the manor, and sells it to *B*, the vendee shall be bound by the estoppel, and cannot say that *A* had not any thing in the manor at the time of the lease. 1 *Salk.* 276.

Coke puts a case where the father is bound by an estoppel and the son is not; as if there be grandfather, father and son, and the father disseises the grandfather, and makes a feoffment in fee, and the grandfather dies, the father against his own feoffment shall not enter; but if he dies his own son shall enter. *Co. Lit.* 265, *b.* The reason is, the son claims, not as heir to the father but to the grandfather, who was the disseisee, and last actually and rightfully

seised. And if the heir does not claim the land from him who made the estoppel, but by his own purchase, or by another ancestor, he shall not be bound; although he derives his blood from the party to the estoppel. Sir *Wm. Jones*, 460, cited 4 *Com. Dig.* 80. In *Rawlin's case*, 4 *Co.* 52, *A* possessed of a house for 30 years, except a stable, of which *B* was possessed for two years, granted all his interest to *C*, and demised the stable to *B* for six years by indenture, after the end of the two years; *C* redemises all to *A* for twenty one years paying rent, then *A* redemises the stable to *C* for ten years. It was resolved that the lease by *A* to *B* for six years, though he had nothing at the time, was good by conclusion by the indenture, and when *C* redemised all to *A*, then was the interest bound by this conclusion; then when *A* redemises to *C* the stable, *C* is also concluded; for all parties or privies in estate or interest are bound by the estoppel.

In *Varnum v. Abbot*, 12 *Mass.* 474, it was stated by *Jackson J.* that the levy of an execution on real estate, raised an estoppel against the judgment debtor, as much as if he had given a deed under hand and seal; and yet in such a case he could be bound neither by covenant nor warranty.

The covenant in *Weston's* deed to *Webster* being one which runs with the land, the demandant, his assignee, may avail himself of it. *Weston*, by his deed and covenant, is estopped to make claim or title to the land; and the tenant, claiming subsequently under *Weston*, is privy in estate, and bound by the estoppel.

Judgment for the demandant.

CARLL *vs.* BUTMAN.

The wife of a mortgagor, or of one claiming under him, cannot have dower at common law against a mortgagee or his assigns, whose title commenced previous to the marriage.

Where the purchaser of an equity of redemption afterwards took a deed of release and quitclaim from the mortgagee, this was held to be no extinguishment of the mortgage, but only an assignment of the title of the mortgagee.

If the mortgagor has aliened the land to two persons, in separate parcels, a judgment obtained by the mortgagee against one of them for the whole tract, does not foreclose the other's right to redeem.

If the widow of the grantee of part of a tract of land, mortgaged before the marriage, would have her dower against the mortgagor, it can be had only by bill in equity, and upon payment of her just proportion of the sum due on the mortgage. The proportion to be paid by the husband's parcel, is such proportion of the principal debt, as the value of the parcel conveyed to him bears to the value of the whole tract mortgaged. And of the sum thus found, the widow must pay the proportion which the present value of an annuity for her life, equal to one third of the rents and profits, bears to the value of the whole parcel conveyed to her husband.

THIS was an action of dower; in which the wife of *Stephen Carll*, from whom she had been divorced for adultery committed by him, sued for her dower in one acre of land.

It appeared that in 1813 one *Ephraim Holmes* mortgaged a tract of land, including the acre in question, to *John Coffin Jones;* and in 1814 conveyed the acre in fee, with general warranty, to *Carll.* In 1817, the last payment from *Holmes* having become due, *Jones* brought a writ of entry on his mortgage against one *Prescott* as tenant in possession; and having obtained judgment, the writ of *habere facias* was put into the hands of *Carll*, who was a deputy sheriff, for service; who made return in 1818 that he had put *Jones's* attorney into possession of the premises, having removed *Prescott* and his effects therefrom. In 1821 *Carll* conveyed the acre, by deed of release and quitclaim, to the tenant; who, in 1822, obtained a similar deed of conveyance from *Jones*, the mortgagee.

The demandant was lawfully married to *Carll* in 1819; and it appeared that he was in actual possession of the acre at the time of

the commencement of *Jones's* action against *Prescott*, and so continued till the latter part of the year 1821.

Upon this evidence a nonsuit was entered by *Parris J.* subject to the opinion of the court upon the question whether the demandant was entitled to dower.

Williamson, for the demandant, contended that the entry of *Jones* did not operate against *Carll;* because it was only into the portion occupied by *Prescott*, against whom alone he had brought his action. *Groton v. Boxboro*, 6 *Mass.* 53; 4 *Dane's Abr.* 191, *sec.* 24; *Varnum v. Abbot*, 12 *Mass.* 474; *Fosdick v. Gooding*, 1 *Greenl.* 50.

He further argued that the tenant could not claim under the mortgage, the release from *Jones* to him having extinguished it. *Barker v. Barker*, 17 *Mass.* 554; *Gibson v. Crehore*, 5 *Pick.* 149; *Bolton v. Ballard*, 13 *Mass.* 227; *Snow v. Stearns*, 15 *Mass.* 280; *Collins v. Torrey*, 7 *Johns.* 277.

Brown, for the tenant, cited *Holbrook v. Finney*, 4 *Mass.* 568; *Bird v. Gardiner*, 10 *Mass.* 364.

Weston J. delivered the opinion of the Court.

In *Bird v. Gardiner*, cited by the counsel for the tenant, *Sewall J.* states that it is well settled that a wife is not dowable of an equity of redemption; but he there means, as is very manifest, as against the mortgagee or his assigns, whose title commenced before the seisin of the husband. That a widow may be endowed, notwithstanding an outstanding mortgage, under which the tenant does not claim, although such mortgage, so long as it remained unextinguished, would defeat her claim in favor of those holding under it, has been repeatedly recognized in *Massachusetts*; and in this State in *Smith v. Eustis & al. (ante p.* 41. *)* The mortgage in evidence in the present case was made before the seisin of the husband, and his title was derived from the mortgagor. If therefore the tenant holds under the mortgagee, he has a good defence against the demandant's claim of dower. Prior to this action, the mortgagee for a valuable consideration released to the tenant; but as the latter had previously taken a conveyance from the husband of his interest, and thus become

the owner of the equity of redemption in the land demanded, it is insisted that the release to him by the mortgagee operated not as an assignment, but as an extinguishment, of the mortgage. And the cases of *Bolton v. Ballard* and of *Snow v. Stearns* are cited in support of this position. But the former of these cases was decided upon the ground that the mortgage was paid with the husband's money, a part of the consideration of the purchase from him being by express agreement reserved and applied to this purpose. And in the latter case, the sum due on the mortgage was paid, not by the tenant, but by the administrator of the grantor of the husband. Here the sum paid to the mortgagee, was the tenant's own money. It was not paid with a view to extinguish the mortgage, or to pay the debt due thereon, but to purchase the land, after the right to redeem was understood to be foreclosed. To regard this purchase as an extinguishment of the mortgage, would be to give a construction to the deed, which neither party could have intended.

In *Gibson v. Crehore*, 3 *Pick.* 475, it is laid down by *Parker C. J.* that "where the purchaser of a right to redeem takes an assignment, this shall or shall not operate as an extinguishment of the mortgage, according as the interest of the party taking this assignment may be, and according to the real intent of the parties." And the learned Chief Justice supports his opinion, by adverting to several authorities. This principle is repeated by *Wilde J.* in a case between the same parties, 5 *Pick.* 146. And nothing is more equitable. The widow is deprived of nothing, to which she is justly entitled. The purchaser of the equity takes an assignment of the mortgage for himself and not for her. He pays the consideration; and as she loses nothing by this transaction, she has no equitable claim to be benefitted by it.

In conformity then with the authorities, with the plain intentions of the parties, and with the justice of the case, the deed from the mortgagee must be regarded as a conveyance of the land to the tenant, and an assigment of the mortgage from which his title originated, if a right to redeem still subsisted, in respect to any part of the land. The tenant thus holding under the mortgagee, the demandant's action cannot be sustained at law.

But she has a remedy by a bill in equity, if the right to redeem the land in question has not been foreclosed. An entry to foreclose, by our statute, must be by process of law, or by consent in writing of the mortgagor, or those claiming under him, or by the mortgagee's taking peaceable possession in the presence of two witnesses. It is not pretended that either of the two latter modes was adopted. There was a process and judgment of law, in favor of the mortgagee, to foreclose the mortgage, but it was not against the husband of the demandant, who was then the tenant in possession of the land in question, it having been severed from the other land mortgaged, by the deed of the mortgagor. The husband's rights were therefore unaffected by the process and judgment against the tenant in possession of the residue of the land. According to a former practice, he might have been joined as a tenant in that suit. 4 *Dane's Abr.* 192. But in conformity with later decisions, in order to foreclose his right to redeem, there should have been a separate process and judgment against him. *Varnum v. Abbot & al.* 12 *Mass.* 474; 1 *Greenl.* 50.

But if she would have her dower, she must pay her just proportion of the sum due on the mortgage. *Swaine v. Perine,* 5 *Johns. Chan.* 482; *Gibson v. Crehore,* 5 *Pick.* 146. As the value of the whole tract mortgaged, is to the whole sum due on the mortgage, so would the value of the acre, of which the husband was seised, be to the amount which that acre should contribute. And of this last sum thus ascertained, the widow would be holden to pay the proportion, which the present value of an annuity for her life, equal to one third of the rents and profits, might bear to the value of the whole acre in which she has a claim to be endowed. The rights of the widow may be adjusted by the parties upon these principles; or she may enforce them by a bill in equity. But the nonsuit, directed by the judge in this action, must stand; and the tenant be allowed his costs.

KNOX & *al. vs.* PICKERING.

The grant of four townships of land in 1799 by the Commonwealth of Massachusetts to *Henry Knox*, containing an exception of the lots occupied by settlers, not exceeding one hundred acres to each, certain lots were afterwards laid out to settlers, fronting on the *Penobscot* river, and bounded by monuments erected on the bank, being the lots in their actual occupancy prior to the grant. It was held that the flats fronting these lots were within the fair construction of the exception, and belonged to the settlers as riparian proprietors.

IN this action, which was a writ of right, the demandants, counting on the seisin of their ancestor the late Gen. *Knox*, asserted their title to a parcel of flats in *Bangor*, lying in front of the settler's lot No. 10, originally granted to the heirs of *James Dunning*.

The demandants adduced in evidence the Resolves of *Feb.* 17th and 23d 1798, the purport of which is stated by the Chief Justice in the opinion of the court. They also read a deed from *Thomas Davis*, agent for the Commonwealth, to Gen. *Knox*, dated *July* 20, 1799, made pursuant to those Resolves; conveying to him certain townships of land, including *Bangor*, excepting the lots occupied by settlers, not exceeding one hundred acres to each. Gen. *Knox* died disseised in the year 1806.

The tenant gave in evidence the Resolve of *March* 5, 1801, providing for the survey and location of certain lots to settlers in *Bangor*, not exceeding one hundred acres to each; and a deed from the Commonwealth's agents *Reed* and *Coffin*, dated *Nov.* 11, 1802, pursuant to the Resolve, conveying to the heirs of *James Dunning* an original settler, a lot of land in *Bangor*, bounded "beginning at a stake and stones, the corner of lot No. 10, thence north 45 degrees west 292 poles to a stake marked; thence west 45 degrees south 51 rods; thence south 45 degrees east to the bank of the river to the corner of lot No. 9; thence upon the bank of said river to the first mentioned bounds." He also produced a deed from *James Dunning*, dated *June* 1, 1800, conveying five eighths of his lot No. 10, to *James Thomas* and *Jeremiah Dudley;* and deduced

title to the premises under this deed and divers other mesne conveyances, from *Dunning's* heirs, down to himself.

It appeared that in the year 1800 *Dudley* took possession of the lot No. 10; and that in the following year he built a wharf on part of the demanded premises, of about thirty feet in width, and extending from near the bank as it then stood, quite to the thread of the first channel, but not the main channel, of the river; on which he erected a store in 1801 or 1802. It was also proved, by the testimony of *Park Holland*, the original surveyor for the Commonwealth, that when he made the survey in 1801, *Dudley* and one *Hatch* were both in possession of lot No. 10, claiming the flats as well as the upland; that for a monument at the north corner of that lot he placed a stake and stones about ten feet below high water mark; and should have placed it lower but for the apprehension that it would be carried away by the ice; that the monument at the south corner was a large pine tree standing on the bank, at high water mark; and that in all his survey of the settlers' lots he placed his monuments on the bank and not in the stream, for fear of having them destroyed by the ice. It was also proved that the water of the river was fresh, though the tide ordinarily ebbs and flows against the premises about fourteen feet. The tenant's store stands below the former bank of the river.

Upon this evidence, and some other offered by the demandant, but not affecting the question decided, a verdict was taken for the demandants, by direction of *Parris J.* who sat in the trial; subject to the opinion of the court upon the right of the demandants to maintain this action; and to be amended accordingly.

R. Williams and *Allen* argued for the demandants; contending that the whole township was granted to *Knox* in 1799, except one hundred acres to each settler. Nothing passed to settlers by the Resolve of 1798, as it contained no words of grant. Every thing relating to them was prospective. They were to be quieted in one hundred acres each, and no more; and to this exact quantity the Commonwealth's right to quiet them, under the reservation in *Knox's* deed, must be strictly limited. *Shep. Touchst.* 78; *Co. Litt.* 106, *b.* And the location, when once rightly made, is conclusive. *Lam-*

bert v. Carr, 9 *Mass.* 185; *Harlow v. French*, *ib.* 192. Here was an actual location, of the full quantity of one hundred acres, on the upland alone; and of course the title of *Knox* to the flats remained untouched. Nor could the flats pass as appurtenant to the upland by the ordinance of 1641; because they were already separated from the upland, by the owner. *Hatch v. Dwight*, 17 *Mass.* 289; *Lunt v. Holland*, 14 *Mass.* 151; *Morrison v. Keen*, 3 *Greenl.* 474.

But if the Commonwealth owned the whole, yet the flats did not pass to *Dunning*, being excluded by the necessary construction of his deed, which confines him to the monuments erected on the bank of the river. *Shep. Touchst.* 87, *rule* 4; *Doane v. Broad Street Association*, 6 *Mass.* 332; *Storer v. Freeman*, *ib.* 434; *Codman v. Winslow*, 10 *Mass.* 146; *Dunlap v. Stetson*, 4 *Mason* 349, 365; *Handley v. Anthony*, 5 *Wheat.* 374; 2 *Dane's Abr.* 691, 701; *Sullivan on Land-titles*, 285.

Godfrey, for the tenant, cited *Storer v. Freeman*, 6 *Mass.* 134; *Commonwealth v. Charlestown*, 1 *Pick.* 180; *Ingraham v. Wilkinson*, 4 *Pick.* 268; 3 *Dane's Abr.* 136.

The opinion of the Court was delivered in *Cumberland*, at the adjournment of *May* term, in *August* following, by

Mellen C. J. The Resolve of *February* 17, 1798, was passed on the petition of *Henry Knox*, late father of the demandants, and largely interested in the *Waldo* claim at the time. The Resolve of *February* 23d of the same year relates to the same subject, and makes further arrangements for the completion of the objects contemplated in the former one. From both of them, viewed in connexion, the following facts appear, viz:—That in the year 1692 a large tract of land was granted to *Beauchamp* and *Leveret*, which in the year 1785 was confirmed by the legislature of *Massachusetts* to the heirs of Brigadier General *Waldo*, and others interested therein, agreeably to certain boundaries recommended by the committee for the sale of eastern lands; and that in the survey and location of said tract, the same was found to run into the *Plymouth* patent, which

was holden under a prior grant; and on the representation of said heirs and others interested, in consequence of such interference, a committee was appointed to investigate the subject. That when their report was made, on their recommendation, *Thomas Davis*, Esquire, was appointed and commissioned with full power to cause a re-survey of the *Waldo* patent to be made; to ascertain the amount of deficiency occasioned by the interference above mentioned with the lands of the *Plymouth* company, and cause to be laid out and assigned, to said heirs and others interested, so much land, belonging to the Commonwealth, as would be equal to the amount of such deficiency, and extend the addition to be made to the *Waldo* patent, the whole length of the northern line of it, as far as the lands of the Commonwealth adjoined thereto. And that "the lots, not exceeding one hundred acres to each settler, which should be occupied by any settlers on the additional lands to be assigned, should not be considered as taken to make up said deficiency"—but that such settlers should be "quieted afterwards in their settlements in such manner as the General Court should direct." All these proceedings were had prior to the conveyance of *Davis* to *Henry Knox*; and the resolves were introduced by the demandant. We have been thus particular in stating these transactions, because, as they were originated on the petition of *Henry Knox*, he must be considered as conusant of them, and, in some measure, as a party to them, as well as deeply interested; for we find the deed from *Davis* was made to him alone; and his heirs are the demandants.

It appears in the case that *James Dunning* was a settler on lot No. 10, in *Bangor*, prior to the year 1784; and that the deed was made to his heirs in *November* 1802, by the agents for the Commonwealth, in consequence of such settlement, and pursuant to resolves of the legislature. There were also many others in different parts of the town, in possession of lots abutting on the river, prior to 1784. The Commonwealth, as successor of the crown, became proprietor of all the public lands within its limits; and as to those in *Bangor*, continued so to be, until the 20th of *July* 1799, when the deed was made by *Davis* in behalf of the Commonwealth to *Knox;* and in virtue of the colonial ordinance of 1641, and of the usage and prin-

ciples founded thereon, the flats in *Penobscot* river and the *Kenduskeag* stream, in and near the land in question, were also the property of *Massachusetts*. There is no proof or pretence that there was ever any discrimination between the upland and flats made by the occupants of these shore or river lots, or any severance of the one from the other contemplated, until two years after the conveyance by *Davis* to *Knox*, even if there was then, at the time of *Holland's* survey and location of the settler's lots. We do not mean to intimate that any such severance was made by the deed of the agents of the Commonwealth to the heirs of *Dunning;* nor is it a question, the decision of which we deem necessary on this occasion. But in addition to this negative proof, it appears that in 1800, *Dudley*, claiming under *James Dunning*, one of the heirs of the original settler, took possession of lot No. 10; and the next year built a wharf on a part of the premises demanded, extending to the first channel; and soon after erected a store on it; and that all the flats were claimed, as well as the upland. With these facts before us, which must be presumed to have been known to *Davis* and *Knox* at the time the deed was made, by reason of their agency and interest in the anterior proceedings relating to these lands, we are now to examine and ascertain the true construction to be given to the exception contained in that deed. After a general description of the lands intended to be conveyed, is the following expression; "excepting certain lots occupied by settlers, not exceeding one hundred acres to each." *Knox* by accepting this deed, admits that settlers were then occupying certain lots on the land conveyed. Their possessions are called "lots;" yet this deed was made about two years before *Holland's* survey; of course it could have no reference to that. We must give a reasonable construction to the language of the exception, and ascertain as nearly as we can, what was the understanding and intention of both parties. It is a matter of notoriety that the settlers on the lands of the Commonwealth have always been treated with indulgence; and under numerous resolves, applicable to different parts of the country, have been quieted in their possessions, on payment of a small sum, perhaps not more than the amount of the expenses of survey and location. The usage was to quiet each settler in one

hundred acres, so laid out to him as to include his improvements. The intention of the legislature, as expressed in the resolve of *February* 23, 1798, was that this liberal and indulgent treatment should be extended to the settlers on the four townships conveyed by the deed in question; hence the limitation as to the quantity of land, which forms a part of the exception. The whole course of proceeding on the part of the government, proves that these settlers were considered as the equitable owners of the lots or lands cultivated and possessed by them, and that they were to become the legal owners in the usual manner. For this reason, the agent of the Commonwealth, by the insertion of the exception, intended to leave the lands occupied by the settlers, under the complete control of the legislature, in the same way, as though the conveyance to *Knox* had never been made, and to be disposed of in the manner mentioned in the resolve of 1798. *Knox* had no concern with the terms and conditions on which the legislature might choose to quiet the settlers within the limits of the tract conveyed; being excepted in the deed in the language before mentioned, every thing composing a settler's lot, both upland and flats were excepted. Nor can we believe that the legislature, while thus liberal and indulgent to settlers, as the resolves prove them to have been, could have intended they should be excluded from the benefit of the waters and shores of the river and the accommodations they afforded, and thus deprived of those peculiar privileges which constituted a principal inducement for settling on lots adjacent to the river; nor would it have been very consistent with that liberal spirit which we have alluded to, for the legislature to have contemplated that the little strip of flats adjoining the upland of each settler should have been included as a component part of the one hundred acres designed for him. Such a construction would involve a singular confusion and contradiction of motives, unworthy of the legislature of *Massachusetts*. Surely, neither the heirs or assignees of *Henry Knox* have any reason to complain. The deed conveyed to him a tract of land sufficient to make up all the deficiency in the ancient grant, occasioned by the interference with the lands of the Plymouth Company. In addition to all the foregoing facts and circumstances, there is anoth-

er deserving of distinct consideration, as confirming our construction, and showing the understanding of all concerned at the time of the transactions we have been considering. The claim now made by the heirs or assigns of *Knox*, has for almost thirty years, to all appearance, been deemed by those interested to assert it, as one destitute of all legal foundation. During this long period all has remained in profound silence and repose. The claim has not been awakened from its slumbers by any newly discovered facts, the absence of which could account for such perfect acquiescence, in the measures adopted in the Commonwealth of Massachusetts, and carried into effect by different agents employed under its authority, in accordance with the evident intentions of all concerned.

In the view we have thus taken of this cause, inasmuch as not only the upland, but the flats adjoining the *Dunning* lot, were embraced in and by the language of the exception in the deed in question, it becomes an immaterial inquiry what is the true construction of the language of the agents' deed to *Dunning's* heirs. The flats demanded in this action never having been conveyed to *Henry Knox* by *Davis's* deed of 1799, there is no proof whatever of the seisin of *Henry Knox*, on which the demandants have counted: of course the action is not maintained. In this result there appears to be a perfect coincidence of the law and justice of the case.

The verdict must be set aside; or rather, so amended as to stand a verdict for the tenant.

HODSDON *vs.* WILKINS.

In an action of the case against an officer for not serving an execution, the jury are to allow the plaintiff such damages only as he has sustained by the breach of duty; unless the neglect was wilful, with a view to injure the plaintiff; in which case they are to allow him his whole debt.

A promise by a third person to indemnify an officer for neglecting his duty in the service of a precept, being founded in an illegal consideration, is void.

It therefore does not disqualify the promissor from being a witness for the officer, in a suit brought against him for such breach of duty.

THIS was an action of the case against the sheriff, for the neglect of one of his deputies in not making service of an execution.

At the trial before *Parris J.* it was proved, by the confessions of the deputy, that he might have arrested the debtor, and once had him in custody; but that relying on the assurances of a friend of the debtor, who promised to see him harmless, he suffered the execution to run down; acknowledging that it was right that he should pay it himself, for having neglected to collect it. It was not returned till after the commencement of this suit.

It appeared that the debtor was a young man, of good health, and regularly bred to a lucrative calling; but was destitute of property, deeply insolvent, and unable to obtain credit even for his board; and that he had removed from this county to *Kennebec*.

In the course of the trial the defendant offered as a witness the person to whom the officer alluded as having promised to save him harmless; to whose competency the plaintiff's counsel objected, on the score of the interest thus created; and proceeded to examine him to that point on the *voir dire;* but the witness denying any such interest, and stating that he had no conversation with the officer till after the return day of the execution, he was admitted to testify.

The judge instructed the jury, in substance, that as the debtor was still within the State, they should find for the plaintiff only the actual damages which he had sustained; unless the neglect of the officer was with intent to injure the plaintiff, or to delay him in the col-

lection of his debt, or to show improper indulgence to the debtor. If the plaintiff might now obtain his debt with no greater difficulty than before, his damages would be merely nominal. But if the officer had conducted with the improper intent above mentioned, their verdict ought to be for the whole amount due to the plaintiff. The jury returned a verdict for nominal damages only; which was taken subject to the opinion of the court upon the admissibility of the witness, and upon the correctness of the judge's instructions.

Williamson, for the plaintiff, argued against the admissibility of the witness, on the ground that the officer himself had confessed that he was interested in the event of the suit; and cited *Pierce v. Chase*, 8 *Mass.* 487. He further contended that the officer was bound to do all the duty he undertook to perform, at the peril of sustaining all the responsibilities of the debtor whom he had protected by his neglect; 4 *Stark. Ev.* 970; *Sanches v. Davenport*, 6 *Mass.* 261; and that his intent, in the view taken of it by the judge, had no relation to the cause; the only question being whether he had done his duty or not.

Kent, on the other side, was stopped by the Court; whose opinion was delivered by

Weston J. No objection has been urged in argument, by the counsel for the plaintiff, to the instructions of the judge who presided at the trial, on the question of damages. The jury were directed to allow to the plaintiff such damages only as he had sustained, by the breach of official duty complained of; unless the neglect of the deputy was wilful, with a view to injure the plaintiff; in which case, they were to allow him the whole amount of his execution. We perceive nothing in these instructions, tending to impair the plaintiff's legal rights.

Without going into the consideration, how far the plaintiff's counsel, having examined the witness as upon the *voir dire*, with a view to show him incompetent on the ground of interest, and he having denied and disclaimed all interest, is precluded from resorting to, or relying upon, other modes of proving it, and taking the admissions and declarations of the deputy to have been true; we are of opin-

ion that they do not establish any legal interest in the witness. There was no privity between him and the plaintiff. It does not appear that he had any right to direct or control the proceedings of the officer. The latter says the witness told him not to do that, which his precept and his duty to the plaintiff required, and he would save him harmless. This then was a promise, if made, founded on an illegal consideration; namely the violation of official duty on the part of the officer. It is void in law; and no action can be sustained upon it against the witness, who must therefore, notwithstanding such promise, be regarded as competent and admissible.

Judgment on the verdict.

TUCKERMAN *& al. vs.* FRENCH.

In the case of a continuing guaranty, given for whatever goods may be delivered from time to time, limited only in its general amount, but not in the duration of the term for which it is to stand, notice of its acceptance is as necessary, as it is in the case of one given for a specific debt, to be contracted at one time.

THIS was *assumpsit* for goods sold by the plaintiffs to one *Charles B. Prescott*, upon a letter of credit signed by the defendant, in these terms:—"*Boston, Sept.* 13, 1822. Messrs. *W. & G. Tuckerman*, Gent. For the bill of goods which Mr. *Charles B. Prescott* bought of you on the 6th instant, I hold myself responsible to you for the payment, agreeably to the contract made with him; and I will hold myself responsible for any goods which you may sell him, provided the amount does not exceed at any time the sum of five hundred dollars."

It appeared at the trial, before *Parris J.* that on the 6th day of *Sept.* 1822, *French*, who then resided in *Boston*, went with *Prescott* into the plaintiffs' store there, and stated to them that he would be responsible for the value of the goods mentioned in a memorandum then produced by *Prescott*, which was a little more than two hundred dollars; which *Prescott* afterwards paid. In *December* follow-

ing *Prescott* took another quantity of goods of the plaintiffs, amounting to thirty two dollars; and at divers other times, down to *April*, 1826, he made several other purchases, never exceeding five hundred dollars at one time, for some of which he gave his promissory notes. He was always, during that period, indebted to the plaintiffs; often for more than five hundred dollars; and at the time of the commencement of this suit he owed them upwards of seven hundred dollars. The goods, so far as the plaintiffs were concerned, were delivered on the credit of the letter of guaranty; but it did not appear that *Prescott* had any knowledge of its existence till it was sent to the plaintiffs' attornies in the autumn of 1827; and he testified that he had not. Nor did it appear that any notice was expressly given by the plaintiffs to the defendant, of the acceptance of the guaranty; but the latter usually spent some months of every year in *Bangor*, where *Prescott*, who was his tenant, resided; and was as often as once, at least, in every week, in his store.

Upon this evidence the Judge directed a nonsuit, subject to the opinion of the court upon the question whether the plaintiffs could maintain the action.

McGaw and *Hatch*, for the plaintiffs, argued that it was an original and continuing undertaking on the part of *French*; binding on him, without notice, till he should repudiate it. *Cobb v. Little*, 2 *Greenl.* 261; *Duval v. Trask*, 12 *Mass.* 154; *Mason v. Pritchard*, 12 *East* 227; 2 *Campb.* 413.

Kent and *Rogers*, for the defendant, cited *Norton v. Eastman*, 4 *Greenl.* 521; *Creamer v. Higginson*, 1 *Mason*, 324; *Leonard v. Vredenburg*, 7 *Johns.* 23, 32, *note*; *Chase v. Day*, 17 *Johns.* 114.

Mellen C. J. delivered the opinion of the Court in *Cumberland*, at the adjournment of *May* term in *August* following.

It appears by the Judge's report that the *express* terms and conditions of the defendant's guaranty have been complied with by the plaintiffs; that is, they did not credit *Prescott* more than five hundred dollars at any one time. But in a guaranty of this description there is always an implied condition that notice shall be given by the

vendor, who gives credit to a third person on the strength of a guaranty, that such guaranty has been accepted, and such notice must be given in a reasonable time, so that the guarantor may know the fact of his liability. What is a reasonable time will depend on circumstances. We have had occasion to examine and remark upon the principal decisions in relation to this subject; and instead of repeating our observations, we merely refer to the case of *Norton v. Eastman*, 4 *Greenl.* 521, and *Seaver v. Bradley*, 6 *Greenl.* 60. In the case before us no question arises as to reasonableness of time, because it does not appear that any notice whatever was given to the defendant of the acceptance of his guaranty, and of any advances made to *Prescott* upon the strength of it. *Prescott* was ignorant of the guaranty until about the autumn of 1827; more than eighteen months after the last goods were delivered to him: and though some facts are disclosed from which it has been supposed notice may be inferred, still it is not our province to infer facts and draw conclusions, but to decide the cause upon the facts as stated. According to the authorities cited and the principles recognized and established in the two cases before mentioned, we are all of opinion that the action is not maintainable, unless the nature of the guaranty is such as to render the principle as to notice, inapplicable to the present case. Upon consideration of this point we are not satisfied that it can change the character of the defence. The guaranty as to the first parcel of goods was definite, but as those goods were duly paid for by *Prescott*, that guaranty may be laid out of the case. The second was a continuing guaranty, limited, however, in amount, to the sum of $500. Now on this point it is difficult to perceive any sound reasons for a distinction between the two kinds of guaranty. The amount for which the guarantor may engage to be responsible, may be the same in both cases; and there seems to be as much reason that he should have due notice of the acceptance of the guaranty in one case as the other. Mr. *Wheaton* has appended a long note to the case of *Lanusse v. Barker*, 3 *Wheat.* 148, containing a catalogue of the principal decisions in England and this country on the subject of guaranties, in which are contained the principles as to notice of acceptance and advances; but

no distinction seems to have been suggested between definite and continuing guaranties as to the necessity of notice.

On the whole we are all of opinion that the nonsuit must be confirmed.

Judgment for the defendant.

ABBOT *vs.* *The inhabitants of the third school district in* HERMON.

Where a town officer is sworn into office by the moderator of the meeting at the time of his election, the proper evidence of the fact is the certificate of the moderator, filed in the office of the town clerk, and proved by an attested copy.

A promise may be implied on the part of a corporation from the acts of its agent, whose powers are of a general character.

Therefore where one built a school house under a contract with persons assuming to act as a district committee, but who had no authority; yet a district school was afterwards kept in it by direction of the school agent; this was held to be an acceptance of the house on the part of the district, binding the inhabitants to pay the reasonable value of the building.

If one accepts, or knowingly avails himself of the benefit of services done for him without his authority or request, he shall be held to pay a reasonable compensation for them.

THIS was *assumpsit* for the labor and materials expended in building a school house for the defendants.

At the trial before *Parris J.* the plaintiff offered copies of the warrant for calling a district meeting, *September* 8, 1821, and of the record of its transactions relative to the building of a school house. The warrant was directed to *William Holt, Junior*, but the return was made by *William Holt*. The record stated that *William Holt* was chosen moderator. And to prove that the clerk was duly sworn, the plaintiff offered a certificate signed by *William Holt, Junior*, stating that at the meeting of the district *Sept.* 8, 1821, at which he was chosen moderator, he administered the oath of office in open meeting, to *Jonathan Hutchins*, the person chosen clerk.

This evidence the Judge rejected, as insufficient to prove any corporate acts of the district.

The plaintiff then proved that in the autumn of 1821, under the direction of *Thompson*, *Holt*, and *Kacey*, three inhabitants of the district who assumed to act in the capacity of district committee for that purpose, he proceeded to finish a school house, the frame of which had been previously erected; that a school was kept in it for the children of the inhabitants during the three following winters; the last of which was under the direction of a person who testified that he was school-agent, and who claimed to act as such. During this last winter the house was consumed by fire.

It also appeared that in the winter of 1822, the house being unfinished, the plaintiff told the inhabitants of the district that if they would turn in materials to help finish the house, they might keep a school in it; which they did; that some of them labored on the house to pay their district taxes; and that at a voluntary meeting of some of the inhabitants, in the winter of 1824, it was agreed that if the plaintiff would expend a small sum more, being about five dollars, in finishing the house, by a certain day then named, they would accept it; but before that day the house was destroyed.

The plaintiff also moved for leave to amend, by inserting a count on an order drawn *Dec.* 27, 1824, by two of the above named committee, on the town treasurer, directing him to pay the plaintiff eighty nine dollars "for work in building the school house." But this motion was denied. And the case was referred to the court to decide, upon such of the foregoing evidence as was legally admissible, whether the action was maintainable; and whether the amendment ought to have been admitted; it being agreed that in that case the action should stand for trial.

J. McGaw, for the defendants, took several objections to the legality of the district proceedings, and of the papers offered in evidence. And he strongly urged that no implied *assumpsit* could be raised against a corporation. It acts only in legal meeting, and by agents duly and legally chosen. If all the individuals should, in any other manner, agree to erect a school house, the corporation, as such,

would not be bound. *Moor v. Newfield*, 4 *Greenl.* 44; *Frothingham v. Haley*, 3 *Mass.* 68.

Allen, for the plaintiff, cited *Damon v. Granby*, 2 *Pick.* 345; *Bassett v. Marshall*, 9 *Mass.* 312; *Taft v. Montague*, 14 *Mass.* 282; *Colman v. Anderson*, 10 *Mass.* 105; *Union Bank of Maryland v. Ridgley*, 1 *Har. & Gill.* 324; *Foster v. Essex Bank*, 17 *Mass.* 503; *Prop'rs. of Canal bridge v. Gordon*, 1 *Pick.* 297.

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

The services of the plaintiff were performed under the supposed authority of *Thompson*, *Holt* and *Kacey*. On inspecting the papers introduced as evidence to prove their authority, we are all satisfied that the presiding judge very properly decided that they were insufficient to shew such authority. Whether the school district meeting on the 8th of *September*, 1821, was regularly called and notified or not, the certificate of the proceedings of the meeting import any thing but certainty and consistency. It is stated that *Jonathan Hutchins* was chosen clerk, and *William Holt* moderator. The only proof that the clerk was sworn, is a certificate signed by *William Holt*, *Jr.* that *Jonathan Hutchins* was duly sworn by him, as moderator of said meeting, into the office of district clerk. Besides, a moderator of a town meeting is not an ordinary certifying officer. When he administers the oath of office to a town officer, he should make out a certificate of the oath, and the same should be filed among the papers of the town, as furnishing the regular evidence that the oath had been administered. The certificate in the present case does not appear to have been so filed. *Welles & al. v. Battells & al.* 11 *Mass.* 477. Had it been filed as before mentioned, a copy of it, attested by the clerk, would have been proper evidence; but in the absence of such attested copy we have no evidence of the proceedings of the said meeting, of course none of the legal existence of the three persons before named as a committee. On this ground the proposed amendment of the declaration by adding a count on the order drawn by *Holt* and *Thompson* on the 27th of

December 1824, if granted, would not avail the plaintiff; because they had no legal authority to draw it so as to bind the school district; it therefore is not allowed. The case furnishes us with no facts that show any express promise on the part of the district to pay for the plaintiff's labor and expense in finishing the school house. Are there any from which the law will imply a promise? This case bears a strong resemblance, in this respect, to that of *Hayden v. Madison, ante p.* 76. It is a sound principle of law, that a promise may be implied, on the part of a corporation, from the acts of its accredited agent, whose powers are of a general character; as in the case of directors of a bank, selectmen, overseers of the poor, &c.

As we decided in the abovementioned case of *Hayden v. Madison*, if one man accepts, or knowingly avails himself of the benefit of services done for him, without his authority or request, he shall be held to pay a reasonable compensation for them, so in the present case the same principle may be applied. The work on the school house frame, which had been erected by the district previously, was commenced in 1821; and it was nearly completed in the winter of 1824, when it was consumed by fire. A school was kept in it in the winter of 1823, and such was the state of it, that for two months, in the winter of 1824, the school was kept there under the direction of a school agent, whose authority was proved and not questioned. In the discharge of the various duties of his office, a school agent is exercising the powers of the district, and binds them by those contracts and arrangements which he, in his judgment, deems proper and for the interest of those whom he officially represents. His acts, therefore, in appropriating the school house to its intended uses, and for the benefit of the district, we must consider as an acceptance of the house and a sanction of those acts which the plaintiff had done towards completing it, equivalent, in its legal effect, to a previous request on the part of the school district. The action, according to the agreement of the parties, is to stand for trial, subject to the principles herein before stated.

BLANCHARD *vs.* CHAPMAN.

An offer to purchase of the true owner, made by the tenant in possession of land not his own, does not prejudice his right to the benefit of the act for the settlement of certain equitable claims arising in real actions; if such offer has not ripened into a contract between them.

It belongs to the court, and not to the jury, to decide whether, upon any given state of facts, the tenant in a real action has a right to the appraised value of his improvements.

IN this case, which was a writ of entry upon the demandant's own seisin and a disseisin by the tenant, the latter claimed to have the increased value of the premises by reason of his buildings and improvements assessed by the jury, pursuant to the statute. This was resisted by the demandant, on the ground that the tenant held the land under a contract with him, and in submission to his title. To prove this the demandant adduced two letters from the tenant to him; from which it appeared that a negotiation had been going on between them for the purchase of the land, which the tenant had proposed, and appeared desirous to accomplish; that the principal point unsettled was the time of payment, which was postponed till a personal interview which the tenant intended to have with the demandant in the following winter; expressing his intention to take the money with him at that time and pay for the land at once. The replies to these letters, and all other letters which had passed between the parties, were called for by notices served on each side; but none were produced by either. There was also parol evidence of the tenant's expressed determination to purchase the land; and of his disappointment when one of his neighbors was supposed to have supplanted him in the purchase. It was also proved that the tenant had been in possession of the land more than six years, and before any intercourse had commenced between him and the demandant.

Upon this evidence the demandant contended that the tenant had no legal right to an appraisement of his improvements; and that the determination of this question belonged exclusively to the court, as a question of law. This point *Parris J.* who sat in the trial, reser-

ved for the consideration of the court; instructing the jury to appraise the value only, as prayed by the tenant; which they did.

Allen and *Starrett*, for the demandant, insisted that the statute did not extend to cases of entry under contract. *Knox v. Hook*, 12 *Mass.* 329; nor to cases of compromise; *Shaw v. Bradstreet*, 13 *Mass.* 241; and that the possession of the tenant must have continued six years, without any intermission of his intent to appropriate the land to himself, or any submission to the title of the owner. 6 *Pick.* 172.

Sprague and *Williamson*, for the tenant, cited *Newhall v. Saddler*, 17 *Mass.* 350; *Bacon v. Callender*, 6 *Mass.* 303; *Baylies v. Bussey*, 5 *Greenl.* 153; *Heath v. Wells*, 5 *Pick.* 140.

WESTON J. delivered the opinion of the Court.

The report states the tenant to have been in actual possession of the demanded premises, for more than six years prior to the commencement of the action. How much longer does not appear. It does not appear that he entered under any contract with the demandant; or with his knowledge, consent or privity. The tenant was therefore entitled to the benefit of the act for the settlement of certain equitable claims, arising in real actions, unless he has precluded himself therefrom by the negotiations, proved to have taken place between him and the demandant. The mere attempt to make his tortious possession a rightful one, ought not to prejudice him. The act is made for cases, where the title is in one, and the possession in another. If the tenant concedes that he has no valid title, either to the proprietor or to others, we do not perceive how it can have the effect to change his relations or his rights. If he surrenders up his possession, and becomes the tenant of the owner of the fee, then indeed he assumes the duties which belong to that relation, and can set up no other interest, than what he derives from his lease. So if he enters into any new contract in respect to the land binding upon him, which is inconsistent with his equitable claims, he may be held to have waived them. But we cannot regard his offer to perfect his defeasible title by purchasing that of the demand-

ant as of this character. It does not appear that the offers were accepted; or any further attempts to purchase made by the tenant; or that these propositions were at all relied on by the demandant.

In *Knox & al. v. Hook*, the grantor of *Hook* went on to the land originally under the ancestor of the demandants. And in *Shaw & al. v. Bradstreet*, the value of the land had been ascertained and fixed between the demandants and the tenant's grantor; and he had purchased with a full knowledge of this fact. It was there decided that this estimate should be conclusive as to the value of the land; but the increased value, by reason of the improvements, was also estimated for the benefit of the tenant. The contract in that case was not a mere offer on the part of the tenant or his grantor; but one binding upon both parties. The question reserved was, whether this evidence was of a conclusive character as to the value, as the judge had ruled on the trial, and the court held it to be so; and sustained the opinion of the judge. They further go on to state that the tenant was not entitled to the benefit of the statute. This was not the question presented to their consideration; and it has not therefore the authority, which an adjudication directly upon the point raised, carries with it. But that case is sufficiently distinguishable from this. There a contract was made; here it was only proposed.

It belongs to the court to decide, whether upon a given state of facts, an equitable interest of this kind has attached. In the present case, we are satisfied that it had, at the commencement of the action. The jury therefore were properly instructed by the judge to estimate the value, and the increased value, of the land under the statute.

Judgment on the verdict.

The inhabitants of the plantation of BLAKESBURG *vs. The inhabitants of the town of* JEFFERSON.

The provisions of the pauper-laws, requiring towns to relieve and support the poor, do not extend to plantations.

THIS was an action of *assumpsit* for supplies furnished to a pauper whose settlement was alleged to be in *Jefferson;* and it was submitted to the court upon the single question whether the plaintiffs, being inhabitants of an organized plantation, and not of an incorporated town, could maintain the action.

Williamson, for the plaintiffs.

Chandler and *Garnsey*, for the defendants.

WESTON J. delivered the opinion of the Court.

Plantations are *quasi* corporations, with limited powers. They have none, except what are given by statute or implied from such as are given. The plaintiffs have strong claims for relief in a case like this; but with every disposition to afford it, upon an examination of the statute in relation to paupers, we do not find sufficient authority to sustain the action. The general provisions of the pauper law cannot be extended to plantations, without further legislation. The duties and liabilities imposed upon towns for the support of the poor, arise from positive law, and not from moral obligation resting upon them as corporations. To the extent required by the statute, and in the mode prescribed, they are chargeable; but their liability has never been extended by construction, beyond what the statute imposes, either in express terms, or by necessary implication. The remedies given to towns, which result from their respective duties, are not given to plantations. The statute does not require plantations to relieve and support their poor. None of its provisions extend to them, except the last section, and that authorizes them to raise money for the support of the poor, but does not impose it as a duty.

Plaintiffs nonsuit.

CAMPBELL *vs.* PETTENGILL *& al.*

Though there be no funds in the hands of the drawee of a bill of exchange; yet if the bill be drawn under such circumstances as might induce the drawer to entertain a reasonable expectation that the bill would be accepted and paid, he is entitled to notice.

If the holder of a bill of exchange, who is entitled to an absolute acceptance, takes a special and conditional one, he cannot resort to the drawer but upon failure of the drawee to pay according to the terms of such limited and conditional acceptance.

THIS was *assumpsit* for the price of certain logs sold; with a count on an order for the same sum, drawn by the defendants, of the following tenor :—" *Orono*, *June* 13, 1827. *Thomas Bartlett*, Esquire, collector and treasurer of the *Penobscot*-boom-corporation. Please to pay *Henry Campbell* or the bearer ninety seven dollars and seventy seven cents being for value received." This was accepted, in these terms :—" *July* 9, 1827. Accepted to pay when in funds of the *Penobscot*-boom-corporation. *Thomas Bartlett*, treasurer of said corporation." On the back of the order was an indorsement of $46 52, received *Sept.* 14, 1827, in part payment.

It appeared, at the trial before *Perham J.* in the court below, that the plaintiff, in *June* 1827, delivered the order to a third person, with directions to call on the drawers for payment, which he did; and they acknowledged that the order was due, and ought to be paid; and one of them agreed to meet him at *Bangor* on a certain day, and pay the amount, " if there were funds." They met accordingly; but the drawer observed that they had not funds, and that the order ought to be presented to the drawee for his acceptance; which thereupon was done. In *August* following the holder had some farther conversation with *R. H. Bartlett*, one of the drawers; in consequence of which he gave up all expectation of receiving payment for the order, and returned it to the plaintiff. The defendants made no objection to the want of notice; but declined payment because they were not in funds. The treasurer, during all this period, had no cash funds of the corporation in his hands, but

held its negotiable securities and other evidences of debt to the amount. He was also indebted in a small balance of account to *Pettengill*, one of the defendants; and to the house of *Bartlett & Davis*, of which the other defendant was one.

Upon this evidence *Perham J.* ruled that the drawee had sufficient funds in his hands to justify the defendants in making the draft; and that proof of a demand and notice was necessary to entitle the plaintiff to maintain the action. To which the plaintiff took exceptions, the verdict being against him.

Rogers, in support of the exceptions, argued that the drawers were personally liable, because they had no funds in the hands of the drawee. *Stackpole v. Arnold*, 11 *Mass.* 27; *Mayhew v. Prince*, *ib.* 54. And whether they had or not, should not have been determined by the judge, but by the jury. *Walwyn v. St. Quintin*, 2 *Esp.* 515; 1 *Bos. & Pul.* 652; *Chitty on bills*, 271, *note a*; *Hoffman v. Smith*, 1 *Caines*, 257. But if the drawee had funds in his hands, they were the funds of the corporation, and not of the drawers; who therefore, having no interest in these funds, nor power to withdraw them, could not be injured by the want of notice. The drawers had no reasonable expectation that the draft would be accepted and paid. *Robbins v. Ames*, 20 *Johns.* 150; *Orr v. Maginnis*, 7 *East* 359; *Legge v. Thorp*, 12 *East* 171.

J. McGaw and *Moody*, for the defendants, cited *Chitty on bills*, 235, 256, 268; *Rucker v. Hiller*, 16 *East* 43; *Brown v. Maffy*, 16 *East* 43; *Blackham v. Doren*, 2 *Campb.* 503; *Bailey on bills*, 199; *Prideaux v. Collier*, 2 *Stark.* 57.

Weston J. delivered the opinion of the Court in *Cumberland*, at the adjournment of *May* term in *August* following.

In the case of *Bickerdike v. Bollman*, 1 *D. & E.* 405, it was laid down by the court, that where the drawer has no effects in the hands of the drawee, no notice is necessary. In *Blackham v. Doren*, 2 *Campb.* 503, Lord *Ellenborough* lamented that this exception to the general rule requiring notice, had ever been established. The same regret had been before expressed by *Eyre C. J.* in *Walwyn v. St.*

Quintin, 1 *Bos. & Pul.* 654, and by Lord *Alvanley* in *Clagg v. Cotton*, 3 *Bos. & Pul.* 241. And in *Claridge v. Dalton*, 4 *Maule & Selwyn*, 226, *Le Blanc J.* says "every new case makes one regret that the rule in *Bickerdike v. Bollman*, for dispensing with notice, was ever introduced." The courts in England have frequently refused to extend the principle of that case, and it has been limited and qualified by subsequent decisions. Thus where the drawer has effects when the bill is drawn, but none at the time of its dishonor; or where there is a running account, and a fluctuating balance; or a *bona fide* expectation of assets; where he has no assets at the time of drawing, but has assets before the bill becomes due, notice is necessary. *Orr v. Maginnis*, 7 *East*, 359; *Brown v. Massey*, 15 *East*, 221; *Rucker v. Hiller*, 16 *East*, 43; *Thackray v. Blackett*, 3 *Campb.* 164.

In *Claridge v. Dalton*, Lord *Ellenborough* says "even where there are not any funds, if the bill be drawn under such circumstances, as may induce the drawer to entertain a reasonable expectation, that the bill will be accepted and paid, the person so drawing is entitled to notice." And in the same case, *Le Blanc J.* remarks, "I perfectly agree that it is not necessary that the drawer should have effects or money in the hands of the drawee, either at the time when the bill is drawn, or when it becomes due. For if the bill be drawn in the fair and reasonable expectation, that in the ordinary course of mercantile transactions it will be accepted or paid when due, the case does not range itself under that class of cases, of which *Bickerdike v. Bollman* is the first."

There is certainly ground to contend that the defendants had reasonable expectations that their order would be accepted, of which its actual acceptance, and partial payment, might be regarded as evidence. But we do not place the decision of the cause upon this point.

The plaintiff, the payee and holder of the bill, might have required an absolute acceptance, without which he might have treated the bill as dishonored; but having received a special and conditional acceptance, he must abide by its terms. *Parker v. Gordon*, 7 *East*, 387; *Gammon v. Schmoll*, 5 *Taunton*, 344; *Sebag v. Abit-*

bol, 5 *Maule & Selw.* 462. It does not appear that there has been any failure, on the part of the acceptor, to pay according to the terms of the acceptance. He was to pay, when in funds of the *Penobscot* boom corporation. He had no cash funds at the time, but he had demands which were good and available, and subject to his control as treasurer. But these, until collected, were not funds, within the meaning of the acceptance. He has paid one half the bill; and is holden to pay the residue, when in funds. Under these circumstances, independent of the objection arising from the want of notice, it cannot be pretended that there is any legal ground to charge the drawers, until there has been a violation of the terms of the acceptance. No evidence to this effect has been adduced; but the testimony was, that up to the time of trial, the acceptor had no funds of the boom corporation, with which to pay the bill. Upon this ground we are satisfied that the verdict is right. The exceptions are accordingly overruled; and there must be

Judgment for the defendants.

Taylor *vs.* Day *& al.*

A trustee who has once been examined and charged as trustee in the original suit, cannot be again examined on *scire facias*, even to correct an error in the judgment upon his former disclosure.

In a *scire facias* against two trustees, it appeared that *Turner*, one of the defendants, had been examined in the court below, was there adjudged trustee upon his disclosure, and appealed to this court, where he made a further disclosure, and was again adjudged the trustee of the original debtor. On appearing to the present process, which was sued out for an execution *de bonis propriis*, he prayed for leave to disclose still further, alleging that it was impossible that justice should be done by a judgment upon either of his former disclosures. But *Parris J.* who sat in the trial, ruled that

no further examination could be had; to which *Turner* took exceptions pursuant to the statute.

Godfrey, for the plaintiff, and *J. McGaw* and *Hatch*, for the defendants, submitted the question without argument.

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

Upon this *scire facias*, *Turner*, one of the trustees, prays leave further to disclose, and offers so to do, because he says it is impossible for justice to be done him by a judgment on his former disclosure. If by such a judgment injustice should be done to any one, we should certainly regret it, though unable to prevent it. The trustee had ample opportunities for disclosing on the original process; and when judgment was rendered on the disclosure against him, he might have excepted to the opinion of the judge who pronounced the judgment, and brought the question as to its correctness before the whole court. But as to that question, we have not, on this process, any jurisdiction. The 9th section of the *Stat.* 1821, *ch.* 61, is decisive on this point. The *proviso* of that section is in these words:—"Provided nevertheless, that where any trustee has come into court upon the original process, and been examined upon oath as aforesaid; and upon such examination, it has appeared to the court that such trustee had goods, effects or credits of the principal in his hands, at the time of serving the original writ, such trustee shall not be again examined upon the *scire facias*, but judgment shall be rendered upon his examination had as aforesaid." This language is positive, and prescribes our duty in terms which cannot be misunderstood. The exception is accordingly overruled, and there must be

Judgment for the plaintiff.

VEAZIE'S *case*.

An indictment for forgery with intent to defraud *A* is supported by proof of intent to defraud *A* and *B*.

THE prisoner in this case was indicted for uttering a forged promissory note, purporting to be made by the house of *Jefferds & Smith*, and passing the same to *Jefferds* in payment, with intent him the said *Jefferds* to defraud, &c. And the fact was fully proved; and that *Smith* was absent from the State.

The counsel for the prisoner contended at the trial, that if the jury believed that the intent was to defraud *Jefferds* and *Smith*, they ought to acquit him of this indictment.

But *Parris J.* who sat in the trial, ruled otherwise; and the prisoner, being convicted, moved for a new trial for this cause.

P. Chandler, in support of the motion, cited 2 *East's P. C.* 988, 990.

The Attorney General, for the State.

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

The indictment charges the commission of the offence with intent to defraud *Jefferds*, one of the firm of *Jefferds & Smith;* and the judge presiding at the trial, overruling the objection of the defendant's counsel, instructed the jury that they might find the defendant guilty, though they should be satisfied that the intent was to defraud *Smith* as well as *Jefferds*. We are all of opinion that this instruction was correct. The proof was merely redundant. On principle, the objection seems to be totally destitute of merits; and we apprehend that on authority it is equally so. If *A* be indicted as accessory to *B* and *C*, he may be convicted on proof of being accessory to a felony committed by *B* alone, or by *B*, *C* and *D*. So an allegation in an indictment for perjury, that the oath was taken before *E. W.* one of the justices of assize, is proved by evidence that it was taken before *E. W.* and another justice of assize. So an allegation in such an

indictment, that *A* filed his bill in chancery against *B* and another, is satisfied by proof of a bill filed against *B*, *C* and *D*. See 3 *Starkie's Ev.* 1585, and cases there cited. So an allegation that a bill of exchange was drawn upon, and accepted by *A*, *B* and *C*, is proved by evidence of a bill drawn on and accepted by *A*, *B* and *C* jointly with a fourth. *Ib.* 1559, 1560. *Starkie*, in the above place, lays down the rule in these words: "Whenever that which is proved, in addition to that which is alleged, is descriptive of it and affects its identity, the variance is fatal; for that which is essential to a correct description has been omitted." Thus, when one is indicted for stealing the goods of *A*, proof that they were the goods of *A* and *B*, will not support the indictment; but variance between the allegation and the proof as to the time of commission, is not material, as the averment is no part of the description of the offence. Nor do we perceive any weight in the objection that the verdict in this case could not be pleaded in bar to another indictment for the same offence, charged as committed with intent to defraud *Jefferds* and *Smith*. Proper averments in a plea in bar could as well be made as to identity in such case, as in those before cited. The motion for a new trial is overruled.

MEANS *vs.* *The inhabitants of the plantation of* BLAKESBURG.

Though plantations may raise money for the support of the poor, they are not obliged so to do. Nor have their assessors any general authority to bind the plantation by their contract for the support of the poor, beyond the amount of the money raised.

THIS was *assumpsit* on an order drawn by the assessors of *Blakesburg*, in these terms:—"*Blakesburg*, *Sept.* 1, 1829. To *Robert Marshall*, Esq. treasurer of the plantation of *Blakesburg*, or his successor in said office.—Please to pay *Oren Briggs* or bearer

twenty nine dollars on sight, it being for the support of the poor. *Isaac Strout, Elisha Strout*, Assessors of *Blakesburg*."

The plaintiff proved that this order was afterwards, on the same day, presented to the treasurer for acceptance and payment, both which were refused for want of funds. Whereupon the defendants demurred to the evidence, as insufficient in law to support the action.

The question was briefly spoken to by *Williamson* in support of the demurrer, and *J. McGaw*, for the plaintiff; and the opinion of the court was delivered in *Cumberland*, at the adjournment of *May* term in *August* following, by

WESTON J. It has been decided in *Blakesburg v. Jefferson*, *ante p.* 125, that the duties and liabilities arising from the pauper laws, and the remedies thence resulting, were not extended to plantations; and that although they were empowered to raise money for the relief and support of the poor, it was not imposed upon them as a duty. If they think proper to exercise this power, the fund thus raised is to be administered and applied by the assessors. They have no general authority to bind their plantations, by their contracts for the support of the poor; except to the amount of the money raised. To this extent, and with this limitation, they may draw on their treasurer, and the plantation will become liable thereon if not duly paid, as towns are upon town orders, drawn by competent authority. It not appearing in the case before us, whether any fund had been raised for the support of the poor, we are of opinion that the evidence set forth in the demurrer is insufficient to change the defendants.

CHASE *vs.* DWINAL.

The acts establishing boom corporations impose upon the owners of lumber the liability to pay toll for the security and preservation of their property; but do not attach to rafts intended to pass down the river, but accidentally stopped by the boom, where its use and security were not sought or desired.

Where money has been paid under such duress or necessity as may give it the character of a payment by compulsion,—such as money paid to liberate a raft of lumber detained in order to exact an illegal toll,—it may be recovered back.

THIS case, which was *assumpsit* for money had and received, came before the court upon exceptions taken by the defendant to the opinion of *Smith J.* before whom it was tried in the court below.

The plaintiff was conducting his raft down the *Penobscot* river; and when he came near the boom of the defendant, which was erected under a charter from the State, he was unable to pass it through the passage-way left for that purpose; and by force of the wind and current it was driven eastward of the passage, and stopped by the defendant's boom. The plaintiff, with other assistance, immediately made exertions to free it from the boom and conduct it through the passage, which in two or three hours was effected. One of the defendant's hired men, who assisted the plaintiff, demanded seventy five cents for this service, which the plaintiff refused to pay. Afterwards the defendant demanded of the plaintiff six dollars and forty cents, being the regular boomage for the raft; which the plaintiff refusing to pay, the defendant stopped and detained the raft, till the plaintiff paid the sum demanded; to recover which this action was brought.

There was evidence on both sides, tending to show the difficulty of passing the boom, which extended nearly across the river; and on the other hand the facility of passing it, with proper care and skill.

The judge instructed the jury that he considered it intended by the statute authorizing the erection of the boom, that the owner

should receive a compensation for drift-timber stopped by it, as well as for the timber placed in it for security or convenience. In such cases the owners of the lumber receive a benefit from the boom, and ought to pay the compensation fixed by law. On the contrary, if by reason of the navigation of the river being obstructed by the boom, a raft is impelled by the winds and current, into the boom, against the will of the owner and conducter; who without delay, in a reasonable time, proceed to get it clear from the boom, as was done by the plaintiff; the owner of the raft was not liable to pay the boomage. He further instructed them that if they should find, upon these principles, that the defendant had no right to claim the boomage, and that the plaintiff was obliged to pay the money in order to procure the release of his raft, he might well recover the money in this action.

And the jury having found for the plaintiff, the defendant filed these exceptions pursuant to the statute.

Rogers, in support of the exceptions, argued that the toll granted by the act was analogous to the like grant in the case of bridges and turnpikes; in which cases it is not for any man to say he passed the bridge or road involuntarily, in order to avoid payment of the toll. It is enough that it was actually passed. The language of the act is clear and unambiguous, and the right to stop rafts is expressly given. 7 *Mass.* 524; 3 *Mass.* 256. The legislature might well have discontinued the river as a public highway; and having this right, it was competent to limit the public use by a toll.

The statute may be construed as transferring to the defendant all the right which the public had to the navigation of the river in that place; thus making the space necessarily occupied for the use of the boom the close of the defendant. In this view the plaintiff was a trespasser. If the erection or continuance of the boom was an injury to him, he should pursue the mode specially provided in the statute on this subject.

But the money was received as well for assisting to remove the logs, as for stopping and securing them; and this form of action being of the nature of a bill in equity, the plaintiff must show that the

defendant has received money which, *ex æquo et bono*, he ought not to retain. 2 *D. & E.* 370; *Cowp.* 793.

In any view, it was a voluntary payment, and therefore cannot be recovered back. 1 *Selwyn's N. P.* 66; *Knibbs v. Hall*, 1 *Esp.* 84; *Brown v. McKinally*, *ib.* 279; *Lothian v. Henderson*, 3 *B. & P.* 520; *Brisbane v. Dacres*, 5 *Taunt.* 143; *Fulham v. Down*, 6 *Esp.* 26; *Hall v. Schultz*, 4 *Johns.* 240.

Godfrey, for the plaintiff.

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

The defendant claims, in behalf of the *Penobscot* boom corporation, a right to receive and retain as toll, the money attempted to be reclaimed in this action. If he has such right, the action cannot be supported. The act, establishing this corporation, grants them a toll for stopping and securing the several kinds of timber mentioned therein, whether drifted or rafted down the river. The franchise of taking toll granted to the corporation, was manifestly in consideration of valuable services rendered. The benefit and advantage was intended to be reciprocal. To the corporation a compensation for the use of their boom, and to the owners of the timber, the security and preservation of their property, arising from such use. It never could have been contemplated that the owners should have been compellable to pay, without seeking or deriving any benefit from the boom. Where their purpose was, to avail themselves of an uninterrupted passage down the river for their rafts, this object might be impeded by the boom, but could not be promoted by it. In the case before us, the plaintiff derived no benefit from the boom, but his raft was retarded and obstructed by it in its progress. It has been contended that by the fifth section of the act, the toll was given for the benefit of the corporation. Doubtless the toll was given for their benefit, but that for which it was given was a benefit confered, not for an injury inflicted, upon the party holden to pay such toll. It is further urged, that it was competent for the legislature to deprive the public altogether of the use of the river, or to permit its use upon such terms,

as they might think proper to prescribe; and that in virtue of the act, the corporation have a right to toll; although they confer no benefit whatever on the party to be charged. The terms of an act must be very clear and unequivocal, to justify a construction which would take money from one man and bestow it upon another, without consideration. And if such construction should become inevitable, from the language used, constitutional objections might be interposed. But without discussing this topic, we are well satisfied that the act imposes the liability to pay toll upon the owners of timber, for the security and preservation of their property; and that it does not attach to rafts, which are intended to pass down the river, where the use and security of the boom is not sought or desired. In the second section of the act, it is expressly enjoined upon the corporation so to construct the boom, as to admit the passage of rafts and boats.

If the defendant was not entitled to boomage, it is, secondly, contended that the payment, being voluntary, cannot be reclaimed. Upon this point, there is not an entire harmony in the decided cases. It is believed, however, that by attending to certain distinctions, which have sometimes not been adverted to, they may be in a great measure reconciled.

It has been often held that money paid with a full knowledge of all the facts, although under a mistake of the law, cannot be recovered back. Thus in cases of insurance, where there has been no fraud, and the party paying is fully apprized of the facts, although under a misapprehension of his legal liability, he can sustain no action for the money thus paid. *Lowrie v. Bourdieu*, *Doug.* 471, *per Buller J.*; *Bilbie v. Lumley*, 2 *East*, 469; *Herbert v. Champion*, 1 *Campb.* 134. The same principle applies, where indorsers of notes of hand or bills of exchange, pay under a mistake of the law, but with a knowledge of the facts. In *Brisbane v. Dacres*, 5 *Taunt.* 144, the captain of a ship of war had paid money to his admiral, in conformity with a usage which had obtained, but to which he was not by law entitled, but he was not permitted to recover it again; there being nothing against conscience in retaining the money. In that case, *Chambre J.* who dissented from his brethren, does

not accede to the principle that money, paid under a mistake of the law, cannot be recovered. But *Gibbs J.* says "I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he can never recover back the sum he has so voluntarily paid." This position is broad enough, to sustain the objection taken by the defendant. There are other cases where, to avoid or close a suit threatened or commenced, a party voluntarily paying, whatever may be his legal liability, must abide by the adjustment he has made. *Knibbs v. Hall*, 1 *Esp.* 84; *Brown v. M'Kinally*, *ibid.* 279; *Cartwright v. Rowley*, 2 *Esp.* 723. These cases illustrate and enforce the legal maxim, *volenti non fit injuria.*

But this rule applies where the party has a freedom in the exercise of his will; and is under no such duress or necessity, as may give his payments the character of having been made upon compulsion. It has been laid down as a general principle, that an action for money had and received lies for money got through imposition, extortion, or oppression, or an undue advantage taken of the party's situation. *Moses v. McFarlane*, 2 *Burr.* 1005; *Smith v. Bromley*, cited in *Doug.* 696. In *Astley v. Reynolds*, 2 *Strange*, 916, an action was sustained to recover money, extorted by a pawn broker, for the redemption of plate; notwithstanding it was objected that the payment was voluntary. In *Hall v. Schultz*, 4 *Johns.* 240, *Spencer J.* says, this case has been overruled by Lord *Kenyon* in *Knibbs v. Hall.* There the plaintiff had paid, as he insisted, five guineas more rent than could have been rightfully claimed of him, to avoid a distress which was threatened. Lord *Kenyon* held this to be a voluntary payment, and not upon compulsion; as the party might have protected himself from a wrongful distress by replevin. His lordship does not advert to the case of *Astley v. Reynolds*; and subsequently, in *Cartwright v. Rowley* before cited, he refers with approbation to an action within his recollection, for money had and received, brought against the steward of a manor, to recover money paid for producing at a trial some deeds and court rolls, for which he had charged extravagantly. It was urged that the payment was voluntary; but it appearing that the party could not do without the

deeds, and that the money was paid through the urgency of the case, the action was sustained. Had the distress, threatened in *Knibbs v. Hall*, been actually made, money paid to relieve the goods, could not have been recovered in *assumpsit*, upon a principle which will be subsequently noticed.

Hall v. Schultz, cited by the counsel for the defendant, was commented upon in *Gilpatrick v. Sayward*, 5 *Greenl.* 465. Neither of these actions could be sustained without a violation of the statute of frauds; and upon this ground they were defeated.

In *Stevenson v. Mortimer*, *Cowper*, 805, the plaintiff recovered, in an action for money had and received, an excess of fees by him paid to a custom house officer, to obtain a document he was under the necessity of procuring.

In *Ripley v. Gelston*, 9 *Johns.* 201, the plaintiff recovered in *assumpsit* of the collector of *New York*, money illegally claimed by him as tonnage and light money; and which the plaintiff paid to obtain a clearance of his vessel. In *Clinton v. Strong*, 9 *Johns.* 370, money was reclaimed, which had been wrongfully exacted by the clerk of the district court, for the redelivery of property which had been seized. In the foregoing cases, the payments were not deemed voluntary, but extorted and compulsory.

It may be insisted that trespass or replevin would have been more appropriate remedies for the plaintiff. Either might doubtless have been maintained; and where they are specific remedies, provided by law for a peculiar class of injuries, *assumpsit* cannot be substituted. It was upon this ground that *Lindon v. Hooper*, *Cowper*, 414, was decided. Cattle damage feasant had been wrongfully distrained, money had been paid for their liberation, and an action for money had and received brought to recover it. The action did not prevail. The court place their opinion expressly on the nature of the remedy by distress, which they say is singular, and depends upon a peculiar system of strict positive law. That the distrainor has a certain course prescribed to him, which he must take care formally to pursue; and that the law has provided two precise remedies for the owner of the cattle, which may happen to be wrongfully distrained, replevin and, after paying the sum claimed, trespass, in

which such payment must be specially averred and set forth as an aggravation of the trespass. Then are to follow pleadings, which put directly in issue the validity of the distress. From a case of this peculiar character, decided upon this special ground, no general principle can be extracted which can govern cases, where the law of distress does not apply.

Irving v. Wilson, 4 *D. & E.* 485, is a case strongly resembling the one, now before the court. A revenue officer had seized goods, not liable to seizure, but demanded money for their release, which the owner paid. This was recovered back in an action for money had and received. It was held to be a payment not voluntary, but by coercion, the defendant having the plaintiff in his power, by stopping his goods. It does not appear to have occurred to the counsel or the court that it was a case which was affected by the decision in *Lindon v. Hooper*.

Trespass would have been an appropriate remedy for the unlawful seizure; but after payment, *assumpsit* was also appropriate. The money was extorted. The payment was not voluntary in any fair sense of that term; and the defendant had no just title to retain it. If money is voluntarily paid to close a transaction, without duress either of the person or goods, the legal maxim, *volenti non fit injuria*, may be allowed to operate. It would be a perversion of the maxim to apply it for the benefit of a party, who had added extortion to unjustifiable force and violence.

The party injured often finds a convenience, in being allowed to select one of several concurrent remedies. In the case under consideration, replevin would have restored the property unlawfully seized. But to procure a writ, and an officer to serve it, would have occasioned delay, which might have subjected the plaintiff to greater loss than the payment of the money demanded. Besides, he must have given a bond to the officer to prosecute his suit; and he might meet with difficulty in obtaining sufficient sureties. Had he brought trespass, several months might have elapsed, before he could have obtained a final decision; and this delay might have been attended with serious inconvenience. By the course pursued, these difficulties were avoided. Nor is the defendant placed by it

in any worse situation. He has been permitted to urge in his defence any claim of right under the corporation, and he is liable to pay only the money actually received by him; the plaintiff waiving, by the form of the action, damages for the illegal seizure. We perceive no objection in principle to the form of the action; nor do we find it unsupported by precedent and authority.

Exceptions overruled.

COPELAND *vs.* WADLEIGH.

Where the plaintiff was requested by a third person, by letter, to do certain work, the letter being in these terms:—"Sir, I want you to bring a load of hay and five bushels corn, and four oxen, and come as soon as possible;" to which the defendant subjoined the following postscript:—"Sir, I will see you have your pay, if you will come and work with your team for Mr. *G.* as you and he agrees;" —it was held that this was an original, and not a collateral undertaking by the defendant; that the hay and corn were within its terms; that the agreement between the plaintiff and the third person might be proved by any one who knew the fact; and that the presence of the defendant, at the making of such agreement, was not necessary, in order to bind him.

If the judge has left certain questions to the jury, which it was his own province to decide; yet if the jury have come to a proper result, the verdict will not be disturbed.

THIS was an action of *assumpsit*, brought to recover of the defendant the value of certain hay and corn delivered to one *Godfrey*, and labor performed for him, at the request of the defendant; and it came up by exceptions taken by the defendant to the opinion of *Perham J.* before whom it was tried in the court below.

The action was founded on a letter, addressed to the plaintiff, in these terms:—"*Oldtown, Jan.* 13, 1829. Mr. *Copeland*, Sir, I want you to bring a load of hay and five bushels corn, and four oxen; and come as soon as possible, without fail, if you have to come with your cart and wheels. *Samuel Godfrey.*" At the bottom of the letter was the following postscript by the defendant:—"Mr.

Copeland, Sir, I will see you have your pay if you will come and work with your team" (for) "Mr. *Godfrey*, as you and" (he) "agrees. Yours, &c. *Ira Wadleigh*." This letter was franked by the defendant as post-master at *Oldtown*. On the back of it, under date *Jan.* 27, 1829, all the items claimed of the defendant, save one, were charged to *Godfrey*.

To prove the agreement between *Godfrey* and the plaintiff, the latter called a witness who heard the agreement; to which the defendant objected, he not being present, at the making of it. But the judge overruled the objection. The witness further testified that the hay and corn were furnished, and the labor performed, in pursuance of that agreement; that the hay and corn were consumed by the plaintiff's oxen while performing the labor agreed for; and that while he was going up with the team to perform the work, the defendant asked him if he was going to work for *Godfrey*; to which he replied in the affirmative; and on his return the defendant again asked him if he had done working for *Godfrey;* to which he answered that he had, and that he had worked forty one days.

The defendant hereupon objected that he ought not to be charged with the hay and corn, because he had requested the plaintiff only to work with his team; also, that here was no proof of notice to him that his undertaking was accepted; and that at all events he was not liable without a special demand.

The judge instructed the jury that the plaintiff could recover only on the express undertaking, on which he relied; but left it for them to determine whether the hay and corn were not fairly within its terms, especially as they seemed to have been furnished for the necessary sustenance of the cattle while at work. He further stated to them that notice to the defendant of the acceptance of his proposition was a necessary part of the plaintiff's proof; but left them to consider whether this might not be inferred from the testimony of the witness. And as to a previous demand, he held it not to be requisite, this being charged as an original and not as a collateral undertaking. The jury, under these instructions, found for the plaintiff; to which the defendant excepted.

Hatch, in support of the exceptions, argued—1st, That the defendant was merely a guarantor, without notice, and therefore not liable. 2d, That whether liable or not, was a question of law, which should have been determined by the judge. *Attwood v. Clark*, 2 *Greenl.* 249; 12 *East*, 227. 3d, That parol testimony was inadmissible to affect the contract, it being in writing; 3 *Dall.* 415; 7 *Cranch*, 69; and if not, the witness should not have been admitted, as the best evidence must have come from *Godfrey* himself. 3 *Stark.* 1386. But none should have been received to any contract made in the absence of the defendant.

Godfrey, for the plaintiff.

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

The request and order, addressed by *Godfrey* to the plaintiff, explain the nature of the assistance wanted of him. The defendant undertook to be responsible, as they might agree. He thereby assumed to pay whatever might be stipulated by *Godfrey;* within the scope of the request under and upon which the guaranty was written. The agreement between *Godfrey* and the plaintiff, might be proved by any person present when it was made. It was not necessary that it should be concluded in the presence and hearing of the defendant. *Godfrey* was clothed with full power to bind him. The testimony of the witness objected to, was not in the nature of hearsay; it verified and established the agreement, for the performance of which on one side, the defendant held himself answerable.

As to the charge for the hay and the corn, it was distinctly stated in the order of *Godfrey*, and was necessary for the support of the team, to which it was applied; and may well be considered as included in the engagement of the defendant.

The jury have found, under the direction of the judge, that the plaintiff gave notice to the defendant of the acceptance of his proposition; and there was ample testimony to support this finding, and of the extent of the services performed, and of the supplies furnished. When the guaranty of the defendant was accepted, and notice

given to him to that effect, and the order was complied with, his liability was fixed, without any further condition or duty to be performed by the plaintiff. This belongs to the first class of cases, laid down by Chief Justice *Kent*, in *Leonard v. Vredenburgh*, 8 *Johns.* 29, "in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor." The promises of both are concurrent; and an action may be prosecuted against each, until satisfaction is obtained.

The case before us bears a very strong resemblance to that of *Duval & al. v. Trask*, 12 *Mass.* 154. The party for whose use the goods, sued for in that action, were furnished, had given his promissory note therefor to the plaintiffs, but the goods were delivered upon the credit of the defendant, who had undertaken by letter, previously written, to be responsible for them. The court denominate this engagement an original undertaking, collateral to the promise of the vendee, as security. When a guaranty has been accepted, and notice given by the party intended to be secured, where notice is necessary, the liability of the guarantor attaches, according to the terms of his agreement; and there is no necessity for averring or proving a demand, in order to sustain an action against him. The objection therefore made by the counsel for the defendant, at the trial below, that no demand of payment had been made upon the defendant, prior to the commencement of the action, could not avail him. The judge it is true, in his charge to the jury, when considering this objection, uses the term collateral, instead of conditional, which would have better expressed the idea he intended to convey, and in that sense stated that the plaintiff had declared upon an original, and not upon a collateral, undertaking; and then left it to the jury, whether, from the evidence, this was not an original undertaking, in contradistinction to collateral, as he uses the term. The contract, on the part of the defendant, was undoubtedly collateral; but if there was a want of precision in the language of the judge in answering this objection, if the objection itself has no weight, it cannot affect the verdict. So if the judge left certain questions to the jury, as to the construction and effect of the contract, which it was his

province to decide, if they have come to the proper result, their verdict is not to be disturbed. This court upon exceptions, are to do what to law and justice may appertain. Being satisfied that the verdict is right, upon the contract and evidence adduced, judgment is to be rendered for the plaintiff.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF HANCOCK, JUNE TERM, 1830.

MEMORANDUM. *Weston J.* was not present at this term.

MEANS *& al. vs.* OSGOOD.

It is essential to the validity of the return of an extent, that it should show that the debtor was duly notified to choose an appraiser.

If it does not, the officer will not be permitted to amend it, if a third person has in the mean time acquired a vested right in the land.

The amendment of an officer's return of an extent after it has been recorded will not, it seems, relate back to the time of its registry; but will take effect only from the time of the amendment.

THIS was a writ of entry, in which the demandants made title to a parcel of land by virtue of the extent of an execution against one *James Snowman*, under whom the tenant claimed the same land by deed. It appeared, at the trial before *Weston J.* that the officer had not stated in his return of the extent that the debtor had been duly notified to choose an appraiser, the officer having chosen one for him; and the judge being of opinion that this was a fatal defect,

the demandants became nonsuit; and the question was reserved for the opinion of the court.

This question was briefly spoken to, at the last term, by *Greenleaf* for the demandants; who also moved for leave to the officer to amend his return by inserting the fact of notice to the debtor; and cited *Morse v. Dewey*, 3 *N. Hamp.* 535.

Abbot, for the tenant, cited *Williams v. Bracket*, 8 *Mass.* 240.

PARRIS J. at this term delivered the opinion of the Court.

Our statute of 1821, *ch.* 60, *sec.* 27, provides, that the officer holding an execution, which the creditor thinks proper to levy on the debtor's real estate, shall cause three disinterested free holders faithfully and impartially to appraise such real estate as shall be shown to them, &c. one of whom shall be chosen by the creditor, one by the debtor, and a third by the officer; and in case the debtor shall neglect or refuse to choose, after being duly notified by the officer, if the debtor be living in the county in which such land lies, the officer shall appoint one for such debtor.

The only way in which title to land can be acquired by the levy of an execution is by a strict observance of this statute, for at common law no title could be acquired by such levy. Whether all the requisites of the statute have been complied with, so as to vest the debtor's title in the creditor, must be ascertained by an examination of the officer's return; other evidence not being admissible. It is, therefore, necessary that he return specially the manner in which he has executed his precept, that the facts may become matter of record. In the return on the execution under which the demandants claim title, it is certified that the officer appointed two of the appraisers, the debtor neglecting to choose; but the return does not show that he was notified or had any opportunity to choose, or that he was not living in the county at the time of the levy. It does not, therefore, appear that the debtor had the option given him by law, or that the duty of choosing an appraiser in his behalf devolved upon the officer.

We are of opinion that the ruling of the judge, at the trial, was

correct. The case of *Wellington v. Gale*, 13 *Mass.* 483, is an authority directly in point. The demandants, however, now move for leave for the officer to amend his return.

It is true this court has permitted returns to be amended or completed, where no one would be affected by such amendment except the parties in the original suit. As in the case of *Howard v. Turner*, in *Lincoln* county, *May* term, 1829, the magistrate, who administered the oath to the appraisers, was allowed to add his official title to his signature, it not appearing in the original return that he was a justice of the peace. So in *Buck v. Hardy* in *Penobscot* county, an amendment somewhat similar to the one now moved for was allowed; but in each of these cases the suit pending was between the original parties, and it clearly appeared that no conveyance had been made of the property on which the amended return would operate, and that no one would be affected by such amendment except the parties to the pending suit. This we think is the extent to which we can go. To permit the officer, after he is out of office, and at a distance, in time, of nearly eight years subsequent to the transaction, to make, from memory, a material addition to his return, of a fact which, from its nature, could not be disproved if untrue, whereby the rights of a *bona fide* purchaser without notice are to be wholly defeated, would be a laxity in practice too unsafe to be permitted. As observed by the court in *Thatcher v. Miller*, 13 *Mass.* 271—"For an officer to undertake, six years after a defective return, to know with certainty the performance of a particular duty, when he is daily and hourly performing similar duties on different persons, is more than can be expected of men, however strong their memory. In the cases cited, where amendments have been permitted, there was something on the record, by which the correction could be made; and in such cases there can be no difficulty." Such was the case of *Morse v. Dewey*, cited by defendant's counsel. A judgment was recovered against *Baldwin*, *Wright* and *Rowley*, and an execution, issued upon the judgment, was extended upon the land of *Wright*. In the execution the judgment was well described, but the sheriff was commanded, that of the goods, &c. of *Baldwin* (omitting the names of *Wright* and *Rowley*) he cause to

be paid, &c. The omission, being a misprision of the clerk, an officer of the court, in issuing a judicial writ, was clearly amendable by other parts of the record. Of the like character were the cases of *Sawyer v. Baker* and *Williams v. Rogers.*

As the demandants' title, if they have any, was acquired by operation of law, and not by the act of the parties, there must be a strict compliance with all the requisites of the law, or no title passed. But the statute requires that the execution and doings thereon shall be recorded in the registry of deeds. What if the officer should be permitted to amend his return, and should certify that the judgment debtor was duly notified? The return, to have validity against a subsequent *bona fide* purchaser, for a valuable consideration, without notice, must be recorded in the registry of deeds in the county where the land lies, within three months after the levy. Can this court require the register to alter his record? It was a correct and true record when made, but from the defective character of the instrument recorded, it gave no title to the creditor; and if the register does his duty, he will record the amended return as entered of this date; and that, however perfect it may be, can give no title as against the tenant, he being a subsequent purchaser; for the statute says the "same shall be recorded within three months." Surely it can give no title from the date of the levy. But to avail the demandant the return must not only be made valid now, but rendered so by relation from the time when the extent was made, and thereby ride over the tenant's title derived from the judgment debtor by deed duly executed for a valuable consideration, and for ought that appears in the case, without any knowledge of the demandant's previous attachment. The demandants, through either their own or their officer's neglect, have failed to perfect their title. The tenant's title is perfect, being by deed duly executed. Under such circumstances which of these litigants does the law favour? *Vigilantibus non dormientibus subvenit lex.*

The nonsuit must stand.

DENNETT *vs.* SHORT.

A promise to pay a certain sum in the wares of a particular trade, must be understood to mean such articles as are entire, and of the kind and fashion in ordinary use; and not such as are antiquated and unsaleable.

THIS was an action of *assumpsit* on a promissory note, in which the defendant engaged to pay the plaintiff "one hundred dollars in pump and block work, at the customary prices, in three months, with thirty days' notice when then the work is called for."

The defendant, who was a pump and block maker, being duly called upon for payment of the note at his shop, offered to the plaintiff a quantity of work which he had previously separated and laid aside for that purpose, consisting of an unusual proportion of small pump boxes; but few blocks, and those small, and some of them old, and not such as were usually called for or in use at the present day, and not suitable to make a gang of blocks for a vessel; with a quantity of hearts, such as were not in ordinary use; which the plaintiff refused.

The jury were instructed by *Parris J.* that the plaintiff was not bound to receive in payment of the note articles which were useless or not merchantable; and that the defendant, by a tender of a lot of pump and block work, comprising articles which, having laid by in his shop for years, had become useless and unsaleable, or containing an unusual proportion of articles not in ordinary use and demand, could not discharge his liability on the note; and that if they were satisfied that such was the character of the articles tendered, they would find for the plaintiff. But if they believed that the articles tendered formed an average lot of pump and block work, of the value of a hundred dollars, and of such a variety of work as was usual in a lot of that value, they would find for the defendant. And they returned a verdict for the plaintiff; which was taken subject to the opinion of the court upon the correctness of these instructions.

Abbot, for the defendant, contended that it was sufficient if he produced a due quantity of any pump and block work, properly

manufactured; and that it was not the right of the payee to prescribe the kind of articles to be tendered; the other party having the privilege of discharging himself by a tender of any which came within the terms of the note. *Chipman on Contr.* 30; *Pothier on Obl. sec.* 283, 284.

Pond, for the plaintiff, cited 1 *Dane's Abr.* 101, *sec.* 28; 2 *Bos. & Pul.* 168; 2 *Comyn on Contr.* 522.

THE COURT said, in substance, that the contract was to be interpreted by reference to the situation of the parties, and to the benefits which each might reasonably be supposed to have intended to derive from making it. Every contract in general terms for the wares of a particular trade, must be understood to relate to wares of the kind and fashion then in ordinary use; since no others would be serviceable to the purchaser. In the present case some of the articles tendered were not of this character; but on the contrary were out of use and unsaleable; and some were only parts of the article mentioned, viz. pumps; on both which accounts the plaintiff was justified in refusing to receive them. For these reasons, although the instructions respecting the average proportion of the articles were broader than the case required, they rendered

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF WASHINGTON, JUNE TERM, 1830.

MEMORANDUM. *Weston J.* was not present at this term.

STEPHENSON *vs.* GOOCH *& al.*

The powers given to the committees appointed under the private statutes regulating the taking of fish in *Denny's* river and its tributary streams, cannot be exercised by an individual member, but are confided to a majority of the committee of any town named in the acts.

Whether, by these statutes, the committee may open a passage for the fish by force,—*dubitatur*.

THIS was an action of trespass for entering the plaintiff's mill, and cutting away part of his mill-dam, standing on one of the tributary streams of *Denny's* river; which the principal defendant justified as one of the fish-committee of the town of *Alexander*, the others being his servants.

At the trial before *Weston J.* the principal questions were whether a single member of the committee, without the concurrence, or against the will of his fellows, could exercise the powers vested in the fish-committees appointed under those statutes; and whether those acts

extended to all the tributary streams of *Denny's* river to which salmon or alewives usually resorted. The judge directed the jury to find for the plaintiff the amount of his damages, subject to the opinion of the court upon those questions.

Weston and *Hobbs*, for the plaintiff, cited 2 *Dane's Abr.* 703; 2 *LL. Mass.* 1027, *app.*; *Stoughton & al. v. Baker & al.* 4 *Mass.* 530.

Greenleaf and *Vance*, for the defendants.

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

The merits of the defence relied on depend on the construction of the private acts referred to in the judge's report; hence the necessity of stating and examining such of their provisions as have a bearing on the questions reserved for our decision.

The act of *February* 3, 1824, [Special Laws, *ch.* 240,] authorizes the town of *Dennysville* to choose a committee of three persons for the eastern district, and a similar committee for the western district of said town; and also authorizes the plantation No. 10, to choose a similar committee, "whose duty it shall be to attend to the preservation of the fish called salmon and alewives in the stream called *Denny's* river and *Pinmaquan*, in their several districts and plantations respectively, by seeing that proper passage ways are kept open for said fish, and prosecuting all breaches of this act which shall come to their knowledge." This act further provides that "there shall always be kept open a sufficient passage way for the fish to pass up the said streams to the ponds where they usually deposit their spawn, from the tenth day of *May* to the first day of *July* in each year; and if any person shall wilfully stop the said passage way, during the time above mentioned, or in any way hinder or obstruct the passage of fish through the same from the time of sunsetting on friday in each week, and sunsetting on monday following during the said term, he or they, so offending, shall forfeit and pay a sum not exceeding fifty dollars, nor less than five dollars." The act further provides that all fines and forfeitures may be recovered by action of debt, by any inhabitant of the town or plantation where the

offence may be committed, and to his use. The act of *February* 4th, 1826, [Special Laws *ch.* 374,] extends the provisions of the former act to the towns of *Charlotte*, *Baring* and *Cooper*, and to Plantation No. 14, so far as applicable thereto, and grants to them the same powers.

The act of *February* 7th, 1827, [Special Laws, *ch.* 457,] provides, "that the fish committee, any and each of them, chosen in the towns of *Charlotte*, *Baring* and *Cooper*, and Plantation No. 14, shall have and exercise the same power in all and either of the towns through which the fish pass, including *Dennysville*, as they have had right heretofore to exercise in the towns and plantations in which they were severally chosen; provided that the fish committees, in either of the aforesaid towns or plantations, shall not neglect to keep open and cause to be kept open, good and sufficient fish ways, under" the two last named acts; and also to increase the *minimum* of penalty from five to twenty dollars. The act of *February* 23d, 1828, extends to the towns of *Alexander* and *Baileyville*, the powers given to the fish committee chosen in the towns of *Charlotte*, *Baring*, *Cooper*, and Plantation No. 14, by the act of *February* 7th, 1817, and authorizes the towns of *Alexander* and *Baileyville* to choose such committees as the towns before mentioned, each committee to consist of three persons, and to possess similar powers. These are the principal provisions of the acts referred to in the report. We have serious doubts whether any other power is given to a fish committee than to attend to the preservation of the fish "by seeing that proper ways are kept open for said fish, and prosecuting all breaches of the act;" and whether they have any authority to open a passage by force; but on this point we avoid giving any opinion; because we place the decision of the cause on another ground. If the committee of the town of *Alexander* had a right to enter on the premises of the plaintiff and open the passage, we are clearly of opinion that at least a majority of the committee, and nothing less, can legally exercise this right; more especially when one only attempts to act directly contrary to the will of the other two. The act has provided that the commitee should exercise their judgment on the question what is "a proper passage way for the fish," taking all circumstan-

ces into consideration, and whether the passage has been wilfully stopped. On these points the committee are to form their opinion, as preparatory to any measure to be adopted. On this subject we consider the case of *Stoughton & al. v. Baker & al.* 4 *Mass.* 530, cited in the argument, as a strong authority against the defence; and bearing a close resemblance to the case before us in respect to the point under consideration. We do not perceive any weight in the defendant's argument, founded on the language of the act of *Feb.* 7th, 1827, "that the fish committee, any and each of them, chosen in the towns of *Charlotte*, *Baring*, *Cooper*, and Plantation No. 14, shall have and exercise the same power in all and either of the towns through which the fish pass, &c." The above words "any and each of them," refer to the committees named, and not to the members of either committee. The defence cannot be sustained; and there must be

Judgment on the verdict.

The inhabitants of CALAIS *vs.* DYER.

The remedy by complaint, provided by *Stat.* 1821, *ch.* 45, for the owner of lands flowed by the erection of a mill-dam, does not lie for a town, against one who has flowed a town road, the fee still remaining in the original owner. For such injury, the remedy is by special action on the case.

But it seems that it does lie for one who has only a private easement in the land; and also for a tenant for years.

THE facts in this case, which were agreed by the parties, are sufficiently stated in the opinion of the court.

The question was argued in writing, in the last vacation, by *Greenleaf* and *Downs* for the complainants, and *Deane* and *Chandler* for the defendant; and the opinion of the court was delivered in *Cumberland*, at the adjournment of *May* term in *August* of the present year, by

MELLEN C. J. This is a complaint for flowing lands, founded

on our statute of 1821, *ch.* 45. The facts of the case, as stated in the agreement of the parties or admitted in argument, are few and simple. The mill dam, which caused the flowing and damage complained of, was erected by the respondent, on his own land, in *October*, 1824, to raise a sufficient head of water for the working of his mill. The land which is flowed is a town road, laid out and accepted by the town of *Calais*, several years before the dam was erected. For such flowing, and for the recovery of damages to reimburse the town the expense they have incurred and must annually incur, in changing the course of the travel and building and keeping in repair a causeway, rendered necessary by such flowing, can the town maintain this process? There is no question that if a town is seised of a piece of land flowed by means of a mill dam, a complaint, grounded on the statute, is a regular proceeding; but the town is not seised of the land, covered by the road, and then covered by the water; the land belongs to the original owner, his heirs or assigns, subject to the public easement, which has been impaired and damaged. The town certainly owns no more than an easement; and as a town road is as much a public road as a county road is, for all the purposes of travelling and use, the consequence is that the easement is a public one; and it cannot be considered, in a legal point of view, as the town's easement or property; hence the question arises, what right has the town of *Calais* to resort to this statute process, for the purposes alleged, more than any other town? All towns have the same interest in the easement. How then can such facts as this case presents, sustain this prosecution? Could the legislature ever have contemplated that the destruction of a highway might lawfully be effected by means of flowing produced by a mill dam? Could they have intended that one general statute should have been enacted in direct hostility to the provisions and requisitions of another general statute? One law declaring it an indictable offence to obstruct or place nuisances in a highway, and another, making it lawful so to do, and even to destroy it? We confess that it is difficult to believe that such inconsistencies were ever designed by the framers of the act of 1821 before mentioned. We are not disposed to deny that a lessee for years may maintain this kind of

process; and, on the same principles, perhaps, it is equally true that the owner of a private easement may avail himself of the provisions of the act, if by means of such flowing he has been totally or partially deprived of the easement, or the same has been impaired; as in case of a right of way across another's land in a particular direction. Such cases present none of those difficulties which embarrass this cause. The principles now intimated are not at variance with those on which the decision was founded in *Stowell v. Flagg*, 11 *Mass.* 364; which appears to have been carefully considered. Whether an indictment would lie against the defendant for a nuisance, we do not decide, because it is not necessary on this occasion. We have intimated our impressions in the queries above suggested.

But is the town of *Calais* without remedy? They have certainly been injured; and though the easement belongs to the public, it is the duty of the town to preserve and continue it. The town, therefore, seems entitled to damages by way of reimbursement. And why may they not recover such damages in a special action on the case? In terms, the statute process, and that only, is to be resorted to when "any person shall sustain damages in his lands by being flowed," &c. &c. That seems not to be the present case; and, as before intimated, such a case as the present seems not to be within the language or the spirit of the act. In the case of *Jewell v. Gardiner*, 12 *Mass.* 311, an objection to such a course of proceeding was not made by the counsel for the defendant, distinguished as they were. *Jewell*, in a special action on the case, alleged that defendant had built a dam across *Cobbessee* stream, by means whereof the water of said stream was flowed back upon a dam built by the plaintiff across the same stream above the dam erected by the defendant, so as to prevent the working of the plaintiff's mill. *Gardiner's* dam was built on his own land. The action was defended and defeated on the ground that the plaintiff's dam was erected wrongfully, and against the will of the defendant, who owned the land on which one end of the dam was built. Here was a flowing occasioned by the lawful erection of a dam by the defendant; but as the damage complained of was not of the statute kind, namely,

flowing the plaintiff's land, the learned counsel for the defendant rested the defence upon the illegal conduct and want of title on the part of the plaintiff. On the same principle, perhaps the town of *Calais* may maintain such an action against *Dyer*, and compel him to reimburse that expense which his act has occasioned. But the present process cannot be sustained; and that is the only point we mean to decide. *A nonsuit must be entered.*

HUME *vs.* VANCE.

Every citizen not within any class of persons specially exempted by statute from military duty, is presumed to be able bodied and liable to enrolment, until he show the contrary.

Being near or short sighted, if the party is able to pursue the ordinary business of life without inconvenience, is not such a permanent disability as will exempt him from military enrolment.

In cases of permanent disability, it is not necessary to obtain a surgeon's certificate, in order to be excused from military duty; the statute on this subject applying only to those which are temporary.

THE facts in this case will appear in the opinion of the court which was delivered by

PARRIS J. This case comes before us by writ of error to one of the justices of the peace in this county. From an examination of the record it appears that the original process was commenced for an alleged neglect in the performance of military duty, *Hume* being clerk of a company of militia in which *Vance* was enrolled;—that the company was duly ordered out on the fifteenth and twenty third days of *September*, for the purpose of military duty, and that the defendant neglected to attend at each of said trainings, although duly enrolled and warned.

The cause was tried upon the general issue; and the justice has embodied in his record the evidence upon which judgment was rendered. From this it appears that the only ground of defence was

an alleged defect of vision; and the question now presented for our consideration is whether the evidence showed such a defect in the defendant's sense of sight as to exempt him from the performance of military duty.

The constitution of the United States having vested in Congress the power to provide for organizing the militia, the act of Congress of *May* 8, 1792, has specified what shall constitute the militia, subject to such exemptions as shall be authorized by the laws of the several states.

By the law of the United States the militia is to be composed of free, able bodied, white, male citizens; and all such between eighteen and forty five years of age, unless exempted by the state laws, are to be enrolled in the companies within whose bounds they reside by the commanding officers thereof. Under this act all who are permanently disabled, either by natural defects or by casualty, are excluded from the militia. Not being able bodied, in the language of the United States' statute, they are not to be even enrolled, and of course can in no wise be subject to the liabilities of the law of the State. The State law also upon this subject provides that no private of any company shall be exempted from military duty on account of bodily infirmity, unless he obtains a surgeon's certificate, &c. that he is unable to perform military duty on account of bodily infirmity, the nature of which is to be described in said certificate, &c. But this evidently refers to temporary disability, for the commanding officer is expressly prohibited from granting a discharge, founded on such certificate, to have effect beyond the term of one year; and unless it be considered as referring to temporary disability merely, the State law would require a surgeon's certificate of disability to exempt from military duty those who, by reason of not being able bodied, could not, by the laws of the United States, be legally enrolled. The question, therefore, in this case seems to be, was *Vance* liable to be enrolled in the company in which he was warned to perform military duty;—or in other words, was he a free, able bodied citizen within the true meaning of the section under which he claims exemption? The difficulty, if any there be in this case, is to ascertain what defect in vision will disqualify for the per-

formance of military service. It is known that all have not the sense of seeing in the same perfection. By reason of a difference in the construction of the organ of sight, some can discern objects at a much greater distance and with more distinctness than others. We are aware that the defect of this sense may be so great as to render it extremely inconvenient and perhaps impossible to perform military service, and that too in cases where the individual may be able to attend to the usual avocations of life. But there have been instances of officers continuing for years in the active command of regiments, and in the performance of field duties in the higher grades, whose vision was much more defective than the defendant's was proved to be in this case. It was proved that the defendant is what is termed, near sighted ;—that when attending public exhibitions he has been in the habit of wearing spectacles for the purpose of seeing more distinctly, and also when engaged in amusements wherein clearness and distinctness of sight were particularly necessary ; but it was also proved, that when about his ordinary common business, which is understood to be that of an attorney and counsellor at law, he makes no use of spectacles ; and that he can, with the naked eye, discern localities and objects at the distance of one mile, at least, with so much distinctness as to be able to indicate and select a suitable site, at that distance for a public building, and point out the particular excellencies of the position. Now we are not aware that any military service, either in the capacity of private or officer of any grade, does require greater strength or distinctness of vision than this.

The principle upon which our militia is raised is that of equality of personal service from every citizen capable of yielding that service ; exempting those only who are engaged for the time being in such public duties as cannot be suspended without public injury, and exempting also the members of a particular religious denomination, whose conscientious scruples, upon this subject, have long been respected.

With these exceptions, every member of the community, capable of bearing arms, is presumed able to perform an equal military service for the public security, and the law is not satisfied, either in

spirit or letter, unless he do so perform it. If he claim to be excused from the service, it is incumbent on him to show such facts as clearly relieve him from the operation of the law; and unless he can do this, he cannot expect to avoid the performance of a duty, which is exacted from every able bodied citizen, for the common good.

As the facts in the case do not satisfy us that the defendant was not an able bodied citizen, or that he was unable to perform military duty on account of bodily infirmity, the judgment of the court below must be reversed.

ANONYMOUS.

The *Stat.* 1829, *ch.* 444, *sec.* 1, inflicting, in certain cases, an addition of twenty five *per cent.* to the costs recovered against a defendant appellant, does not apply to cases brought up by demurrer to the plea, with the usual reservations of leave to waive the pleadings in this court.

IN this case the question arose whether the twenty five *per cent.* to be added to the plaintiff's costs, by *Stat.* 1829, *ch.* 444, *sec.* 1, in certain cases brought up by the defendant by appeal, applied to cases brought up by appeal from judgments rendered upon demurrer.

And THE COURT held that in cases of demurrer to the declaration, where the defendant appealed, and the damages recovered in the court below were not reduced, the twenty five *per cent.* was to be added to the plaintiff's costs since the appeal; for the demurrer was the act of the defendant, which the plaintiff could not control. But where the defendant pleaded, with the usual reservation of liberty to waive the plea, and plead anew in this court; to which the plaintiff, consenting to the reservation, demurred, for the purpose of bringing up the cause by mutual agreement, without the expense of a trial in the court below, the plaintiff must be considered as waiving his right to the penalty imposed by the statute in restraint of groundless and dilatory appeals.

BOIES *vs.* WITHERELL.

In replevin of a horse, the defendant pleaded property in one *G.* and denied the title of the plaintiff; who replied that *G's* title was by sale from the defendant, after which the defendant again sold and delivered the horse, with warranty, to the plaintiff, who knew nothing of the prior sale; and relied on this by way of estoppel.—On demurrer it was held that the defendant was not estopped to set up the title of *G.* against the plaintiff; and that the replication was ill.

THIS was an action for replevin of a horse; to which the defendant pleaded that the property was in one *Salmon Gates* and not in the plaintiff. The plaintiff replied that the title of *Gates*, if any he had to the horse, was derived by a sale from *Witherell* to him; after which sale, the plaintiff being ignorant thereof, *Witherell* himself, for a full and valuable consideration, sold and delivered the same horse to the plaintiff; and upon the sale warranted that he was the sole owner and had good right to sell; alleging that therefore he ought to be estopped from setting up the title of *Gates* by way of defence to this action. To this the defendant demurred.

The demurrer was briefly spoken to at chambers, by *Downes* and *Cooper* for the plaintiff, and *Bridges* for the defendant; and the opinion of the Court was delivered in *Cumberland*, at the adjournment of *May* term, in *August* following, by

MELLEN C. J. This is an action of replevin for a horse. The defendant pleads that at the time of the taking, the property of the horse was in one *Salmon Gates*, and traverses the asserted property of the plaintiff. The plaintiff replies that the property and title of *Gates* in and to the horse, if he had any, was derived by a sale thereof to him by *Witherell*, the defendant; after which sale the plaintiff, being ignorant of any previous sale of the horse, purchased him of the defendant and paid a full and valuable consideration to him, he warranting the horse then to be his, and that he had good right to sell him. To this replication there is a general demurrer and joinder. There can be no question but that the plea in bar is good, unless avoided by the replication; inasmuch as it expressly avers the

horse, at the time of the taking, to have been the property of *Gates*. It is the office of a replication either to traverse the plea or some one fact in it, or else to confess and avoid it by the introduction of some new fact, which, if true, shows the plea to be of no importance. Now the replication in the present case does not traverse the property of *Gates*, which is distinctly and correctly alleged in the plea; neither does the replication confess the property to have been in him. Besides, it presents no facts that show any title in the plaintiff. Of what consequence is it, of whom *Gates* purchased the horse, if at the time of the taking, he was the owner? The replication admits that the defendant sold the horse to him, and there is no fact stated, showing that the sale was not a fair one; of course, by the sale, the property was legally transferred to *Gates*. After all this, the defendant sold the horse to the plaintiff, as before stated; but as he did not then own the horse, he is answerable to the plaintiff on the warranty; but no property passed, unless by way of estoppel, which is relied on by the plaintiff in the close of his replication. The only doubt is whether the principle of estoppel is applicable in the present case. Estoppels are not to be favored, as their object and tendency are to exclude the truth by closing the door of investigation. We have not been able to find any decisions in which an estoppel has been applied in case of a parol contract. Though a release under seal is an estoppel, a receipt is not; it is capable of explanation. Lord *Coke* says, *Co. Litt.* 352, that estoppels are of three kinds. 1. By matter of record. 2. By deed. 3. By matter *en pais*, as by livery—by entry—by acceptance of rent—by partition and by acceptance of an estate. We might have viewed this cause in a different light, perhaps, if the replication had contained an averment that the title to the horse had been obtained by *Gates* of the defendant, by means of collusion between them to defraud the plaintiff, and he had been a creditor of the defendant; for that would have proved the defectiveness of *Gates's* title; but the replication, so far as it relates to that title, seems to confirm the allegations of the plea, and leaves the title in *Gates* uncontradicted and unquestioned. We do not feel at liberty to apply the estoppel in

this case. On the facts disclosed by the pleadings, the defendant passed no right to the plaintiff by the sale of the horse, because he had none to convey. The remedy of the plaintiff is upon the warranty. If the plaintiff had grounds, and thought it prudent to contest the fairness and honesty of the sale from the defendant to *Gates*, he might have given the usual replication, and submitted the question of fraud, if there was any, to the decision of the jury.

Replication adjudged insufficient.

VANCE *vs.* CARLE.

If the court below improperly reject a report of referees appointed by a rule of court, the remedy is by exceptions regularly filed and allowed. If the defendant, after the report is rejected, plead to the action, and the cause is brought up by appeal from a judgment rendered upon the pleadings or verdict, no question is open respecting the report.

IN the court below, this action, with all demands, was submitted to referees by a rule of court, two of whom made a report in favor of the defendant, which was contested upon written objections made by the plaintiff, and was rejected. The action was then continued to the next term for trial. Before the continuance, the counsel for the defendant offered in writing certain objections to the order of the court rejecting the report, stating reasons why it ought to have been accepted; and requested the judge to receive and approve them; which he declined to do; but permitted the offering of them to be noted on the docket. At the next term the defendant pleaded to the action, reserving liberty to waive his plea and plead anew, and "saving all advantages," at this court; to which the plaintiff consented and demurred, bringing up the cause in the usual mode. And now, the pleadings in the court below being waived, the defendant moves this court that the report be accepted.

R. K. Porter, in support of the motion, offered to prove the facts

alleged in his objections to the order of the court below; and argued that as the rejection of the report was not a final decision of that court, he was obliged to plead to the action, in order that a judgment might be rendered from which an appeal would lie. The plea contains a saving of all advantages, specially applicable to this case. And by the appeal the whole case was now before the court. 1 *Gall.* 5; *Rathbone v. Rathbone*, 4 *Pick.* 89; *Cummings v. Rawson*, 7 *Mass.* 440; *Tappan v. Bruen*, 5 *Mass.* 195; *Cleaveland v. Welch*, 4 *Mass.* 591; *Bemis v. Faxon*, 2 *Mass.* 141.

Greenleaf and *Deane*, for the plaintiff.

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

The counsel for the defendant now moves for the acceptance of the report which was rejected by the Court of Common Pleas. A report, however perfect in point of form, may, on objection to its acceptance, be proved by parol to have been founded on illegal principles. For instance, it may be shown that one or more of the referees acted corruptly; in which case it ought to be rejected. We are not to presume that the court, in the present case, decided on illegal or improper grounds in refusing to accept the report; and we have no legal proof of the grounds on which the decision was founded. On this point, we cannot proceed, in the circumstances of this case; we cannot travel out of the report, in search of facts on which to pronounce the rejection improper. We know of no other legitimate mode of presenting to this court the necessary facts; that is, the facts appearing in the lower court, offered by way of objection to the acceptance of the report, and on which it was rejected, than by an exception, certified as correct and allowed by the judge presiding at the trial. We have before us nothing of this kind; but merely the written statements of the parties, of facts in favor and against the acceptance of the report; which in some particulars are contradictory. But it is said that inasmuch as the judge declined to allow and sign certain exceptions offered to him at the time of his decision, we are now authorized, in the mode proposed by the de-

fendant's counsel, to revise and correct the proceedings complained of, and proceed to accept the report. We cannot admit the correctness of this conclusion. We can go no further than the law has allowed, nor exercise jurisdiction over the decisions of the Court of Common Pleas, except where by law given, and in the manner prescribed.

But it has been contended that by the appeal the cause is opened for re-examination in all respects; and that we are, in virtue of our appellate jurisdiction, now authorized to correct every thing in which the court below proceeded erroneously. In *Rathbone v. Rathbone*, the principle is applied only to errors or defects appearing on record. Several other cases have been cited in support of this position; but we do not consider them as applicable to the case at bar. They are generally cases of an order or decision of the court below, which was of a character to settle the rights of the complaining party, as to the pending suit; as by arresting the judgment, or sending him out of court without giving any judgment. From such determinations an appeal may be sustained, provided the action be such as that an appeal would lie from a regular judgment rendered therein. With the exception of such determinations, and the interlocutory judgments on pleas in abatement, in account or partition, the right of appeal must be understood to be confined to cases where final judgments have been rendered. The order of the court, by which the report was rejected, was merely an interlocutory one, by which the action was again placed in a proper situation for trial, according to the usual course, by the court and jury, after it had been for a time under the jurisdiction of referees, whose report was not entitled to that sanction of the court which only could give it effect. Besides, there was no appeal from the order of non-acceptance, even if one could have been claimed. But at a subsequent term the appeal was claimed and granted from a judgment rendered on the issue in law joined by the parties. By this appeal the correctness of that judgment may be revised, or the merits of the cause tried on any other issue which may be joined, in common form. It is further contended that the appeal was made, after a plea filed saving all advantages.

If this means any thing, it is only legal advantages. But the defendant had none of the kind for which he has contended. We cannot sustain his motion in the form proposed, or grant him any other relief, than by the usual mode of trial in a court of justice.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF WALDO, JULY TERM, 1830.

MEMORANDUM. *Parris J.* was not present at this term.

SAFFORD *vs.* ANNIS.

Where one granted all the growing timber on his land, and covenanted that the vendee should have seven years in which to remove it without being a trespasser; and afterwards sold the land to a stranger, without reserving the trees or giving notice of the grant;—it was held that the sale alone of the land was no breach of the covenant, the vendee of the timber not having been molested.

If land be sold with a parol reservation of the standing trees, the reservation is good, and the trees do not pass to the grantee.

THIS was an action of covenant broken, on a sealed agreement, dated *Nov.* 9, 1822, in which the tenant, reciting that he had sold to the plaintiff all the growing timber on a certain lot of land, covenanted that the plaintiff should "have seven years to get the same off in, without being subject to an action of trespass."

It appeared at the trial before the Chief Justice, that the tenant, on the 4th day of June, 1825, sold and conveyed the land in fee to a third person, without reserving the timber, or giving the grantee any notice of the plaintiff's title to it; and that it passed in the same

manner through several mesne conveyances, till *Sept.* 29, 1828, when it was again conveyed to the tenant.

It appeared further, that the plaintiff continued, for a long period, to cut and carry off the timber, at his pleasure; and that he was never forbidden so to do, till after the commencement of this action; which was prior to the last conveyance to the defendant; when the person who then owned the land forbade the plaintiff's entry, and threatened him with a suit if he should persist in attempting to take away the timber.

Upon this evidence the Chief Justice ordered a nonsuit, subject to the opinion of the court, upon the question whether the action was maintainable.

J. Thayer, for the plaintiff, argued that the sale of the land without any reservation of leave for the plaintiff to enter and remove the trees, was a breach of the contract, as it put it out of his power to obtain them without committing a trespass. And his remedy was perfect as soon as the defendant conveyed the land. He was not obliged to wait till he was prosecuted; for in the mean time the defendant might die, or become insolvent. *Newcomb v. Bracket*, 16 *Mass.* 161; *Webster v. Coffin*, 14 *Mass.* 196.

C. Porter, for the defendant, cited *Cook v. Stearns*, 11 *Mass.* 537; *Clapp v. Draper*, 4 *Mass.* 266; *Gardiner Manuf. Co. v. Heald*, 5 *Greenl.* 386.

MELLEN C. J. delivered the opinion of the Court in *Cumberland*, at the the adjournment of *May* term, in *August* following.

We do not deem it of importance to decide whether the instrument declared on amounts to a grant, a lease, or a license; the covenant it contains, in connexion with the facts reported, is all which now requires examination. The language of this covenant respecting the timber sold, is, that "the said *Safford* is to have seven years to get the same off in, without being subject to an action of trespass." Had this covenant ever been broken on the part of the defendant, prior to the commencement of the action? For more than five years the plaintiff continued to cut and carry away the timber to which the covenant related, at his pleasure; and it does not ap-

pear that he was forbidden by the defendant or either of the persons claiming under him, until sometime after the date of the writ; and no facts appear in the case showing that any one ever intimated a disposition to interfere and prevent him from enjoying all his rights under the covenant without molestation, and even without the expression of a doubt as to the nature and extent of those rights. It is true that after the commencement of the action, the person who then owned the land forbade the plaintiff's entry and denied his right to the timber, and threatened him with a prosecution, in case he should enter and cut any; but whatever might have been the effect of this proceeding, had it taken place before the suit was instituted, it is clear that it cannot avail the plaintiff in the present case, which must be decided according to the facts as they stood on the day of the date of the writ.

But it is contended that the defendant violated his covenant by conveying the land, on which the timber was standing, without a reservation or exception of the timber which he had previously sold to the plaintiff. This objection is founded on a construction of the covenant which seems broader than the parties could have intended; but if the purchaser had notice that the plaintiff was the owner of the timber, it would have been as effectual as an exception in the deed; and as the plaintiff contends that the covenant was broken by the conveyance made by the defendant, he should prove also that the purchaser had no such notice, in order to render the conveyance a breach of the covenant. But if the covenant was as extensive as the plaintiff supposes, and if it was broken, what damages had he suffered at the time he commenced the present action? There is no proof of any; and, of course, only nominal damages could be recovered. The plaintiff would gain nothing by a new trial; and in such circumstances the court are not in the habit of setting aside a nonsuit and sending the cause to trial for the purpose of giving the plaintiff an opportunity of recovering nominal damages only, when substantial justice has been done already, and when also we doubt seriously whether the action is maintainable on any principle. See *Boyden v. Moor*, 5 *Mass.* 365.

Judgment for the defendant.

NATHAN KENDALL *vs.* SAMUEL P. KENDALL.

Where three brothers entered into written articles of agreement not under seal, with a fourth, for the support of their parents, fixing the ratio of contribution by each; and therein providing for a new ratio, in case a fifth brother should be able and liable to pay; which was signed by all the five;—it was held that the fifth, though not named as one of the contracting parties, yet by his signature assented to the terms of the contract, and became liable, if able, to pay his proportion.

Held also, that such contract was upon sufficient consideration;—and that the ability and liability of the fifth brother might as well be tried in an action of *assumpsit* on this agreement, as by a complaint under *Stat.* 1821, *ch.* 122.

THIS was an action of *assumpsit*, in which the plaintiff demanded of the defendant thirty one dollars and twenty cents *per annum*, for two years and two months, as the stipulated compensation for his supporting his parents, as mentioned in a contract of the following tenor:—"Articles of agreement made and concluded the fifteenth day of *March*, in the year of our Lord one thousand eight hundred and twenty six, by and between *Nathan Kendall*, of *Searsmont*, in the county of *Hancock*, of the one part, and *George Kendall*, *Charleville Kendall*, and *Thomas Kendall*, all of *Searsmont*, aforesaid, of the other part, witnesseth,—That the said *Nathan Kendall*, for the consideration hereinafter mentioned, hath agreed, and doth hereby covenant and agree to and with the said *George*, *Charleville* and *Thomas*, that he will keep, maintain and support our father, *Cheever Kendall*, and mother, *Dolly Kendall*, *i. e.* he will furnish and provide for said *Cheever* and *Dolly*, a suitable dwelling place and habitation, and comfortable and convenient food and clothing, and carefully attend to them both in sickness and in health, and if necessary provide for them suitable medical aid in case of sickness, and in every respect do for them as a child ought to do for their parents, during their natural lives, or the life of either of the survivers of them, and at their decease to cause them to be decently buried. And the said *George*, *Charleville* and *Thomas*, and each of them on their part have agreed, and do hereby covenant and agree to and with the said *Nathan* for the support and maintenance of said *Chee-*

ver and *Dolly*, to pay him the said *Nathan*, the three fourth parts of the sum of one hundred and fifty six dollars annually from the date of this instrument, that is to say, estimating the whole expense of supporting the said *Cheever* and *Dolly* at the above sum of one hundred and fifty six dollars, and at the death of either of them the said *Cheever* and *Dolly*, the one half of the above sum is to be estimated as the expense of the survivor of them; and if *Samuel P. Kendall* of *Hope*, in the county of *Lincoln*, is liable and able to pay, then such sum, whatever it may be, shall be divided equally among the four quarters of the said sum of one hundred and fifty six dollars. And in case of deficiency or inability of either of the said *George*, *Charleville* and *Thomas*, to pay their proportion of said sum of one hundred and fifty-six dollars, the said sum is to be divided among the remainder, few or many, in such a manner that the aforesaid *Nathan* is to bear his equal part of the expense of the support of the said *Cheever* and *Dolly* with the others who are able to pay, be it more or less; that is, if the above sum is divided in parts between the said *Samuel*, *George*, *Charleville*, *Nathan* and *Thomas*, the several parts to be paid by the said *Samuel*, *George*, *Charleville*, and *Thomas* to the said *Nathan*, will be twenty-four dollars and eighty cents each; and if by *George*, *Charleville* and *Thomas*, will be thirty-nine dollars each, to be paid by the said *George*, *Charleville* and *Thomas*, to the said *Nathan*; and so in the same ratio as above stated."

This contract was signed by all the parties, and lastly by the defendant; whose legal liability under the contract was the only ground of defence. On this subject the Chief Justice, before whom the cause was tried, instructed the jury that the signature of the defendant amounted to an assent to the contract, as far as it related to him, as much as though he had been described in the writing in the usual manner as a party to it;—that if they should find that the defendant had been and was able to contribute to the support of his parents, according to the contract, then the plaintiff was entitled to recover;—and that in estimating the defendant's ability, they would consider all circumstances relating to that subject, from the date of the contract, up to the commencement of this action. The jury returned a verdict for the plaintiff, which was

taken subject to the opinion of the court, upon the correctness of those instructions.

Huggles, for the defendant, took the several objections which are stated in the opinion of the court; and he cited *Mills v. Wyman*, 3 *Pick.* 207; and 3 *Bos. & Pul.* 249, *note.*

J. Thayer, for the plaintiff.

MELLEN C. J. delivered the opinion of the Court in *Cumberland*, at the adjournment of *May* term, in *August* following.

Though the name of the defendant does not appear in the body of the instrument declared on, as one of the contracting parties, yet there is a provision in it that if liable and able to pay, he shall contribute a certain portion of the sum necessary to the support of his parents; and we are of opinion that the defendant, by signing the contract, assented to the terms of it, and, for the purposes of the present action, made himself a party to it, at least so far as conditional liability, in the manner and for the purposes therein expressed, extended. This disposes of the first objection to the verdict.

The second is that the promise was destitute of a consideration to support it. The answer is that *Nathan Kendall*, the plaintiff, agreed to support the parents, in consideration of which his brothers agreed to bear their proportion of the expense, and reimburse to him the stipulated amount. The very form of the contract shows a request on the part of the brothers to *Nathan* to maintain the parents; and his engaging to incur this expense forms a good consideration. A disadvantage to the promisee or an advantage to the promissor is a legal consideration. The case of *Mills v. Wyman*, cited by the defendant's counsel does not oppose the principle just stated. No request on the part of the defendant was proved; and the court say "there seems to be no case in which it has been nakedly decided that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action."

The third objection is that there was no proof that the parents were destitute. Surely the agreement in this case is proof of it, and so is the very defence of this action. Besides no such objection was made at the trial, and therefore the instructions of the judge could have had no relation to such a ground of defence. If the instructions were correct, there is to be judgment on the verdict.

The last objection is that this action is not the proper form of process for deciding the question of liability and ability; that by the terms of the contract, so far as they related to the defendant, he was under no obligation to contribute any proportion of the expense of maintenance of his parents, unless liable and able to pay; and that the Court of Common Pleas, by the *Stat.* 1821, *ch.* 122, *sec.* 5, has the exclusive jurisdiction in the determination of those questions. In support of this objection, also, the counsel relies on the before mentioned case of *Mills v. Wyman.* It must be remembered that there, no bargain had been made between the plaintiff and defendant, prior to the incurring the expense, which was the subject of the suit. There was no consideration for the father's promise. The plaintiff then resorted to the connexion between the father and son as showing such a statute liability, as that the law would on that ground imply a promise on the part of the father to pay the expense incurred for the relief of the son. Such doctrine was not sanctioned by the court. In the case at bar the plaintiff relies on and proves an express promise. And we are very clear that such a promise is not to be considered as void by reason of this objection, founded on our statute. The parties have entered into a fair and commendable contract for the comfortable support of their aged parents. It must be construed by common law principles; and by those principles the rights of one of the parties and the liabilities of the other must be conclusively decided.

Judgment on the verdict.

TYLER *vs.* CARLTON.

Where one conveyed land to his son, the deed expressing a valuable consideration, but the son verbally engaging to support the grantor during life, as a consideration for the land; and a year afterwards the son, being about to die insolvent, gave a mortgage to the father, conditioned for the support of his father during the residue of his life;—it was held, in an action by the father against one claiming the land by virtue of a sale by the son's administrator, that the mortgage was good, even against the creditors of the son; and that parol proof of the contract was admissible, notwithstanding the deed.

THIS was a writ of entry, in which the demandant claimed title to the land by virtue of a mortgage deed made to him by his son *Abel Tyler.*

At the trial, before the Chief Justice, it appeared that the demandant who formerly owned the premises, had conveyed them by deed to his son *Abel,* about a year before the mortgage, for the consideration of a thousand dollars expressed in the deed; and that the mortgage was given by *Abel* during his last sickness, and five or six days before his death; and was conditioned for the maintenance of his parents during their natural lives. Parol evidence was offered by the demandant, and admitted, though objected to by the tenant, showing that at the time of the conveyance to *Abel* he verbally engaged to support his father and mother during their lives, as a consideration for the land conveyed; and that he promised to prepare and execute, on the following day, a proper instrument for that purpose. It further appeared that the mortgage was made at *Abel's* suggestion, for his father's security; that he had assisted in supporting his parents ever since the first conveyance; and that he was insolvent at the time of executing the mortgage. The tenant claimed under a regular sale made by *Abel's* administratrix, for the payment of his debts, pursuant to the statute.

Upon this evidence it was contended, for the demandant, that the two deeds constituted but one entire contract. But if not, yet there was a subsisting obligation on the part of *Abel* to support his parents, at the time of giving the mortgage; which, therefore, was not such

a voluntary conveyance as could be avoided by his creditors on the score of fraud.

But the Chief Justice instructed the jury that the two deeds could not be taken as parts of one contract; but that by the first deed the estate was vested absolutely in *Abel;* and that if he did verbally agree to maintain his parents, and had assisted in so doing, as was testified, yet it appeared by the condition of the mortgage that no reference was had to any past transaction, its language being wholly prospective. And if, in consequence of any previous parol engagement, he was debtor to his father, yet as the mortgage was not made to secure the payment of any sum then due, it was a voluntary conveyance, and therefore void against creditors. The jury under these instructions, the correctness of which was reserved for the consideration of the court, returned a verdict for the tenant.

Greenleaf and *Ruggles*, for the demandant, maintained the ground taken at the trial; citing *Quarles v. Quarles*, 4 *Mass.* 680; 1 *Com. Dig. tit. Bargain and Sale, B.* 11; *Bullard v. Briggs*, 7 *Pick.* 537; *Miller v. Hawks*, 15 *Johns.* 405; *Schillinger v. McCann*, 6 *Greenl.* 364; *Wilkinson v. Scott*, 17 *Mass.* 249.

J. Thayer and *C. Porter*, for the tenant, cited *Flint v. Sheldon*, 13 *Mass.* 443; *Boyd v. Stone*, 11 *Mass.* 348; *Steele v. Adams*, 1 *Greenl.* 1; 1 *Ves.* 128; *Emery v. Chase*, 5 *Greenl.* 232.

Mellen C. J. delivered the opinion of the Court in *Cumberland*, at the adjournment of *May* term, in *August* following.

By the report of this case it appears that the judge presiding at the trial admitted parol evidence as to the consideration of the deed from the demandant to *Abel Tyler*, though objected to by the counsel for the tenant, and also gave certain instructions to the jury, of which the counsel for the demandant complains. We are of opinion that the instructions were not correct, and on that ground the verdict ought to be set aside; unless the objection as to the admissibility of the parol evidence touching the consideration of the deeds, is by law sustainable; for if such proof cannot be admitted,

a new trial would be useless, and judgment should be entered for the tenant.

It is contended that no parol proof is admissible to show that the consideration of the deed was in any respect different from what the deed imports; and it is admitted that the only consideration therein expressed is one thousand dollars. Several cases on this point have been cited; as *Steele v. Adams*, on one side, and *Wilkinson v. Scott*, 17 *Mass.* 249, on the other. There are numerous other cases bearing on the general question; and in *Schillinger v. McCann*, 6 *Greenl.* 364, we were requested to review our decision in *Steele v. Adams*. But the cause was disposed of without either affirming or overruling that decision. In the present case it is not necessary for us to pursue a different course. Without contradicting the deed as to the consideration expressed, it was competent for the plaintiff to prove an additional consideration, not expressed. Such was the object and tendency of the evidence which was offered and admitted. This seems to be a well settled principle of law. 1 *Co.* 176, *Mildmay's case*; 2 *Co.* 76, *Ld. Cromwell's case*; 1 *Com. Dig. tit. Bargain and Sale, B.* 11; 1 *Bac. Abr. same title D*; *Rex v. Scammonden*, 3 *D. & E.* 474; *Wallis v. Wallis*, 4 *Mass.* 135. Here *Parsons C. J.* says "in this case, beside the valuable consideration expressed, a consideration of natural affection may be averred, as consistent with it." And in *Quarles v. Quarles*, *ib.* 680. *Sedgwick J.* in pronouncing the opinion of the court, says "the principle is, I think, most clearly established, that when one consideration is expressed in a deed, any other consideration consistent with it may be averred and proved." For these reasons the cause must be opened to another trial, when the jury may expressly decide the question whether there was existing and in force, at the time the mortgage deed was given, a parol contract on the part of *Abel Tyler* to support and maintain his parents, as mentioned in the condition of the mortgage.

Verdict set aside and new trial granted.

WOODMAN *vs.* TRAFTON *& al.*

The lien created by attachment of the articles enumerated in *Stat.* 1821, *ch.* 60, *sec.* 34, is not dissolved by taking the security there mentioned; and therefore a subsequent sale of such articles by the debtor, even without notice, gives the vendee no rights against the attaching creditor.

THIS was an action of trespass against a deputy sheriff, for taking and carrying away the plaintiff's horse.

At the trial, which was before the Chief Justice, it appeared that the horse formerly belonged to one *Daley*, from whom *Trafton* the officer, took him by attachment, by virtue of a writ in favor of one *Hall*. On receiving security for the safe keeping and return of the horse, the officer again delivered him to the debtor; who used him as before, and afterwards sold him to the plaintiff, who had no knowledge of the attachment. Judgment having been rendered in *Hall's* suit, execution was duly issued and delivered to *Trafton* for service; who, with the other defendant, seized and sold the horse under the execution, within thirty days after judgment.

The Chief Justice hereupon directed a nonsuit, subject to the opinion of the court upon the general question whether the action was maintainable.

Ruggles, for the plaintiff, argued that the *Stat.* 1821, *ch.* 60, *sec.* 34, which permits the attaching officer to return to the debtor certain property attached, on receiving security for its safe custody and re-delivery, without its being liable to a second attachment, ought to be construed strictly, being in derogation of the rights of other creditors; and that by this rule, a sale by the debtor was not within its provisions. The intent of the statute was to give the debtor the means of making the most of his property for the payment of his debts, the first attaching creditor being protected by the security given to the officer. If a sale by the debtor, under such circumstances, is not supported, the law will prove a snare to the innocent

purchaser, and open to the debtor a temptation to commit the greatest frauds.

J. Thayer, for the defendants.

MELLEN C. J. delivered the opinion of the Court in *Cumberland*, at the adjournment of *May* term, in *August* following.

The decision of this cause depends altogether upon the construction of the last section of the revised statute, *ch.* 60, *sec.* 34. The section is in these words, viz: "Be it further enacted, that when hay in a barn, sheep, horses, or neat cattle are attached on mesne process, at the suit of a *bona fide* creditor, and are suffered by the officer making such attachment, to remain in the possession of the debtor, on security given for the safe keeping or delivery thereof to such officer, the same shall not by reason of such possession of the debtor, be subject to a second attachment, to the prejudice of the first attachment." The facts stated in the report present a case precisely within the provision of the foregoing section. Before that section was enacted, if any personal property was attached on mesne process and permitted to remain in the possession of the debtor, or was returned to his possession, the lien created by the attachment was thereby lost and at an end, at least so far as that it might be effectually attached and holden at the suit of another creditor, neither he, nor the officer having notice of the first attachment. The object of the legislature in enacting the above section, we apprehend, was to prevent the expense of keeping the animals therein mentioned, and removal of the hay, between the time of the attachment and the sale of them on execution, by the officer or the person to whom they had been delivered by him. In many instances such expense would amount almost to the value of the animals; in which case the creditor and the debtor were both sufferers. The evident object was to authorize an attaching officer to avoid this expense, by indulging the debtor with the privilege of retaining possession of them, without any prejudice to the attachment he had made; that is, the section was designed to preserve and continue the lien on the property attached, in the same manner as though it had remained in the exclu-

sive possession of the officer. When property attached so remains in his custody, it is clear that the debtor cannot exercise any control over it or make any disposition of it, to the prejudice of the rights of the attaching creditor or officer. The question then is, whether the statute was intended, by the indulgence it has granted to a debtor, to give him rights which he had not before, where he was legally deprived of the possession of the animals mentioned, and greater rights than any of his other creditors, in respect to such property. It is contended by the counsel for the plaintiff that such was the intent, because the section only provides that the articles so attached and returned to the possession of the debtor, shall not be liable to a second attachment to the prejudice of the first; but does not declare that they shall not be subject to the right of sale by the debtor. We apprehend that this construction is too limited and would lead to inconsistencies and injustice. The object was to continue the lien created by the attachment for the benefit of a *bona fide* creditor. But this object would be completely defeated, should we adopt the above construction, and allow him to sell the property and appropriate its value to his own use. But it is urged that the plaintiff is a fair purchaser for a valuable consideration and without notice, and therefore a construction should be given to the statute, that will protect his rights. The answer to this argument is that the debtor had no right to sell the horse; at the time of the sale he had no property in him, except subject to the attachment; and by the sale of the horse on execution, every kind of property was gone from him and transferred to the purchaser at the auction sale. The case of the plaintiff does not differ in this respect from that of the man who purchases a horse from a thief, or from one who had no ownership or delegated power to sell. In these cases the purchaser must yield his supposed right to him who has the real right. In these cases the maxim applies, *caveat emptor*. We are perfectly satisfied that there is no ground on which the action can be maintained. The nonsuit was proper and is confirmed.

Judgment for the defendants.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF YORK, APRIL TERM, 1831.

WOODMAN *vs.* COOLBROTH.

A leading interrogatory, in a deposition taken when both parties are present, must be objected to at the time it is put to the witness, if at all.

Where the parties to a deed were both present at the time of its execution, and the grantor was bound by his previous contract to make the deed; yet the grantee having taken it up and carried it away without the consent of the grantor, this was held to be no delivery of the deed.

Office-copies of deeds of conveyance, to which he who offers them is not a party, are in all cases admissible in proof of title. And where such office-copy was rejected, though the party then produced, proved and read the original, yet the verdict, being against him, was for this cause set aside.

THIS was a writ of entry, in which the tenant claimed title to the land under a deed from the demandant to *Nathan Winslow*, and from him, by mesne conveyances, to the tenant.

At the trial, before *Parris J.* the tenant offered in evidence an office-copy of the deed from the demandant to *Winslow;* which being objected to, was not admitted. He then produced the original deed, and proved its execution.

It appeared that the premises had once belonged to one *Johnson*, who was indebted to the demandant on sundry promissory notes;

and that he had conveyed the land to the demandant for the price of one hundred dollars, which was indorsed on one of his notes. Afterwards the demandant agreed with *Winslow*, who negotiated for the benefit of *Johnson*, that he would give up the land, and that the indorsement should be cancelled, on payment of the sum of eighty dollars. *Winslow* then obtained an obligation from *Johnson* agreeing to the cancelling of the indorsement; which he showed to the demandant, who expressed himself satisfied with its terms. They then went to the office of one *Richardson*, a scrivener, where a deed was drawn and signed, and the eighty dollars paid to the demandant and indorsed on one of *Johnson's* notes. The demandant again examined the obligation, objected to its tenor, and laid it down on the table. *Richardson*, in the mean time, handed the deed to *Winslow*, who took it away, leaving the obligation with the demandant; the latter at the same time calling on the persons present to take notice that he took the deed without leave. *Winslow* testified that the contract on his part had been strictly fulfilled.

The demandant then offered the deposition of *Richardson*; which was objected to because all the interrogatories on his part were leading. But the objection was overruled.

Upon this evidence the judge instructed the jury that unless the deed was delivered to *Winslow* by *Woodman*, or by another person acting for him; or came into *Winslow's* possession with the approbation and consent of *Woodman*, nothing passed by it:—and that even if *Winslow* had fully complied with the agreement on his part, by which he had a right to demand a deed in fulfilment of the agreement; yet if he took the instrument without *Woodman's* consent and against his will, the fee in the premises therein described did not pass to him thereby:—that it was immaterial what induced *Woodman* to refuse to deliver the instrument; if he did so refuse, from whatever cause, and did not deliver it either himself or by the agency of some other person, and it did not come into *Winslow's* possession by *Woodman's* assent, nothing passed by it. The jury, under these instructions, returned a verdict for the demandant; which was taken subject to the opinion of the court upon their correctness, and upon

the decisions of the judge upon the deed and deposition offered in evidence at the trial.

E. Shepley, for the tenant, to the admissibilty of the copy of the deed, referred to *Rule* 34 of the rules of practice in this court, admitting office-copies of all deeds to which the officer is not a party; and cited *Thompson v. Hatch*, 3 *Pick.* 512; *Rathbone v. Rathbone*, 4 *Pick.* 89.

To the inadmissibility of *Richardson's* deposition he cited 1 *Stark. Ev.* 123, 124; 1 *Phil. Ev.* 205, *in notis;* and argued that from the course of our practice in the taking of depositions, especially when the adverse party, whether from accident or design, does not attend, it ought not to be required that objections to interrogatories should be made at the time when they are put. Such a rule would place a strong temptation before one party always to take depositions when it was most probable the other could not attend.

As to the delivery of the deed, he contended that the instructions of the judge were too limited. The strictness of the old rules on this subject has been much relaxed; and courts look rather to the substance than the formalities of delivery. Where the deeds is in the hands of the grantee with the implied assent of the grantor, it is enough. And here his assent ought to be implied from the fact that the terms of the contract on the other side were fulfilled, upon which he was bound to deliver the deed. 2 *Com. Dig. tit. Fait, A.* 3; 2 *Stark. Ev.* 477, *in notis; Porter v. Cole*, 3 *Greenl.* 20.

N. Emery, for the demandant.

This argument was made in the last year; and the opinion of the Court was read at the last *September* term, as drawn up by

Parris J. We are not satisfied that the verdict ought to be disturbed on account of the admission of *Richardson's* deposition.

In permitting leading questions to be put to a witness much is confided to the discretion of the court or magistrate before whom the examination is had.

A witness may be so dull in intellect, or embarrassed through timidity, as not to be able to communicate intelligibly upon the points di-

rectly in issue by a general and diffuse statement. The only mode by which testimony in such cases can be drawn forth is by direct questions, in some measure partaking of the character of leading interrogatories, propounded, however, in such form as not to suggest to the witness the answer which he is to give, but to free him from embarrassment and ensure a developement of truth. Or the person under examination may be what is termed an unwilling witness, in which case the party calling him would be indulged in putting leading questions to the utmost latitude permitted in a cross examination.

In this case it does not appear that any objection was made to the interrogatories at the time they were propounded, either by the tenant or his counsel, although by the certificate of the magistrate before whom the deposition was taken, the tenant appears to have been present. In *Sheeler v. Spear*, 3 *Binney*, 130, it was decided that a leading interrogatory must be objected to at the time it is put to the witness. If no exception is then taken by the opposite party, the answer of the witness to the leading question cannot be opposed upon that ground, when his deposition is read upon the trial. *C. J. Tilghman*, in delivering the opinion of the court, says, "the objection to the first interrogatory is, that it is a leading one. I do not think the question was properly put: but the defendant should have objected to it at the time; he was present and cross examined the witness. If it had been objected to it might have been waived. It was too late to make the objection at the trial." The same doctrine is applied in *Strickler v. Todd*, 10 *Serg. & Rawle*, 63.

Neither do we think that the tenant has reason to complain of the instructions to the jury relative to the delivery of the deed.

The jury were told that unless the deed was actually delivered by the grantor or some person acting for him, or came into the grantee's possession by the approbation and consent of the grantor, nothing passed by it. No one pretends that a ceremonious delivery is requisite; but the authorities are full in support of the position that an instrument purporting to be a deed obtained without the consent of the grantor is inoperative; and such were the instructions to the jury. It is true, they were not told, in so many words, that a de-

livery could not be revoked ;—that when once the deed was in the grantee's possession by the consent of the grantor, the fee had passed ; but they were told so substantially ; and if, upon that point, the tenant had desired more particular instructions, it was his duty to move the court to give them, and, if improperly refused, all his rights would have been preserved.

Upon the other point, the rejection of the office-copy, we think the tenant's motion must be sustained. It is true, that according to the *English* practice, office-copies are inadmissible, and the party attempting to support title must do it by producing the original title deeds, not only to himself, but to those under whom he claims. This he is supposed to be able to do without inconvenience, as this evidence uniformly accompanies the title. It is not unfrequently the case that the owner in fee is possessed of all the original title deeds to his estate to a very remote period.

But such is not our practice. Hence has arisen the rule that office-copies may be used in tracing title until we come to the party himself, who, being presumed to be in possession of the original evidence of his own title, must produce it.

But, although in the case at bar the person under whom the tenant claimed was present in court with the original deed in his pocket, and was even offered, by the tenant, as a witness, and the deed was within the tenant's control and used by him on the rejection of the copy, yet we think it better that the rule, salutary in its general operation, should not be impaired or made to yield to the special circumstances of any case, and that the tenant should have opportunity of availing himself of its full operation. Indeed, we do not perceive that we have the right to deprive him of it. The verdict must, therefore, be set aside, and a new trial granted.

READ *& al. vs.* CUTTS.

The essence of the engagement of a guarantor of a pre-existing debt, is that the debt shall be paid if the creditor shall take the usual legal steps to secure it, or to render the principal debtor's liability absolute. But where the original debt was due and payable and absolute before the guaranty was given; or where the rights of the creditor of an indorsed note or bill of exchange have become absolute against all the parties chargeable upon it; or where, from the absolute character of the debt guarantied, nothing of a preliminary nature on the part of the creditor is by law required, to perfect his rights;—demand and notice are not essential to the maintenance of an action against the guarantor.

Therefore where *H.* was indebted to *R.* in a certain sum then due and payable; and *C.* in consideration of an indemnity given by *H.* and of *R's* engagement not to sue *H.* for twelve months, promised to pay *R.* the debt at that time unless the same should have been paid by *H.*:—it was held that this was an original and absolute undertaking; and that no demand and notice, nor diligence in pursuing *H.* were necessary in order to entitle *R.* to an action on the guaranty.

THIS was an action of *assumpsit* on a written promise of the defendant, dated *Jan.* 14, 1825, in these terms:—"Whereas *Tristram Hooper* of *Saco* has given his several notes of hand to *James Read & Co.* of *Boston*, one dated *Nov.* 25, 1824, for $689,11, and the other dated *Nov.* 26, 1824, for 1106,64; and whereas said *Tristram* has conveyed to me by his deed of this date a lot of land in said *Saco*, being numbered" &c. "Now for the consideration above, and in consideration that said *James Read & Co.* have promised to and will forbear to sue said *Tristram* on said notes of hand for and during the term of twelve months from the date hereof, I promise to pay the said *Read & Co.* the sum of thirteen hundred dollars at that time, unless the same shall have been paid by said *Hooper*."

At the trial before *Parris J.* it appeared that *Hooper* continued in business as a trader in *Saco*, having a stock of goods liable to attachment, of the value of fifteen hundred or two thousand dollars, from the date of the notes till the time of his death, which was in *November*, 1826. His estate being represented insolvent, the plaintiffs proved their claims, being the two notes above mentioned, and

another dated *June* 30, 1825, for $229,12; on all which they received a dividend of $444,39 in the whole, under an agreement with the defendant that the rights of neither party should be thereby affected. On the largest of the notes mentioned in the defendant's undertaking certain payments were made in the summer of 1825, amounting to seven hundred dollars. And it appeared that in *June* of that year the defendant suffered the farm conveyed to him to be sold, and the proceeds of the sale to be received, by *Hooper;* and that no notice of the non-payment of the notes was given to him, nor demand made, till the commencement of this action; nor did it appear that the plaintiffs had ever taken any measures to enforce payment from *Hooper.*

Upon these facts, reported by the Judge, the question whether the action was maintainable was submitted to the Court.

G. Thacher, for the plaintiffs, to the point that the debt being due and payable when the guaranty was given, no demand and notice were necessary, cited *Warrington v. Furber*, 8 *East* 245; *Phillips v. Astling*, 2 *Taunt.* 206; *Cannon v. Gibbs*, 9 *Serg. & Rawle*, 202; *Sage v. Wilcox*, 6 *Conn.* 81; *Oxford Bank v. Haynes*, 8 *Pick.* 423; *Redhead v. Carter*, 1 *Stark. Rep.* 14; *Goring v. Edmunds*, 6 *Bing.* 94; *Williams v. Granger*, 4 *Day* 444; *Cobb v. Little*, 2 *Greenl.* 261.

Nor is the defendant discharged by delay. *Poth. on Obl. part* 2, *ch.* 6, *sec.* 1—8; *Code de Com. l.* 3 *tit.* 14, *art.* 2011—2043; *Rees v. Berrington*, 2 *Ves.* 540; *Boultbee v. Stubbs*, 18 *Ves.* 20; *Hunt v. Bridgham*, 2 *Pick.* 583; *U. States v. Kirkpatrick*, 9 *Wheat.* 724.

But if demand and notice were generally necessary; yet they are not, where, as in this case, the guarantor has been collaterally indemnified, or has funds in his hands for that specific object. *Bond v. Farnham*, 5 *Mass.* 170; *Mead v. Small*, 2 *Greenl.* 207; *Norton v. Eastman*, 4 *Greenl.* 521; *Sturgis v. Robbins*, 7 *Mass.* 301; 8 *Wheat.* 148.

And the plaintiffs have a right to apply the payments made, to such part of their debt as is not secured by the defendant. *The Mayor & Commonalty of Alexandria v. Patten*, 4 *Cranch* 316;

Goddard v. Cox. Stra. 1194; *Cremer v. Higginson*, 1 *Mason*, 338; 14 *East*, 239 *note*; *Field v. Holland*, 6 *Cranch*, 8.

M. Emery, for the defendant, argued that whatever might be the construction of his written engagement, the plaintiffs had no right of action, except for a small balance unpaid. He was liable only for what *Hooper* should not pay. Now he paid seven hundred dollars in his life time; and the claim, by virtue of which the plaintiffs received their dividend of $444,39 more, was supported by the notes in question; to which, therefore, the dividend ought to be applied.

But here was no right of action till after request of payment made by the plaintiffs to the defendant. His promise was on a condition precedent, to be performed by the plaintiffs, whose duty it was to notify him that it had been performed, and demand payment accordingly. 1 *Bac. Abr. Assumpsit B*; 2 *Com. Contr.* 420; 1 *Com. Dig. Assumpsit A.* 5; 1 *Lawes on Plead.* 190; 1 *Chitty on Plead.* 323; *Birks v. Tippet*, 1 *Saund.* 42.

It was also their duty to have demanded payment of *Hooper*, and to have given seasonable notice to the defendant of his neglect. For want of such diligence on the part of the plaintiffs, the defendant has been lulled into security, till his remedy is gone forever. No case can be found where laches so gross has been supported. *Phillips v. Astling*, 2 *Taunt.* 206; *Ex parte Adney Cowp.* 460; *Jones v. Cooper*, *Cowp.* 228; *Norton v. Eastman*, 4 *Greenl.* 521; 3 *Wheat.* 148, *note*; *Cannon v. Gibbs*, 9 *Serg. & Rawle*, 202; *Warrington v. Furber*, 3 *East.* 246; *Oxford Bank v. Haynes*, 8 *Pick.* 423; *Sage v. Wilcox*, 6 *Conn.* 81.

And the fact that the notes were already due when the guaranty was given, makes no difference in the case. The reason why demand must be made on the principal debtor is that it may be known whether he will pay; and the reason of notice to the guarantor or indorser is, that he may know his liability and its extent, and have opportunity to secure himself. These reasons exist, in the same force, whether the debt was due or not, at the time of his entering into the contract. *Duval v. Trask*, 12 *Mass.* 154; *Ulen v. Kittredge*, 7 *Mass.* 233; *N. Eng. Mar. Ins. Co. v. D'Wolf*, 8 *Pick.* 56.

Neither is the defence impaired by the deed made by *Hooper* to the defendant. It is mentioned merely as a consideration for the guaranty. It was not put into his hands as security for a debt; nor as a fund out of which to pay the notes; but merely to indemnify him against his liability. And it was given up the better to enable the debtor to make the payments which he did, to the plaintiffs. Such a case is not within the principle of any known decision holding the guarantor liable for the debt. *Corney v. Da Costa*, 1 *Esp.* 302; *Brown v. Maffit*, 15 *East*, 223; *Dennis v. Morris*, 3 *Esp.* 158; 2 *Caines*, 343; *Bond v. Farnham* 5 *Mass.* 170; *Mead v. Small*, 2 *Greenl.* 207; *Dulaney v. Hodgkins*, 5 *Cranch*, 333; *Clegg v. Colton*, 3 *Bos. & Pul.* 239; *Tower v. Durell*, 9 *Mass.* 332; 2 *H. Bl.* 609; *Whitefield v. Savage*, 2 *Bos. & Pul.* 278; *Ireland v. Kip*, *Anthon's N. P.* 143.

E. Shepley, replied for the plaintiffs.

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

Mellen C. J. Strictly speaking, guarantors, indorsers and co-obligors or co-promissors, are all sureties for others who are the principals; but still, in common parlance, the word surety is used in a more limited sense, to mean a co-obligor or co-promissor, entering into a contract with the principal jointly, or jointly and severally, and at the same time. He may in all cases be sued jointly with the principal. No demand of the debt or notice of its non-payment by the principal, need be proved in an action against such surety in any case. But the contract of a guarantor is entered into by him before or after that of the principal generally, and has, in terms, a special reference thereto. His contract always being of this peculiar character, he must always be sued seperately; and in many cases he cannot be made chargeable, unless a seasonable demand of payment be made on the principal and notice of non-payment given to the guarantor, where a pre-existing debt is the subject of the guaranty. In support of the above positions the following cases may be cited:

Hunt v. Adams, 5 *Mass.* 358; *Carver v. Warren*, 5 *Mass.* 545; *Moies v. Bird*, 11 *Mass.* 436; *White v. Howland*, 9 *Mass.* 314; *Upham v. Prince*, 12 *Mass.* 14; *Oxford Bank v. Haynes*, 8 *Pick.* 423; *Sage v. Wilcox*, 6 *Conn.* 81; *Phillips v. Astling*, 2 *Taunt.* 206; *Warrington v. Furber*, 8 *East.* 242; *Sivinyard v. Bowes*, 5 *M. & S.* 62; *Cannon v. Gibbs*, 9 *Serg & Rawle*, 202. Another distinction between a surety and a guarantor is that a promise of a surety is supported by the consideration on which the promise of the principal is founded; and no other need be proved; but the engagement of a guarantor must be founded on some new or independent consideration, except in those cases where the guaranty is given at the time the debt is contracted by the principal; and so may be considered as connected with it. In support of the above principle in relation to a guarantor are the cases of *Leonard v. Vredenburgh*, 8 *Johns.* 29; *D'Wolf v. Rabaud*, 1 *Peters*, 476; *Bailey v. Freeman*, 11 *Johns.* 221; *Hunt v. Adams*, and *Sage v. Wilcox*, cited before; 3 *Kent's Com.* 86, 87; *Oxford Bank v. Haynes*, before cited; and *Packard v. Richardson*, 17 *Mass.* 122.

With respect to the question of demand and notice, in order to charge a guarantor of the payment of a pre-existing debt, there seems to be less certainty than might have reasonably been expected, considering the importance of the subject, especially in the commercial community. In the before mentioned cases of *Warrington v. Furber*, *Phillips v. Astling*, *Cannon v. Gibbs*, *Sage v. Wilcox*, and *Oxford Bank v. Haynes*, and some others, demand and notice were decided to be necessary, unless in case of the insolvency of the principal. In *Redhead v. Carter*, *Goring v. Edwards*, *Allen v. Brightmore*, 20 *Johns.* 365, *Williams v. Grainger*, *Cobb v. Little*, and some others, such demand and notice were decided not to be necessary. It is important to ascertain the true grounds of these apparently opposing decisions; and we apprehend that the principle on which they rest, when carefully examined, will explain their seeming contradictions, and show their consistency. The essence of the engagement of a guarantor, of the character we are considering, we apprehend, is, that the debt shall be paid, if the creditor shall take the usual and legal steps to secure it or render the principal's lia-

bility absolute. In *Warrington v. Furber*, *Phillips v. Astling*, *Cannon v. Gibbs*, and *Oxford Bank v. Haynes*, the guaranty was that certain debts arising on bills of exchange or promissory notes, but which were not then payable, should be duly honored and paid. The case of *Bank of New York v. Livingston*, 2 *Johns. Ca.* 409, and *Cumston v. McNair*, 1 *Wend.* 457, are of the same character; and demand and notice were held necessary.

In the case of *Sage v. Wilcox*, it does not appear when the note, the payment of which was guarantied, was made payable; besides, in addition to the want of notice in due season, the court in their opinion say the promise alleged was absolute, but that which was proved was conditional. It is true that want of demand and of seasonble notice was one ground of the decision; but when we take into consideration the terms of guaranty, viz: "I hereby guaranty the payment of the within note one year from this date, whether a suit is brought against the signer, *Jacob Wilcox*, or not,"—it seems somewhat singular that the court considered a demand on the signer as essential. The decision is at variance with *Williams v. Granger*, and several other important cases, among which is that of *Allen v. Brightmore*, above cited. In most of the other cases before named, where demand and notice were held necessary, the plaintiff had not taken the legal steps to charge the principal debtor and obtain the money; and the omision so to do was not excused on account of insolvency. In all these and similar cases, it is evident that certain measures are to be pursued by the creditor to give effect to the guaranty, cases of insolvency excepted. But when the debt, which is the subject of the guaranty, has become due and payable and absolute before the guaranty is given, the creditor has nothing to do to perfect his legal claim on the principal; it has become perfect, and the guarantor must be deemed conusant of that fact; and when a creditor's rights upon a bill of exchange or an indorsed note have become absolute as against all parties chargeable upon it; or when, from the absolute character of the debt guarantied, nothing of a preliminary nature on the part of the creditor is by law required to perfect his rights, why should demand and notice be essential to entitle him to maintain his action against the guarantor? We apprehend

that upon examination it will be found that the cases cited, as well as others, in which demand and notice have been held to be unnecessary, were decided upon the foregoing distinction. In *Cobb v. Little*, *Crague's* note was dated *April* 30, 1817, payable in six months; on the back of the note the defendant wrote these words: "I guaranty the payment of the within note in six months. *Thomas Little. June* 3, 1817." Here the guaranty was absolute, extending *Little's* term of payment beyond the six months named in the body of the note; and nothing was by law required to be done by *Cobb* to perfect his claim against *Crague*. The court held that a demand on *Crague* and notice to *Little*, were not necessary. The court proceeded on the same principle in *Breed v. Hillhouse*, 7 *Conn.* 523, in which the payee of a promissory note, after it became due, received a guaranty of a third person in these words: "I hereby guaranty the payment of this note within four years." The court held it an absolute guaranty; and that demand and notice were unnecessary. Here the note being due at the time of the guaranty, nothing was required to be done to perfect the payee's rights against the promissor. So in the case of *Norton v. Eastman*, 4 *Greenl.* 421, the court say, "if A holds a note against B for $100 payable in one year, and C guaranties the payment of it when due, in such a case notice is superfluous." So in *Allen v. Brightmore*, before cited, the court decided that no demand and notice were necessary, considering the promise of the guarantor as absolute that the maker of the note should pay it or that he himself would. In *Boyd v. Cleaveland*, 4 *Pick.* 525, the defendant, an indorser, declared to the plaintiffs, who had no confidence in the other parties to the note, that he should be in *New York* when the note would become due, and would take it up, if not paid by any other party to it; and the court held that the plaintiffs were not bound to give notice of the non-payment by the maker, as in those cases where an implied promise is relied on. In *Redhead v. Carter*, no notice was given; but the cause was decided on another ground, namely, that the undertaking or engagement was absolute, and so no notice was necessary. It was a case at *nisi prius*, and the promise of the de-

fendant seems to have been considered as an independent and original contract on his part.

The case of *Jones v. Cooper*, *Cowp.* 228, was different from the present; it merely presented the question whether the defendant's promise was a collateral one, and so was within the statute of frauds. And *Adney's* case also was one of a collateral and contingent nature, and so not proveable before commissioners of bankrupt.

In the case at bar, it appears that *Hooper*, on the 25th of *Nov.* 1824, gave his promissory note to the plaintiffs for $689,11, and on the next day gave them another note for $1106,64; both payable on demand; and that the defendant on the 14th of *January*, 1825, signed the agreement on which the present action is founded; and he states that in consideration of a conveyance of a tract of land to him by *Hooper*, and of the plaintiffs' promise to forbear to sue *Hooper* on said notes of hand for and during the term of twelve months from the date of his contract, and of their actual forbearance during that term, he would pay the plaintiffs the sum of thirteen hundred dollars at the end of said twelve months unless the same should then have been paid by said *Hooper*. The consideration of this promise is a legal one; and no question is made as to its sufficiency. No demand was made on *Hooper* at the end of the twelve months, though for many months after that time he remained solvent and amply able to pay the notes. And it is not denied that the plaintiffs did forbear to sue *Hooper* during the twelve months. On these facts it is contended that this action is not maintainable, on account of the omission to demand payment of *Hooper* at the end of the term of credit to the defendant, and to give notice of non-payment by him; and also on account of the *laches* of the plaintiffs in not collecting the money of *Hooper* in his life time. With respect to this latter objection we would observe that it has been repeatedly decided that mere delay to pursue the principal and collect the money of him, does not discharge a surety or guarantor, provided such delay be unaccompanied by fraud, or an agreement not to prosecute the principal, made without the assent of such surety. *Lock v. U. States*, 3 *Mason* 446; *Hunt v. Bridgham*, 2 *Pick.* 583; *U. States v. Kirkpatrick*, 9 *Wheat.* 724; *Kennebec Bank v. Tuckerman* 5 *Greenl.*

130. As to the objection that no demand was made on *Hooper*, or notice of non-payment given to the defendant, the cases before cited as applicable to such a guaranty as the present furnish an answer. The liability of *Hooper* on his notes to the plaintiff was an absolute one at the time he signed the guaranty; they had then a perfect right of action upon them against *Hooper*, without any demand upon him. The defendant did not employ the language made use of in the case of *Sage v. Wilcox*, "I guaranty the payment of the note;" but it is, "I promise to pay the sum of thirteen hundred dollars at that time," (the end of twelve months) "unless the same shall have been paid by said *Hooper*." If the defendant at that time had called on the plaintiffs to pay the notes according to his promise, he would have learned that they had not been paid, and that he must pay them. Nothing being necessary to be done on the part of the plaintiffs to perfect their rights as against *Hooper*, this case does not come within the principle of the decisions before mentioned in which demand and notice were held necessary. The plaintiffs knew that *Cutts* had received a conveyance of a tract of land from *Hooper* by way of indemnity against loss in consequence of the guaranty; and the land thus conveyed, was stated at the argument to be worth $1300 or more, and this fact was not denied. This very circumstance naturally lulled the attention of the plaintiffs, and led them to the conclusion that the defendant would promptly fulfil his engagement, attend to his own interest, and take notice of those facts which might seriously affect it. Instead of all which, within less than six months after giving the guaranty, he conveyed the land, and permitted *Hooper* to receive the avails of it. He has thus voluntarily given up his indemnity, and has placed himself in his present situation and there is no one but himself on whom to cast any blame. There is no proof that the defendant ever informed the plaintiffs of the above fact until after the commencement of the present action.

As to the question of damages, we are of opinion that the defendant is answerable to the extent of thirteen hundred dollars, and interest thereon, from *January* 14, 1826, unless the payments which have been made by *Hooper*, have reduced the sum now actually due, below the amount. It does not appear that those payments

were specially directed to be applied in part discharge of the defendant's liability; and such being the case, the plaintiffs had the right to make the appropriation, and consider the sums paid as going to extinguish, *pro tanto*, the portion of the two notes not collaterally secured by the guaranty of the defendant. *Brewer v. Knapp & al.* 1 *Pick.* 332.

According to the agreement of the parties, a default must be entered.

LAWRENCE *& al. vs.* TUCKER.

Though an attorney of record may have had knowledge of a prior conveyance of land attached in the suit in which he is retained, this does not affect the attachment, if his client had no such knowledge.

In cases of implied notice of a conveyance not recorded, the facts must be of such a nature as to leave no reasonable doubt of the existence of the conveyance.

IN this action, which was debt on bond, the principal controversy related to the proportion of interest which the plaintiffs acquired in certain farm called the *McIntire* farm, by the extent of their executions thereon as the property of *Joseph Granger*.

On the part of the plaintiffs, at the trial before *Parris J.* it was proved that the farm was conveyed by *Daniel Hooper* and *Daniel Sewall* to *Joseph Granger*, by deed dated *April* 10, 1824, and recorded *Jan.* 1, 1825. On the 10th day of *April*, 1826, *Joseph Granger* conveyed three undivided fourth parts of the farm to *George T. Granger*, which deed was recorded on the following day. On the 23d day of *August*, 1826, the remaining fourth part of the farm was attached in certain suits of the plaintiffs against *Joseph Granger* and others, by direction of Messrs. *John & Ether Shepley*, their attornies; in which suits judgments were rendered at *May* term, 1827, and executions were regularly and seasonably extended on the 30th day of *June* following, upon the property so attached.

In the defence it was proved that *Joseph Granger* conveyed an undivided moiety of the premises to *George Scamman*, by deed dated *April* 15, 1824, but not recorded till *July* 30, 1827. On the 6th day of *December*, 1824, by a deed of that date acknowledged before *Ether Shepley*, Esq. *April* 21st, and recorded *April* 25, 1825, *George Scamman* conveyed the same undivided moiety to *Joseph Granger*, *Daniel Granger* and *Andrew Scamman*. On the 10th day of *April*, 1826, *Daniel Granger*, by his deed of that date, recorded on the following day, conveyed his one undivided third part of that moiety to *Joseph Granger*. On the 12th day of *April*, 1826, the defendant, by the Messrs. *Shepley* his attornies, caused two undivided twelfth parts of the farm to be attached in his suit against *Joseph Granger*, *Daniel Granger* and *Andrew Scamman*; on which his execution was afterwards seasonably and regularly extended on the 12th day of *June* 1827. The same officer made all the attachments. It was admitted that the defendant had acquired all the title of *George T. Granger* to three fourths of the farm; and he now contended that since the extent of his execution, he was entitled to eleven twelfths.

The defendant offered parol testimony to prove that the farm was originally contracted for by *Joseph Granger* and *George Scamman*, each of whom paid a moiety of the purchase money; that the deed was made to *Joseph Granger* by mistake, but they took it as it was, he agreeing to make a deed to *Scamman* on his return home; that their joint purchase was a matter of public notoriety; and that the deed to him of *April* 15, 1824, not recorded till *July* 30, 1827, was made pursuant to that agreement. But this evidence was rejected by the judge.

It was proved by the defendant by the testimony of *Joseph Granger*, that in 1824, the witness made an agreement with one *Henry Green* for the management of the whole farm, considering himself as tenant of *George Scamman's* moiety; that the latter went with him to the farm where he gave some directions respecting the repair of the house, and the cutting of a tree for ship timber; that *Joseph* and *Daniel Granger* and *Andrew Scamman*, entered under

the deed of *Dec.* 6, 1824, and continued to occupy the premises, by cutting timber and taking the crops; that previous to *May* term, 1826, the witness informed Mr. *E. Shepley* that *George Scamman* was joint purchaser of the farm with him; and afterwards, previous to the levies, Mr. *Shepley* mentioned to him several parcels of land, and among them this farm, as land the title to which on record appeared to be in him, and deeds of conveyance from him were not on record; whereupon the witness replied that Mr. *Shepley* knew of these deeds; and the latter answered that his clients in *Boston* did not. The witness then inquired if it was not sufficient if their attorney knew of the conveyance; and was answered that knowledge of the existence of the deeds must be brought home to his clients. Mr. *Shepley*, however, testified that he had no knowledge how the title stood, or that *Joseph Granger* had ever made a deed, till he obtained it by extracts from the record, after the attachments, but before the executions were extended.

Greene continued to occupy the farm as tenant, from the spring of 1824 to the autumn of 1828, under his original agreement with *Joseph Granger*, no other having been made; and *Granger* appeared principally active in all the other business done upon the farm, which consisted in cutting ship timber, and peeling bark.

Upon this evidence the parties submitted the case to the decision of the court; agreeing that the court might infer whatever a jury lawfully might, from the facts proved.

J. Shepley, for the plaintiffs, contended that neither the directions given by the attornies to the officer, nor the fact of his attaching the land previously at the suit of the defendant, nor that one of the deeds was acknowledged before one of the plaintiff's attornies, proved any notice to the plaintiffs of a conveyance of the land prior to their attachment. *Stanley v. Perley*, 5 *Greenl.* 373; *Farnsworth v. Child*, 4 *Pick.* 637; *Connecticut v. Bradish*, 14 *Mass.* 296; *Cushing v. Hurd*, 4 *Pick.* 253; *Trull v. Bigelow*, 16 *Mass.* 406.

And to the point that the facts proved relating to the possession of the land did not amount to notice of the title of *D. Granger* or ei-

ther of the *Scammans*, he cited *Norcross v. Widgery*, 2 *Mass.* 506 ; *McMechan v. Griffin*, 3 *Pick.* 149 ; *Boynton v. Rees*, 8 *Pick.* 329.

Goodwin, for the defendant, argued—1st. That *George Scamman*, by virtue of the deed from *Joseph Granger* to him of *April* 15, 1824, because forthwith seised of one moiety of the farm as tenant in common ; and that the possession of his co-tenant, and of *Greene*, and of his grantees, were in law the possession of *George*, and affected third persons with all the consequences of actual notice of his title. *Marshall v. Fisk* 6 *Mass.* 24 ; 3 *Mass.* 573 ; *Prist v. Rice*, 1 *Pick.* 164 ; *Brown v. Wood*, 17 *Mass.* 68 ; *Barnard v. Pope*, 14 *Mass.* 434 ; *Shumway v. Holbrook*, 1 *Pick.* 114 ; *Porter v. Cole*, 4 *Greenl.* 20 ; *Farnsworth v. Child*, 4 *Pick.* 637.

2d. Being thus seised, his title passed to *Daniel Granger* and others his grantees, by his deed to them of *Dec.* 6, 1824.

3d. The actual notice had by the plaintiffs' attornies, proved by their directing the prior attachment in favor of the defendant, by taking acknowledgement of the deed, and by their own admission, was of itself sufficient to affect the plaintiffs themselves. *Cruise's Dig. tit.* 32, *chap.* 28, *sec.* 21, 24 ; *Jackson v. Sharp*, 9 *Johns.* 163 ; *Paley on Agency*, 200 ; *Brown v. Maine bank*, 11 *Mass.* 153.

4th. At least, the deed from *George Scamman* to *Daniel Granger* and others operated to disseise *Joseph Granger* of the proportion therein conveyed ; and to estop him, and of course all claiming under him, from denying the seisin of his two co-tenants. *Gookin v. Whittier*, 4 *Greenl.* 16 ; *Little v. Libby*, 2 *Greenl.* 242 ; *Ken. Prop'rs v. Laboree*, *ib.* 273 ; *Higbee v. Rice*, 5 *Mass.* 344 ; *Little v. Megquier*, 2 *Greenl.* 176 ; *Robison v. Swett*, 3 *Greenl.* 316 ; 3 *Com. Dig. tit. Estoppel A. B.* ; *Stearns v. Barrett*, 1 *Pick.* 443 ; *Barnett v. Hall*, 1 *Mason*, 472 ; *Bean v. Parker*, 17 *Mass.* 591. Being thus disseised, he could not convey the land ; nor can his creditor acquire it by attachment and extent. *Porter v. Perkins*, 5 *Mass.* 233 ; *Warren v. Child*, 11 *Mass.* 222 ; *Davis v. Blunt*, 6 *Mass.* 487 ; *Bott v. Burnell*, 9 *Mass.* 96 ; *Waterhouse v. Gibson*, 4 *Greenl.* 230 ; *Bartlett v. Harlow*, 12 *Mass.* 348.

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

This is an action of debt on bond. Upon the several pleadings and issues, the principal, if not the only question, is whether the plaintiffs, by means of certain attachments and the levies of their respective executions, hereafter described, in connexion with certain conveyances and their legal operation, are owners of one fourth part of the *McIntire* farm, so called, or only one twelfth part thereof. Though a long catalogue of facts is contained in the report of the judge, yet we apprehend that the decision of the cause depends on a few of them only. By the deed from *Sewall* and *Hooper* to *Joseph Granger*, the legal estate of the whole was conveyed to him, although *George Scamman* was concerned in the purchase and paid one half of the purchase money, and although the plaintiffs were acquainted with that fact. A part of the plaintiffs in their action against the said *Joseph Granger*, and the remaining part of them in their action against him, caused the said tract of land to be attached on the 23d day of *Aug.* 1826. In *May* 1827, they respectively recovered judgment, and on the 30th day of *June* following, they caused their executions to be duly extended on one undivided fourth part of said lot of land. These executions having been levied within thirty days after rendition of judgment, and seasonably registered, conveyed a good and legal title to the plaintiff, having relation back to the 23d of *August*, 1826, the day of attachment, unless the plaintiffs or their attornies, before or at the time of the attachments, had knowledge of the existence of the deed made by *Joseph Granger* to *George Scamman* on the 15th day of *April*, 1824, of one undivided moiety of that tract of land, though the deed was not registered until *July* 30th, 1827, about eleven months after the attachments were made. If they had such knowledge, it is admitted that the title of *George Scammon* under this deed would prevail against the levies. It is not pretended that either of the plaintiffs had any express knowledge previous to the attachments. Nor is there any proof that either of the attornies of either set of creditors had such express knowledge at that time, though *E. Shepley* had notice of it after

the attachments and before the extent of the executions; but such knowledge does not defeat the title under the execution, as we decided in the case of *Stanley v. Perley*, 5 *Greenl.* 369. It is contended, however, that *E. Shepley* must be presumed to have known the existence of that deed because he took the acknowledgement of the deed from *George Scamman* to *Joseph Granger* and others of *Dec.* 6, 1824, of the same moiety previously conveyed to *George Scamman* by *Joseph Granger*. Nothing can be more slender than such a presumption; for surely a magistrate has no occasion to examine the contents of a deed, merely because the grantor applies to him to take the acknowledgement of it. He has no concern with the contents, or right to examine them. But it is idle to urge this argument, because *E. Shepley* testified that he did not know of the existence of the deed till some time after the attachments were made. There is an end then of all pretence of express knowledge.

But it is contended that the possession of *George Scamman* under the deed from *Joseph Granger* to him, was of such a nature as to furnish implied notice of a conveyance of the title and a change of ownership. In cases of implied notice, the facts must be of such a nature as to leave no doubt of the truth of the transaction; suspicion, conjecture and probability, that there has been a change of property and transfer of title are not sufficient. *McMechan v. Griffin*, 3 *Pick.* 149, and cases there cited; *Boynton v. Rees*, 8 *Pick.* 329. For in many cases even where there has been a change of property, there may have been no change of possession in virtue of which third persons would be able to draw any satisfactory much less any certain conclusions as to the real state of the title. The facts in the present case, from which it is contended that notice of the conveyance from *Joseph Granger* is to be implied, are of a very doubtful character; for though *Henry Green* occupied the *McIntire* farm from the spring of 1824 to the autumn of 1828, he made the bargain with *Joseph Granger* the first year, and there was no other agreement made afterwards until the last year, or year 1828. It is true *Granger* states that after the year 1824 he considered himself tenant under *George Scamman* of one half, and

Green as tenant of the whole; still this understanding of *Joseph Granger* as to his own character and that of *Greene*, in relation to the occupation of the farm, were circumstances known only to themselves. They gave nothing in the shape of information to others of any change of title and consequent change of possession; and the more natural presumption was that any acts done by *Joseph Granger* on the land, from the years 1824 to 1828 inclusive, were done in virtue of his ownership under his deed from *Sewall* and *Hooper*, recorded *January* 1, 1825.

We do not perceive any objection to the title of the plaintiffs under their respective attachments and levies, in consequence of the alleged disseisin of *Joseph Granger* by means of the deed of *George Scamman* to *Joseph Granger*, *Daniel Granger* and *Andrew Scamman*, bearing date *December* 6, 1824, and their entry under it; their possession, whatever it was, must have been in common, and so was not exclusive of *Joseph Granger's* rights. The ruling of the judge, by means of which certain parol evidence which had been offered was excluded, was unquestionably correct. There must be judgment for the plaintiff, according to the agreement of the parties.

Staples *vs.* Emery.

The manure on a farm in the possession of a tenant at will is liable, during the continuance of his tenancy, to be seized in execution and sold for the payment of his debts.

This was an action of trespass for taking and carrying away from the barn yard of the plaintiff, thirty cords of manure, in the month of *May*, 1828.

In a case stated by the parties, it was agreed that one *Elwell*, who was the owner of the farm from which the manure was taken, had mortgaged it to the plaintiff, who had entered for condition broken, in *August*, 1827. The farm, however, had for many years, and until *September*, 1830, been in the sole occupancy of *Elwell*

the mortgagor; and the manure was taken under an execution against *Elwell*, committed to the defendant, as a constable, for collection.

J. and *E. Shepley*, for the plaintiff, relied on the case of *Lassel v. Reed*, 6 *Greenl.* 222, as conclusively showing that the manure, did not belong to the tenant, and could not be seized for his debt.

J. Holmes, for the defendant, distinguished this case from that of *Lassel v. Read*, and cited *Ricker v. Ham*, 14 *Mass.* 141.

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

The only question decided in *Lassel v. Reed*, 6 *Greenl.* 222, was, that a tenant for one year, ending *April* 15, had no right to remove and convert to his own use, at or after the end of the lease, the manure made and accumulated on the premises during the continuance of the lease. In some peculiar respects the present action differs from that; for in this it appears that before the manure in question was made, the plaintiff had entered under the mortgage for breach of the condition; but it also appears that *Elwell*, the mortgagor, for many years before such entry, had been in possession of the land, and ever since the entry, which was in *August* 1827, had continued in possession, up to the time when the statement of facts was signed in *September*, 1830; and from this last fact we are to consider *Elwell*, during all that time, as a disseisor of *Staples*, or as a tenant at will under him; but as a wrong is not to be presumed, and as none is alleged on his part, we ought to consider him, and so the plaintiff's counsel contends, as a tenant at will, liable to the uncertainties of such a tenancy, and entitled to its privileges; liable to have the lease terminated at the pleasure of the lessor or owner, but entitled to emblements, if terminated unreasonably, according to well settled principles. It is important to attend to the reasoning of the court, which led to the decision, in the case of *Lassel v. Reed.* They say, "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 applied to enrich the farm and render it productive. If at the end of the year, or of the term, when 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 tenant; or else the farm, destitute of manure, must be leased at a reduced rent or unprofitably occupied by the owner." In the case before us the above reasoning is inapplicable, because none of the contemplated consequences could follow. Suppose a tenant for five years, should, the second, third and fourth years sell all the manure and manage the land without any; whose loss would it be? He would be injuring himself, destroying his own profits to a certain extent, and rendering himself less able to pay his rent. Still, would he not have a right to proceed in this manner? At least might he not convert it to his own use in this imprudent manner without being a trespasser, or the purchaser's being liable in an action of trespass or trover? And has the owner any other remedy than an action for damages for bad husbandry and mismanagement of the farm? In the case supposed, the manure is a part of the annual produce of the farm; and, as such, belongs to the tenant; and might be attached and sold on execution to satisfy the debts of such tenant, without rendering the officer or the creditor a trespasser. That is to say, a tenant, as in the case supposed, may injure himself and impair his own profits; but the manure of the season next before the known term of the lease, is the produce of that season and designed for the use of the farm the following season, at which time the owner is to occupy or have the control of the land as in the abovementioned reported case. Now, all the observations made on this head apply to the lease at will in the case under consideration. *Elwell* was in possession, as tenant at will in *August*, 1827. The manure was made during the following winter, and the tenancy at will has never been determined; of course, the rights of no one have been impaired, but *Elwell's*; or rather the loss of profits by reason of the seizure and sale of the manure has been only his loss; the same having been a part of the annual profits designed for his

own use and benefit, and which would have been so applied had not the sale prevented it. The hay and fodder cut on the land by *Elwell* in the summer of 1827, belonged to him as tenant, and that hay and that fodder were the materials of which the manure was composed, which is the subject of dispute, and which, had it not been taken and sold, would have increased his crops in 1828; and a similar alternation of profits and manure to increase them, probably occurred annually for two years, at least, afterwards; for the facts before us do not show any interruption of the natural order observed in such business on a farm. On this view of the cause we think the plaintiff is not entitled to maintain this action. As we have before observed this case differs from *Lassel v. Reed*, and we do not mean to extend the principle of that decision beyond the peculiar facts, or to intimate any opinion as to the question whether manure, lying in heaps or yards, passes to the grantee by an absolute deed of land, where no mention is made of it as a subject of the conveyance. A nonsuit must be entered.

BUCKLEY *& al. vs.* WOODSUM *& al.*

Where, at a trial by jury, certain depositions were objected to by one party, but were used by consent, upon condition that the Judge should direct the jury what parts of them to disregard as inadmissible; and no such direction was in fact given; but the Judge, before the jury retired, offered to give them further instructions on any point which either party might desire; yet none were desired; it was held, that this silence of the party amounted to a waiver of any objection to the testimony.

THIS was an action of *assumpsit* for the value of a cable and anchor, furnished by the plaintiffs in *New York*, for the use of the defendants' vessel there.

At the trial before *Parris J.*, it was made a question whether the cable and anchor were furnished by the plaintiffs on account of the master and owners, or on the account and credit of one *Kellogg*, a

commission merchant, by whom, or through whose agency in some degree, they were procured; the defendants contending that in the latter case they were not liable to the plaintiffs, but to *Kellogg*. To both these points evidence on both sides was adduced. But the plaintiffs contended that if the articles were procured by *Kellogg*, as a commission merchant, for the use of the vessel, and through him were applied to that use, the defendants, by the custom of *New York*, were still liable to them for the value. To this point they adduced several depositions, part of which being objected to by the defendants, the Judge ruled that they were inadmissible. But afterwards the objection was withdrawn, the defendants' counsel observing that the whole might be read to the jury, the judge instructing them what portions to disregard as legally inadmissible.

Upon the whole evidence the jury were instructed that the master had power to bind the owners by purchasing the articles for their use and receiving them on board the vessel; and that if they were so purchased, and were charged to the owners at the time, they were liable; but that if they were sold to *Kellogg*, though he were a commission merchant, the owners were not liable, notwithstanding the articles were furnished for the use of the vessel. The judge gave them no particular instructions respecting the depositions; but after closing his observations to the jury, he stated to the counsel on both sides that if they wished it, he would give the jury further instructions on any point of law, or draw their attention more particularly to any part of the testimony; but nothing of this kind was requested by either side.

The verdict being returned for the plaintiffs, the defendants moved the court to set it aside, because the jury were not instructed respecting the admissibility of the depositions.

Fairfield, for the defendants, supported the motion on the ground that it was the duty of the judge properly to instruct the jury on all points material to a right decision of the cause, independent of what the counsel might either say or omit. And he insisted that the practice of appealing to the counsel for the expression of their wishes, however it might manifest the earnest desire of the judge to do full justice, could not absolve him from the duty of excluding illegal evi-

dence, without regard to the compact of parties. *Smith v. Carrington*, 4 *Cranch* 62 ; 1 *Stark. Ev.* 430.

E. Shepley, for the plaintiffs, cited *Curtis v. Jackson*, 13 *Mass.* 513 ; *Spaulding v. The inhabitants of Alfred*, 1 *Pick.* 33 ; *Esting v. The United States*, 11 *Wheat.* 75 ; *Brazier v. Clap*, 5 *Mass.* 10 ; *Jones v. Fales*, 4 *Mass.* 245.

Weston J. delivered the opinion of the Court.

It was understood at the trial, that the presiding judge would instruct the jury that certain portions of the plaintiff's depositions were by law inadmissible. This he did not do ; but after he had closed his remarks to the jury, he stated to the counsel on both sides that if they desired it, he would call the attention of the jury more particularly to any part of the testimony. No intimation to this effect being made by the counsel on either side, the jury retired. A verdict being returned for the plaintiffs, the counsel for the defendants now moves for a new trial, on the ground that the judge omitted to point out to the jury such parts of the depositions adduced, as were inadmissible. We are very clear that under the circumstances, he must be regarded as having waived this objection. He took the chance of a verdict in his favor ; and by his silence acquiesced in the omission of which he now complains.

But both the omission and his silence are easily accounted for. By the instructions of the judge, the depositions were of no sort of importance in the cause. They were adduced to show that by the custom of *New York*, the defendants were liable for the value of the cable and anchor, which the action was brought to recover, although they were sold and delivered to a commission merchant ; but the jury were instructed to find for the defendants unless the sale was made to the master, by which the depositions were entirely disregarded, having no legal effect or bearing upon the cause. It became therefore unnecessary to refer to certain parts of them as more especially objectionable.

Judgment on the verdict.

WILSON *& al. vs.* AYER *& als.*

W. S. devised certain lands to the children of his daughter *M. W.* who were minors, living with their parents; but the will, being defectively executed, and inoperative, was never proved. Afterwards the heirs at law undertook to settle the estate agreeably to the will, without administration; and accordingly *M. W.* with *S. W.* her husband, released all her right in the land to the executors, who at the same time conveyed it to the children; a large debt due from *S. W.* to the deceased being also extinguished. It was held that this conveyance was good against the prior creditors of *S. W.* who subsequently extended an execution on his life estate in the land.

THIS was an action of trespass *quare clausum fregit*, brought by certain children of *Samuel Wilson;* and it came before the court upon the following case stated by parties.

The *locus in quo* belonged to *William Symmes*, the father of the plaintiffs' mother, but was always occupied by *Samuel Wilson* their father, who dwelt there with his family, of which they were a part; their mother also being alive. On the 20th day of *December*, 1825, *William Symmes* died, having made a will, which however was inoperative, it being attested by only two witnesses, and therefore was never proved, wherein he devised the *locus in quo* to the plaintiffs. On the 20th day of *February* 1826, the heirs of *William Symmes* undertook to settle his estate without any administration, and according to his intention as expressed in the will; and in pursuance of this arrangement the *locus in quo* was conveyed by *Samuel Wilson* and his wife, by a deed releasing all their right therein to two of her brothers, who were named as executors in the will; and who, at the same time, conveyed it by deed to the plaintiffs, for the consideration, in part, of love and affection therein expressed. As a part of the same arrangement, the sum of seven hundred and thirteen dollars was allowed to *Samuel Wilson*, father of the plaintiffs, by extinguishing a debt of that amount which he owed to the deceased.

The defence of *Ayer*, the principal defendant, the others being his servants, was founded upon the extent of an execution in his favor against *Samuel Wilson*, the father, by which the *locus in quo*

was regularly set off by metes and bounds *March* 10, 1829, in satisfaction of a debt which was created in *January* 1824, for the original sum of about ninety dollars.

N. Emery, argued for the plaintiffs.

E. Shepley, for the defendants, contended that the whole transaction showed a conveyance of the life estate which was vested by law in *Samuel Wilson*, for other than valuable considerations; and that therefore it was void against prior creditors, who might lawfully take it in satisfaction of their debts. *Bennett v. Bedford Bank* 11 *Mass.* 421. The extent thus made, he argued was good for the life estate; *Roberts v. Whiting*, 16 *Mass.* 186; and was valid against these plaintiffs, notwithstanding it was made by metes and bounds, upon a portion in severalty, instead of a share in common. *Bartlett v. Harlow*, 12 *Mass.* 348; *Varnum v. Abbot*, *ib.* 474.

Weston J. delivered the opinion of the Court at the ensuing *May* term, in *Cumberland*.

It appears that in *December* 1825, *William Symmes* died seised of the land, where the trespass, complained of in this action, is alleged to have been committed. *Symmes* left a will, which however was inoperative for want of a legal attestation, and the land descended to his heirs at law, of whom the wife of *Samuel Wilson* was one, whereby the said *Wilson* having had issue by his wife became seised of a life estate in that portion, which descended to her. In pursuance of an arrangement made by the family, *Wilson* and his wife, in *February* 1826, conveyed their interest to her two brothers, who conveyed the premises in question to the plaintiffs. And it is understood that this arrangement corresponded with the provisions in the will. One of the defendants was a creditor of *Wilson* prior to these conveyances, and having obtained judgment against him, has caused the execution issuing thereon to be levied upon the land in question as the property of *Wilson*, insisting that his conveyance to his wife's brothers is fraudulent and void against his creditors.

His creditors had a right to look only to his life estate. The in-

heritance belonged to his wife and her heirs; and if she, with the assent of her husband, was disposed to convey the inheritance for the benefit of their children, his creditors had no right to complain. There was nothing therefore fraudulent or illegal in that part of the consideration which consisted in the conveyance, by the grantees of *Wilson* and wife, of a certain portion of the land descended, to their children. As to *Wilson's* interest, he could not convey it to defraud his creditors; but he had a right to sell it for a valuable and adequate consideration; and a sale thus made could not be defeated. Now it appears, that besides the land conveyed to his children, which was an equivalent for the inheritance, he himself received the sum of seven hundred and thirteen dollars. There has been no proof tending to show, nor has it been suggested or pretended, that this was not the full value of his life estate. It does not appear that there was any thing colorable or collusive in the transaction. *Wilson* did not, it is true, receive this part of the consideration in money; but it went to pay a just debt, due from him to *Symmes'* estate; and the payment of such a debt is a consideration sufficiently meritorious. Although there was no administration on this estate, *Wilson* was discharged from his debt by the assent of the heirs, the estate being solvent, and there being no interposing or conflicting claim of any creditor to the estate. We are unable to perceive any thing morally or legally fraudulent in these transactions. The deed to the plaintiffs purports to be in part for love and affection. If their grantors had a fair and legal title to the land, which we see no reason to doubt, they might part with it upon such considerations as they thought proper, if they did not thereby defraud their own creditors, whose rights and claims are not now the subject of discussion.

The opinion of the court is, that upon the facts stated, the plaintiffs are entitled to judgment.

SAYWARD *vs.* SAYWARD.

One devised his estate to his son *S.* "provided and on condition he lives to the age of 21 years AND has issue of his body lawfully begotten; but in case he shall die under the age of 21 years and without issue as aforesaid," then to his son *E.* and his heirs. The "and" in the first part of the devise was construed to mean "or," in order to carry into effect the intent of the testator. And hereupon it was held;—that this was an executory devise to *E*;—that *S.* took a fee simple conditional, defeasible only on the subsequent condition of his dying under 21 *and* without issue;—and that on his arriving at 21 it became an absolute estate in fee simple.

IN this case, which came before the court upon a statement of facts reported by *Parris J.* the demandant claimed title to the whole of certain lands under the will of his grandfather *Ebenezer Sayward*; or as his heir at law of one thirty fifth part.

By the will, which was made *March* 30, 1782, the testator made divers specific devises and bequests, among which were the following:—"I give and bequeath to my fifth son *Samuel Sayward* all my lands, buildings and other real estate not heretofore disposed of, to have the possession thereof when he comes to be twenty one years of age."

"*Item.* I give to my son *Ebenezer* the income or profit of my estate which I have bequeathed to my son *Samuel*, till *Samuel* is twenty one years of age." "Furthermore, my will is that if my son *Samuel* should die before he is twenty one years of age, without lawful issue, or after that term, and doth not dispose of the aforementioned buildings and lands, then they shall be my son *Ebenezer's.*"

Afterwards, on the 16th day of *January*, 1783, he made a codicil, commencing thus—"I *Ebenezer Sayward*, on perusing my will, think proper to make the following amendments"—and declaring that sixteen acres of wood land devised to his son *Ebenezer* were meant to him, his heirs and assigns; and after some changes in the bequests of personal estate to his daughter *Mary*, proceeding as follows:—"*Item.* To give a clear and intelligent meaning to the de-

vise of the residue of my real estate, I hereby revoke the devise of the same in my said will; and do give and devise the same to my son *Samuel Sayward* his heirs and assigns forever, provided and on condition he lives to the age of twenty one years *and* has issue of his body lawfully begotten; but in case my son *Samuel* shall die under the age of twenty one years *and* without issue as aforesaid, living his brother *Ebenezer*, then my will is that the same shall vest in my son *Ebenezer*, his heirs and assigns forever. And as my son *Ebenezer* is under age, my will is that my executors improve or lease out the same, in the manner they shall determine most for the interest of the estate, until said *Ebenezer* shall arrive at the age of twenty one years; and then my will is that said *Ebenezer* have and hold the same until his brother *Samuel* shall arrive to the age of twenty one years." The testator died soon after, leaving six children; of whom *Ebenezer*, the father of the demandant, was one, and *Samuel* was another.

Ebenezer the son, after he arrived at full age, entered into possession of the premises, which he occupied till *Samuel* became twenty one years of age, which was in *January*, 1794; when *Samuel* took possession of the farm, and held it till *September* 29, 1829, when he died, never having had issue. In *April*, 1820, *Samuel Sayward* made his last will, which was duly proved after his decease, devising a life estate in part of the premises to his wife, and the reversion, with the residue of the premises, to *Rufus Sayward* the tenant, in fee. And on the 28th day of *September*, 1829, he conveyed all his real estate in fee to the tenant, by deed of that date; which was not recorded till after his decease; taking back a lease of the same to himself for life, and of one half to his wife for her life.

After the decease of *Samuel*, the demandant made entry into the premises, claiming title to the same; his father *Ebenezer* having deceased in the year 1816.

Upon these facts the right of the demandant to recover was submitted to the court.

J. Holmes and *D. Goodenow* argued for the demandant, that *Samuel* took only an estate for life, under the will; to be enlarged into a fee upon his arriving at full age and having issue. The re-

mainder in fee vested in *Ebenezer*, in interest, and was descendible to his heirs; defeasible only on *Samuel's* having issue. *Purefoy v. Rogers*, 2 *Saund.* 388, *note* 9; 4 *Dane's Abr.* 790, 278, 525, 800; 2 *Cruise's Dig.* 28, 261, 265, 266, 272, 281, 395, 443; *Willes*, 327; 1 *Salk.* 224; *Hanson v. Graham*, 6 *Ves.* 239; *Ives v. Legg*, 3 *D. & E.* 488; *Fearne on remainders*, 142, 327, 389, 391, 497, 521; *Brownswood v. Edward*, 2 *Ves. sen.* 243; 1 *Bos. & Pul.* 250, 262; 10 *Mod.* 419; *Marks v. Marks*, 1 *Stra.* 429; 2 *Mass.* 67; 2 *Wils.* 29, 35; 6 *Cruise's Dig.* 523, 524; 1 *Roll. Abr.* 835, 836; *Doe v. Wilson*, 2 *Bos. & Pul.* 324.

The words "heirs" of *Ebenezer* may be taken as words of purchase, to carry the intent of the testator into effect; and he dying before the contingency happened to vest the whole estate in him, it descended to his heirs. *Willes*, 592; *Doug.* 264; 2 *Burr*, 1100; 1 *East*, 264.

Samuel did not acquire a conditional or base fee; the condition precedent, viz. having issue, never having been performed. In this respect the case differs from *Barker v. Surtees*, 1 *Stra.* 1175, where no previous condition was annexed. Neither did he take a fee tail. For here were no appropriate words to create an entailment; which the policy of our law, since the statute of 1791 for barring entails, will not allow to be created by unnecessary construction. And whatever estate he was to have had was to commence *in futuro*, without an intermediate estate sufficient to support an entailment. *Pells v. Brown* Cro. *Jac.* 590; *Porter v. Bradley*, 3 *D. & E.* 146; *Roe v. Jeffrey*, 7 *D. & E.* 596.

But if it was an estate tail in *Samuel*, it has not been barred. For the *Stat.* 1791, *ch.* 61, by which a tenant in tail may aliene in fee, was made since the decease of the testator, and so could not operate on this estate. And if it could, yet the deed from *Samuel* to the tenant was not registered in the life time of the grantor; which, by that statute, is an indispensable requisite. Therefore, on the decease of *Samuel*, it vested in *Ebenezer* in tail.

E. Shepley and *Appleton* argued for the tenant, citing the following authorities. 1st. That *Samuel* took a fee simple, with limitation over to *Ebenezer* by way of executory devise. 4 *Kent's Com.*

265, 268; *Pells v. Brown*, *Cro. Jac.* 590; *Doe v. Webber*, 1 *Barnw. & Ald.* 718; *Morgan v. Morgan*, 5 *Day* 517; *Anderson v. Jackson*, 16 *Johns.* 382; *Jackson v. Chew*, 12 *Wheat.* 153; *Richardson v. Noyes*, 2 *Mass.* 56; *Ray v. Easlin*, *ib.* 554; *Lippet v. Hopkins*, 1 *Gall.* 454; *Dean v. Keneys*, 9 *East*, 366; *Barrister v. Casey*, 7 *Cranch*, 469; *Holmes v. Holmes*, 5 *Binn.* 252. 2d. That this estate became absolute when he arrived at the age of twenty one years. 4 *Kent's Com.* 7; *Ide v. Ide*, 5 *Mass.* 504; *Framingham v. Hogan*, 1 *Wils.* 140; *Barker v. Surtees*, 2 *Stra.* 1175; 1 *Wils.* 333; *Hogan v. Jackson*, 3 *Bro. P. C.* 388; 6 *Cruise's Dig.* 197, 200; *Rowe v. Hervey*, 5 *Burr.* 2638; *Doug.* 763; *Brown v. Wood*, 17 *Mass.* 68; *Soulle v. Gerrard*, *Dyer*, 33; *Doe v. Jessup*, 12 *East*, 288; *Fairfield v. Morgan*, 2 *New Rep.* 38; *Jackson v. Blenshaw*, 6 *Johns.* 54; *Arnold v. Buffum*, 2 *Mason*, 208. 3d. That if not, then he took an estate tail, which was barred by his deed to the tenant. 6 *Cruise's Dig.* 268; 4 *Dane's Abr.* 624; *Clark's case*, *Dy.* 330; *Doe v. Fyldes*, *Cowp.* 833; *Brown v. Jarvis*, *Cro. Jac.* 290; *Dutton v. Engram*, *Cro. Jac.* 427; *Chaddock v. Cowley*, *ib.* 695; *Doug.* 321; *Brice v. Smith*, *Willes*, 1; *Roe v. Avis*, 4 *D. & E.* 605; *Williams v. Hichborn*, 4 *Mass.* 189; *Hawley v. Northampton*, 8 *Mass.* 2; *Soule v. Soule*, 5 *Mass.* 67; *Lithgow v. Kavanagh*, 9 *Mass.* 170; *Wheelwright v. Wheelwright*, 2 *Mass.* 450.

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

MELLEN C. J. From a careful examination of the principal and leading cases which have a direct bearing on this cause, we are perfectly satisfied that by the language employed by the testator in his codicil, neither an estate for life nor an estate in tail was created by the devise to *Samuel Sayward*; and as he was not a tenant for life nor a tenant in tail, the demandant cannot take any estate under the codicil by way of remainder. "A remainder is a remnant of an estate in lands or tenements, expectant on a particular estate created together with the same at one time. *Fearne on Remainders*, 11, 12. "It follows," says *Fearne*, "that wherever the whole fee is

first limited, there can be no remainder in the strict sense of the word; therefore, if I limit an estate to the use of *A* and his heirs, till *C* returns from *Rome*, and after the return of *C* to the use of *B* in fee, the whole fee being first limited to the use of *A*, there is no remnant left to limit over, and consequently the limitation to *B* cannot be a remainder within the foregoing definition." In the present case the whole fee was devised by apt and technical words to *Samuel*, subject to the conditions and limitations immediately following. In *Lippett v. Hopkins*, 1 *Gall.* 454, Mr. Justice *Story* says, "If a devise be to one and his heirs, and upon a limited contingency to take effect in his life, as upon his dying under age, then over, the first estate is a fee simple, whether the ultimate devisee be an heir or a stranger; for the second devise is a limited contingency, and good as an executory devise." This rule on principle was introduced at an early period, and was adopted in the great and leading case of *Pells v. Brown*, *Cro. Jac.* 590, which, though for a time doubted, and in some instances opposed, soon after became an undisputed guide, and has never since been departed from, but acknowledged and followed in numberless instances; we need name only a few cases. *Porter v. Bradley*, 3 *D. & E.* 143; *Roe v. Jeffrey*, 7 *D. & E.* 589; *Doe v. Watson*, 2 *Bos. & Pul.* 324; *Goodtitle v. Gurnal*, *Willes*, 211; *Jackson v. Blanshan*, 6 *Johns.* 54; *Richardson v. Noyes*, 2 *Mass.* 56; *Ide v. Ide*, 5 *Mass.* 500; *Ray v. Euslin*, 2 *Mass.* 554. These show that if the demandant has any title under the codicil to the demanded premises, it is by way of an executory devise to *Ebenezer Sayward* and his heirs; for the contingency contemplated by the testator was not an indefinite failure of issue, but on *Samuel's* dying without issue in the life time of *Ebenezer*, which brings the case distinctly within the rule, as to executory devises, established and adhered to in the several cases abovementioned. If *Samuel* had died under age and without issue, in the life time of *Ebenezer*, then it would clearly have been a good executory devise of the estate to him.

Our next inquiry is whether the limitation to *Ebenezer* or his heirs ever took effect. This depends on the construction of the language of the devise, in connexion with the intentions of the devisor, which

are always to be carefully regarded; and as far as the settled principles of law will permit, carried into execution. It may be useful on this head to examine the language of the will, which was afterwards revised by the testator in his codicil, as furnishing evidence of his intentions. It is observable that the testator, in the will, did not in any of the devises make use of the technical language of "heirs and assigns," though he doubtless intended to devise a fee, except in those parts of the will where he expressly made a different disposition. The devise to *Samuel* is in these words: "I give and bequeath to my fifth son, *Samuel Sayward*, all my lands, buildings and other real estate, not heretofore disposed of; to have the possession thereof when he comes to be twenty one years of age." "Furthermore my will is that if my son *Samuel* should die before he is twenty one years of age, without lawful issue, or after that term, and doth not dispose of the aforementioned buildings and land, then they shall be my son *Ebenezer's*. Thus it appears clearly to have been the intention of the testator, that if *Samuel* should have no issue, but should survive the age of twenty one, he should have full power to dispose of the estate as his own; and in such case, *Ebenezer* would never derive any advantage from the devise. In the following year the testator made the codicil to his will, commencing with these words. "I *Ebenezer Sayward*, on perusing my will, think proper to make the following amendments." He does not profess an intention to make alterations as to his real estate; but after throwing the devise of sixteen acres of woodland to *Ebenezer* into more technical language, by adding the words, "his heirs and assigns," and making some changes in relation to the bequest of certain personal property to his daughter *Mercy*, he proceeds thus: "*Item.* To give a clear and intelligent meaning to the devise of the residue of my real estate, I hereby revoke the devise of the same in my said will; and do give and devise the same to my son *Samuel Sayward*, his heirs and assigns forever; provided and on condition he lives to the age of twenty one years, and has issue of his body lawfully begotten; but in case my son *Samuel* shall die under the age of twenty one years, and without issue as aforesaid, living his brother *Ebenezer*, then my will is that the same vest in my son *Ebenezer*, his

heirs and assigns forever." Now the case finds that *Samuel* did not die under the age of twenty one years, nor in the life time of *Ebenezer*, though he died without issue. From the express language of the devise, therefore, it appears to have been the intention of the testator that the estate should never vest in *Ebenezer* or his heirs unless those events should happen, which have never actually taken place. For if *Samuel* had married and died under the age of twenty one years, leaving issue, such issue could have taken nothing under the devise; hence we see the reason for considering that it must have been intended by the testator that both the specified events should take place before the estate should vest in the ultimate devisee. This is the reason assigned in the following cases, (in which the testator had provided that if the first devisee should die under age or without issue, on a limited contingency, then the estate should go over,) why the word "or" was construed to mean "and." It was from respect to the general presumed intentions of the testator, and in order that those intentions should not be defeated. *Price v. Hunt, Pollexfen*, 645; *Barker v. Surtees*, 2 *Strange*, 1175; *Framingham v. Brand*, 1 *Wils.* 143; *Fairfield v. Morgan*, 5 *Bos. & Pul.* 30; *Wilkins v. Kernys*, 9 *East*, 366; *Eastman v. Barker*, 1 *Taunt.* 174; *Jackson v. Blanshan*, 6 *Johns.* 54; *Anderson v. Jackson*, 16 *Johns.* 382; *Ray v. Euslin*, 2 *Mass.* 554. *A fortiori*, in the present case, where the conditions or events are expressed conjunctively by the word "and," a strict compliance with them cannot be dispensed with by the court.

The next question is whether the demandant is entitled to recover one thirty fifth part of the estate, as one of the heirs at law of his grandfather, the testator. This also depends on the nature, terms and construction of the devise under consideration. Though these qualifying terms are so worded as at first to appear to constitute two conditions, yet there is only one with two branches. The case in simple language amounts to this. The testator says "I devise my homestead farm to my son *Samuel*, his heirs and assigns forever; but if he should die under the age of twenty one years and without issue, in the life time of my son *Ebenezer*, then the estate shall vest in him and his heirs." But even if the devise be considered as

qualified by two contingencies; one in respect to *Samuel* and the other in respect to *Ebenezer;* still we apprehend the legal result must be the same, or else the evident intentions of the testator must be disregarded. We have just stated the reason given in the above cited cases, for substituting the word "and" for the word "or," where the contingencies on which the devise over is to take effect are expressed disjunctively; namely, that if they were construed in that manner, the case might often happen that the first devisee might marry and die under age, leaving issue; the devise over would then take effect and the issue be thus disinherited; an event, which the testator, surely, could never have intended. Now, to prevent such an undesigned and unwelcome consequence, and to render the law consistent with itself, the word "and" in the sentence immediately following the devise to *Samuel*, should be construed "or"; for if not so construed, then also if *Samuel* had died under age, leaving issue, they could have derived no benefit from the devise to their father, although the devise over never did or could take effect; and thus the whole devise would be completely frustrated. The same reason operates with equal force in both cases, and the same rule of construction, we apprehend, ought to operate in both. In *Price v. Hunt*, it was decided that "or" is to be taken for "and"; and "and" is to be taken for "or," as may best comport with the intent and meaning of the devise or grant.

It is a well settled principle that the condition on which the estate thus devised to *Samuel* was to be defeated, was a condition subsequent; and of course, on the death of the testator, the estate was immediately vested in *Samuel*. *Barker v. Surtees*, before cited; *Doe v. Underdown, Willes*, 493; *Lippett v. Hopkins*, 1 *Gal.* 454. But it never was so defeated, because the specified events never took place; and therefore *Samuel's* fee simple conditional was never divested, but on his arrival at the age of twenty one years was changed from a conditional or determinable estate into an absolute estate in fee simple. The following cases will shew this to be the legal result. In the before cited case of *Price v. Hunt*, the devise was to the son in fee, with a devise over on the contingency of his dying before the age of twenty one years, or without lawful issue.

The son arrived at full age, but died without issue, and the second devisee claimed the estate and brought his action against the heir at law of the son. The decision was in favor of the defendant. The same point was decided in the same way in the House of Lords in the before mentioned case of *Fairfield v. Morgan*; which was an action brought by the devisee over against the grantee of the first devisee. It may be said that these cases and some of the others like them, do not go to establish the title absolutely in the first devisee, but merely to decide that the devise over never took effect, and of course that the actions could not be maintained; as the demandants could only recover on the strength of their own title, and not on the weakness of that of the tenants. But admitting this to be so, there are at least three cases where the question of title was so presented that judgment could not have been rendered in favor of the demandants in two of them, and for the defendant in the other, except on the ground of the absolute title of the first devisee. The first of these is *Eastman v. Baker*, 1 *Taunt.* 174, in which the plaintiff's lessor claimed the premises under *Jane Boatfill*, to whom the estate was devised upon a contingency similar to that in the present case, against *Baker*, who claimed the same under a title derived from the devise over, which devise never took effect. The court decided in favor of the demandant, and established his title. The second is the before cited case of *Ray v. Euslin*. This was an action of dower, and the question in the cause was whether the demandant's husband was seised in fee of the premises during the marriage. It appeared that he held the estate by certain mesne conveyances from *Deborah King*, the first devisee; and the defendant claimed to hold them under the will as heir in tail. The court decided that an estate tail was not created by the will, but an executory devise; and as the devise over never took effect, the sale by *Deborah King*, the first devisee, passed the fee, which was afterwards vested in the husband; his seisin was thus proved, and the plaintiff recovered.

The third case is that of *Jackson v. Blanshan*, before cited, in which *Kent C. J.* examined most of the English decisions relating to the subject. In that case the testator had six children, and de-

vised his estate to them in fee adding, "but if any one or more of my abovenamed children should die before they arrive to full age, or without lawful issue, that then his, her or their part or share of my estate shall devolve upon and be equally divided among the rest of my surviving children and their heirs and assigns forever." Four of the children died at full age, in the life time of *Matthew* and *Brachie*, (the other two,) each leaving issue. *Matthew* died after the age of twenty one years without lawful issue. *Brachie* and her husband were the lessors of the plaintiff; and the defendant held under a person to whom *Matthew* had mortgaged it some years before his death. The question reserved was whether the lessors had any and what interest in the premises devised to *Matthew* in the will. The Chief Justice says, "*Matthew*, one of the sons, died, without lawful issue, after he was of full age, and after he had parted with the estate by a title, under which the defendant now holds, leaving *Brachie* one of the lessors, as the only surviving child of the testator. It is settled that the devise to *Matthew* became absolute, as soon as he arrived at the age of twenty one, though he had no lawful issue; and the devise over did not take effect." In that case the plaintiff's lessor was an heir at law of the testator; and if he had been considered as having died intestate as to *Matthew's* part, then the plaintiff would have been entitled to recover. Yet the court decided that there was no intestacy as to any of the property; but that the defendant, who claimed the estate under *Matthew*, had an indefeasable title against the devisee over and the heir at law of the testator. In principle that case is not distinguishable from the one at bar; and there is scarcely any difference in the facts. In both, the first devise, after one of the specified contingencies had taken place, conveyed the estate in fee; in that, the grantee was decided to have the perfect and absolute title; and in the present case, the tenant who is the grantee of *Samuel Sayward*, the first devisee, for the same reason has acquired a good and absolute title to the premises demanded.

We might have multiplied authorities in support of our decision, on the several questions presented by the facts of the case; but we preferred the selection of the most important and leading cases,

deeming them amply sufficient for the purpose. Any thing beyond this would have appeared more like parade than utility.

There must be judgment for the defendant.

ALLEN *vs.* LITTLEFIELD.

A "settler," within the description given in the resolve of 1784, received from the Commonwealth a deed of a hundred acres of land, described as being the land on which he lived, but further described by metes and bounds which excluded a large portion of his actual possession.—It was held that the general language of the deed could not control the particular description, so as to include the whole of his possession; notwithstanding the declared intent of the legislature to quiet the settlers in their possessions.

The resolve of Massachusetts passed *Feb.* 18, 1829, authorizing its land agent to sell such small gores and tracts in Maine as might from time to time come to his knowledge, and evidently appear to belong to the Commonwealth, is sufficiently complied with if the agent knows of the general title of the Commonwealth to the tract sold, without having knowledge of its particular location or quantity.

THIS was a writ of entry on the demandant's own seisin, brought to recover possession of a small parcel of land in *Sanford*.

The premises were part of a larger tract formerly belonging to Massachusetts; by a resolve of which Commonwealth, passed *Feb.* 18, 1829, its land agent was authorized "to sell and convey, by deeds of quitclaim, all such small tracts or gores of land in the State of Maine, from time to time, as shall come to his knowledge, for the benefit of the two States of Massachusetts and Maine; provided it appears evident the same are owned by said States." And by a resolve of Maine passed *March* 3, 1829, the land agent of this State was authorized to join in conveyances with the agent of Massachusetts. On the 6th day of *July*, 1829, the two agents by deed conveyed to the demandant "all the right, title, interest and estate, be it what it may, which the said State and Commonwealth have in and to a certain tract or tracts of land in said town of *Sanford*, said

to contain about 12 acres, be the same more or less—without any recourse to either for any defect of title, or deficiency in quantity whatever."

The tenant proved that during the war of the revolution one *Jedediah Low* entered as a "settler" into a tract of land including the demanded premises, surrounding it by what was termed a "possession-fence," not sufficient to restrain cattle; and built a house upon it, in which he dwelt. In *January*, 1785, he received a deed from from the agents of Massachusetts, conveying to him "a tract of land in *Sanford* described as "one hundred acres of land, be the same more or less, lying and being in said county of *York*, where he now lives, bounded," &c.—proceeding to a more particular description by metes and bounds, by which the demanded premises were not included. *Low* conveyed his land, by the same description, in *June*, 1785, to another person; who in 1792, sold it in the same manner to the tenant. Soon after his purchase, the tenant caused the land to be surveyed according to *Low's* possession and claim; and ever since continued to claim accordingly; but suffered *Low's* old fence to decay, and every vestige of it to be effaced, without renewal.

It appeared that about the same time when the deed was given to *Low*, the agents of Massachusetts gave deeds to one or two other settlers on the same tract, conveying lots of a hundred acres; and that these lots, and that of the tenant, when laid out by the descriptions in their deeds, would interfere largely with each other; but that the settlers had so adjusted their actual possessions as not to interfere, by extending them into the adjoining land.

On the part of the tenant it was contended that the deed from the Commonwealth to *Low* ought to be so construed as to pass to him the title to all the land he then claimed as above mentioned, although not included by the metes and bounds stated in the deed. It was also insisted that unless the demandant proved that the demanded premises had come to the knowledge of the land agent of Massachusetts, and had been made evidently to appear to him to be owned by the two States before he joined in the deed conveying the

same, he was not authorised to convey, and nothing passed by that deed.

But *Parris J.* before whom the cause was tried, instructed the jury that *Low* could take by his deed no more land than was included by the particular metes and bounds therein given; and that title passed to the demandant by the deed to him, though the land agent had no knowledge, either before or at its execution, that the Commonwealth owned the particular tract demanded.

In the course of the trial the tenant offered the deposition of *George W. Coffin*, Esq. the land agent of Massachusetts, to prove that he had no such knowledge at that time; to the admission of which the demandant objected; but the objection was overruled. He testified that he believed the Commonwealth owned some land in *Sanford*, which he intended to convey; but that he thought it was differently located.

The jury returned a verdict for the demandant; and under particular instructions upon the point they found that Mr. *Coffin*, at the time he executed the deed, did not know that Massachusetts owned the particular parcel of land in controversy. And the verdict was taken subject to the opinion of the Court upon the question whether the demandant was entitled to recover.

E. Shepley, for the tenant, argued that it could never have been the intention of the Commonwealth to grant the same land to different persons; nor to create conflicting titles; but that its object evidently was to quiet the settlers in their several possessions, by deeds which should have that effect. Such was well known to be the general policy of the government. And to give it proper effect the deed to *Low* should be so construed as to include his possession, as part of the "hundred acres where he lived;" rejecting the parts of the description inconsistent with it. *Worthington v. Hylyer*, 4 *Mass.* 196; 2 *Wheat.* 321.

The agent of Massachusetts, he insisted, had no right to convey, but upon two conditions, both precedent in their nature;—viz. first, that the particular tract should come to his knowledge; without which he might be imposed upon in the price; and secondly, that it should evidently appear that the Commonwealth owned the land;

without which, embarrassments might be created by improper or unnecessary conveyances. *Banorgee v. Hovey*, 5 *Mass.* 11; 15 *Johns.* 1; *Stanwood v. Pierce*, 7 *Mass.* 460; *Albee v. Ward*, 8 *Mass.* 84; *United States v. Hayward*, 2 *Gal.* 485; *Tappan v. United States*, *ib.* 393; *United States v. Lyman*, *ib.* 504.

To the admissibility of *Coffin's* deposition, he cited *Fowle v. Bigelow*, 10 *Mass.* 384; *Leland v. Stone*, *ib.* 459; *Emery v. Chase*, 5 *Greenl.* 232.

J. Holmes and *D. Goodenow*, for the demandant.

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

Whatever may have been *Low's* possession, under whom the tenant claims, through certain mesne conveyances, the deed he received from the agents of the Commonwealth of Massachusets, did not include the demanded premises. Had the transactions, which took place between them, related to the case of a proprietor other than the Commonwealth, *Low's* title to land commencing by disseisin not included in his deed, ought to be regarded as waived and abandoned. But no such claim could ever have affected the title of the Commonwealth. The general object of the legislature, indicated by the resolves upon which the tenant relies, was to quiet the settlers in their possessions; and it is insisted that the particular description in *Low's* deed, ought to yield to this general intent. If the particular description conflicted with the general intent expressed in the deed; as for instance if *Low* had lived upon a different lot from that described; there might be something to sustain this argument. His deed conveyed to him one hundred acres of land where he then lived, described by lines clear, definite, and without ambiguity; and he lived upon the lot so described. How it happened that these lines varied from his actual possession does not appear; but his acceptance of the deed shows that it was satisfactory to him at the time; and indeed he had great reason to be satisfied with the bounty of the government, extended to him not as a matter of right, but of favor. If the committee of the Commonwealth subsequently made

other grants conflicting with his, it could have no effect either to impair, enlarge, or vary the limits of his grant, which were distinctly and clearly expressed.

Without determining how far it was competent for the land agent of Massachusetts to testify what land he intended to convey to the demandant, we are of opinion that facts enough appear to sustain his authority, and that of the land agent of Maine. It came to their knowledge, and was evident to them, that the two States owned a small tract or gore of land in *Sanford*. And what appeared evident to them, has proved to be true in fact. This presents a case falling within the terms of the resolves upon which they acted, whether they were advised or not as to the actual location, or even if they believed it located in a different part of the town. They were induced to believe that the two States owned a small tract somewhere in that town, and they conveyed by terms, which would carry the land, wherever it might be found.

Judgment on the verdict.

FROST *vs.* BUTLER.

An estate was granted upon condition that the grantor should be permitted to occupy part of the premises, and that the grantee should cultivate the land in a husbandlike manner, and render to the grantor half the produce; provide him with fuel; and pay him certain sums of money. And they both occupied the land accordingly. The money being unpaid, the grantor notified the grantee that the condition was broken, and ordered him to quit the premises. But afterwards he received his proportion of the produce actually raised, though the farm was badly managed. The grantee then sold the land, subject to the condition.

Hereupon it was held, that here was a sufficient entry for condition broken:—

That the acceptance of the produce was no waiver of the breach in the non-payment of the money:—

And that this forfeiture was not within the provisions of *Stat.* 1821, *ch.* 50, *sec.* 2, the land not having been granted by way of pledge, by the party seeking relief.

Whether the case of such tenant is within the equity powers vested in this court by *Stat.* 1830, *ch.* 462:—*quære.*

THIS was a writ of entry brought by *Elliot Frost*, upon his own seisin. At the trial before *Parris J.* the original title of the demandant, and ouster by the tenant were admitted. It appeared that in 1827, the demandant conveyed the premises to *William Frost*, to hold to him, his heirs and assigns, upon these conditions expressed in the deed;—that he should pay to the grantor certain sums of money at divers times, according to the tenor of certain promissory notes then given; that he should cultivate the premises in a good and husbandlike manner during the life of the grantor, and deliver to him annually one half of the produce; that he should permit the grantor to occupy certain parts of the mansion house; should provide him at all times with suitable fuel, ready cut, at the door; and should take care of his neat stock, &c.; and concluding that if the grantee his heirs, executors or administrators, should fail to perform any of the conditions in the deed, it should be void, and the estate revert to the grantor in as ample a manner as if the deed had never been made. On the 5th day of *December* 1829, *William Frost* conveyed the premises to the tenant, subject to the conditions con-

tained in the deed to himself, which he covenanted that he had performed, up to that time; the tenant engaging to save him harmless from the notes he had given for the monies due to the demandant, which remained unpaid.

The demandant insisted that by this conveyance to the tenant, the estate was forfeited, the services which *William Frost*, the original grantee, was bound, by the terms of the grant, to perform, being wholly of a personal character. But this point the judge overruled.

It was proved or admitted that the demandant had received his proportion of the annual produce of the farm; and the principal questions of fact raised in the trial were upon the performance of the condition to manage and cultivate the farm in a good and husbandlike manner, and to provide suitable fuel; upon which questions much testimony was given on both sides.

The tenant contended that though in these respects there had not been a perfect performance on his part, yet the demandant having received his share of the produce actually raised on the farm, and consumed the fuel actually provided, and received the benefit of the services actually rendered; this amounted to a waiver of the forfeiture; leaving to him only his remedy for damages, upon the contract.

On the part of the demandant it was proved that in *June*, 1828, he demanded of *William Frost* payment of the first note mentioned in the deed, which was then due; who replied that he could not pay it; whereupon the demandant told him that he had broken the condition, and that he did not wish him to stay any longer. In *April* 1829, the damandant again requested payment of the same note; whereupon *William Frost* produced sundry demands which he had taken up against the demandant, offering them in payment of the note; but the demandant refused to accept them; saying that he had broken the condition, and ordering him to quit the farm. During all this time both parties dwelt on the premises. On the 19th day of *December* 1829, payment of the second note was tendered and refused. It did not appear that the demandant ever made any other entry for condition broken, than as above stated; but he

continued to reside on the premises, from the date of the first conveyance to the time of commencing the present suit.

The jury found for the demandant; and it was admitted that the finding was upon the ground that the farm was not managed, nor the fuel provided, in the manner specified in the deed; and it was also admitted that there was no finding by the jury in relation to the payment of the first note.

And upon the facts above stated, it was agreed by the parties that if, in the opinion of the court, the demandant ought not to retain the verdict, it should be set aside.

J. & E. Shepley argued for the tenant. 1. Taking the whole deed together, it is manifest that a forfeiture of the estate by personal nonperformance, by the grantee, of any of the conditions, was not intended. Many of the services no one man could ever perform; all of them might remain to be performed after the death of the grantee; and provision is made for this contingency by the introduction of his heirs, executors and administrators, at the close of the condition. Now the feoffee of the grantee may always perform a condition, to save his estate, though the grantee alone is named in the deed. *Litt. sec.* 336, 337; *Co. Litt.* 207, *b.*; *Church v. Brown*, 15 *Ves.* 263; *Cruise's Dig. tit.* 13, *ch.* 1, *sec.* 24.

2. As the jury have found nothing against the tenant respecting the nonpayment of the money, there is no evidence of any breach of this condition. And as to the other conditions, there has been no entry for any breach of these, nor any evidence of an intent to claim on this account.

3. If there has been a forfeiture, it has been waived by subsequent acceptance of performance by the grantee. If the grantor intended to insist on a forfeiture, he should no longer have recognized the relation which had subsisted between them; and having received the benefit of the grantee's labors under the deed, he cannot now repudiate that relation; but must resort to the covenants, for such they are, in the deed itself, for recompense in damages. *Co. Litt.* 211, *b.*; *Goodright v. Davids*, *Cowp.* 803; 2 *Com. Dig. Condition P.*; *Fludyer v. Cochran*, 12 *Ves.* 27; 1 *Mad. Chan.* 310; *Fleming v. Gilbert*, 3 *Johns.* 528; 2 *Com. Dig. Covenant*

A. 2; *Goodwin v. Gilbert*, 9 *Mass.* 510; *Atto. Gen. v. Christ's Hospital*, 3 *Bro. Ch. Ca.* 165.

4. But if there has been a forfeiture, and no waiver, the tenant is entitled to a hearing in equity, under *Stat.* 1821, *ch.* 50, *sec.* 2. For this is a case of "forfeiture annexed to articles of agreement in a specialty," within the words of the statute; or it may be deemed within the just construction of the next following sentence in the act, by supplying the word "or" after the word "condition," or by inserting a comma after the word "estate" in the same line.

Otherwise, proceedings here should be stayed, till relief can be sought in equity. *Stetson v. Dunlap & al. C. C. U. S. Maine*, 1825, *Mss.*; *Cruise's Dig. tit.* 13, *sec.* 32, 33; 2 *Com. Dig. Chancery*, 2 *Q.* 3, 9; *Wadman v. Colcroft*, 10 *Ves.* 67; *Saunders v. Pope*, 12 *Ves.* 282; *Davis v. West*, *ib.* 475; *Hill v. Barclay*, 16 *Ves.* 402; 18 *Ves.* 56, *S. C.*; *Skinner v. White*, 17 *Johns.* 357.

J. Holmes and *D. Goodenow*, for the demandant.

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

Weston J. The original seisin of the demandant and an ouster by the the tenant being admitted, the demandant is entitled to judgment; unless the tenant has made out a sufficient title on his part. He relies upon the deed made by the demandant to *William Frost*, and by *William Frost* to himself. The former undoubtedly passed the land; but upon certain conditions, upon the non-performance of which the deed was to be void. From the report of the judge, it very distinctly appears, that the grantor demanded of the grantee payment of the first note mentioned in the condition of the deed, and that the grantor did not make payment according to the condition. In regard to this fact, which is reported to have been proved, there does not appear to be any opposing or conflicting testimony. It further appears that the jury found for the demandant upon other breaches, and that this fact was not settled or established by their verdict. The question submitted to the court is, whether, upon the

facts, the demandant is entitled to retain his verdict. The failure of the grantee to pay the first note mentioned in the condition, is one of the facts which must necessarily be considered by the court. It further appears that the grantee did not manage, till, cultivate, and improve the farm in an husbandlike manner; and did not provide suitable fire wood for the grantor; according to the conditions of his deed.

Did the demandant, prior to the bringing of this action, enter for condition broken? The case finds that from the date of the deed to the commencement of the action, the demandant resided upon the premises. By the general principles of law, an estate of freehold, which has once vested, cannot cease or be defeated by the nonperformance of conditions, unless upon entry for condition broken. But to this rule there are some exceptions. One is, where the party entitled to the benefit of the condition is in actual possession. *Co. Litt.* 218, *a.* But there being in this case a concurrent possession, it was doubtless incumbent upon the demandant to notify the grantee that he claimed to hold for condition broken; and this it appears he did at two successive periods, the last time in *April*, 1829, requiring the grantee to quit the place. These notices were both preceded by a demand of payment of the first note; and it is insisted that the entry or claim to hold was for this breach only, which the jury have not found. The character of the entry must appear; that is, whether it be for condition broken, or for any other purpose; but if a party enter for condition broken, he may doubtless verify his right so to do by proof of any prior breach, whether stated by him or not at the time of his entry. Besides, as has been before stated, we must regard this breach as a fact proved in the case.

It is however urged by the counsel for the tenant that the demandant has waived his entry for condition broken; and that he has by his acts affirmed the continuance of the estate. Had he received the money which the grantee was to pay, there would certainly be ground for this position; for he could have no claim to the money, if he held the estate. This is not pretended; but it does appear that prior to the action, the demandant declined to receive payment

of the second note, which was tendered to him. The ground of waiver relied upon is, that he continued to receive his proportion of the produce; but this is what he was entitled to as owner of the farm, and is entirely consistent with his right to hold for condition broken.

But if the demandant has established his legal title, the counsel for the tenant moves the court that a conditional judgment only be rendered in his favor. And he founds this motion upon the second section of the act, for giving remedies in equity, *Stat.* 1821, *ch.* 50. First, upon the ground that this is a cause brought to recover a forfeiture, annexed to articles of agreement in a specialty. Or secondly, for the forfeiture of real estate upon condition. As to the first ground, it is not supported in point of fact. This is not an action to recover a forfeiture annexed to any articles of agreement, but a writ of entry to recover seisin and possession of real estate; so that it is not brought within the language of that branch of the statute. Nor does it appear to us to present a case within its intention or meaning. In the connexion in which it stands, it is manifestly limited to personal actions; for where the forfeiture claimed is of real estate, it is provided for in a distinct clause. Our next inquiry is, whether that clause reaches this case. It is in these words: "or for forfeiture of real estate upon condition, by deed of mortgage, or bargain and sale with defeasance." It has been ingeniously contended by the counsel for the tenant, that if the word "or" is supplied after the word condition, or a comma after estate, the provisions of the section, upon a just construction, would extend to all estates, which may be forfeited or defeated by the nonperformance of conditions. This position may be true; but we have no authority for the emendation. Upon comparing this section with the corresponding one in the laws of Massachusetts, from which it was derived, a slight alteration in the punctuation may be perceived, but none which varies the sense, or requires a different construction. All estates upon condition do not fall within the range of the remedies in equity given by the statute; but such only as arise from deeds of mortgage, or of bargain and sale with defeasance. These are conveyances by way of pledge, to secure collaterally the pay-

ment of money, or the performance of some other duty or obligation on the part of the grantor. He from whom the estate moves is to be restored to it, upon the performance of conditions. In the case before us the grantee pledged no estate of his, but the grantor conveyed his estate to the grantee to be held by him, if he fulfilled certain conditions; if he did not, the deed was to be void and the estate to be resumed by the grantor. The deed under consideration therefore not being a deed of mortgage, or of bargain and sale with defeasance, the motion of the tenant that a conditional judgment only be rendered, must be overruled.

The counsel for the tenant lastly moves, if the court should be against him upon the other points taken, that the court would stay proceedings, that the tenant may bring a bill in equity to be relieved from the conditions of the deed, upon the payment of a reasonable compensation. If the tenant has a fair claim for such relief, and the court in the exercise of its equity jurisdiction, could and would grant it, the motion ought to prevail. The authorities cited for the tenant do sustain the position, that a court of chancery has often interposed to relieve against forfeitures and penalties arising from the breach of conditions, wherever a due compensation and indemnity can be made. And this relief has latterly been extended even to conditions precedent. There is much reason to contend that the case before us is one, where an adequate compensation in damages might be allowed. But the equity powers of this court, although much extended, are still not general, but limited. In addition to those given in the second section of the statute before commented upon, this court has chancery jurisdiction in all cases of contract in writing, where a party claims the specific performance of the same, and in all cases of fraud, trust, accident or mistake, where there is not a plain, adequate, and sufficient remedy at common law. But the tenant does not claim the specific performance of a contract in writing, or the execution of a trust; nor does he aver that he has been circumvented by fraud, or that he has suffered, or is in danger of suffering, from accident or mistake.

These are our present impressions and they are sufficient to induce us to overrule the motion. It is to be understood however

that we do not give a definitive opinion upon this point, but reserve it for future consideration if the counsel for the tenant should think proper to bring a bill in equity.

Judgment on the verdict.

HOLMES *vs.* FERNALD.

In real actions, no lien can be created by attachment of property.

THIS was a writ of entry, in which both parties claimed title under the extent of their several executions against *William Linscott*, made on the same day, and duly registered and returned. The land was attached in each of their original actions against *Linscott;* of which the tenant's was the prior attachment, but his action was a writ of entry; and the demandant's was an action of *assumpsit.* The only question, therefore, was whether property was liable to attachment in a real action.

J. Holmes, pro se, contended that it was not; because the statutes created this lien only for the security of the *debt* to be recovered, and incidentally for the costs; and cited *Stat.* 1821, *ch.* 60, *sec.* 1; 5 *Dane's Abr. ch.* 175, *art.* 8, *sec.* 3, 6.

J. & E. Shepley, for the tenant, argued from the several statutory provisions that it was the intent of the legislature that the property of the defendant should be attached in all cases. They have given the plaintiff the right to proceed either by *capias* or original summons; and speak of the service of the "writ or summons" without discrimination. The provision introduced in the case of executors and administrators, by our *Stat.* 1821, *ch.* 52, that process against them should run only against the goods and estate of the deceased in their hands, proceeds wholly on the assumption that property is attachable by an original summons, since they could be sued in no other mode. *Cook v. Gibbs,* 3 *Mass.* 197. In all real actions the practice has been to proceed by *capias,* attachment, or original sum-

mons, at the demandant's election. *Stearns on real actions*, 92, 94, 200. And our *habere facias*, provides for the satisfaction of damages and costs out of the tenant's estate. *Stat.* 1821, *ch.* 63, *sec.* 2.

But if the provisions of the statutes are to receive the strict construction contended for, then no lien is created for the security of costs; and therefore the demandant must fail, his extent including both debt and costs.

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

MELLEN C. J. In this case it appears that both parties extended their executions on the demanded premises on the same day and within thirty days after judgment; and the proceedings were seasonably recorded. Both parties had also caused the premises to be attached on the mesne process. The demandant's original action was *assumpsit*, and the tenant's original action against the same person was entry on disseisin; and the only question in the present action is whether any legal lien on the land was created by that attachment and the officer's return of it. If there was, then the tenant is entitled to judgment; if not, then the levy of the demandant vested the title in him from the day on which his attachment was made, and it is thus the paramount title.

By the colonial statute of *October*, 1650, it was ordered that "henceforth all goods attached upon any action, shall not be released upon the appearance of the party or judgment, but shall stand engaged until the judgment, or the execution granted upon the said judgment be discharged." By the colonial statute of *May*, 1659, it is provided "that henceforth in all civil procedings, except where the defendant is a stranger, where execution is not taken out and executed within one month after that judgment is granted, all such attachments, whether on persons or estates, with sureties, shall be released and void in law." By the provincial statute of 13 *Will.* 3, it was enacted in these words: "Nor shall any goods or other estate, attached to respond the judgment that shall be recovered on suit brought, be released or discharged from such arrest until the

expiration of thirty days next after rendering of judgment for the plaintiff in such suit." In the several provisions above quoted there appears to be no distinction as to the nature of the action in which the attachment created and continued a lien on the property specially attached; and these provisions, or at least the principle they had established, continued as the law on the subject until the year 1784, when there was a general revision of ancient statutes. The provision in the act of Massachusetts as to the attachment of property on mesne process in civil actions is in these words: "Be it enacted, &c. that all goods and estate attached upon mesne process for the security of the debt or damages sued for, shall be held for the space of thirty days after final judgment to be taken in execution." The first section of *ch.* 60, of our revised statutes, contains a provision in precisely the same language; and in terms does not extend to any but personal actions; because, in such actions only, are debt or damages recovered. This is an evident limitation imposed upon the generality of the language employed in the colonial and provincial statutes relating to the same subject; and why does not this indicate the intention of the legislature of Massachusetts, and that of this State, to have been, that no special attachment of goods or estate was proper in a real action, and that in such cases no lien should be created by any such attachment? There is no other statute touching the subject by which in a real action a lien can be created in the above mode. There is a total absence of all other legislation on the point. This single fact would seem to settle the question at once, as the lien of an attachment is unknown to the common law. But though an original summons is the proper and usual process in the institution of real actions, still, it is said that practice in Massachusetts, at least, has sanctioned the correctness of making special attachments in real actions for the purpose of securing costs in case of a recovery; and that the opinion of Mr. *Stearns* to that effect, in his valuable treatise on real actions, confirms the legality of the proceeding. He cites no decisions and refers to no authorities. No doubt, as he states, both modes of process have been adopted; and, probably, because the change of language, in the act of 1784, was not particularly regarded. Such might have been the origin of

the practice. But it is surely more safe and proper for a court to be regulated by the clear language of our own statute, than by a usage in Massachusetts which seems contrary to, or at least unwarranted by any law of that Commonwealth. It is further said that the form of an *habere facias*, as given in the 2d *sec.* of *ch.* 63, of our revised statutes, commands the officer to satisfy the costs of suit out of the tenant's property; true, because the demandant is the prevailing party; but this has no connexion with the question presented in this case. It is true that ever since the year 1784, property specially attached in personal actions has been considered holden for thirty days for the satisfaction of the costs of suit as well as the debt or damages recovered; and it is believed that this opinion and practice are sanctioned by a fair construction of the language of our statute. Because a debt due or damages to which a man may be entitled for an injury done him, cannot by law be secured and recovered without incurring a bill of costs; and the statute may be properly considered as giving him security not only for the obtainment of the end, but for the necessary expense in the employment of the appropriate means to obtain it. For in many cases the costs necessarily expended in obtaining the debt or damage sued for, exceed such debt or damage. But this provision does not extend to real actions. This construction will not disturb the levy of any execution, where lands have been appraised and set off to satisfy costs as well as damage, where a special attachment was duly made on mesne process. The conclusion is, that in the opinion of a majority of the court, the demandant is entitled to

Judgment for the premises demanded.

Frost *vs.* Shapleigh.

In an action of replevin against a sheriff, for goods attached by him under a writ, which had never been returned, the suit having been settled by the parties, it was held that he might prove the attachment by parol.

In replevin of certain cattle, the defendant, who was a deputy sheriff, pleaded property in a stranger; and at the trial, before *Parris J.* he produced certain writs of attachment against the stranger, on which no returns had been made; and the return-days of which were long past; and proved that after service of the writs, and before the return-day, those suits had been settled by the parties. He then offered parol evidence to show that the cattle in question were attached by him by virtue of those writs, and that therefore he represented *bona fide* creditors of the debtor, under whom the present plaintiff claimed the cattle by an alleged sale, which the defendant would impeach as fraudulent. This evidence was objected to, on the ground that the officer's return was the best evidence of the fact; which it was his duty to have made; and to the benefit of which all parties in interest were entitled. But the judge overruled the objection; and reserved the point for the consideration of the court; a verdict being returned for the defendant.

And the Court held that the evidence was properly admitted, the writs having never been returned, to become matter of record; and that the officer's omission to make return was excused by the act of the parties in suppressing the suits.

D. Goodenow, for the plaintiff.

J. & E. Shepley, for the defendant.

HAYES, *Judge, &c. vs.* SEAVER.

Real estate devised, is not liable to contribute to the payment of legacies, on a deficiency of personal assets, unless specially charged.

In an action against the surety in an executor's bond, he is not precluded, by a previous judgment against the executor in a suit by a legatee, from showing a deficiency of assets.

THIS was an action of debt on a bond given in *March*, 1817, by *Jacob M. Currier* and others, as executors of the last will and testament of *Micajah Currier;* the defendant being one of the sureties. The suit was brought for the benefit of *Ruth Griffen*, to whom the testator had bequeathed a legacy of a thousand dollars; and it came before the court upon a case stated by the parties.

It appeared that all the real estate of the testator was specifically devised, free of charge; and that the devisees had entered into possession. By the executors' account of administration, settled in 1829, the whole personal estate was accounted for, being $11,331, 84; and the executors were allowed the amount of their payments for debts and legacies, being $12,537,85; leaving a balance of $1206,01, due to them. All the debts and legacies of specific articles had been paid. The whole value of all the legacies was $7600; and the amount paid was $6556,11; leaving $1043,89, unpaid; which added to the amount due to the executors, left a deficiency of $2249,90, in the assets.

The executors had paid Mrs. *Griffen* part of her legacy; and at *April* term, 1828, she obtained judgment against them in this court, for the residue, with interest and costs; which judgment, in 1829, was revived by *scire facias* against the surviving executors, one of them having deceased.

During the pendency of the present suit, the executors paid her a further sum; which it was agreed was more than her rateable proportion of the personal estate, if the devisees were not bound to contribute to the deficiency; otherwise, it was less.

It was further agreed that the inventory was not returned within

three months, according to the condition of the bond; being delayed nearly five months after the issuing of the letters testamentary.

Hereupon the parties submitted the cause to the decision of the court, upon the question whether the plaintiff was entitled to any judgment for the benefit of Mrs. *Griffen;* and if so, whether the defendant was entitled to be heard in chancery.

J. Holmes, for the plaintiff, contended that the defendant was not entitled to be heard in chancery, any farther than for an allowance of the sums actually paid. He is precluded, by the judgment against the executors, from denying the existence of assets; it being rendered on default, and therefore equivalent to a judgment against them on a replication of assets to a plea of *plene administravit. Shepley v. Farnsworth*, 4 *Mass.* 632; *Heath v. Gay*, 10 *Mass.* 371; *Paine v. Gill*, 13 *Mass.* 365; *Sturgis v. Reed*, 2 *Greenl.* 109; *Ramsdell v. Creasy*, 10 *Mass.* 170; *Brigden v. Cheever*, *ib.* 460; *Clark v. May*, 11 *Mass.* 233; *Shepley's case*, 8 *Coke* 184; *Richmond v. Allen*, 7 *Mass.* 254; *Earle v. Hinton*, 2 *Stra.* 732.

And enough appears in this case to show gross negligence in the executors, they having suffered nearly twelve years to elapse before a final settlement of their accounts was made in the Probate office. *Foster v. Abbot*, 1 *Mass.* 234.

E. Shepley and *Burleigh*, for the defendant, resisted the action on the ground that the real estate was not liable to contribution, being specifically devised; 8 *Pick.* 478; 7 *Ves.* 399; 2 *Bl. Com.* 512; *Barton v. Cook*, 5 *Ves.* 461; *Roberts v. Pocock*, 4 *Ves.* 150; and that therefore the legatee had already received more than her proportion. The deficiency was not discovered till the settlement of the administration account; which was after the original judgment against the executors, and therefore may be shown either in a *scire facias*, or an action on the bond. *Colman v. Hall*, 12 *Mass.* 570; *Ruggles v. Sherman*, 14 *Johns.* 446; *Platt v. Robbins*, 1 *Johns. Chan.* 276; *Foxcroft v. Nevens*, 4 *Greenl.* 72; 2 *Vern.* 205; *Walker v. Bradley*, 3 *Pick.* 261.

PARRIS J. delivered the opinion of the Court.

It is a familiar principle that specific legatees, although bound, under certain circumstances, to contribute towards the payment of debts, are not bound to contribute towards the payment of other legacies. The real estate, in this case, is all specifically devised, and not being charged with the payment of legacies, nor necessary for the payment of debts, it passed absolutely, by the will, to the devisees, immediately on the death of the testator; and there being personal property sufficient for the payment of the debts, the executor has no authority to sell it, or in any way disturb the devisees' possession under the will.

But it is contended that the defendant is now precluded from availing himself of his defence, inasmuch as a judgment has been rendered against the executors, his principals, for the full amount of the legacy, upon which judgment, one of the executors having deceased, a *scire facias* was issued against the surviving executors, and a judgment rendered thereon, also, for the whole legacy. As a general proposition, perhaps it may be admitted that if the executor neglect to plead *nulla bona*, or *plene administravit*, but suffer judgment to be rendered against him, he shall be bound by the judgment, and shall not afterwards be permitted, in avoidance of such judgment, to deny assets, although he might have done it under the proper plea. But to this general proposition there are exceptions. As in the case of insolvent estates, where the insolvency is established subsequent to the rendition of the judgment against the goods and estate of the deceased in the hands of the administrator; on *scire facias* suggesting waste and praying for execution against the administrator *de bonis propriis*, the insolvency may be shown in bar of the execution, notwithstanding the judgment. *Coleman v. Hall*, 12 *Mass.* 570.

In this case, it may be true, as contended, that the executors themselves, having been defaulted in the original suit, would not now be permitted to deny assets. But we do not admit that a judgment thus rendered against the principal is equally binding upon the surety, even if it had been rendered, either originally or on *scire facias*,

de bonis propriis. Such, however, is not the case here. The original judgment was against the goods and estate of the intestate in the hands of the executors. At that time a deficiency of assets had not been ascertained. Upon the death of one of the executors *scire facias* was issued to revive the old judgment, not to obtain an execution *de bonis propriis.* The old judgment was revived against the goods and estate of the testator in the hands and possession of the defendant's principals.

Although the surviving executors had knowledge previous to the judgment on the *scire facias* that there was not personal property sufficient to pay Mrs. *Griffen's* legacy, and might have shown that fact in defence, yet their neglecting so to do, however it might prejudice them, ought not to preclude the defendant, their surety, from showing it. He was not a party to any of the previous proceedings, and consequently had no opportunity to show it. He is now, for the first time, a party in court; and claiming the right to prove that the plaintiff in interest has suffered nothing by any neglect of the executors; that she has received from the estate even more than she was by law entitled to; it must be a severe principle that would preclude him from the opportunity of doing so.

It is clear that the executors suffered a judgment to be rendered against them, which they might have successfully resisted; and inasmuch as the defendant, their surety, was not a party, he ought not to be barred by that judgment thus negligently or collusively suffered by his principals, even were it *de bonis propriis*, but may now be permitted to avail himself of the same matter in his defence which they might have urged against the original suit or the *scire facias*. *Foxcroft v. Nevens*, 4 *Greenl.* 72; *Dawes v. Shed*, 15 *Mass.* 6; *Gookin v. Sanborn*, 3 *N. Hamp. Rep.* 491; *Tarbell v. Whiting*, 5 *New Hamp. Rep.* 63.

We are all of opinion that the real estate, having been specifically devised, is not holden to contribute to the payment of Mrs. *Griffen's* legacy; and that the defendant is not precluded, by reason of any of the previous proceedings appearing in the case, from showing that his principals have no assets wherewith to satisfy the legacy which this suit is brought to recover.

BRINLEY *& al. vs.* SPRING.

It is not against the policy or rules of the law, that an insolvent debtor should assign all his property to secure a part of his creditors :—

Nor that the assignment should be by way of mortgage, with a stipulation that the mortgagor should retain possession of the property, changing that which is personal by manufacturing and selling; and that such possession should continue for a length of time beyond the day when the money becomes due;—provided such possession is not inconsistent with the security of the mortgagee; and there be not mingled in the contract any intention to delay or defraud other creditors, or to withhold the property from them beyond what may be necessary for the mortgagee's protection.

The length of time for which such possession is to continue, may be so great as to afford evidence, *per se*, of fraudulent intent.

It is not essential to the validity of a mortgage of personal property, that it should contain a schedule or particular enumeration and valuation of the goods; if it be made without fraud, and sufficiently indicate the goods intended to be mortgaged.

The delivery of the deed of transfer of a ship at sea, passes the title to the vendee, subject only to be defeated by his negligence in not taking possession of her within a reasonable time after her return to port.

The negligence in that case must be such as to afford ground for the presumption of fraud.

Should such vessel arrive at another port, notice of the sale, forwarded by the purchaser to the captain, would seem to be equivalent to taking possession.

THIS was an action of trespass, against the sheriff, for taking and carrying away the plaintiffs' schooner *Factor*, on the 6th day of *May* 1830; which the defendant justified under divers writs of attachment in actions of *assumpsit*, against the *Saco Manufacturing Company*, served by *Albra Wadleigh*, one of his deputies.

In a case stated by the parties it was agreed that the schooner was built in 1827, by *Robert Rogers*, who was general agent for the *Saco Manufacturing Company*, and for its use, with the funds of the company in his hands. The accounts of the building and employment of the vessel were kept on the company's books, in the same manner as its other transactions, including her repairs and earnings, which latter were always received by the company. On

the 20th day of *June*, 1827, when she was completed and ready for use, *Rogers* gave to the company a written memorandum, stating that in consideration that the company had agreed to permit him to take to his own use the schooner built with its funds, he promised to pay the company therefor the amount of all bills and expenditures upon her, or to account for her earnings and convey her as the company should direct, on demand. She was accordingly enrolled at the custom house, *June* 29, 1827, and furnished with regular documents as the property of *Rogers*.

On the 16th day of *December*, 1829, the company, being largely indebted to sundry banks and individuals, made an assignment and conveyance, in general terms, of all its effects and property whatsoever, to the plaintiffs, by an indenture to which certain banks, being the principal creditors of the company, were parties of the third part, upon the following trust:—"That until default of or in the payment of the principal or interest" of the debts due to the specified creditors, "the trustees shall permit the said company to use, occupy and enjoy all the estate, real and personal, hereby conveyed and transferred to them, and to take the rents and profits thereof, and to sell, dispose of, and apply to its own use at its discretion, all the said personal estate, except the machinery, (no part whereof shall be sold or disposed of by the said company without the consent of the trustees,) without molestation or hindrance, but only according to the usual course of the business of cotton and iron manufacture; unless the trustees shall be of opinion that the safety of the claims of the said parties of the third part requires them to enter upon and take actual possession of the said granted premises; in which case" they "shall have the right, and it shall be their duty to take into their possession all the said estate, real and personal, and all personal estate which may hereafter be acquired or purchased by said company, and to make sale and dispose of the same in such way and manner as they shall be directed by said parties of the third part;" &c. "and they shall also collect all the debts and *choses in action*, and shall pay over and distribute the proceeds," &c. to the creditors; accounting for the surplus, if any, to the company. In the same indenture it was further provided that the trustees should have free

access to the company's books, papers and manufactories, and receive a full account and report from time to time of its proceedings; and that any neglect, obstruction or refusal herein, by the company or its officers should be a sufficient cause and justification to the trustees to sequester the property. It was further agreed that the creditors might use their own discretion respecting the collection of such of the assigned notes as were given to the company for shares in its capital stock, or for debts originally due to the corporation; and might also enforce payment against the indorsers or guarantors of the company's notes held by said creditors, unless such indorsers or guarantors who were to become parties of the fourth part, should thereby consent to continue responsible as before, till the trustees should have made a final disposition of the property, but not exceeding the term of five years. It was also agreed that when the trustees should deem it necessary to take actual possession of the property assigned, they should also have the right to take possession of all the notes, books, accounts, and all other property which the company might have acquired subsequent to the assignment, and apply the proceeds thereof to the purposes of the assignment, first paying the debts created in the purchase or manufacture of the same. And the company stipulated to complete the machinery then in progress, and to keep the factories insured against fire, in such amount as the trustees should direct. But the indenture was upon condition that if the debts due to the creditors, parties of the third part, should be paid by the company in five years, the conveyance should become void, &c. This assignment was duly recorded in the county registry.

On the 24th day of *February*, 1830, the trustees, under this conveyance, entered and took possession of the property described therein, situated in *Boston* and *Saco;* the factories having on the 21st of *February* been consumed by fire. And on the 25th day of the same month, *Rogers*, by a bill of sale of that date, conveyed the vessel to the plaintiffs; in whose name she was regularly enrolled at the custom house, *May* 8, 1830.

At the date of the indenture, the vessel was at sea, out of the limits of the United States, under the command of one *Hill;* who

arrived with her at *New York*, being her first American port, in *March* or *April* following. On the 24th day of *April*, as soon as intelligence of her arrival reached *Saco*, a letter was sent to the master by *Rogers*, informing him of the assignment, and directing him to deliver over to the trustees any property belonging to the company, in his hands. At the same time a letter with the same intelligence was addressed to him by *Jonathan King*, one of the trustees, acting at *Saco* for the others, directing him, for any further advice in regard to his future proceedings, to confer with the trustees at *Boston;* some of whom might succeed in getting a freight for that city. The captain, however, having sailed under general discretionary orders for the employment of the vessel in freighting business, and being unable to obtain a freight for *Boston*, did not communicate with the trustees there, but sailed directly for *Saco*; at which place she arrived in the evening of *May* 5, 1830. Early the next morning the captain met Mr. *King*, who stated to him that the vessel had been conveyed to the trustees, naming them, in whose behalf he acted; directing him where to moor the vessel; and inquiring if he would take a frieght to *New York*. The captain went on board her again, and returned on shore; after which, about ten o'clock in the forenoon, she was attached. Soon after the attachment, she was removed by the captain to the place directed by Mr. *King;* who, about half an hour after the attachment, came on board, and asserted the title of the plaintiffs, saying she had been conveyed to them on the 24th day of *February*. Upon the change of her papers three days afterwards, *King*, *Rogers* and *Hill* went on board, for the purpose of committing her to *Rogers* as master. Some of the debts, for which she was attached, accrued prior to the conveyance on the 16th day of *December*, 1829.

J. & E. Shepley, for the plaintiffs, maintained the following positions.

1. The legal title to the vessel was in *Rogers*, and was conveyed by him to the plaintiffs; notwithstanding any equitable claims of the corporation. For the legal title to a registered ship may well exist in one person, and the equitable in another. *Weston v. Penniman*, 1 *Mason*, 306; 2 *Bl. Com.* 337; 2 *Fonbl. Eq.* 147.

And the assent of the corporation, in the present case, may be presumed in law, without a corporate vote. *Prop'rs of Canal bridge v. Gordon*, 1 *Pick.* 297; *United States bank v. Dadridge*, 12 *Wheat.* 68; *Lincoln & Ken. bank v. Richardson*, 1 *Greenl.* 81; *Fryeburg canal v. Frye*, 5 *Greenl.* 42; *Kupfer v. S. Parish Augusta*, 12 *Mass.* 185. Even its subsequent assent is binding. *Episc. Char. Soc. v. Episc. Ch. in Dedham*, 1 *Pick.* 372; *Emerson v. Prov. Hat Manuf. Co.* 12 *Mass.* 237. It is questionable whether the legal title to a vessel at sea can be changed, without written evidence of the transfer. *The Sisters*, 5 *Rob.* 155; *San Jose Indiana*, 2 *Gal.* 284; *Weston v. Penniman*, 1 *Mason*, 317; *Ohl v. Eagle Ins. Co.* 4 *Mason*, 172. If therefore the legal title was in *Rogers*, it is wholly immaterial whether the plaintiffs took possession of the vessel before the attachment, or not.

2. But if the vessel belonged in law to the company, she was conveyed to the plaintiffs by the indenture of *Dec.* 16, 1829; the language of that instrument being sufficiently broad for this purpose. Where a ship at sea is conveyed in mortgage, it is not necessary that the deed should recite her registry; *D'Wolf v. Harris*, 4 *Mason*, 533; and no new registry need be entered at the custom house, till after her return. *United States v. Willing*, 4 *Cranch*, 48. Nor is it a good objection that by that conveyance the mortgagors were to retain possession of the mortgaged property, and did in fact retain it. *Brooks v. Marbury*, 11 *Wheat.* 78; *Reed v. Jewett*, 5 *Greenl.* 96; *Holbrook v. Baker*, *ib.* 309; *Haskell v. Greely*, 3 *Greenl.* 425. Nor, that it was made to secure future advances. *Ward v. Sumner*, 5 *Pick.* 59; *Holbrook v. Baker*, *supra.* The instrument, moreover, was good as an assignment for collateral security, vesting the title in the assignees, notwithstanding the stipulation that the assignees should not take possession except on a contingency, and that the company might sell the property, or substitute other property in its stead. *Conard v. Atlantic Ins. Co.* 1 *Pet.* 386; 4 *Mason*, 533; *Haille v. Smith*, 1 *B. & P.* 563.

3. The title of the plaintiffs was not defeated or impaired by any neglect in taking possession. For possession, to all legal purposes, was taken in *New York*, by notice of their title to the master, to

which he submitted. It was again taken in *Saco*, before the attachment, by directions given to the master, with which he afterwards complied. But no such act was necessary; for the sale of a ship at sea is good on the delivery of the deed of conveyance, unless defeated by unreasonable neglect to take possession, after her return into port in the State to which she belongs. *Atkinson v. Maling*, 2 *D. & E.* 462; *Bissell v. Hopkins*, 3 *Cowen*, 166; *Putnam v. Dutch*, 8 *Mass.* 287; *Badlam v. Tucker*, 1 *Pick.* 389; *Gardiner v. Howland & tr.* 3 *Pick.* 602; *Wheeler v. Sumner*, 4 *Mason*, 183; *D'Wolf v. Harris*, *ib.* 533; *Bholan v. Cleaveland*, 5 *Mason*, 174; *Conard v. Atlantic Ins. Co.* 1 *Pet.* 449; *Dowes v. Cope*, 4 *Bin.* 258.

Mason, for the defendant, in the first place examined the question whether the plaintiffs were entitled to hold the vessel by the indenture of *Dec.* 16, 1829. And he contended that the conveyance was inconsistent in its nature, and *felo de se*. It is a grant of rights over property, with provision that the grantor shall still retain the absolute right for all purposes useful to himself; a provision inconsistent with a sale, mortgage, or pawning; and creating a confusion of rights which the law cannot permit. It is in effect a barrier interposed between the company and the arm of the law; a writ of protection, covering their whole property; leaving the company at liberty, for five years, to manage its vast capital, and to pay what debts it pleases; but effectually shielding it from all legal coercion.

But it is of the very essence of a sale or mortgage, that the vendee or mortgagee has a vested right not dependent on the will or act of the vendor or mortgagor. If the company retains the ownership for all its own purposes, it is owner for the purposes of its creditors.

No imaginable case can operate more severely than the present on the general creditors; all the property of the company being assigned, without provision, in any event, for the excluded creditors. The surplus is to go only to the company. The trustees may pay after contracted debts, out of after acquired property; but existing debts are not to be paid out of any property whatever.

The assignment being of all the property of the company, is a

sufficient indication of its insolvency. And this being its situation, the attempt to continue its operations five years longer, to try its fortune in business at the risk of its present and future creditors, is an experiment not to be countenanced by the law.

As a sale, the conveyance is clearly fraudulent and void, for want of nearly all the requisites of such a contract; there being no inventory or estimate of the property; the transaction being secret; and not accompanied by possession.

Nor can it be supported as a mortgage. It seems to be admitted, by all the authorities, that there can be no valid pawn without possession. In the most ancient case on this subject, *Ryal v. Rolle*, 1 *Atk.* 164, such mortgage, without possession, was held equally fraudulent and void, as in case of an absolute sale; because equally dangerous to the public, and injurious to the rights of private creditors. *Worseley v. Demattos*, 1 *Burr.* 467. The true rule is stated in *Sturdivant v. Ballard*, 9 *Johns.* 337, as applicable both to mortgages and sales; that any agreement, in the deed or otherwise, that the vendor shall retain possession, makes the conveyance fraudulent and void; unless special reasons, consistent with the policy of the law, be shown, and approved by the court. *Cadogan v. Kennett*, *Cowp.* 432; *Estwick v. Caillaud*, 5 *D. & E.* 420; *Machie v. Cairns*, 5 *Cowen*, 547; 2 *Kent's Com.* 405—413. If the fact of the conveyance being a mortgage, lays a foundation for excusing the want of some of the requisites of an absolute sale; yet it cannot be a safe general rule that possession need not attend a mortgage of personal property. No rule could be laid down, better adapted to protect fraudulent conveyances. If a merchant's stock can be secured from the reach of legal process solely by being mortgaged for a *bona fide* debt, no fraudulent absolute conveyance need ever be made.

Without possession, these requisites must attend a valid mortgage of personal property. The property must be of a nature to continue till condition broken, or during the term of credit, without material deterioration. It must not be of perishable property; for otherwise, it would be no valuable security to the creditor, and only a protection against the process of law. It must also be made as pub-

lic and notorious as the case will admit. The mortgagor must retain no right to sell or dispose of it; for this would necessarily destroy the existence of any security to the creditor. An exact inventory or description should be made, to show in certainty what property is conveyed. And the time allowed for the mortgagor to retain possession must not extend beyond the time of payment or performance; nor should this period be so long as to protect or lock up the property an unreasonable time. But in the present case debts were due in thirty days; and the mortgagors were to retain possession for five years; unless the plaintiffs deemed it for the security of the banks to take possession sooner; that is, if other creditors should attach the property. These terms are unreasonable and evidently tend to delay and defraud the other creditors.

It may well be doubted whether all the property of an insolvent can in any case be mortgaged or assigned to secure a part of his debts; leaving him in possession, for his own benefit; or reserving to him any right in the property, or any surplus. The creditors unprovided for have the right to all the residue of the property. Yet here is a secret conveyance, of all the property of an insolvent, for the benefit of only a part of his creditors, locking up the property for an unreasonable time, and securing the surplus to the insolvent. Such a conveyance, no case, it is believed, can be found to sustain. *Harris v Sumner*, 2 *Pick.* 129; *Widgery v. Haskell*, 5 *Mass.* 151; *Burlingame v. Bell*, 16 *Mass.* 324; *Hills v. Elliot*, 12 *Mass.* 31; *Hyslop v. Campbell*, 14 *Johns.* 458; *Riggs v. Murray*, 2 *Johns. Chan.* 582; *Mackie v. Cairns*, 5 *Cowen*, 547; 5 *New Hamp. Rep.* 122.

But here is no proof that any debts were due to the banks for whose benefit this conveyance was made. Neither the recitals in the instrument, nor the schedules annexed, are any evidence of the fact. And without proof of the amount of the debts, and a schedule of the property, no comparison can be made to determine whether the value of the property conveyed is not excessive, and wholly disproportionate to the amount of debts intended to be protected.

2. If the property in the vessel did not pass to the plaintiffs by the indenture, neither did it pass by the bill of sale from *Rogers*.

It was built by the company, with its own money; the accounts were kept in its books; and the company was well entitled to hold property of this description, at least against all strangers. If such an employment of its capital was a violation of its charter, and so afforded ground for a prosecution in the nature of a *quo warranto*, this is an objection open to none but the State.

The memorandum of *June* 20, 1827, did not pass the property to *Rogers*. For it was not an agreement made or ratified by the company. And if it were, yet by its terms *Rogers* was not to become the owner without payment; which he was no where bound to make, and never has made. If there was a contract, he took the other alternative, and accounted for the earnings; and had the vessel been lost, the loss would not have been his, but the company's.

But if the indenture is void, then *Rogers* had no authority to convey to the plaintiffs; for no request of the company is shown, except by the indenture. It then is a conveyance by a trustee, without consideration, and without authority from the *cestui que trust;* to persons not ignorant of the trust. Such a conveyance, upon settled principles, is void.

And whatever rights may have been acquired by the plaintiffs under the indenture, they should have taken possession before the rights of other creditors attached to the vessel. Such possession was contemplated by the indenture, and was indispensably necessary to the perfection of their title. *Bartlett v. Williams*, 1 *Pick.* 295; *Mair v. Glennie*, 4 *Maule & Selw.* 240. Here the letters to the master amounted to nothing; he was not governed by them. His possession of the vessel was under the old owners, and not under the new. And the trustees were dilatory in taking possession. The arrival of the vessel was of sufficient notoriety in such a village as to have come to the knowledge of Mr. *King* the same night. He certainly knew it at six the next morning; yet he did nothing, tending to give notice to creditors and complete the sale, till five hours afterwards; and after the attachment.

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

The question presented for our consideration is, whether at the time of the alleged trespass, viz. on the sixth of *May* 1830, the plaintiffs were or were not the owners of the schooner *Factor*. As evidence of title in them they rely, first, upon a bill of sale of the schooner, executed to them by *Robert Rogers*, on the twenty fifth of *February*, 1830; secondly, upon an indenture, dated *December* sixteenth, 1829, executed by the *Saco Manufacturing Company*, purporting to convey all the property of the said company to the plaintiffs in trust. By the original enrolment of said vessel, dated *June* twenty ninth, 1827, it appeared that she was built and owned by the said *Rogers*. It was proved by the defendant that *Rogers* built the vessel as agent for the *Saco Manufacturing Company*, out of their funds; and her accounts of earnings, repairs and disbursements, were kept in their books; and it is insisted by the defendant that she was originally, and continued to be, up to the time of the attachment, their property. By a memorandum signed by *Rogers*, on the twentieth of *June*, 1827, an agreement on the part of the company is recited, that she was to be his property, upon his paying to them the amount of all her bills and expenditures; otherwise he was to account to the company for her earnings, and to convey her on demand to whomsoever they might direct. It does not appear that he ever paid to the company her bills and expenditures, but it does appear that they received her earnings; and his bill of sale to the plaintiffs, who claimed to be the assignees of the company, was probably made in pursuance of his agreement before mentioned. Notwithstanding these facts however, it is contended by the plaintiffs that she was to be regarded as *Rogers'* property, they having acquiesced in the oath of ownership made by him, which, if untrue, operated a forfeiture of the vessel. And, secondly, if he held in trust for the company, his conveyance would nevertheless bind them. These positions are controverted on the part of the defendant. Without deciding definitively upon this point, it may be useful to examine the plaintiffs' title, derived from the indenture; for if this

is valid, although that derived from *Rogers* may be defective, by reason of the interest of the company, if they took a legal transfer from the company, prior to the attachment, this objection is removed.

Upon inspecting the indenture, it is found broad enough in its terms to carry this property; and unless void by reason of fraud, apparent on the face of the instrument, or as evidence of a contract against the policy of the law, it must have that effect. The counsel for the defendant urges many objections against the validity of the instrument, upon both these grounds. That it is a sweeping conveyance by the company of every species of their property, existing or to be acquired, to the plaintiffs in trust. That the company however were to keep possession, so long as the trustees deemed it safe for them so to do, and to carry on their business as before. That this was secretly done. That the trustees thus became the owners of the property for protection, while the company continued to be so for use. That the law will not suffer this double ownership, by which property to a great amount is attempted to be put by insolvent debtors out of the reach of the ordinary process of law. He admits however that in case of a mortgage, possession may be retained by the mortgagor, although he combats this doctrine as unsafe and inconsistent with the old law, and insists that it should be regarded with jealousy and restricted by construction within reasonable bounds. That in point of time its existence was unreasonable, as it might be extended to five years; and that the use of much of the property, by which it might undergo many transmutations, was inconsistent with the nature of the contract, and the exigency to be provided for. That an assignment of all to pay all is valid, but that this was an assignment of all to pay part, with a reservation of the surplus for the benefit of the assignors. That it is at least fraudulent as a transaction tending to delay creditors; and, lastly, that there is no evidence of the existence of the debts of the *cestui que trust*, set forth and referred to in the indenture. Many of the objections taken by the learned counsel, will be found by a reference to the cases cited by him, to have been adjudged fatal to transfers absolute upon the face of them, and to be inapplicable to cases of

mortgage. It is assumed by him that the company, when they executed the indenture, were insolvent. This does not appear in the case reserved; and it is insisted that they were then possessed of a large amount of property beyond what was necessary for the payment of their debts, and that they afterwards became insolvent by the burning of their factories, and the consequent breaking up of their establishment. We must look at the facts as they existed at the time the indenture was made. It is obvious that what may be fraudulent in an insolvent debtor, may be fair and unexceptionable, when done by a solvent party.

Whether if the question were now open, it ought to be regarded as wise or expedient, that the mortgagor of personal property should be permitted, without vacating the security of the mortgagee, to keep possession of the property, and to use it as his own, might be a subject of grave consideration, from the frauds with which it may be attended. But the law has been otherwise settled; and we can no longer regard it as an open question. *Haskell v. Greely*, 3 *Greenl.* 425; *Reed v. Jewett*, 5 *Greenl.* 96; *Holbrook v. Baker*, *ibid.* 309; *Badlam v. Tucker*, 1 *Pick.* 389. But the law tolerates this course only for the security of the mortgagee, or if in trust, of those he represents. If there is mingled in the contract an intention to delay or defraud other creditors, or to protect the property from them beyond what may be necessary for the security of the mortgagee, the contract will be deemed to be fraudulent and void. If it be in writing, and such unlawful intention be deducible from the instrument itself, it will be void upon the face of it. And it is open to be impeached upon this ground, by evidence *aliunde*. If by its terms it was to continue a great number of years, this might be deemed evidence of a fraudulent intention; but we do not think that a stipulation that it might be kept open for five years, in a concern of this magnitude, especially as it does not appear that the company was insolvent, is to be so regarded. If any attempt at concealment of the mortgage had appeared, it might have afforded evidence of fraud, but we hold it a sufficient answer to the objection of a want of publicity, that the attaching creditor was a stockholder in the company, and that the indenture was recorded.

A part of the funds of the company consisted in notes given by stockholders. For this and other reasons, they found it convenient to take large loans of banks, which were disposed to continue the accommodation, if made secure to their satisfaction. To effect this object principally, the indenture was made. The company were to continue their business. For this purpose the loans were procured, and all their arrangements were made to promote this end, which was the very object and design of their institution. To this, the plaintiffs, and the creditors for whom they were to hold the property in trust, were willing to accede. By the indenture therefore, the plaintiffs were to permit, so long as they deemed it safe, the company to sell their manufactured goods, to purchase the raw materials, and to make all necessary disbursements in the prosecution of their business, but the property in the transit, and in its various changes, was to be holden by the plaintiffs, subject to the same trust. We cannot pronounce a transaction of this kind fraudulent upon the face of it. The instrument being recorded, those who had occasion to deal with the company, may be presumed to have been made acquainted with the condition in which they had placed their property. The contract certainly has no features indicating positive fraud, nor does it appear to us to amount to legal or constructive fraud.

In *D'Wolf v. Harris.* 4 *Mason*, 515, Justice *Story* decided that an assignment of goods at sea and their proceeds, if *bona fide*, is sufficient to transfer the legal title to the goods and also to the proceeds; and that an assignment may, in point of law, be valid of goods and their proceeds, though given by way of mortgage, or as security for future advances. He further decided that the possession and management of vessels and cargoes by the mortgagors, if consistent with the deed, at least until condition broken, is perfectly fair and legal, and does not vitiate the security of the mortgagee.

In *Conard v. The Atlantic Ins. Co.* 1 *Pet.* 449, it is laid down by the court, that in cases where the sale is not absolute but conditional, the want of possession, if consistent with the stipulations of the parties, and *a fortiori*, if flowing directly from them, has never been held to be, *per se*, a badge of fraud. Justice *Story*, by whom the opinion of the court was delivered, speaks with approbation of

the case of *Bissell v. Hopkins*, 3 *Cowen*, 166 ; and he adds that there is appended to this case a learned note by the reporter, " which embodies, in an exact manner, the principal authorities, English as well as American, upon this subject." In that case, and in the elaborate note subjoined, commended as it is by the high authority just cited, will be found an answer to many of the objections made by the counsel for the defendant.

The indenture embraces the whole property of the company ; but if made to secure the mortgagees, unless with the further intention also to cover the property, which does not appear, and which is not to be presumed, it is not illegal. As to a resulting trust in favor of the company, after the objects of the mortgage have been fulfilled, it would have been implied by law, if it had not been expressed, and flows necessarily from the nature of the contract. No evidence of fraud has been produced *aliunde*. It has been insisted that no adequate consideration has been proved. We are called upon to pronounce the indenture fraudulent upon the face of it ; but it being evidence in the case, we must take the consideration, upon which it purports to have been executed, to be true. It was open to be disproved by the defendant, impeaching the instrument upon the ground of fraud. This has not been done or attempted, and the question referred to us is, assuming the averments and recitals in the indenture to be true, is fraud apparent? But if not at liberty to assume their truth, still less, without proof, can we assume their falsity, as the basis of our decision.

Regarding then the indenture as fair and legal, which we feel bound to do, as such it transferred the vessel in question then at sea to the plaintiffs, subject to be defeated by their negligence in not taking possession of her within a reasonable time, after her return to port. *Putnam v. Dutch*, 8 *Mass.* 287 ; *Badlam v. Tucker*, 1 *Pick.* 389 ; *Conard v. Atlantic Ins. Co.* 1 *Pet.* 449. What precise period is embraced under the term, reasonable time, and when that degree of negligence is imputable, by which a transfer of this kind is vacated, has not been distinctly settled, to a day or an hour. In *Gardiner v. Howland*, 2 *Pick.* 602, *C. J. Parker* states, that the transfer of a ship at sea remains valid, unless there have been

such negligence in taking possession, when the ship arrives, as will afford ground for the presumption of fraud. It was there deemed important that the assignees forwarded notice of the transfer to the captain. In *Mair v. Glennie*, 4 *Maule & Selw.* 240, it is deducible from the opinion of the court, that notice of the transfer of the ship, then in controversy, to the captain, would have been equivalent to the taking of possession. The letters, which form part of this case, of *Robert Rogers*, and of *Jonathan King*, one of the plaintiffs, dated *April* twenty fourth, 1830, to the captain, whether distinctly understood by him or not, were doubtless intended to apprize him of the fact that the vessel, of which he was master, had become the property of the plaintiffs. The vessel arrived at *Saco*, her home port, in the evening. Early the next morning the fact of the transfer of the vessel was communicated to the master by *King* in clear and distinct terms, accompanied with directions as to the part of the wharf, at which she should be placed. Before eleven o'clock on the same morning, *King* went on board of the vessel himself, and repeated the same directions. It does not appear to us that the case presents any such negligence on the part of the plaintiffs, as will justify the inference of fraud, or that possession was not taken within a reasonable time.

Judgment for the plaintiffs.

The Saco Manufacturing Company *vs.* Whitney.

W. gave his promissory note to a manufacturing corporation, in consideration of the written engagement of *R.* who signed as agent of the corporation, but without authority, to procure the obligation of the treasurer for certificates of two shares of their capital stock. *R.* obtained the obligation of the treasurer to deliver certificates of two shares on payment of the note; and requested *W.* to call at his house and receive them. Hereupon it was held, that *R.* was personally bound by his engagement;—that this was a sufficient consideration for the note, the promises being mutual and independent;—that no tender of the treasurer's obligation was necessary, the possession of *R.* being the possession of *W.*;—and that the condition of payment of the note, therein inserted, was proper, and not inconsistent with *R's* engagement.

This was an action of *assumpsit* on a promissory note made by the defendant *July* 9, 1828, for 1500 dollars, payable to *Isaac C. Pray*, treasurer of the *Saco* Manufacturing Company, or his order, in eighteen months and grace; and by him indorsed in blank, both in his private capacity, and again with the addition of his office.

The consideration of the note was a written promise in these words:—"*Saco*, *July* 9, 1828. Received of *Aaron Whitney*, his note of hand of this date at eighteen months and grace, for fifteen hundred dollars, payable to *Isaac C. Pray*, treasurer of *Saco* Manufacturing Company, for which I promise his obligation for certificates of two shares of stock in said company. *Robert Rogers*, agent *Saco* Manufacturing Company."

At the trial before *Parris* J. the plaintiffs offered in evidence a vote of the corporation passed *July* 9, 1828, authorizing the directors to increase the shares to a number not exceeding six hundred; and to dispose of the same as they might deem proper, at not less than seven hundred and fifty dollars for a share, on a credit equal to eighteen months without interest. They also proved by parol testimony that the directors did so increase the number of shares; that *Rogers*, on the 13th day of *September*, procured the obligation of Mr. *Pray*, as treasurer, to convey to *Whitney* a certificate of two shares in the stock of the company, on payment of his note; and that he called on the defendant and informed him that he had the

obligation, requesting him to call and receive it in exchange for his own above mentioned; but made no formal tender of it.

They further offered in evidence a written communication of the defendant to them, dated *Jan.* 15, 1830, proposing a mode of payment for one of the shares, and the transfer of that share as security for the residue of the note; together with the detention of a hundred dollars out of certain funds in their hands towards the same object. Also, an indenture dated *Dec.* 16, 1829, by which all the property of the corporation was assigned to trustees therein named.

The defendant objected to the admissibility of parol proof of the creation of the new stock by the directors; contending that their records were the best evidence of the fact; but the judge overruled the objection. The defendant then produced certain by-laws of the corporation; from one of which it appeared that all contracts, bonds and notes, signed by the treasurer in pursuance of a vote of a majority of the directors, should be binding on the corporation; and by another of which it was provided that the directors might employ such agents or superintendants as they might deem expedient, whose duty should be defined in writing.

Hereupon the defendant contended, and the judge, *pro forma*, ruled, that the action was not maintainable; and a nonsuit was entered by consent, subject to the opinion of the Court.

D. Goodenow, for the defendant, contended that the note was without consideration to support it. The corporation was not bound by the undertaking of *Rogers*, because he was neither the treasurer, nor an agent constituted by written authority and instructions from the directors, agreeably to the by-laws; which, by implication, exclude all other modes of binding the corporation. Neither did he bind himself. He derived no benefit from the transanction; nor did he stipulate by deed. *Frontin v. Small*, *Ld. Raym.* 1418; *Sumner v. Williams*, 8 *Mass.* 187; *Rann v. Hughes*, 7 *D. & E.* 350; *Pearson v. Henry*, 5 *D. & E.* 6; *Tippets v. Walker*, 4 *Mass.* 595; *Thacher v. Dinsmore*, 5 *Mass.* 299; 8 *Mass.* 193.

The contract, moreover, has not been performed on the part of the plaintiffs; for the paper signed by *Pray* is conditional, and is not such as was originally to have been procured; and the plaintiffs

have never tendered such an obligation to the defendant. Until this is done, the contract remains open and unexecuted. And the plaintiffs have rendered themselves incapable either to perform the contract, or to maintain an action on the note, by the assignment of all their property to trustees.

J. & E. Shepley, for the plaintiffs, cited *Reed v. Cummings*, 2 *Greenl.* 82; *Gore v. Grafton*, 15 *Mass.* 73; *Northampton bank v. Pepoon*, 11 *Mass.* 291; *Dugan v. The United States* 3 *Wheat.* 172; *Thacher v. Dinsmore*, 5 *Mass.* 299; *Stinchfield v. Little*, 1 *Greenl.* 231; *Harper v. Little*, 2 *Greenl.* 14; *Fowler v. Shearer*, 7 *Mass.* 14; *Smith v. Sinclair*, 15 *Mass.* 171; *Little v. O'Brien*, 9 *Mass.* 423; *Bowman v. Welch*, 15 *Mass.* 534; *Raymond v. Johnson*, 11 *Johns.* 488; *Brigham v. Marean*, 7 *Pick.* 40; *Weston v. Codman*, 3 *Cranch* 207; *Vose v. Handy*, 2 *Greenl.* 322.

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

The promissory note declared on was given by the defendant for the price of two shares of stock in the company, and was made payable to *Pray*, treasurer of the company; and was indorsed in blank by *Pray* as treasurer, and also in his private capacity. The consideration for which the note was given, was the memorandum signed by *Rogers*, calling himself agent for the company, by which he promised to the defendant that *Pray*, the treasurer, should give his obligation for certificates of two shares of stock in the company. It does not appear that *Rogers* had any authority from the company to enter into any such stipulation in behalf of it. Numerous objections have been urged against the plaintiff's right to recover.

It is contended that the defendant's promise was not founded on any legal consideration. "It is a known rule of law that to make a contract or agreement obligatory, the consideration must be either a benefit to the person promising, or some trouble or prejudice to the party to whom the promise is made." 1 *Comyn on Contr.* 13; 1 *Comyn's Dig. tit. Action on the case upon Assumpsit B.* and numerous cases cited; *Yelv.* 184, and *note* 1. We must consider the

defendant as desirous of becoming the owner of two shares in the stock of the company, and as giving the note in question in consideration of the agreement of the plaintiff to procure them for him. This agreement was a benefit to him. Here was promise for promise, which is a good consideration. 1 *Com. on Contr.* 14.

It is contended, however, that here was not one binding promise for another; because *Rogers* had no authority to bind the company; and that the promise did not bind him personally. It is true he subscribes the note with his name, adding the words "agent *Saco* Manufacturing Company;" but as he was not agent for the purpose, the words following his name may be considered merely as descriptive, but he personally bound himself.

It is said that *Rogers* received no benefit from the contract made with the defendant, because *Whitney's* note was made payable to *Pray* as treasurer of the company; but if it was not any advantage to *Rogers*, the performance of the promise would have been an advantage, and the breach of it an injury to *Whitney;* and thus, according to the principle above cited from *Comyn*, the promise on each side was binding.

Again it is said that the promise of *Pray* to deliver to *Whitney* a duly executed certificate of the shares, was a conditional one, as to the time when it shall be delivered; namely, on payment of the note and interest, and so does not agree with the contract or promise of *Rogers;* but this objection is not maintained by facts. *Rogers* describes no particular form of the certificate in his agreement with *Whitney;* besides, it appears to be in conformity to the vote of the directors, giving to the treasurer the power to sell shares and give certificates of them to purchasers.

Again; it is contended, that this action cannot be maintained, because, though *Rogers* procured a certificate of the said shares to be duly issued by the treasurer, and informed the defendant of the fact and requested him to receive it in exchange for the accountable receipt which he then held, still he did not carry the same to the defendant and deliver or tender it to him. We think the answer to this objection by the plaintiff's counsel may be considered a sufficient one; which is, that *Rogers*, in the above transaction, was act-

ing as the agent of the defendant, and that his possession must be deemed the possession of the defendant. But, as we have said before, the promises were mutual and independent; and therefore, if the note had been made payable to *Rogers*, he need not, in an action on it in his own name, have averred or proved a delivery of the certificate to the defendant; and for the same reason the present plaintiffs need not do it.

Again it has been urged that the note declared on has been assigned to trustees, and so the plaintiffs have no authority to maintain an action in it. It appears, however, that it was produced on trial by the plaintiffs, and we may and ought to presume that it has been lawfully reconveyed to them, with power to recover it, if due. 3 *Wheat.* 172, 183. Besides, the defendant seems to have no interest in this arrangement.

The last particular we shall notice is, the language of the defendant in his communication to the company, bearing date *January* 15, 1830; in which he proposes a negotiation, by which he might transfer one share to the company by way of security for the very note now in suit, and that the interest, and $100 in part of the principal, should be retained by the company for the purposes proposed by him; thus treating the note as valid, due and uncontested. In view of all the facts and objections which we have examined, we are all satisfied, that the ruling of the judge was correct, admitting parol proof of the creation of new shares under the vote of *July* 9, 1828; and that his ruling was incorrect, that the action was not maintainable. This last, however, was a ruling *pro forma*, as it appears. The result is that the defendant must be called.

WINSOR *& al. vs.* CUTTS *& al.*

Where a fishing vessel was let on shares to the master, who was to victual and man her, the owner having nothing to do with the purchase of supplies, nor with the employment of the vessel;—it was held that the owner was not liable for supplies furnished to the master.

Whether one holding the title to part of a fishing vessel, as security for the payment of the purchase-money, in trust for the master who had contracted for the purchase, and had taken the vessel for the fishing season on the usual shares, is liable for supplies furnished to the master;—*quære.*

THIS was an action of *assumpsit* against *Thomas Cutts* and *Richard C. Thornton*, as owners of the schooner *Sally*, of which *Thomas Farris* was master, for supplies denominated "great and little generals," furnished *June* 2, 1829, to the master.

It appeared that the schooner was originally owned, one quarter by *Cutts;* and the other three quarters by *Emery & Chase;* who, in *April*, 1829, contracted to sell their interest to one *Farris*, who was master of the vessel; taking his notes, with *Thornton* as surety, for the price. The conveyance was made directly to *Thornton;* who gave a written memorandum to *Farris*, purporting that *Thornton* was to retain the three fourths of the vessel, her earnings and bounty-money, till the notes were paid, and he should have received whatever he might have advanced by way of outfits, &c.;—that *Farris* should employ the vessel in the fishery;—that *Thornton* should receive and hold her earnings, fish and bounty for the above purpose;—and that *Farris* should be chargeable with all expenses, and credited with the earnings, &c., in the same manner as if he was the true owner. *Thornton* and *Cutts* accordingly took out the proper papers of the vessel on the 27th of *April*, 1829, in which they were stated to be the owners, and *Farris* the master.

It appeared from the testimony of *Farris* that in the spring of 1829, *Cutts* agreed to let him take the vessel on shares, for the purpose of employing her in the fishery during the fishing season. *Cutts* was to have nothing to do with the purchase of supplies; was to have one fourth part of the bounty allowed by law to fishing ves-

sels; and one fourth part of the vessel's share of the fish and oil. *Farris* was to victual and man her. In the course of the season *Farris* purchased part of his supplies at the store of *Cutts*, and paid for them, in the ordinary course of trade; and on one occasion transported goods in the schooner from *Saco* to *Boston*, for *Cutts*, who paid him freight for the same. During all this period neither *Cutts* nor *Thornton* gave directions concerning the vessel, nor received any part of her earnings; nor employed her; nor paid the men.

When *Farris* obtained the supplies of the plaintiffs, he gave them no information of his contract with *Cutts*, nor of the conveyance to *Thornton*, nor concerning the ownership of the vessel. And in *Nov.* 1829, he sold three fourths of the vessel to a person in *Portland*, and received the price, no part of which came to the hands of *Thornton*.

It further appeared that *Cutts* had in frequent conversations spoken of a debt due in *Boston* against them as owners of the vessel, of about three or four hundred dollars, alluding to the demand of the plaintiffs, which he said they would probably have to pay; and complained that they had heavy expenses to pay, and nothing coming in. *Farris* also had at some time declared to Mr. *Scamman*, the collector, that he had little or no interest in the bounty; which *Thornton*, at the close of the season, demanded of the collector, but did not obtain.

Upon these facts, proved before *Parris J.* and from which it was agreed that the court might infer all which a jury might, the case was submitted to the decision of the court; a nonsuit being entered by consent.

J. & E. Shepley, for the plaintiffs, relied on the general doctrine that the owners are liable for supplies furnished to the master for the purposes of the voyage; and argued that the present case was not within any exception to the rule; because the master was appointed by the owners themselves, and subject to their supervision and control in the employment of the vessel. *Rich v. Coe*, *Cowp.* 639; *Fletcher v. Braddock*, 2 *New Rep.* 182; *Milward v. Hallet*, 2 *Caines* 77; *McIntire v. Brown*, 1 *Johns.* 229; *Cheriot v. Bar-*

ker, 2 *Johns.* 346; *Reynolds v. Toppan*, 15 *Mass.* 370; *Taggard v. Loring*, 16 *Mass.* 336; *Wait v. Gibbs*, 4 *Pick.* 298; *Perry v. Osborne*, 5 *Pick.* 422. The case of *Thompson v. Snow*, 4 *Greenl.* 264, was decided in favor of the owners, on the same principle, the master in that case having the entire control of the vessel. But the owner's liability continues so long as he has any right to interfere in her management. *Emery v. Chase*, 4 *Greenl.* 407.

Fairfield, for the defendants, cited *Hussey v. Allen*, 6 *Mass.* 163; *Dame v. Hadlock*, 4 *Pick.* 458; *Leonard v. Huntington*, 15 *Johns.* 298; *Bixby v. Franklin Ins. Co.* 8 *Pick.* 86; *Frazer v. Marsh*, 13 *East* 238; *James v. Jones*, 3 *Esp.* 27; *Sharp v. United Ins. Co.* 14 *Johns.* 201; *Hallet v. Columbian Ins. Co.* 8 *Johns.* 272; *Reynolds v. Toppan*, 15 *Mass.* 370; *Taggard v. Loring*, 16 *Mass.* 336; *Perry v. Osborne*, 5 *Pick.* 422; *Cutler & al. v. Winsor*, 6 *Pick.* 335; *Thompson v. Snow*, 4 *Greenl.* 264; *McIntire v. Scott*, 8 *Johns.* 159; *Jackson v. Vernon*, 1 *H. Bl.* 114; *Chinnery v. Blackburn*, *ib.* 117, *note a*; *Eaton v. Jaques*, *Doug.* 455; *Portland bank v. Stubbs*, 6 *Mass.* 425; *Hatch v. Dwight*, 17 *Mass.* 299; *Champlin v. Butler*, 18 *Johns.* 169; 4 *Maule & Selw.* 240; *Goodwin v. Richardson*, 11 *Mass.* 474.

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

Mellen C. J. It appears that *Cutts* and *Farris* originally owned the schooner; *Cutts* owning one quarter and *Farris* three quarters. That on or before the 12th of *April* 1829, *Farris* conveyed his three quarters to *Thornton* on certain terms mentioned in the statement of facts. That on the 27th of the same *April*, the schooner was enrolled and licensed as the property of the defendants; and that in the following *November*, *Farris* sold the same three quarters to some person in *Portland*, and received payment therefor. The supplies furnished by the plaintiffs, for which this action is brought, were furnished in *June* 1829; two months before which, *Farris*, according to his testimony, had agreed with *Cutts* to take his quarter part of the vessel on shares during the fishing season of

that year; to man and victual her himself; *Cutts* was to have nothing to do with the purchase of supplies, but was to have one fourth part of the bounty and one fourth part of the schooner's share of the fish and oil taken during the season. *Farris* was master. It appears that the terms of the above agreement were complied with in respect to the management of the vessel and her employment; and it does not appear that *Cutts* in any one particular interfered; on the contrary it does appear that he gave no directions concerning the vessel and received no part of her earnings that season, and did not employ or pay the men; that he sold to the captain a part of the vessel's supplies, and on one occasion paid freight to the captain for part of a cargo to *Boston*. Upon these facts the law considers *Farris* as owner, *pro hac vice*, and while the schooner was thus under his management and control, the liability of *Cutts*, the general owner, ceased and was transferred to him. This principle is distinctly settled or recognized in *Taggard v. Loring*, 16 *Mass.* 336; *Reynolds v. Toppan*, 15 *Mass.* 370; and by this court, in *Thompson v. Snow*, 4 *Greenl.* 264, and *Hersey v. Emery*, *ib.* 407, and the other cases cited by the counsel for the defendants. It is true the supplies were charged to the owners of the schooner, and that the plaintiffs at the time knew nothing of the bargain between *Cutts* and the captain; but in the receipt for the goods purchased, which *Farris* gave to the plaintiffs, they are described as "great and little generals for schooner *Sally* of *Saco*." The circumstance in respect to the manner of the charge, we apprehend, in legal contemplation does not affect the rights of *Cutts*. The facts show that in respect to these supplies, he was not owner, but *Farris* was. In the above cited case of *Reynolds v. Toppan*, the defendant appeared by the register or enrolment to be the owner; but the court said "it is not enough to prove that the vessel was owned by the defendant; it must appear also that she was in his employment." As to any declarations of *Cutts* respecting a claim of a *Boston* creditor against him as owner, and his apprehended liability, they cannot have any influence on our decision, any further than they have a tendency to lessen the credit due to *Farris*. The liability of *Cutts* must depend on legal principles applied to the facts proved. The testimony of *Farris* is impor-

tant to *Cutts*, to establish the agreement between them under which *Farris* took the vessel on shares, in the manner before stated; but it is contended that his testimony is not to be relied on, because on some occasion, but when, does not appear by *Scamman's* deposition, he said in the presence of *Scamman*, "he had but a small interest in the bounty." It is true that by the agreement of the parties, we are authorized to draw all such inferences as a jury might legally draw; but still, from such an expression, uncertain as to the time when used, and as to the amount of interest, we do not feel at liberty to reject his testimony as undeserving of credit. Many of the facts which do not appear to have been proved by his testimony, are in perfect harmony with the agreement on his part to take the vessel on shares. As before stated, it was proved that *Cutts* gave no directions as to the vessel, and received no part of her earnings; did not employ or pay the men; that *Cutts* paid him freight for part of a cargo to *Boston*, and *Farris* found supplies. Taking his testimony as true, we do not perceive how *Cutts* could be considered as owner, or chargeable as such when the plaintiffs sold and delivered the articles to *Farris*, according to the decisions above mentioned. *Cutts*, merely by letting his quarter part of the vessel to *Farris*, did not appoint him captain. Being owner himself *pro hac vice*, he chose to take the command himself, as *Thornton* took no concern in the employment of the vessel. In most of the cases cited by the defendant's counsel, the vessel was chartered or let to the captain, as in the present case; still he had the vessel under his own control during the season, and *Cutts* had nothing to do with her.

Our opinion is that when the supplies were furnished, *Cutts* was not owner so as to be liable to the plaintiffs; and whether *Thornton* was liable or not is immaterial in this action. The plaintiffs have declared against the defendants jointly, but the facts do not prove a joint contract. A nonsuit must be entered.

TRIPP, *plaintiff in error*, *vs.* GAREY.

The commanding officer of a regiment, for the time being, is the proper officer to sign a sergeant's warrant.

The only legal evidence of the appointment of a clerk of a company of militia, is the captain's certificate on the back of his sergeant's warrant, "that he does thereby appoint him to be clerk of the company."

ERROR to reverse the judgment of a justice of the peace, given in an action of debt brought by *Garey*, as clerk of a company of militia, against *Tripp*, a private in the same company, to recover a fine for his neglect to appear at a militia training.

From the record sent up it appeared that the only evidence of *Garey's* appointment as clerk was a warrant issued by "*Timothy Shaw*, colonel elect;" who was at that time commanding officer of the regiment, but had not then been commissioned and sworn as colonel. This warrant was addressed to *Garey* as "having been appointed by Capt. *Jeremiah Moulton*, jr. to be a sergeant and clerk" in the company under his command; and charged him with "the duties of sergeant and clerk" accordingly. On the back of the warrant and of the same date, was a certificate of the captain, that *Garey*, "appointed clerk as within," had been duly sworn before him.

It further appeared that the notice to *Tripp* to attend the company training, was proved by the testimony of *Joseph Young*, a private in the same company; who was admitted by the justice, though objected to as incompetent by reason of his interest, as a member of the company, in the penalty sued for.

The errors assigned were—1st, that *Garey* was not legally appointed sergeant;—2d, that he was not legally appointed and qualified as clerk;—3d, that *Young* was improperly admitted as a witness;—and 4th, the general error.

Appleton, for the plaintiff in error, cited *Abbot v. Crawford*, 6 *Greenl.* 214; *Commonwealth v. Hall*, 3 *Pick.* 262; *Commonwealth v. Sherman*, 5 *Pick.* 239; 1 *Gilb. Ev.* 106—7; *Marquand v. Webb*, 16 *Johns.* 89; 1 *Phil. Ev.* 52; *Craig v. Cundell*, 1

Campb. 381; *Phenix v. Ingraham*, 5 *Johns.* 258; *Innis v. Millar*, 2 *Dal.* 50; *White v. Derby*, 1 *Mass.* 239; *Boynton v. Turner*, 13 *Mass.* 391; *Austin v. Bradley*, 2 *Day*, 406; *Temple v. Ellett*, 2 *Munf.* 252.

Walker, for the defendant in error, argued that in his appointment all that was substantial in the statute had been complied with; and that to set aside these summary transactions for mere objections of form, would tend to subvert the militia system, and impair if not destroy its usefulness. He also contended that *Young* was a competent witness, his interest in the penalty being wholly contingent and remote; depending on the will of the commissioned officers.

PARRIS J. delivered the opinion of the Court.

The first error assigned is that *Garey*, the defendant in error, was not duly and legally appointed a sergeant. The warrant, under which he claims to act, was granted by *Timothy Shaw*, who signs as colonel elect. It is manifest that until *Shaw* had been duly commissioned and taken the requisite oaths, he was not authorized, as colonel, to discharge any of the appropriate duties of that office. But the case finds that he was then the commanding officer of the regiment, and, as such, he was clothed with power to grant warrants to such non-commissioned officers as might be properly appointed for the several companies within his command. The objection that the appointment purports to be of clerk, as well as sergeant, we think does not vitiate the warrant, but that it may be deemed effectual so far as the powers of the commanding officer extended, and that the residue may be properly considered as surplusage.

Inasmuch, therefore, as *Shaw* had power, although not as colonel, yet as senior or commanding officer, to grant the warrant, it might not be going too far, perhaps, to reject the words of title annexed to his signature, and consider the instrument as his official act as commanding officer.

The next error assigned is that the defendant was not legally appointed clerk. It appears from the case that the only evidence of such an appointment is in the recital in the body of the sergeant's warrant, and a certificate, on the back, of the administration of the

requisite oaths; and we are called upon to decide whether this is a compliance with the requirement of the statute. The statute requires 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." The appointment of clerk is limited to one of the sergeants of the company, and any other appointment would be void. Had the defendant been appointed a sergeant and received his warrant as such, and was he qualified to act in that capacity, at the time of his pretended appointment as clerk? Clearly not;—for in the body of the same instrument, by virtue of which he acted as sergeant, it is recited that he had been appointed clerk. If the recital be true, it follows that his clerk's appointment was prior in time to his sergeant's warrant; or in other words that he was appointed clerk before he was qualified to act as sergeant.

But it is urged that the legality of the appointment is to be inferred from the certificate of qualification, in which it is stated that *Moses Garey*, appointed clerk as within, appeared, &c. It is not perceived that this phraseology can materially affect the state of the case. How was the appointment "within?" If it referred to an appointment as clerk by the captain, previous to the appointment of sergeant and the granting the warrant as such, it was an appointment of a person ineligible to the office. If it referred to the warrant itself, which purported to be for sergeant and clerk, the reply is, that so far as the body of the warrant relates to clerk, it is wholly void and inoperative, the commanding officer of a regiment or battalion not having any authority to interfere with the appointment or qualification of clerk.

The statute says, that the commanding officer of the company shall certify on the warrant that "he does thereby appoint," &c. From this language, can it be doubted that the statute contemplates an appointment after the granting the warrant, and that the entering the certificate of the captain or commanding officer on the warrant is the act whereby the appointment is to be made?

We fully assent to the correctness of the position assumed by the defendant's counsel, that the court will not disturb the judgment, if

it can be supported upon legal principles. But when a prosecutor claims a forfeiture by virtue of his official character, a portion of which accrues to himself, it is incumbent on him to establish such official character in the manner pointed out by law; otherwise the forfeiture might as well be claimed by any private citizen.

In cases of forfeiture, perhaps more strictness may be required in the proof establishing the authority, and the right of the prosecutor to claim the forfeiture, than in ordinary cases of public officers, who perform and certify official acts in which they have no special pecuniary interest adverse to any portion of the community.

We do not perceive that this case materially differs from that of *Abbot v. Crawford*, 6 *Greenl.* 214, to which we refer, as expressive of our views of the character of the office of clerk, and of the propriety of requiring all the evidence of the appointment which the statute contemplates.

While this court feels itself bound thus to apply the law in this class of cases, it has shown no disposition to encourage the avoidance of military duty by frivolous or inadequate excuses. It will require a strict performance of that duty in all cases which may come before it;—and it must, on the other hand, require unquestionable proof of authority in all those who claim to exercise it; and more especially when a forfeiture is exacted from any of the citizens.

In the case of *Hume v. Vance*, at the last term in *Washington* county, we took occasion to observe that military duty was a personal service, which was or ought to be required equally from all the citizens; and that he who claimed exemption from that service must substantiate his claim by clear and indubitable evidence.

It will be found no inconvenience or disservice to the militia to require of its officers a strict performance of their legal duties, especially when made so plain as they are by the language of that section of the statute now under consideration. It must be rather a matter of surprise that such errors should exist, considering that every officer, from the highest to the lowest, is furnished with a copy of the law, which upon this point is too plain to require explanation or to be misunderstood. They must arise from inattention to its provisions.

We have no occasion to examine the third error assigned, as, upon a full consideration of the second, we are of opinion that it is well assigned, and that the judgment must be reversed.

The inhabitants of BIDDEFORD *vs. The inhabitants of* SACO.

Where a husband had been absent at sea more than sixteen years prior to *March* 21, 1821, without having been heard from, except a rumor that he was impressed on board a British vessel of war; this was held to afford legal ground for the presumption that he was dead; so that the wife was capable of acquiring a new settlement for herself by dwelling on that day in another town, under *Stat.* 1821, *ch.* 122.

Illegitimate children, under age, living with their mother on the 21st day of *March*, 1821, do not follow a new settlement acquired by her by residence on that day in some town in this State; but retain the settlement which she had at their birth.

THIS was an action of *assumpsit* for the support of *Mary Billings*, and her two sons, of the ages of about twenty and seventeen years respectively. The parties agreed that she was born in *Kittery*, and removed with her father to *Saco*, where she was married to *Samuel Billings*, *Aug.* 10, 1788. Her husband was a sailor, and between the years 1800 and 1805, while resident in *Biddeford*, he sailed on a voyage; since which he had never been heard from; but it was reported that he was impressed by a British armed vessel. His wife continued to live in *Biddeford;* and about the year 1810, she commenced living with one *Allard*, as his house-keeper, by whom she had the two sons, who were born in *Biddeford.* In the autumn of 1817, they all removed with *Allard* to *Saco*, where they resided till after *March* 21, 1821; when they removed to *Scarborough*, thence back to *Saco*, and thence to *Biddeford*, where *Allard* died in *Feb.* 1830; having for sometime previous to his death received supplies as a pauper from the defendants; but with-

out having gained any new settlement in *Biddeford*, subsequent to the passage of the act of *March* 21, 1821.

W. Goodenow, for the plaintiffs, to the point that the mother acquired a settlement in *Saco*, by residence on the 21st day of *March*, 1821, the long absence of her husband raising the presumption of his death, cited 1 *Stark. Ev.* 379, 380; 2 *Stark. Ev.* 218, 358, 359; *King v. Padlock*, 18 *Johns.* 141; *Van Buskirk v. Claw*, *ib.* 346; *Abbot v. Bailey*, 6 *Pick.* 89.

And he contended that the children acquired a settlement there by the operation of the same statute upon their actual residence; the statute laying down a fixed and imperative rule, designed to prevent, as far as possible, the litigation of doubtful questions of settlement; and it being contrary to the policy of the law to separate parents and children. *Lubec v. Eastport*, 3 *Greenl.* 220; *Shirley v. Watertown*, 3 *Mass.* 322; *Hallowell v. Gardiner*, 1 *Greenl.* 93; *Green v. Buckfield*, 3 *Greenl.* 136.

J. & E. Shepley, for the defendants, resisted the application of the statute of *March* 21, 1821, to the mother in this case, on the ground that *Billings* not being proved to be dead, his settlement was confirmed, by the same act, in the place of his last domicil, which was *Biddeford*. And by the same rule the settlement of the wife was there also, the wife having in all cases the settlement of her husband. There is no general rule as to the period beyond which an absent man shall be presumed to be dead; 1 *Phil. Ev.* 161, *note a.*—every case being governed by its peculiar circumstances. And in the present case the fact of impressment sufficiently explains his absence and his silence; leaving the presumption to rest on the general chances of human life, which at his probable age, are in his favor.

The residence of the wife in *Saco*, at the time of the passage of the act, cannot affect the case; as it is not in her power to change the domicil of her husband. *Knox v. Waldoborough*, 3 *Greenl.* 455; *Parsonsfield v. Kennebunkport*, 4 *Greenl.* 47; *Pittston v. Wiscasset*, *ib.* 293.

Neither did the children gain a settlement in *Saco*, by residence in 1821, they not being emancipated. *Somerset v. Dighton*, 12

Mass. 383; *Wright v. Wright*, 2 *Mass.* 109; *Taunton v. Plymouth*, 15 *Mass.* 203; *Hallowell v. Gardiner*, 1 *Greenl.* 93; *Lubec v. Eastport*, 3 *Greenl.* 220; *Sumner v. Sebec*, 3 *Greenl.* 223.

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

From the facts reported, the legal presumption must be that *Samuel Billings*, the husband of *Mary Billings*, was dead prior to the 21st of *March*, 1821. Between the years 1800 and 1805, he went to sea as a common sailor, and has never since been heard of; though there was a rumor that he was impressed on board a British armed vessel; but whether there was any foundation for the report does not appear; and its probability is entirely done away by the fact of his not having returned, if alive, soon after the peace of 1814, between this country and Great Britain, when he must doubtless have been exchanged and released. At any rate the presumption of his death before 1821, is on every principle admissible. Such being assumed as the fact, *Mary Billings*, his widow, was capable of gaining a settlement in her right; as she resided, dwelt and had her home in *Saco*, on the 21st day of *March* 1821, she, by virtue of the act passed on that day, *ch.* 122, gained a settlement in *Saco*. But her two illegitimate children who were then living with her, and composing part of her family and dependent upon her, were incapable of gaining a settlement in their own right by virtue of said act. And as they were born before their mother gained her settlement in *Saco*, they have no derivative settlement there under her. The second section of the act declares that "illegitimate children shall follow and have the settlement of their mother at the time of their birth, if any she shall then have within the State." Where the mother's settlement was, at the time of their birth, is an immaterial inquiry in this case, inasmuch as it was not in *Saco;* probably it was in *Kittery.* The above quoted passage is precisely in the same language used in the act of Massachusetts of 1793, which was in force in this State until our statute of 1821 was enacted. The authority cited by the counsel for the plaintiffs to show that the children gained a settle-

ment in their own right, do not apply. In the present case there is no proof of their emancipation, or any thing equivalent; indeed the contrary appears to be the fact. *Hallowell v. Gardiner*, 1 *Greenl.* 93. The plaintiffs are entitled to judgment.

SPRING *vs.* RUSSELL *& als.*

Fresh water rivers, of public use in the transportation of goods, are of common right as public highways by water.

Whether a person whose private property has not been taken from him, and whose rights are only consequentially affected, by a statute creating a corporation for opening a canal, has a right to contest its constitutionality:—*dubitatur.*

The legislature has the power to judge when the public exigency requires that private property be taken for public uses. And it is within the range of its powers to change the course of a public river, for the public convenience.

Where a private statute created a corporation for the purpose of opening a canal, without directing when it should be done; under which statute the defendants, as corporators, justified certain acts complained of; and the plaintiff replied that they had never opened the canal in manner and form as prescribed by the statute, without alleging that reasonable time for that purpose had elapsed; the replication was for this cause held bad on general demurrer.

The statute incorporating the proprietors of the *Fryeburg* canal having prescribed a particular remedy for all damages occasioned by opening the canal, all other modes of remedy are by necessary implication excluded.

The proprietors of the *Fryeburg* canal are not liable to an action for consequential damages occasioned by turning the channel of *Saco* river as directed by their act of incorporation.

THIS was an action of trespass on the case, in which the plaintiff declared as follows:—"for that a certain river called *Saco* river, had for a long time before the opening and removing of the banks thereof, herein after mentioned, to wit, from the time whereof the memory of man is not to the contrary, to the time last aforesaid, flowed in a certain channel or course, from the line of the State of New Hampshire, through the said town of *Fryeburg* to the sea; and the inhabitants of the said State of Maine and others had been accus-

tomed during the time aforesaid to have their logs and timber float along and down the same river, below said town of *Fryeburg*, to be used below the town last mentioned; and the said *Spring* avers, that the said defendants afterwards, to wit, on the first day of *July*, in the year of our Lord eighteen hundred and fifteen, well knowing the premises, removed and opened, and caused to be removed and opened the banks of said river, and thereby diverted and turned a great portion of the water of said river from its natural and usual channel and course; and until the commencement of this action, the water of the same river, by means of the same opening of said banks, was so diverted and turned from its accustomed channel, and the defendants thereby obstructed and prevented the floating and passing of logs and timber along the usual channel of said river as before the opening of the banks aforesaid; and the said *Spring* further avers, that after the opening and removal of said banks of said river as aforesaid, and before the commencement of this suit, that he the said *Spring*, put and had a great number of logs, to wit ten thousand logs, of great value, to wit of the value of ten thousand dollars, in the said river, above the place where the banks thereof were opened as aforesaid, for the purpose of having the same logs floated down the same river to be used below the opening of the said banks, which said logs, by means of the opening and removal of said banks of said river as aforesaid were prevented from floating down the same river, as they otherwise would have done, and thereby were carried from the natural channel of said river, and became of no value, and were wholly lost to said *Spring*."

The defendants severally pleaded—*first*, the general issue; which was joined.

Secondly. That they were not guilty within six years before the commencement of the action; on which issue was taken to the country.

Thirdly. That by a private statute passed *March* 2, 1815, which they set forth, certain persons, including the defendants, were incorporated by the name of the Proprietors of *Fryeburg* canal, for the purpose of opening a new channel for *Saco* river within the town of *Fryeburg*, by turning its waters through *Bear* and *Bog* ponds; in

which act it was provided that the proprietors should be liable in their individual as well as corporate capacity, together with their real estate, for the damages thereby occasioned; and that if any person should be damaged in his property by reason of opening or managing such new channel, without satisfaction made by the proprietors within thirty days after demand, he might have remedy by complaint made within two years thereafter to the Court of Common Pleas or to the Supreme Judicial Court, who should determine the same by a jury, unless the parties should substitute a committee for the same purpose; upon whose report, or the verdict of the jury, the Court should render a final judgment; saving to the proprietors the right to tender amends for the damages so occasioned:—

And that by another private statute, which they set forth, passed *June* 20, 1816, it was provided that any person who should be damaged in his property by the opening of such new channel, and who should claim damages of the corporation, should deliver his claim in writing to the clerk of the proprietors, after which the corporation should be allowed ninety days to settle the claim, before any complaint should be made to either of the courts for damages: Also, that the corporators might erect mills on the new channel: And that all claims or right of action which individuals might have against the corporation or the members thereof, by reason of opening such new channel, should be barred and cease at the expiration of four years from and after the time when the cause of action accrued:—

And that by another private statute, which they set forth, passed *Feb.* 23, 1818, it was provided that the real estate of the original corporators should be liable for the damages occasioned by opening the new channel, only so long as they continued the owners thereof; and limiting the remedies for such damages to "six years from and after the time the said *Saco* river shall have been turned and taken its course through the said new channel:"—And thereupon they averred that the said persons thereby became a corporation accordingly; and at a legal meeting of the corporation holden *Sept.* 29, 1817, and adjourned to *Oct.* 13, 1817, they accepted said acts, and were duly organized as a corporation; on which last mentioned day they voted to open the new channel, of which the plaintiff had no-

tice;—and that the supposed wrongs mentioned in the plaintiff's declaration were done by the defendants as members of the corporation, and by its license, direction and permission, by virtue of the statutes aforesaid;—and that the supposed cause of the plaintiff's action did not accrue at any time within four years next before the commencement thereof:—

Fourthly. After stating the acceptance of the acts, the incorporation of the proprietors, the vote to open the new channel, and the acts done in pursuance thereof, as before; the defendants pleaded that more than six years next before the commencement of the plaintiff's action, viz. on the last day of *February* 1822, the *Saco* river was turned and had taken its course through the new channel; and that the plaintiff never, at any time within six years thereafter, preferred any claim for damages occasioned thereby, in any mode mentioned in said statutes:—

Fifthly. After stating as in the inducement to the fourth plea, the defendants pleaded that more than six years next before the commencement of this action, the *Saco* river was turned and had taken its course through the said new channel, to wit, &c.

Sixthly. After stating as before—the defendants pleaded that the plaintiff never did exhibit and deliver his claim in writing to the clerk of the proprietors, and therein name the sum claimed by him as damages, as provided in said statutes:—

Seventhly. After stating as before—the defendants pleaded that the acts complained of were done by them as members of the corporation, and in pursuance of said statutes; and that the plaintiff never applied to either of the courts for the appointment of a committee to estimate his damages, pursuant to the statute passed *June* 20, 1816.

To each of these pleas the plaintiff replied that the corporation had never opened a new channel for *Saco* river, in the manner provided in the acts before recited.

The defendants, in their rejoinder to the *third* replication, insisted on the limitation of four years, pleaded in their third plea; traversing the matter of the replication.

To the *fourth* replication they rejoined that more than six years

before the commencement of the action, the *Saco* river was turned and had taken its course through said new channel.

To the *fifth* replication they rejoined as in the fourth rejoinder, with a traverse of the plaintiff's allegation that the proprietors had not opened the new channel.

The *sixth* rejoinder was similar to the fourth.

And to the *seventh* replication the defendants answered by a general demurrer; which was joined.

The parties then agreed on a commissioner, to repair to *Fryeburg*, and hear the testimony, and make a report to the court of all material facts proved before him; and that upon said facts, and upon the several pleadings which had terminated in demurrers, the court should decide whether, upon legal principles, the action could be maintained; and if so, to render judgment conformably to law.

The following are the material parts of the commissioner's report:

"Previous to the year 1819 or 1820, the *Saco* river flowed in a certain channel from the line of the State of New Hampshire, through the town of *Fryeburg;* and the inhabitants of the State of Maine, as well as others, had been accustomed to float their logs and timber down and along said river, in its ancient channel, through and below said *Fryeburg*. Since the year 1820 all the water of said river has been diverted from its ancient channel and course, through a part of said *Fryeburg*, and flowed in a new course and direction, leaving its ancient channel at *Russell's creek*, so called, in said town, and flowing through *Bear* and *Bog* ponds, meeting its former channel again near the land of *John H. Frye;* and running in this new course through what is called the canal. The course of the river has been changed as aforesaid, and a new direction given to it, by the labor of individuals at different times, in opening and removing its banks and digging up the earth and making a channel where it now flows. Previous to the diversion of the waters of the river as aforesaid, it had been deemed of great importance by a portion of the inhabitants of the town, to produce that result, for the advancement of their agricultural interest, and enhancing the value of their land situated upon and near the river; and with this view,

thirty years ago, the undertaking had been commenced of opening a communication through the high land which separated *Bear* and *Bog* ponds. In very high freshets the water of *Saco* river would flow over its banks into *Bear* pond; and in the great freshet of 1785, it flowed over and tore out a "Gulf" so called, from the height of land between *Bear* and *Bog* ponds. In 1814 the freshet of that year made the channel into *Bog* pond wider and deeper, which was enlarged, by the freshets of 1819 and 1820, into the deep and broad channel through which the river now flows. In its present course, the river runs a less distance in *Fryeburg* than formerly, by fifteen or eighteen miles. The fall round the old river to the mouth of the canal, except rapids, is estimated at one foot a mile."

"It was proved that the corporation was duly organized; and that at the original and subsequent meetings the following votes among others, were passed."

"*October* 13, 1817—*Voted*, to take up the third article of the warrant, which was as follows, viz. to see if the proprietors would proceed to act on the grant of the Honorable General Court incorporating the proprietors of said canal, as said grant now stands amended;—and *Voted*, to proceed on the grant of the Honorable General Court and to open said canal."

Voted, to choose a committee of five persons to superintend the business of opening said canal."

"*October* 22, 1817—*Voted*, to see if said proprietors will instruct their committee to open said canal. Voted by yeas and nays so to instruct their committee; all the votes being in the affirmative but one."

October 30—*Voted*, to direct the committee to proceed on monday next to work on said canal."

December 27, 1817—*Voted*, to raise five hundred dollars to meet the expenditures that have already accrued in opening the canal, the remainder of the money, if any, to be paid in labor by the delinquent proprietors if wanted, provided they come in and do the labor, when called upon by the committee."

"*September* 8, 1818—*Voted*, to direct the committee to proceed

in opening the canal;—and *Voted*, to raise two hundred dollars for the purpose of opening said canal."

"*March* 22, 1822. The third article in the warrant was to choose a committee to open the channel from *Bog* pond to *Saco* river, the summer ensuing. Under this article it was *Voted*, to empower the standing committee to take such measures to open the channel from *Bog* pond to *Saco* river as they should think proper."

"*October* 7, 1822. *Voted*, to choose a committee of three persons to superintend the further opening of said canal."

"*Article* 7. To raise money to meet the expenses that have already accrued in opening said canal, and to pay such damages as the proprietors may think proper to individuals who claim the same, and for the further exigencies of said proprietors. *Voted*, to raise three thousand dollars for the purposes expressed in the seventh article."

"It was further proved, that in the ordinary course of events, logs and timber might be floated down the former channel of the river, by the use of competent skill and proper care, without difficulty, and with little or no loss. In great freshets however, when the river was unusually high and its banks were overflowed, very considerable losses had been sustained by the logs floating upon the intervales and into the creeks, gulfs and ponds adjacent to and connected with the river. Great losses were sustained by the log owners in 1785, 1807 and 1814, by the extraordinary freshets of those years; and in all human probability consequences equally disastrous would have happened from the freshets of 1819, 1820, 1826, and 1827, had *Saco* river continued to flow in its former channel."

"Since the diversion of the water of the river from its former channel, it has been found more difficult and expensive, and less safe and convenient, in many places on the river above and below the canal, to drive and float logs down and along the same. The channel of the river above the canal, has been deepened from *Swan's* falls, so called; the water is drawn off with more rapidity than formerly, and extensive flats have been created. The distance from the commencement of the canal to the head of the flats, is one hundred and ninety rods, and the distance across them in the widest

place, is ninety six rods, including ten rods for the width of the river Below the canal the river rises higher and quicker and falls sooner than heretofore, and logs are now more liable to be thrown far upon the intervales and scattered and detained or lost; and a shorter time is afforded for the convenient running or floating of logs, when the water is at a suitable pitch for that purpose, than formerly."

"The distance from the old river at the head of the canal, to the bridge at the lower end of *Bear* pond, is two hundred and ninety four rods; and the distance thence to *Bog* pond is one hundred and twenty rods."

"The canal here for the most part is very broad, with large sand flats; and requires a high pitch of water in the river above, in order to float logs through it. That height of water which was safest and best to drive logs round the old river formerly, would now be insufficient to float them in this channel to *Bog* pond."

"Adjoining *Bog* pond is an extensive tract of low meadow land or bog, which is always flowed when there is sufficient water in *Saco* river to float logs into that pond. Upon this bog, when thus flowed, logs and timber are more or less driven and scattered by the wind and currents among trees and stumps; rendering it difficult and expensive for the owners to remove them, and sometimes impracticable, when the water subsides, until another freshet succeeds. By these means logs are often detained a long time from their places of destination; and when received, are diminished in value by exposure to the elements and other causes."

"Previous to the year 1824, there was no proper channel or canal from *Bog* pond, through which the logs which had been driven into that pond or upon the bog, might be floated to the old river below. *Thomas Day* and *David Bradley*, two of the defendants, with *Robert Bradley*, Esq. first explored the passage for a channel from said pond to the river in 1821, and worked in digging and opening the present channel in 1822. After they had commenced and made considerable progress in the work, they were aided in it by others, proprietors of the *Fryeburg* canal. The first year after it was commenced, a channel was dug four feet deep and sixty or eighty rods in length. The undertaking was afterwards continued

and so far completed as to admit the passage of logs through this channel in 1824."

"Since the year 1824, by the flowing of the water through the new channel, it has been greatly increased in width and depth. The channel in the narrowest places was proved to be at this time about thirty three feet wide, and in the widest upwards of a hundred feet, and the banks at low water about five feet above the water, which was from six to eight feet deep, except at the outlet of the pond, where the water is shoal. This channel is crooked and somewhat circuitous. Since the year 1824, the owners of logs have found less difficulty and incurred less risk and expense in driving their logs through the canal, than in the preceding years. The opening of the channel from *Bog* pond to *Saco* river was a benefit and not an injury to the log owners."

"From the year 1820 to 1826, there were no freshets of extraordinary magnitude, and during that period probably logs might have been floated round the *Saco* river had it run in its ancient channel, with but little risk, expense or loss to the owners."

"It was also further proved, that the plaintiff, *John Spring*, was the owner of a large number of logs, which at different times had been put into *Saco* river above the head of the canal, for the purpose of being floated down the river to be used and disposed of below the town of *Fryeburg*, from the year 1821 to the time of the commencement of this suit; which logs, by the opening of the canal, and diverting the water of the river as aforesaid, were prevented from floating down the river as they otherwise would have done, and were floated into the canal, out of the usual and natural course of the river; that said *Spring* has within six years suffered loss and sustained damages by reason of his logs running into the canal, and being prevented from following the ancient and natural channel of the river, to the amount of thirteen hundred dollars."

J. & E. Shepley, for the plaintiff. The injuries sustained by the plaintiff being found to have been done within six years, the action is not barred by the general statute of limitations. In an action of the case for consequential damages, like the present, it is not the first act in a series of events resulting in an injury, which gives the

right to sue; but it is the injury itself which is the ground of the action. The first act is regarded merely to ascertain if the injury is one which the law will repair. However long the mischief may have been continued, the right of action attaches only when the party begins to be damnified. Such is the principle recognized in fixing the time of commencing the period of limitation of suits against the administrator of an insolvent estate. *Walker v. Bradley*, 3 *Pick.* 261; *Sherman v. Atkins*, 4 *Pick.* 283; *Chandler v. Chandler*, *ib.* 78. So in actions of the case. *Beasley v. Shaw*, 6 *East*, 208; *Weld v. Hornby*, 7 *East*, 196; *Sherwood v. Burr*, 4 *Day*, 244; *Rice v. Hosmer*, 12 *Mass.* 127; *Mather v. Green*, 17 *Mass.* 60; *Cro. El.* 402; *Cro. Jac.* 231; 1 *Com. Dig. Action on the case for Nuisance B.*

Neither is the plaintiff's right to recover barred by the acts incorporating the proprietors of *Fryeburg* canal, or further modifying their powers.

Because—1st. Those acts are unconstitutional. By the constitutions of this State, and of the United States, no man's property can be taken from him under the public authority, except for public uses. The private property of one man cannot, in any case, be taken for the private use of another. *Ken. Prop'rs. v. Laboree*, 2 *Greenl.* 290. Now here, the plaintiff, as well as others, had a vested right to the navigation of *Saco* river, by the usage of more than twenty years; *Berry v. Carle*, 3 *Greenl.* 269; and this right none but the legislature, and for public uses, could take away. But the acts in question appear to have been passed for the benefit of private individuals; who are made liable in their estates for all damages; and without any remuneration in tolls, the benefit being derived from the increased value of their estates. Restrictions and incumbrances like these, not being usually imposed in cases of public interest, show that this was deemed by the legislature to be merely a private speculation. Besides, the alteration is found by the commissioner's report, to be detrimental to the navigation of the river; and useful to no one, except to the lands of the corporators. And to justify such an invasion of private rights it should appear, on the face of the statutes, that the design was for the public

good. But whether the whole grant is unconstitutional or not, yet the limitation in these statutes is inoperative and void, because it goes to establish a rule in favor of one class of citizens which is not granted to all; exempting these corporators from the operation of the general statute of limitations. *Holden v. James*, 11 *Mass.* 405; *Piquet, appt. &c.* 5 *Pick.* 65; *Lewis v. Webb*, 3 *Greenl.* 336.

2. The remedy given by these statutes is cumulative only; and does not take away the right to sue at common law. To this point the rule is that no statute is to be construed as taking away a common law right, unless the intention is manifest. *Melody v. Reab*, 4 *Mass.* 373. But here, the remedy by complaint lies only against the corporation; and as the individuals are also made liable, the remedy against them is left at common law. The court seem to have taken this view in *Prop'rs. of Fryeburg Canal v. Frye*, 5 *Greenl.* 43. The cases of *Stowell v. Flagg*, 11 *Mass.* 364, and *Stevens v. The Middlesex Canal*, 12 *Mass.* 466, are not opposed to this position; the general mill-act being manifestly for the public benefit; and the act in the latter case containing no provision for individual liability.

3. Nor do these acts contemplate any injuries to be redressed by the particular method therein prescribed, except injuries to real estate. The word "property" has generally been interpreted in this sense, in other statutes of a similar character. *Boston & Roxbury mill corp. v. Gardiner*, 2 *Pick.* 37. And it may be so inferred from the limitation here commencing at the time the channel is changed; by which act the land alone can receive damage. So the mills, which the corporators are authorized to build, may be erected at any time, after this particular limitation is expired; and upon any other than the construction contended for, the party injured would be without remedy.

4. Neither do these acts purport to afford protection to the corporators for injuries sustained by others on other parts of the river, beyond the limits of the canal. Yet the case finds that the river has been deepened in one place; its force altered for the worse in others; and that flats of ninety rods in breadth have been created above

the mouth of the canal; which is not the necessary consequence of making it, but on the contrary is an abuse of the powers granted.

5. And the defendants themselves are not protected by the statutes, because they have not opened a new channel in the manner intended by the legislature. If the statutes intended a public benefit, on which ground alone can their constitutionality be defended, it was by opening a safe, practicable and convenient passage for the floating down of timber as before. It was never designed to destroy the navigable character of the river, and do an irreparable injury to those who had been accustomed to use its waters; but only to change its course. Unless, therefore, the corporation has opened such a passage, the acts afford them no justification, sufficient time to do this having long since elapsed. This corporation, also, is specially vested with all the powers and privileges of corporations of the like nature. It must therefore be subject to similar obligations and duties. Now all other similar acts of incorporation, in Massachusetts, are manifestly designed to improve the navigation of the waters. There is no ground, either on the face of the statutes, or in their subject matter, for any other conclusion, Yet these individuals, so far from improving the navigation, have essentially injured, and nearly destroyed it; wasting its waters over so wide a surface as to create shoals and morasses in which the property of the citizens is detained and lost. *Wales v. Stetson*, 2 *Mass.* 146; *Coolidge v. Williams*, 4 *Mass.* 40; *Hood v. Dighton bridge*, 3 *Mass.* 267.

The *seventh* set of pleadings, terminating in demurrers, present the question whether the defendants are justified by the statutes, after having admitted that their requirements have in no respect been complied with. To allow such a justification would be to legalize any mischief which corporators could be found willing to perpetrate. *Andover & Medford Turnpike Corp. v. Gould*, 6 *Mass.* 40; *Commonwealth v. Heare*, 2 *Mass.* 102; *Stanwood v. Pierce*, 7 *Mass.* 458; *Steele v. Western Inland Lock Navigation comp.* 2 *Johns.* 283.

N. Emery and *Fessenden* argued for the defendants:—1st. That under the general issue the defendants could not be found guilty, the case finding no facts on which they could properly be charged.

2. That the general statute of limitations began to run from the time of the first act openly done, which was more than six years before the commencement of the action. *Hurst v. Parker*, 1 *Barnw. & Ald.* 92; *Dyster v. Battye*, 3 *Barnw. & Ald.* 448; *McFadson v. Oliphant*, 6 *East*, 387; *Coke v. Sayer*, 2 *Wils.* 85; *Reed v. Markle*, 3 *Johns.* 523; *Bank of Utica v. Childs*, 6 *Cowen* 238; 2 *Salk.* 442; 1 *Ld. Raym.* 772.

3. That the particular limitations in these statutes commenced at the time the current of the river was in fact turned, by whatever agency this may have been done. *Fisher v. Hamden*, 1 *Paine's Rep.* 55; *Boyden v. Drummond*, 2 *Campb.* 157; *Bishop v. Little*, 3 *Greenl.* 405; 9 *Dane's Abr.* 491; 5 *Barnw. & Cresw.* 149, 259; *Troup v. Smith's Ex'rs.* 20 *Johns.* 33; *Iveson v. Moor*, 1 *Comyn*, 58; 6 *Cowen* 189; *Mullaghan v. Palmer*, 3 *Caines*, 307.

4. That *Saco* river was a public highway, in the use of which no person had such a vested right as to deprive the legislature of the power to alter its course, for the public good; and at its discretion to limit the mode of remedy for damages occasioned to the property of individuals.

5. That the mode of redress provided in these statutes was not cumulative. They are public acts, to be construed as other statutes relative to highways, the provisions of which are held to take away all remedies at common law. *Gedney v. Tewksbury*, 3 *Mass.* 307; *Smith v. Drew*, 5 *Mass.* 514; *Commonwealth v. The Bluehill turnp. corp.* 5 *Mass.* 520; *Commonwealth v. Coombs*, 2 *Mass.* 489; *Arundel v. McCulloch*, 10 *Mass.* 70; *Craigie v. Mellen*, 6 *Mass.* 7; *Wales v. Stetson*, 2 *Mass.* 143; *Hood v. Dighton*, 3 *Mass.* 263; *The Governor and Comp. of the cast plate manuf. Co. v. Meredith*, 4 *D. & E.* 794; *Stowell v. Flagg*, 11 *Mass.* 364; *Cro. Jac.* 644; *Williams v. Hingham and Quincy turnp.* 4 *Pick.* 341.

6. That a demand in writing by the plaintiff, according to these statutes, is a condition precedent, without which he cannot recover.

7. That the transactions complained of were lawful acts, relating to public property, and therefore formed no foundation for a claim

of consequential damages. *Callender v. Marsh*, 1 *Pick.* 418; *Stat.* 1821, *ch.* 118, *sec.* 1; 1 *Chitty's Pl.* 133.

8. That the plaintiff having purchased his timber several years after the river was turned, he took it subject to all the inconveniencies resulting from the existing state of the river, and therefore at a price proportionably reduced; which being the loss of the seller and not his own, he has no claim for damages.

9. That if he had a remedy, it was local, and should be sought in the county of *Oxford;* being in the nature of case for a nuisance. *Warren v. Webb*, 1 *Taunt.* 379.

E. Shepley, in reply, to the point that fresh rivers partook of the nature of highways only so far as the right of passage was concerned; and that the legislature could change their channels only for public and not for private purposes; cited *Hargrave's law tracts*, 5, 8, 9; *The people v. Platt*, 17 *Johns.* 195; *Hooker v. Cummings*, 20 *Johns.* 90; *Angell on Water courses*, *p.* 14. And he urged that the limitation was unconstitutional, being from a fixed day, and not from the time of the act done. 1 *Ld. Raym.* 307, 1 *Chitty*, 233.

This cause was argued at the last *April* term; and the opinion of the Court was now delivered by

Mellen C. J. It appears by the report of the commissioner who was appointed, by consent of parties, to ascertain and settle the facts in this case, that the plaintiff has sustained damages within six years next before the commencement of the action, to the amount of thirteen hundred dollars; by reason that his "logs, by the opening of said canal and diverting the water of said river as aforesaid, were prevented from floating down said river as they otherwise would have done, and were floated into said canal, out of the usual and natural course of said river; and by reason of said logs running into said canal, and being prevented from following the ancient and natural channel of said river;" and the question before us is, whether he has a right to recover all or any part of that sum, upon a view of all the facts detailed in the report, and the application of

legal principles to those facts. We have listened with patience, pleasure and profit to the learned and elaborate arguments of the counsel upon the numerous questions discussed, arising on the several issues joined; and, aware of the interesting nature of the cause to the parties, in a pecuniary point of view, as well as of the importance of some of the principles involved in its decision, we have examined it with attention, and have formed an opinion which we believe to be correct.

The act incorporating the proprietors of the *Fryeburg* canal was passed on the second day of *March*, 1815, and they are vested thereby "with all the powers and privileges which are by law incident to corporations of the like nature for the purpose of opening a new channel for *Saco* river within the town of *Fryeburg*" from one point on the river to another, particularly described in the act. The second section declares that the persons named in the first section "shall be liable in their individual as well as in their corporate capacity to make good all damages sustained by any person or persons, in consequence of opening said new channel;" and it creates a lien upon the real estate of the several corporators. The third section declares "that in all cases where any person shall be damaged in his property, by reason of opening or managing said new channel or canal, and the said proprietors do not within thirty days after being requested thereto in writing, make or tender reasonable satisfaction to the acceptance of the person so damaged, such person damaged as aforesaid, may apply in writing to the Court of Common Pleas or the Supreme Judicial Court holden within the county where the damage is sustained, within two years thereafter for redress." The section then goes on and prescribes the particulars of such proceeding by complaint. An additional act, passed on the 20th of *June*, 1816, prescribes some further restrictions as to the mode of prosecution by complaint; authorizes the proprietors to purchase and hold real estate on the river and canal to a certain amount; and declares that all claims or right of action, against the corporation or the members thereof, shall be barred at the expiration of four years from the time the cause of action shall have accrued. The act of *February* 23, 1818, bars all such claims or

right of action at "the expiration of six years from and after the time the said *Saco* river shall have been turned, and taken its course through the said new channel." The act of *June* 19, 1819, merely relates to the choice of assessors and the assessment and collection of sums assessed, and has no relation to this cause. Neither of the acts before mentioned limits the time within which the canal was to be opened and the river to be turned into and take its course through it; nor does either of them authorize the proprietors to demand or receive any toll from those whose property should be transported upon its waters.

The defendants have severally pleaded seven pleas, viz:—the general issue and six special pleas in bar. Four of the six are pleas founded on the general statute of limitations, or the special limitations in some of the acts before mentioned; the sixth is a plea of conformity to the act of incorporation in opening the canal. The seventh plea states in substance, the organization of the proprietors under the act of incorporation and some of their proceedings preparatory to their commencing the work intended; and each defendant in this plea says that the acts done and complained of in the writ, were done by him, as one of the corporation, and under its authority, in opening the canal. The plaintiff to this replies and says that the proprietors did not open the canal in conformity to the act. To this there is a general demurrer. At present we shall confine ourselves, to the examination of the cause as presented on this issue; waiving the numerous questions arising upon the six other issues. We adopt this method, because the seventh plea discloses the character in which the defendants acted, and opens the whole subject to consideration, as well as the legal objection to the sufficiency of the replication to this plea; though there is no doubt we are at liberty to examine all the merits of the cause, so far as facts are concerned, upon the general issue; for in the agreement of the parties as to the appointment and powers of the commissioner, it is expressly stated, that the court, upon the facts reported by him, and upon the several pleadings which have terminated in demurrers, shall decide the cause.

Prior to the act of incorporation in 1815, *Saco* river passed

through the town of *Fryeburg* in a very circuitous manner. By the opening of the canal, its winding course has been essentially altered, and it has been shortened fifteen or eighteen miles in that town. It is stated or admitted that until it was so shortened by means of the canal, "the inhabitants of the State of Maine, as well as others, had been accustomed to float their logs and timber down and along said river, in its ancient channel, through and below said *Fryeburg*." The allegations in the writ are, that the defendants on the first of *July* 1815 "removed and opened the banks of said river, and thereby diverted and turned a great portion of the water of said river from its natural and usual channel and course, and until the commencement of this action the water of the same river, by means of the same opening of said banks, was so diverted and turned from its accustomed channel, and the defendants thereby obstructed and prevented the floating and passing of logs and lumber along the usual channel of said river, as before the opening of the bank." The plaintiff then avers that his logs which he had in *Saco* river above the opening in the bank, "by means of the opening and removal of said bank of said river as aforesaid, were prevented from floating down the same river, as they otherwise would have done, and thereby were carried from the natural channel of said river, and became of no value, and were wholly lost to said *Spring*."

Whatever acts the defendants did, of which the plaintiff complains, they claim to justify under the act of incorporation. This act and those additional thereto, the plaintiffs declaration and the pleadings, together with the report, present three general questions to view:

1. Whether the plaintiff has suffered any damages for which he ever could maintain any legal process.

2. If so, does a common law action furnish a legal remedy for their recovery?

3. Has the remedy been lost by the operation of any of the statute limitations on which the defendants rely in their pleas.

Damnum absque injuria, is not a legal novelty. It does not necessarily follow that because a plaintiff may have sustained a serious injury in his property, consequent upon the voluntary acts of a defendant, that therefore he has a right to recover damages for that in-

jury. Some acts may be justified by an express provision of law; or the damage may have arisen as the consequence of those acts which others might lawfully do in the enjoyment and exercise of their own rights and management of their own business; or it may have resulted from the application of those principles by which the general good is to be consulted and promoted, though in many respects operating unfavorably to the interests of individuals in society. Other instances might be stated. Such is and must be the law of society. But we proceed to the consideration of the first question.

Fresh water rivers, though in point of property, they are *prima facie* private, yet they may be of public interest, and belong to the people at large as public highways. Rivers of public use in the transportation of property are of this class; and being subservient to commerce, have by general consent of mankind and by the rule and authorities of the common law been considered as things of common right. Sir *Matthew Hale*, in his learned treatise *de jure maris*, lays down the doctrine that fresh rivers belong to the owners of the adjacent soil; but that such rivers as well as those which ebb and flow, may be under servitude of the public interest; that is, may be of public use for the carriage of boats, &c. and in this sense may be considered as public highways by water. *Harg. Tracts, ch.* 3, 8; *Davies Rep.* 152; 4 *Burr.* 2162; *Palmer & al. v. Mulligan & al.* 3 *Caines* 307; 3 *Kent's Com.* 344; *Berry v. Carle & al.* 3 *Greenl.* 269.

Saco river in the town of *Fryeburg* is one of the character above described; not a navigable river, however deep and large, in common law language, being above tide waters; but one under servitude to the public interest, and over the waters of which the public have a right to pass. In this respect such a river resembles a highway on land; for the land over which a highway is laid out is private property; yet the highway belongs to the public for the common use. The owner of land adjoining a fresh water river owns to the thread of the river; so if a man purchase land bounded on one side by a highway, the deed will convey to him the land as far as the centre of the road. 3 *Kent's Com.* 349, and cases there cited. The legislature, if they see cause, may lay out a highway; and for reasons

satisfactory to them, they can discontinue or change the course of it. It is equally true, and is admitted by the counsel for the plaintiff, that the legislature may alter the direction of a river when the public good requires it; and that if the act incorporating the proprietors of the canal in question was passed for public benefit and not for private accommodation and advantage, the act is so far constitutional. But he contends that individual interests and personal or private considerations were the only objects in the view of the legislature.

It is said that this fact appears from the report; it only appears that thirty years ago "it had been deemed of great importance by a portion of the inhabitants of the town to produce that result" (the diversion of the waters of said river as aforesaid) "for the advancement of their agricultural interest and enhancing the value of their land situated upon and near the river; and the undertaking had been commenced of opening a communication through the high land which separated *Bear* and *Bog* ponds." The opinions and proceedings above mentioned do not appear to have any connexion with the act in question or with the persons therein named. Besides, as we determined in the case of *Thomas v. Mahan & al.* 4 *Greenl.* 513, we are not at liberty to travel out of the act in search of its meaning; but must give it such a construction as its language authorizes and seems to require; remembering at the same time that when the constitutionality of the law is in question, we should be on our guard not to decide and pronounce it to be unconstitutional, by ascribing motives for its enactment which perhaps never existed, and excluding from our view those facts and considerations which might have justly had an important influence on the mind of the legislature. *Marshall C. J.* in the case of *Fletcher v. Peck* says, "The question whether a law be void for its repugnance to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case." The constitution of Massachusetts in the 4th article of *ch.* 1, as originally formed, authorized the legislature to establish and ordain all manner of wholesome and reasonable laws, not repugnant to such constitution, as they should judge to be for the good and welfare of the commonwealth and of the subjects of the same. And in the 10th article of

the Declaration of Rights it is stated that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

Under the above mentioned limitations it is the unquestioned province of the legislature to determine as to the wisdom and expedience of a law, and how far the public interest is concerned, (if in any degree,) and may properly be influential in the enactment of a law directly operating on private property or private rights. In the case before us the legislature have made provision for compensation to those injured by the opening the canal and the diversion of the river into it; and we hear no complaint from those whose lands have been appropriated for the purposes of the canal, or those whose lands may have been rendered less valuable, if there are any such, by so important a change in the course of *Saco* river. How far a a person whose private property has not been taken from him by means of the act of incorporation, has a right to contest the question of constitutionality, is worthy of consideration. On principles of analogy it would seem he has none; but we will not pursue this inquiry, or decide the point. We apprehend that the question of constitutionality does not in judicial consideration, depend on the proportion which the public interest bears to private interest, in the application of the restrictive principle on which the plaintiff's counsel relies. In the case of *Commonwealth v. Breed*, 4 *Pick.* 462, the court observe, "but it is said this grant was made upon the petition and for the sole benefit of an individual, and was not needed for the accommodation of the public. It is doubtless true that the leading motive of the defendant in erecting the bridge was private profit; and so almost all other enterprizes, many of which have resulted in great public improvements, have originated in private gain. We can see no valid objection to the constitutionality of this grant." The grant to *Breed* was to erect a bridge from *Chelsea* to *Belle* Island in *Boston* harbor; and the court lay down the principle before stated in this opinion, that "in all cases the legislature has the power to inquire when the public convenience and necessity demand these partial obstructions and interruptions to navigation, and

upon what terms and conditions they may be established." The act of *March* 15, 1821, establishing the *Cumberland* and *Oxford* canal corporation, authorizes the corporation to "take and use the lands of private persons, acquiring the same title to said lands as is acquired by the public to lands appropriated for public highways, and paying a just compensation therefor." In the act establishing the *Kennebec* and *Androscoggin* canal association, passed *March* 4, 1826, there is a clause exactly in the same words. Are these acts unconstitutional in respect to the foregoing provision? In the act of *June* 22, 1793, incorporating the proprietors of the *Middlesex* canal, there is this clause:—"Whereas it may be necessary in the prosecution of the foregoing business, that the property of private persons may (as in the case of highways) be appropriated for the public use; in order that no person may be damaged," &c. &c. The act then prescribes the mode for obtaining compensation. In the act of *March* 10, 1792, incorporating the proprietors of the *Massachusetts* canal, there is a more extensive authority given. And similar power is given in the following acts, viz. that of 10th *March*, 1797, incorporating the proprietors of *Ten Mile Falls*. So in the act as to *Saco* falls canal, of *February* 1803, and in that of *Medford* canal of *March* 1805. The act of *March* 1793, empowering *Charles Barrett* to open and make a canal in the county of *Lincoln* is more in point still. On his application he was authorized "to open and cut a navigable canal from the upper part of *Barrett's* town (now *Hope*) so called, in said county of *Lincoln*, beginning at the distance of twenty five miles above the head of the tide in *George's* river, so called, in the county aforesaid, to communicate with the sea, at the mouth of said river." The same power was given to take and appropriate private property as in the other acts before cited, making compensation for it. Here a sufficient quantity of water is to be taken for the canal; and the preamble of the act states that the object in view in making the canal was to avoid the falls in *George's* river. Had not the legislature as much right to change the course of *Saco* river and shorten it thereby fifteen miles, as to avoid an obstruction occasioned by falls? The act incorporating the proprietors of the locks and canals on *Connect-*

icut river confers similar powers; and among others, *John Worthington*, *Caleb Strong* and *Theodore Sedgwick* appear in the act as proprietors; three of the most eminent lawyers in that section of the country. Many other acts similar in principle might be mentioned. All these canals and locks are or were to be made at private expense, and for the profit of the proprietors; yet as the legislature granting the several charters considered that a public good would result from the existence of this species of river or highway, they gave to the proprietors the same power of appropriating private property in effecting the object in view as is exercised in the location of highways. But we have never heard of any objection to these acts on the ground of unconstitutionality; and yet why are they not as liable to the objection as the act incorporating the proprietors of the *Fryeburg* canal? They were authorized merely to open the canal or new channel for *Saco* river; no time was limited within which the channel should be completed, nor does the act require it to be of any particular width or depth, or degree of excellence, convenience or safety, as it respects those who might transport through it, their boats, logs or lumber; no toll was granted to the proprietors, nor, by the act, were they bound to keep it in repair or free from obstructions after it was once opened according to the act. Whether the new channel opened by the defendants, under the authority of the corporation, is more or less safe and convenient than the river before the diversion of it, we apprehend to be no question in this cause; if properly opened, the defendants are not responsible.

The act of incorporation empowers the corporation to open a new channel for *Saco* river, between two given points; and the act of *February* 23, 1818, as before stated, bars all claims for damages "at the expiration of six years from and after the time the said *Saco* river shall have been turned and taken its course through the said new channel." The several acts must be construed as one act, being *in pari materia*. What then did the legislature mean, in the absence of all descriptive language, by the words "a new channel for *Saco* river?" The act of 1818, fixes the liability of the corporation and its members, for damages, as terminating at the time of

the turning of the river and taking its course through the new channel; and allows six years after that time to prosecute for the accrued damages. On this principle, the new channel seems to have been contemplated as opened when the river should be turned into it and take its course through it; and it is stated in the report that "since the year 1820, all the water of said river has been diverted from its ancient channel at *Russell's* creek, so called, in said town of *Fryeburg*, and flowing through *Bear* and *Bog* ponds and meeting its former channel again near the land of *John H. Frye*, and running in this new course through what is called the canal." According to this fact, it seems that such a new channel was opened, sometime in the year 1820, as the legislature intended by the act of incorporation.

The report further states that *Spring* was the owner of a large quantity of logs in *Saco* river from 1821, to the commencement of the action, and those are the logs mentioned in the writ; and this implies that he did not own them till after the canal was opened and the course of the river changed. In addition to this, it appears by the writ that that the *gravamen* alleged, which we have before copied *verbatim* from the declaration, has no connexion with or reference to any insufficiency or imperfection of the new channel; but all which the plaintiff complains of is, that the defendants, by removing the banks of the river, prevented his logs from floating down the river as they would have done, if there had been no diversion; instead of which they were carried into the new channel. All this is true; but do these facts lay a foundation on which this action can be sustained, when by an act of the legislature the proprietors had a legal authority for diverting the river from its ancient channel? In our allusion to the limitation in the act of 1818, which has been made above, our only object was to aid us in giving to the expression in the first act, "opening a new channel," our construction as to its import and meaning; and without reference to the constitutionality of it, against which the plaintiff objects. The plaintiff in his declaration does not allude to either of the acts before mentioned, much less claim any damages in virtue of any of their provisions; therefore if the facts which have been reported to us, in con-

nexion with those provisions, amount to a justification of their conduct, the action of course must fail.

Having thus considered the general ground of defence under the first head or division of the cause, we now proceed to examine the special ground, presented on the demurrer to the replication to the seventh plea. The substance of this plea has already been stated, and also of the replication. The plea states a good defence, and the question is whether the replication has avoided it. As we have before observed, the act of incorporation limits no time within which the new channel or canal should be completed; and in such a case the general principle of the common law implies and requires that it should be done in a reasonable time. In such a case as this, the question as to reasonable time is matter of evidence, depending on facts which are not before the court. When the facts are found, it is a question of law. It is true that the length of the canal is given; but as to the time and expense requisite for its completion the court know nothing. The replication professes to avoid the plea by saying that the corporation never opened the new channel according to the provisions of said acts; and on the demurrer, the counsel for the defendants contend that the replication is bad, as it contains no averment of any neglect, or that a reasonable time had elapsed, before the plaintiff sustained the injury of which he complains; it being a traversable fact, as much as an averment of special notice or of performance of a condition precedent on the part of the plaintiff is traversable. These are familiar principles. The plaintiff's counsel in reply, contends that his replication puts every thing in issue, including the question of reasonable time. The averment is that the proprietors have never opened a new channel, in the prescribed rout in manner and form as in the said acts is provided; and yet these acts contain no provision as to time. Whether a reasonable time had elapsed or not, is not the question; but whether on demurrer the averment that it had elapsed is not essential to the sufficiency of the replication. Upon the principles of pleading we are strongly inclined to the opinion that it is. Nothing was averred in it but a nonconformity to the provisions of the acts, in the manner of opening the new channel for *Saco* river.

Our opinion is, that the defence is sustained upon the broad, general ground on which we have examined and placed it; and it seems to be also on the demurrer to the replication to the seventh plea; and thus we close our observations on the first head or division of the cause.

The disposition which we have thus made of the cause, renders it unnecessary for us to proceed any further; but still, as to the second division of the subject, we would observe, that the ground of action assumed by the plaintiff is not covered by the specific process which the act of incorporation has prescribed. It was the usual mode of redress pointed out in acts of a similar character previously passed, having for their object the claims of those whose property might be taken or appropriated for the contemplated purposes. From the provision of a remedy for this class of persons and no others, an argument may well be drawn in favor of the defence, and of the exemption of the proprietors from liability for consequential damages like those demanded in this action; inasmuch as the act does not declare them liable for such damages, nor liable for repairs, nor grant them any toll. Towns are expressly made liable for the repair of highways, and for damages to individuals suffering from bad roads; and corporations entitled to and receiving toll are also liable on that principle. As to the questions arising on the pleadings, based on the statute of limitations, being the last division of the cause, we forbear all observations, and waive the examination of them, as wholly unnecessary.

Plaintiff nonsuit.

COFFIN *vs.* COFFIN.

An attorney at law is liable to an action for money collected by him, in the same manner as any other agent, and without a special demand; and the statute of limitations begins to run from the time he receives the money.

ASSUMPSIT to recover $47,60 which *Charles Coffin* the defendant, in the course of his practice as attorney and counsellor at law, had collected for a demand left with him by *Paul Coffin*, the plaintiff, against one *Bean*. The demand was left with the defendant prior to the year 1807; and the money was received *July* 20, 1815. In 1806, *David Coffin* was appointed guardian to the plaintiff; in which office he continued till the year 1829; and on the 19th day of *December* 1818, he had a settlement of accounts with the defendant, and thereupon gave him a receipt in full of all accounts and demands to that date; and in full for all demands left in his office for collection. In this receipt the plaintiff was not mentioned. It was agreed, in a case stated by the parties, that *David Coffin*, if he were a competent witness to the fact, would testify that this receipt was not intended to include and did not settle the demand in question. And it was further agreed that during the period of the guardianship the plaintiff resided in New Hampshire, the guardian, during the same time, residing within half a mile of the defendant's house. The money being demanded of the defendant, *March* 9th 1830, he replied that he had paid it over to the guardian, and should not pay it again.

The defendant pleaded the general issue, and the statute of limitations; to which the plaintiff replied a new promise, on which issue was joined; and the cause was submitted, upon the facts and pleadings, to the decision of the court.

J. & E. Shepley, for the plaintiff, contended that the statute of limitations did not begin to run till the plaintiff had a right to maintain an action; *Walker v. Bradley*, 3 *Pick.* 261; *Wilcox v. Plummer*, 4 *Peters* 172; and that here no action could be maintained against the defendant, he being an attorney at law, till the money

was demanded, which was not till *March* 1830. *Staples v. Staples & tr.* 4 *Greenl.* 532. And to the competency of *David Coffin* as a witness, they cited *Bliss v. Thompson*, 1 *Mass.* 488; *Page v. Weeks*, 13 *Mass.* 199; *Barstow v. Gray*, 3 *Greenl.* 409; *Ely v. Forward*, 7 *Mass.* 25; *Phillips v. Bridge*, 11 *Mass.* 242; *Gifford v. Coffin*, 5 *Pick.* 447.

D. Goodenow, for the defendant, objected to the right of the plaintiff to maintain this action; there being no special request, but only the usual *sæpe requisitus*, alleged in the declaration; 1 *Chitty's Pl.* 322, 325; 1 *Saund.* 33, *note* 2; *Wallis v. Scott*, 1 *Stra.* 88; and such request being necessary, on the authority of *Staples v. Staples & tr.* 4 *Greenl.* 532. But he contended that the facts in that case did not call for the decision of that point, which was extrajudicial, and not supported by the analogies of the law. The right of action here accrued as early as the year 1815, when the money was received and ought to have been paid over.

He also contended that *David Coffin* was not a competent witness, as his testimony would go directly to exonerate himself by charging the defendant. *Emerton v. Andrews*, 4 *Mass.* 653; *Widgery v. Haskell*, 5 *Mass.* 144.

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

Mellen C. J. Some years prior to 1815, the plaintiff placed in the hands of the defendant, as an attorney at law, for collection, a demand against one *Bean*; and the same was paid to the defendant on the 20th of *July*, 1815, amounting to $47,60. The present action is brought to recover that sum. The defendant pleaded and relies on the statute of limitations; the plaintiff replied and relies on a new promise within six years, next before the commencement of the action. On the 9th of *March* 1830, an agent of the plaintiff demanded the money of the defendant, who replied that he had once paid it to the guardian of the plaintiff, and that he should not pay it again. Whether he ever did or not, is an immaterial inquiry, if the statute of limitations commenced running when the

money was received of *Bean* by the defendant and he became accountable for it; for if it did, the action is barred, because there is no pretence that any new promise was ever made. Viewing the cause in this light, it is evident at once that the facts deposed by *David Coffin* are not of the least importance, and therefore it is of no consequence to inquire whether the deposition was admissible or not. Nor is it a subject of consideration whether the pleadings are technically accurate and formal, in the decision of a cause on an agreed statement of facts. This we have often decided. The only question is when the statute of limitations commenced running against the plaintiff's demand. Unless the defendant stand in a relation to the plaintiff different from that of any other person who has collected a sum of money as agent for the principal who employs him, then most clearly the action is barred. On this point no doubt has been raised. The counsel for the plaintiff, however, contends that his right of action did not accrue till after the demand on the defendant in *March* 1830, and that till then the statute did not commence running; and in support of his position he relies upon the case of *Staples v. Staples* and *Adams tr.* 4 *Greenl.* 532. The only question in that case, as stated by the court, in delivering the opinion, was "whether at the time of the service, he *(Adams)* was such a debtor of the principal as to be chargeable in this process," and that was the only question which it was necessary for the court to decide, and which they formally did decide. The cases there cited clearly show that debts payable at a future day are attachable by our trustee process; so that on the ground assumed in argument by *Adams* he was clearly a trustee. In answer to the argument, the court used the expressions "we admit the principle to be correct, that until after demand made, the attorney in this case was not liable to the action of the principal, and it appears that no such demand was made; but it does not follow that he was not liable to this process at the suit of the plaintiff under the circumstances disclosed." By the report of that case it appears that ten minutes after the money had been paid to Mr. *Adams*, and before he could possibly have had time to pay it over to his client, it was attached. In view of these facts and in reference to them, the observation of the court above quoted, was

made, and not in language sufficiently guarded. The expression as to the necessity of demand was incidental, and not necessary, and had no connexion with the point decided. We are perfectly satisfied with the decision itself, but do not feel bound by any collateral or incidental expression of an opinion, having no necessary connexion with it. Any impressions received, as to the necessity of a demand upon an attorney for money collected by him, before he can be considered as liable to an action, will be removed by the present opinion. Indeed we are satisfied on further examination of the subject, that we are not authorized to distinguish an attorney from other agents, and that the language used by the court, even if applied exclusively to that case, could not be sanctioned as correct. Still, the case of *Staples v. Staples & tr.* was properly decided and is fully sustained by settled principles. The result is, that the present action cannot be maintained.

Plaintiff nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF CUMBERLAND, MAY TERM, 1831.

POTTER, *Judge, &c. vs.* TITCOMB.

In an action on a Probate bond, it is sufficient if the writ be indorsed with the names of the persons for whose benefit it is brought, without mentioning the characters in which they claim.

In order to compel an administrator, on his official bond, to pay the amount of a debt due from him to the intestate, it is necessary that he should first be charged with the amount, in an administration account, by a decree of the Judge of Probate.

In an action on an administrator's bond, to compel him to account for and pay over the amount of a private debt due from him to the intestate, the lapse of more than twenty years since the date of the bond affords no ground for the presumption of payment to the heirs; because such payment, without a previous decree of distribution, would be a violation of his duty, which the law will not presume. Neither does the presumption arise that the debt was forgiven by the intestate; for gifts, as well as wrongs, are not to be presumed.

The presumption of payment, arising from lapse of twenty years, does not seem applicable except in cases of bonds or other contracts for the payment of money, &c. or the performance of a specific duty, at a fixed time, from which the term of twenty years might commence.

Potter *v.* Titcomb.

In an action on an administrator's bond, brought for the benefit of the heirs at law here, it was held to be no good objection, in arrest of judgment, that the intestate was a foreigner, having a foreign domicil at the time of his death, and that the administrator here was therefore accountable to the administrator abroad for the assets, if any, in his hands.

An official bond, being given for official good conduct, is not discharged by a faithful accounting for monies to the amount of the penalty; but stands good as a security for losses and defalcations to that amount.

In debt on an administrator's bond, the defendant pleaded in bar that he had paid to the heirs and creditors of the intestate divers sums which had been allowed by the Judge of Probate, amounting to more than the penalty of the bond. The plaintiff replied that the defendant was indebted to the intestate in certain promissory notes, of which he had never rendered any account; but without any averment that he had been cited for that purpose. And on demurrer it was held that the replication was bad, for the omission of such averment; that the plea would have been bad if demurred to; that the defect of the plea was cured by the fault of the replication; and that a citation to account being an essential pre-requisite to the right to maintain the action, and it judicially appearing that the defendant had never been cited, though several issues of fact had been found against him he was entitled to judgment *non obstante veredicto.*

Leave to replead may be granted after argument upon demurrer.

THIS was an action of debt brought by the Judge of Probate, on an official bond given to his predecessor *Nov.* 28, 1804, by *Joseph Titcomb*, in the penal sum of ten thousand dollars, conditioned for his faithful administration of the estate of *Moses Titcomb* deceased, described as late of the island of *St. Croix.* The condition was in the language of the form prescribed in the statute, except that the words "*or judges*" were omitted. The writ was indorsed with the names of divers persons "for whose benefit this action was brought," without mentioning whether they were heirs, creditors or legatees.

The object of the suit was to compel the defendant to render an account of, and to charge him as administrator with the amount of two promissory notes given by the defendant to the intestate; one dated *Aug.* 26, 1799, for $454, payable in two years; and the other dated *Aug.* 10, 1804, for $4450 payable in three years, both bearing interest.

The defendant, after *oyer*, pleaded *first, non est factum*, on which issue was joined:—*secondly*, a general performance of the condition:—*thirdly*, *nil debet*, on which issue was joined;—*fourthly*,

that he had paid to the heirs and creditors of the estate the sum of $1211,26 which was settled and allowed by a decree of the Judge of Probate *Nov.* 13, 1805; and the further sum of $431,18, which was also allowed *Dec.* 24, 1806; and the further sum of $9210,77 which was stated in account and assented to by the heirs in writing *Jan.* 9, 1807, but not finally acted upon till *Nov.* 1825: *fifthly*, payment of the whole penal sum to Judge *Freeman*, the original obligee, *Nov.* 28, 1808.

To the *second* plea the plaintiff replied that the defendant was indebted to the intestate by the promissory notes above mentioned, setting them forth, of which he had never rendered any account, either to the Judge of Probate, or in any other manner. And the defendant rejoined that he was not so indebted; on which issue was taken to the country.

To the *fourth* plea the plaintiff replied in the same manner as to the second, protesting that the defendant never paid the sums mentioned in this plea. And the defendant, protesting that he was not so indebted, rejoined that it was the declared intent of the intestate in his life time, and up to the time of his decease, that whatever monies might be apparently due to him from his brothers and sisters, (the defendant being his brother,) should not be inventoried or brought into any administration account, but should be deemed to be, and by him were on the day of his decease, which was *Sept.* 1, 1804, in consideration of love and affection, freely remitted and forgiven;—Wherefore, with the concurrence and assent of the heirs, such debts, and particularly the notes mentioned in the replication, were not inventoried nor brought into the administration accounts. To this the plaintiff surrejoined; denying that such was the intent of the intestate; denying also the assent of the heirs to the omission to render an inventory of the notes; alleging that the defendant fraudulently concealed and kept back the notes, and neglected to render any account of them; and traversing the remission of the debt by the intestate, as alleged in the rejoinder. Whereupon the defendant demurred, assigning for causes of demurrer, that the plaintiff had not confessed nor avoided the rejoinder,—that he had attempted to put in issue all the facts of the re-

joinder, instead of taking by *protestando* all which he had not traversed,—that he had also attempted to make a denial of facts in the rejoinder, a matter of inducement to his traverse;—that his surrejoinder was double, in denying both the intent of the testator and the assent of the heirs—that it contained new matter, not stated in his fourth replication, and so was a departure,—that it denied matters not traversable,—and that the plaintiff attempted insidiously to charge the defendant with fraud, in order to drive him either to admit the fraud, or to commit a departure by denying it.

To the fifth plea the plaintiff replied that the defendant was indebted by the notes, as stated in his replication to the second plea, setting them forth; alleging that at the time of granting administration the defendant did not exhibit the notes, nor give any account of them to the Judge of Probate; but kept them back, and wilfully and fraudulently concealed and suppressed them; and that the defendant never paid any monies in his office of administrator, except the sums mentioned in his fourth plea; and traversed the payment of the penalty to the Judge of Probate as alleged in the fifth plea; on which issue was tendered to the country and joined.

At the trial, before the Chief Justice, the defence, upon the issues of *nil debet* and payment, was placed upon two grounds;—first, that the intestate never intended that the notes should be paid or called for in the event of his decease, but that they were to be forgiven;—and secondly, that they had been paid. No direct proof was adduced in support of either of these positions; but they were maintained by inferences drawn from the mutual relations between the parties in interest and the intestate, and the course of transactions and equitable circumstances existing among them, as exhibited in the evidence and in their correspondence shown to the jury; and also from the lapse of more than twenty two years since the notes became due. On the other side it was contended that as no person was authorized to receive payment, except the defendant himself as administrator of the promissee, this was not a case in which the presumption of payment, arising from lapse of time, could be raised; but that if it were, the presumption was necessarily that of payment to himself as administrator, in which case he should have

charged himself with the amount, in his account. It was proved, that when the larger note was signed, the defendant was requested by the agent of the intestate to deposit it with *Henry Titcomb*, another brother of the deceased, who died about twenty months previous to the trial; among whose papers, soon after his decease, the note was found, together with a mortgage to secure its payment, and a power of attorney, from the widow of the intestate.

On the whole evidence the chief justice instructed the jury that if the notes had come into the possession of the defendant on his appointment as administrator, it would have been his duty to have charged himself with the amount in his administration account, as soon as they became due; and that if he knew where they were, he should have obtained possession of them as soon as he could, and then have so charged himself with the amount. The evidence relied on to prove that the defendant must have known where the notes were, the chief justice left to the jury, instructing them that if they should be satisfied that he did not know where the notes might probably have been found, so that he could cancel them, then they would not impute any fault in him; but would give effect to the legal presumption of payment, as in other cases; otherwise not.

Much testimony was introduced, both to support and to repel the presumptions raised by the defendant; including a voluminous correspondence between him and the intestate. Among these letters one was offered bearing date *Aug.* 3, 1792, which the chief justice excluded as irrelevant. And he admitted one offered by the plaintiff, addressed by the intestate to his brother *Andrew*, dated *Aug.* 31, 1800, though objected to, the defendant having previously read one from the intestate to *Andrew*, on the same subject, dated *Aug.* 27, 1779.

The defendant objected that the action could not be maintained without proof that he had been cited by the Judge of Probate to render an account of the notes and to charge himself with them; which had never been done; but the chief justice ruled that this objection could not be taken under either of the issues then on trial. The insufficiency of the indorsement of the writ was also urged in

abatement, the objection having been taken at the first term; but this also was overruled.

The jury returned a verdict for the plaintiff upon all the issues of fact; which was taken subject to the opinion of the court upon the correctness of the decisions and instructions of the chief justice's given at the trial.

The defendant moved in arrest of judgment, because upon the record it appeared that the intestate, at the time of his decease, was a foreigner, and had his domicil in a foreign country; and that this suit was brought for the benefit of certain of his heirs in this country; whereas the defendant, if accountable at all, is accountable only to the ordinary of the place of his domicil. He also moved for judgment *non obstante veredicto*, because it appeared of record that he had already accounted for and paid over a greater sum of money than the whole penalty of the bond.

N. Emery, *Longfellow*, *Greenleaf*, and *Daveis*, were of counsel with the defendant; and supported the following positions.

1. The bond itself is not in the form prescribed in the statute, as in terms it binds the administrator to execute the decrees of the then existing Judge of Probate, without appeal; by the omission of the words "or judges," which, in their collocation, are material. Neither does it appear to have been approved by the judge; which the law requires. Being therefore a bond at common law, the writ should have been indorsed by the plaintiff himself, under the general statute. But if not, yet the indorsement, by the evident meaning of the statute regulating probate proceedings, should have stated in what character the plaintiffs in interest appear, whether as heirs, creditors, or legatees. *Coffin v. Jones*, 5 *Pick.* 61; *White v. Quarles*, 14 *Mass.* 451.

2. It appearing, on the face of the bond, that the intestate, at the time of his decease, had his domicil in a foreign country, the heirs here cannot sustain this action; but the administrator is accountable only to the ordinary of the place of his domicil. If he is obliged to pay to the heirs here, he is still liable to pay the notes to the administrator there; without the means of recalling the money from their hands for his reimbursement. *Dawes v. Boylston*, 9 *Mass.*

337; *Selectmen of Boston v. Boylston*, 4 *Mass.* 318; 2 *Mass.* 384; *Stevens v. Gaylord*, 11 *Mass.* 256; *Ritchards v. Dutch*, 8 *Mass.* 506; *Dawes v. Head*, 3 *Pick.* 128.

3. The defendant was not liable on the bond, without a previous decree of the Judge of Probate charging him with the debt. It is only in regard to debts admitted to be due, and uncontroverted, that the rule applies by which a debtor, being appointed administrator on his creditor's estate, is thereby instantly chargeable, as administrator, for so much money actually received to the use of the estate. If the debt is merely a disputed claim, totally denied and resisted by the administrator, he cannot be liable on the bond, till the question of indebtedness has at least been settled by a decree of the Judge of Probate. Otherwise sureties might be ruined by the neglect of the heirs to cite the administrator to account, he honestly believing that he owed nothing. 11 *Mass.* 269.

4. The defendant was not bound to charge himself with the notes till they came into his possession. It was not enough even if he knew where they were. He could not know that they were not negociated by the intestate to another person. Being in the hands of one of the heirs, if he would charge the administrator with them he should first have delivered them up.

5. The estate having been accounted for, to a greater amount than the penalty, the bond is *functus officio*; the administrator being alone chargeable for the surplus, in another form of action. The bond is for the payment of money; and it operated on a particular fund then existing, in specie, in the hands of the administrator. The sureties stipulate only that he shall account for so much property. They would be responsible for him in no deeper trust. It was not like an official bond for good conduct, in an office in which the incumbent might or might not receive monies, to an amount perpetually uncertain; but on the contrary it was a measured stipulation; which the heirs or the Judge of Probate might at any time have increased by requiring a new and further bond. Yet being an official bond, no interest is to be computed upon the penalty. To this point they referred to the authorities cited in *Potter v. Webb*, 6 *Greenl.* 14.

6. The lapse of twenty years has raised a legal presumption against the indebtedness of the defendant, operating as a peremptory bar to the action. 15 *Viner's Abr.* 52; *Stark. Ev.* 1090; 2 *Wash. C. C. Rep.* 323; 5 *Pick.* 20; 6 *Wheat.* 504. If he was ever chargeable for the notes upon his bond, his liability commenced with the execution of the bond; *Stevens v. Gaylord*, 11 *Mass.* 256; *Winship v. Bass*, 12 *Mass.* 199; *Hayes v. Jackson*, 6 *Mass.* 149:—and therefore from that moment the common law presumption takes its date. Even the mortgage, given as collateral security, is no longer evidence of a subsisting debt. *Giles v. Barrymore*, 5 *Johns. Ch.* 545. The Judge of Probate being but a mere trustee of the bond, for the benefit of heirs and creditors, payment to the *cestui que trust* is a good payment, without the formality of a regular decree for that purpose. *Thomas v. White*, 12 *Mass.* 369; *Dearborn v. Parks*, 5 *Greenl.* 81; 4 *Bac. Abr.* 279, *tit. Release D.*; 5 *Dane's Abr. ch.* 144, *art.* 8, *sec.* 5; *Hanson v. Parker*, 1 *Wils.* 257; *Ward v. Lewis*, 4 *Pick.* 522. And if the presumption of a discharge by the *cestui que trust* is not impossible, his long acquiescence ought to avail to that end, even without other evidence to support it. 1 *Mad. Chan.* 75, 105, 453, 455; *Eden on Injunctions, p.* 10; 1 *Swanst.* 137; *Jennison v. Hapgood*, 7 *Pick.* 1; *Quarles v. Quarles*, 4 *Mass.* 680; *Crane v. March*, 4 *Pick.* 131; *Dawes v. Boylston*, 9 *Mass.* 137.

7. In support of the demurrer, they cited 5 *Com. Dig.* 439, *tit. Pleader G.* 2; 1 *Lev.* 77; *Cro. Eliz.* 671, 755; *Cro. Jac.* 86; *Cro. Car.* 366; 5 *Bac. Abr.* 328, 445, 451; *Hob.* 316, 321; *Yelv.* 225; *Cooper v. Homan*, 3 *Johns.* 315; 1 *Chitty's Pl.* 533, 553; *Plowd.* 140; 6 *Pick.* 269; 3 *Lev.* 467; *Co. Litt.* 77, *b*; 1 *Roll. Abr.* 45; *Dyer* 31, *b*; 1 *Stra.* 493. And they insisted that this action could not be maintained, until the defendant, had first been cited to render an account. *Boston v. Boylston*, 4 *Mass.* 318; 9 *Mass.* 397; 7 *Pick.* 1; *Dawes v. Head*, 3 *Pick.* 128.

Fessenden, Shepley and *Deblois*, argued for the plaintiff, citing the following authorities. In support of the indorsement of the writ; *Robbins v. Hayward*, 16 *Mass.* 527; *Potter v. Mayo*, 2 *Greenl.* 241. That presumption of payment arises only where some one in

being had a right of action, or had authority to receive the money; 3 *Stark. Ev.* 1253; *Winship v. Bass*, 12 *Mass.* 200; which these heirs had not; *McLellan v. Crofton*, 6 *Greenl.* 302; *Voet. Lib.* 39, *tit.* 5; and is rebutted by the situation of the parties; 7 *Wheat.* 59; *Dunlap v. Ball*, 2 *Cranch*, 180; 4 *Cranch*, 415; *Amer. Jurist*, *No.* 9, *p.* 189; *Oswald v. Legh*, 1 *D. & E.* 270. That a previous citation was necessary only where the administrator had never rendered any account; not where he had accounted falsely, by omitting to exhibit assets already in his hands; 9 *Mass.* 114, 137; *Paine v. Fox*, 16 *Mass.* 139; *Coffin v. Jones*, 5 *Pick.* 621. That interest was to be computed on the penalty; *Bank of United States v. McGill*, 12 *Wheat.* 66. And in support of the surrejoinder; *Dyer v. Stevens*, 6 *Mass.* 389; *Keay v. Goodwin*, 16 *Mass.* 1; *Dawes v. Winship*, *ib.* 291; *Kellogg v. Ingersoll*, 2 *Mass.* 101; *Pearsall v. Dwight*, *ib.* 84.

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

Mellen C. J. This case presents several questions for our consideration. A verdict having been returned against the defendant on the several issues to the country, a motion for a new trial has been filed, grounded on the report of the presiding judge. Two motions have also been filed, *one*, wherein the defendant prays that judgment may be arrested; the *other*, in which he prays that it may be entered in his favor, *non obstante veredicto*; and lastly, several questions have arisen out of the fourth set of pleadings which terminated in a special demurrer. We shall consider the merits of the motion founded on the judge's report, in the first place.

It is contended that the writ was never indorsed in the manner by law required; and that as the defect is apparent on the record, no plea in abatement was necessary; and that as a motion was seasonably made for its abatement, the writ ought to have been abated and no trial had. The 70th section of our statute of 1821, *ch.* 51, declares "that all suits brought in the name of any Judge of Probate, upon any probate bond of any kind, shall be originally com-

menced in the Supreme Judicial Court, held within or for the county in which the said Judge of Probate shall belong; and the writ in addition to the usual indorsement of the name of the plaintiff or his attorney, shall also have the name of the person or persons, for whose particular use the suit is brought written thereon." It appears that this was done in the present case, but it is contended that the character in which such persons claim, whether as heirs, devisees, legatees, or creditors, or representatives, or assignees of creditors, should have been added. It has been urged in reply to this objection, that in the present case, even the indorsement of the names of the persons, which appear on the writ, was unnecessary; and several cases were cited in support of this position. We do not deem it of any importance to examine this point, because we are well satisfied that the indorsement is sufficient as it stands. The section above cited does not require any thing more than the indorsement of the names of the persons for whose use the action is instituted. We perceive no reason why we should require more than the statute requires.

It is also contended, that the action is not maintainable, because there was no previous decree of the Judge of Probate, charging the defendant with the amount claimed, preceded by a citation to him to appear and settle his account in the probate office, according to the provision in the 72d section of the beforementioned statute. Admitting at present, for the sake of the argument, that such would be the principle of law to be applied by the court, provided the alleged omission had been presented for decision on a plea in abatement or a special plea in bar, the question is, whether the court can travel out of the issues on which the trial proceeded, and sustain an objection, grounded on the alleged omission of a fact, which the plaintiff might have proved, had the form of any of the issues rendered proof of the fact necessary or proper. In the case of *Bartlett v. Willis & al.* 3 *Mass.* 36, *Parsons C. J.* stopped the counsel, who wished to avail himself of an objection that the sureties of *Willis* had never been approved, there being no plea presenting that point for examination. Our opinion is that the ruling of the judge in this particular was correct, in confining the par-

ties, the jury and himself to those questions, which, on the defendant's pleas were put in issue. This answer is applicable to both branches of the objection, but in respect to a previous decree of the Judge of Probate, charging the defendant with the amount of the two notes in dispute, as being a necessary preliminary to the maintenance of this action, we think the answer of the plaintiffs counsel is a satisfactory one; namely, that the office of a decree is to act upon the property when accounted for by the defendant in his capacity, to the Judge of Probate, and placed under his immediate, judicial controul.

Little, if any, reliance seems to have been placed on certain objections, stated in the report having reference to the rejection of the letter of the intestate written in 1792. It was rejected on the ground of its irrelevancy, being dated seven years before one of the notes in question was given, and twelve years before the other was. It certainly could not have had any tendency to prove the defence relied on. The other letter of *August* 31, 1800, the admission of which is complained of, was admitted as explanatory of one from the intestate which had been introduced by the defendant. Both were proper evidence as instructions from the intestate to his brother *Andrew*, who was his agent as to the custody of certain notes therein specified, and as to the intentions of the intestate. We have no hesitation in saying that they are both as unimportant as the counsel have, in their argument considered them.

The next inquiry is, whether the instructions of the judge to the jury were correct, as to the presumption of payment, arising from the lapse of nearly twenty four years between the time when the last note became due, and the commencement of the present action, and the application of that principle of law on presumption to the case at bar. It appears that the defendant was appointed administrator *November* 28, 1804, almost three years before the last and large note became due, though about fifteen months after the first note became payable. Upon pleas of *nil debet* and payment, and issues thereon, the defendant placed his defence before the jury on two grounds. 1. That the intestate never intended that said notes should be paid or called for, in case of his decease. 2. That said notes

had been paid. Whether they were intended to be considered as forgiven and not to be called for in case of his decease, and, if not, whether they were paid to the intestate in his life time, were both pure questions of fact for the jury to decide, and on these points it does not appear that the judge gave, or was requested by the defendant to give, any particular instructions; as to this part of the cause, therefore, no legal questions arise. The instructions had relation to the presumption of law, as applied to the present case, where the defendant was at the same time a debtor to the intestate and administrator on his estate; that is, the person to pay the notes and the person to receive payment. As there was no direct proof of payment offered, every thing depended on the legal presumption; and in such circumstances, in the absence of all repelling evidence, it would be that the defendant had taken up the notes, or in other words, had cancelled them, holding himself responsible for the amount due thereon; *Winship v. Bass & al.* 12 *Mass.* 199; but such a presumption certainly would not aid the defence; for instead of excusing, it would only charge him with the receipt of it. As no other person had a right to receive the money due on the notes, how can the usual presumption of payment from lapse of time be applicable to such a case as this? It is said that as the notes in question were found among the papers of *Henry Titcomb* about twenty-two years after they were both due, and their existence was then first known to the heirs for whose benefit this action is prosecuted, this fact distinguishes it from ordinary cases where the same person is promissor and administrator of the promisee; but it must be noticed that there was proof in the cause tending to show that the defendant must have known where the notes were deposited during the long period of their concealment, although others were ignorant as to that fact; and under the instructions given them, the jury have found that the defendant knew or had reason to be satisfied where the notes might have been found by him on application for the purpose. It is true that for some years before the death of *Moses Titcomb*, *Henry* was the attorney of the intestate; but all his powers, as such, were at an end on the intestate's decease; of course he had no right to receive payment of the notes. We are all of opinion that the

judge, as to the legal presumption, was more indulgent and liberal in his instructions than settled principles will justify; and had the verdict been for the defendant, and the above instructions excepted to by the plaintiff, it would, in our opinion, have been difficult to sustain it. But it has been further contended with great earnestness that the numerous facts which are generally referred to in the report and were examined or alluded to in argument, furnished a legal ground on which the jury might have presumed that the defendant had paid or accounted to the heirs of the intestate for the amount of the notes, without the formality of any proceedings in the Probate Court, by way of a settled account and a decree thereon; and that the judge should have left this question to the jury and not have confined them as he did by his instructions. The obvious reply to this objection and argument is, that the law does not presume that an administrator does wrong; it does not presume that the defendant did what, by law, he had no right to do; that is, that he had made an unauthorized payment to the heirs under the circumstances mentioned. He was bound to account to the Judge of Probate, and he had no right to pay the heirs but under decree. To presume it, would be to presume against law and right. We do not mean to say that had there been proof that the amount of the notes had been actually apportioned and paid to the several heirs, though without a decree of the Probate Court, it might not, in a hearing in Chancery, be a bar to an execution for any thing beyond nominal damages. It would be as strange to sanction the presumption above mentioned, as that which was relied upon in another part of the argument to prove that the intestate had forgiven the debt due on the notes. Wrongs and gifts are not to be presumed; they must be proved.

Again, it is urged that the condition of the bond declared on was violated as soon as the bond was executed, and that on that ground the legal presumption of payment was sufficient to bar the action, and that so the jury should have been instructed. Presumption of payment to whom? To the defendant himself as administrator, is the only answer that can be given on legal principles. Having then so received it, has he rendered any account of the sums so paid? If he had, the records of the Probate Court would show it, and the

aid of presumption would be unnecessary, even if admissible as evidence in such a case. If the counsel for the defendant means, that from lapse of time, the bond must be presumed to have been in all things satisfied and its condition in all things performed, and that so the bond twenty years before the commencement of this action had become a dead letter, we need only resort to the evidence alluded to in the report to find an answer to this argument. It there appears that so lately as in *November* 1825, the defendant settled his last account of administration on said estate in the Probate office. Here, surely, is a distinct recognition of the existing obligation of the bond, and exercise of his official authority, in the performance of the duties imposed by the condition of the bond, which was intended, like all other administration bonds, as a continuing security, until all the estate of the intestate should be faithfully administered. Indeed this presumption does not seem applicable, except in cases of bonds or other contracts for payment of money or other articles, or performance of some act or acts at certain specified times. In such cases and such only it would seem there could be a *terminus a quo* the computation is to be commenced. *White v. Swain*, 3 *Pick.* 365.

We have thus examined the several points which have been raised and argued, as growing out of the report of the judge, and his decisions and instructions to the jury; and we are all of opinion that the motion for a new trial cannot be sustained; accordingly the verdict must stand.

As the motion in arrest of judgment is, of course, founded on facts appearing on the record, but which have no connection with those alleged in the fourth set of pleadings, on which the motion is founded for judgment for the defendant, we shall proceed now to the consideration of the motion in arrest of judgment; leaving the merits of the other motion to be examined, in connection with, and and as one of the questions arising on the demurrer; this will save the trouble of a distinct and second examination of it, in the form in which it is presented by the motion.

The reason assigned in arrest of judgment is, "because it appears upon the record that *Moses Titcomb*, the intestate, was at the time of his decease a foreigner and had his domicil in a foreign

country, to wit, in the island of *St. Croix* in the West Indies; and that this suit is brought for the benefit of certain heirs in this country; whereas, the defendant, if accountable for any assets in his hands, is accountable to the ordinary of the place of his said domicil." It is somewhat singular that though the defendant, more than twenty six years ago, was appointed administrator on the estate of the intestate, and, as appears by the evidence generally referred to in the report of the judge, as before mentioned, has settled several accounts with the Judge of Probate of this county, and, pursuant to his decree, has paid to the heirs at law above ten thousand dollars, should now deny his liability to account in the same manner for the amount of the notes in question, which the jury have found to be now in his hands. It does not appear on the record, that any administration was ever granted on the estate in *St. Croix*; but if it did so appear, and that the administration in this county was merely ancillary, that circumstance would not be of any importance; for it is a familiar principle that executors or administrators appointed in any other State or country, cannot maintain an action in their representative capacity in this State. *Cutter v. Davenport*, 1 *Pick.* 86; *Stevens v. Gaylord*, 11 *Mass.* 263. Besides, if the administration were ancillary, the debts here must be collected and accounted for to the Judge of Probate, under whose authority the administrator proceeds. In the action of *Dawes Judge &c. v. W. N. Boylston*, administrator *de bonis non* with the will annexed of *Thomas Boylston*, which had been proved in England, it appeared that the defendant as administrator, had recovered a judgment in Massachusetts for above $100,000, and received the avails of it: The object of the suit was to compel him to render an account of it to the Judge of Probate, that the town of *Boston* might thus obtain the benefit of the property given in the will. The defendant had asserted a claim to the property as his own, and declined accounting for it. *Sewall J.* in delivering the opinion of the court says, "The jurisdiction here exercised for this special purpose does not interfere with, but is auxiliary to the jurisdiction where probate of the last will of *Thomas Boylston* has been granted." He, in conclusion, adds "the defendant's refusal to acknowledge as assets in

his hands as administrator, and to account for the effects received and collected upon the judgment recovered by him against the executor of the last will of *Moses Gill* deceased, is a forfeiture of the bond declared on." The above case of *Stevens v. Gaylord*, and *Dawes, Judge, &c. v. Head & al.* 3 *Pick.* 146, both distinctly recognize the same principle and course of proceeding. What disposition shall be made by the Probate court of the property in question after the same shall have been duly accounted for to that tribunal, is not now a subject under consideration; the only enquiry is, whether the bond has been forfeited by the defendant's omission of official duty.

We are unable to perceive, why the principles above stated are not as applicable in the present action, as they would be if another person had been appointed administrator,—received payment of the notes from the defendant,—refused to account for the money,—and the action had been commenced against such person. The conclusion to which this investigation has conducted us, is that, according to legal principles, as we find them settled, there is no ground for the motion in arrest of judgment. The only remaining questions arise out of the fourth set of pleadings, which have resulted in a special demurrer to the surrejoinder, assigning numerous causes as shewing its insufficiency. We have carefully examined all the pleadings, as well as the surrejoinder, but in the view we have taken of this branch of the defence, we have not found it necessary to decide on the merits of the surrejoinder or the rejoinder, and accordingly shall not express any opinion as to either; but confine ourselves to the examination of the plea and replication. For it is an established principle of law, that when pleadings are terminated by a joinder in demurrer, the court are to look to all parts of them, and, as it is technically expressed, found their decision upon the whole record; and if according to such record, it does not appear that any legal defence, or ground, or cause of action is disclosed, it is the duty of the court to decide the cause against the party thus appearing to be destitute of merits, whether the part of the pleadings particularly demurred to is good or bad. This principle is laid down by Lord *Hobart* in the case of *Foster v. Jackson, Hob.*

56, in these words, "Though the parties will join issue upon some one point, upon which, if it stood alone, judgment should be given for the one party; yet if upon the whole record matter of law appear, why judgment should be given against the said party, the court must judge so; for it is the office of the court to judge of the law upon the whole record; and the consent of parties cannot prejudice their opinions, nor quit them of their office in that point." This is the law in case of demurrer. Again, in the case of *Brickhead v. Archbishop of York, Hob.* 199, the principle is laid down thus, "It is regularly true in law, that if upon the whole record it appear that the plaintiff had no cause of action, and especially of his own shewing, that the court shall never give judgment for him, however the defendant had misdemeaned himself in his pleading; for *melior est conditio possidentis;* and the defendant is safe if the assailant misses him, for *vana est sine viribus ira.*" With these principles as our guide, let us examine the plea and replication, and see who has been guilty of the first and decisive fault in pleading. The declaration in this case is in the usual form, setting forth, in substance, the penal part of the bond. This is all which the plaintiff was bound to do leaving the breach to be assigned in the replication. Of course the declaration is good and sufficient. To this declaration the defendant, after craving *oyer* of the condition of the bond and setting it out, pleads in bar that he paid, before the commencement of the action, three several sums of money to the heirs and creditors of the intestate, amounting in all to $10,853 21, being more than the amount of the penal sum of the bond, all which were allowed and sanctioned by the Judge of Probate. Does this fact constitute a legal bar to the action? By the condition of the bond the defendant was bound to administer according to law, not only the goods and chattels "rights and credits of said deceased," of which he was bound to make and exhibit an inventory to the Judge of Probate, but "all other the goods and chattels, rights and credits of the said deceased at the time of his death which at any time after" should "come to the hands and possession of the said *Titcomb.*" Now the plea does not state any fact but the payment of the above sum to the heirs and creditors of the deceased; it contains no aver-

ment that he had administered according to law and rendered to the Judge of Probate an account of all the property which had come into his hands and possession, which belonged to the deceased; neither does it contain any averment that he presented an inventory or a true account under oath to the Judge of Probate at the respective times mentioned in the condition of the bond. When *oyer* of a bond is craved and set forth in the plea, it becomes a part of the declaration and must be answered as such; yet the plea does not distinctly meet and answer any one of the particular stipulations on the part of the defendant. It has no resemblance to a plea of general performance, which would have been good. It is true, such a plea was pleaded, which was followed by a replication, rejoinder and issue to the country; but that plea cannot aid this; it must stand or fall according to its own merits. But the counsel for the defendant would at once avoid all the objections above stated, by the application of one single principle (on which he has based his motion for judgment in favor of the defendant *non obstante veredicto*) namely, that the liability of the defendant and his sureties was terminated the moment he had legally administered upon and legally accounted to the Judge of Probate and to those interested for a sum equal to the penalty of the bond, as the defendant has done in the case at bar; and his argument is, that if this is not the true principle, it will always be the interest of an administrator, in all cases, where the bond is for less than the value of assets, to render no inventory or account, but suffer judgment for the penalty and pay it. It is true, a dishonest administrator may always do this; still a Judge of Probate may always guard against danger from dishonesty by requiring a bond in a sum, and with sureties amply sufficient for the purpose. But we apprehend the principle assumed by the counsel can never be sanctioned.

The design of all official bonds, is to secure from losses those who are, or may be interested in the faithful discharge of the duties mentioned in them. Such bonds are given to protect against damage, occasioned by unfaithfulness, negligence or dishonesty in such officers; not, for instance, that an administrator, or a state or county treasurer, or collector of the customs, through all whose hands mon-

ies are to pass to double or to ten times the amount of their respective bonds, should faithfully pay over a sum equal to the penalty of his bond, and that then the bond should instantly lose its force and become a dead letter. No. The principals and sureties in such bonds are answerable for losses to the amount of the penalty, if nothing more; their direct liability amounts to nothing so long as the officer promptly and faithfully discharges his duties. When, from the neglect of them, persons interested suffer losses and damages, then the unwelcome and immediate accountability on the bond commences. Sureties on such bonds, are in some respects, like under writers upon the pecuniary responsibility and official fidelity of their principals. We do not deem it necessary to cite any authorities on this point. Considering the plea in bar in any point of view we are all satisfied that it is bad and insufficient in law. The only remaining inquiry is whether, notwithstanding the badness of the plea, and that it is the first fault in the pleading, the plaintiff is entitled to judgment. In cases as they ordinarily occur and according to the general rules of pleading, he certainly would be, in such a state of the pleadings. Does this case furnish an exception from the general principle? The authorities must answer this question. Where the defendant pleads a performance of conditions in an action on a bond, though it is not well pleaded, yet the plaintiff in his replication must assign a sufficient breach, for he has not a cause of action unless he shews one. *Meredith v. Alleyn*, 1 *Salk.* 138. So in *Norton v. Simmes*, *Hob.* 12, (*Williams'* edition,) it is decided that if in debt on bond for performance of covenants the defendant pleads an insufficient plea of performance, and the plaintiff in his replication assigns no sufficient breach, he cannot have judgment. So also if it appears by the replication to an insufficient plea, that the plaintiff had no cause of action at the time of commencing his suit, he cannot have judgment. *Brickhead v. Archbishop of York*, *Hob.* 197, and *Perkin v. Perkin*, *ib.* 128, *a.* In the case of *Keay v. Goodwin*, 16 *Mass.* 1, the court say, "It is the duty of the court to look at the whole record; if to a defective plea the plaintiff replies and shews that he had no cause of action, he is not entitled to judgment, although the declaration be good and the defendant was guilty of the first fault

in pleading." We need not cite more cases. In the case before the court, the defendant has pleaded what he intended and considered as a bar to the action, and as saving him from the penalty of the bond; and though an insufficient plea, it does not admit and profess to excuse a breach by nonperformance of conditions; and therefore, whether the plea be considered as good or bad, the plaintiff as he did not demur to the plea, was bound to assign a sufficient breach in his replication, with all necessary averments to entitle him to maintain his action. Does the replication contain such an assignment and such averments? It states that the notes in question were justly due to the intestate at the time of his death, and that the defendant, as administrator, never rendered any account of them to the Judge of Probate, or in any manner charged himself on account thereof. By the verdict, he stands liable to account, but the replication does not contain any averment, that prior to the commencement of the action he had been cited by the Judge of Probate to render an account of said notes and charge himself with their amount; and it is contended that this omission is fatal to the present suit. The 72d section of ch. 51, of our revised statutes prescribes the mode of proceedings in actions on probate bonds by creditors and heirs to recover what may be due to them respectively from an administrator, as ascertained by judgment of court or a decree of the Judge of Probate; in all which cases a previous demand on the administrator must be proved. The paragraph of the section applicable to the present case, as disclosed in the replication, is in these words: "and when the administrator shall refuse or neglect to account upon oath for such property of the intestate as he has received, after he has been cited by the Judge of Probate for that purpose, execution shall be awarded against him for the full value of the personal property which has come to his hands, without any discount, abatement or allowance for charges and expenses of administration or debts paid." This is a severe and penal provision and should certainly receive a strict construction. The statute of 1786 on this subject, now in force in Massachusetts, is in the precise language of the above quotation, excepting that when the general revision of the Massachusetts statutes took place in 1821, the words "es-

pecially if" were erased, and the word "after" inserted in their place, for the very purpose of leaving no room for doubt or option, as to the necessity of issuing a citation in the case alluded to. The words in the statute, "especially if he has been cited by the Judge of Probate," seem to have left it as a matter of discretion whether to issue a citation or not. But according to our statute no such discretion exists. Besides it appears that in Massachusetts the practice has been, generally at least, to cause an administrator to be cited before he was sued on his administration bond. Thus in the case of the *Selectmen of Boston v. Boylston*, 4 *Mass.* 318, and *Dawes v. Boylston* 9 *Mass.* 337, both of which are cited and commented upon in *Nelson v. Jaques & al.* 1 *Greenl.* 139, (in which the provision of the act of Massachusetts was a subject of examination and construction) the Supreme Court of the Commonwealth gave a construction evidently requiring a citation before suit; and a citation was served on the defendant before he was sued in the action on the bond. In the above mentioned case of *Nelson v. Jaques*, this court proceeded expressly on the ground that no action could be sustained on the administration bond for not accounting, until a citation had been issued and the administrator had unreasonably neglected to render his account; and this opinion was founded on the act as now in force in Massachusetts; which does not, in terms require it, as our own statute does.

It has, however, been contended by the counsel for the plaintiff, that the foregoing provision in our statute as to the necessity of a citation before an action can be maintained on a bond against the administrator for not accounting for property, applies only to those cases where he had never settled or rendered any account whatever. The language does not impose any such limitation, nor seem to justify so narrow a construction. In *Nelson v. Jaques*, there must have been an account settled, as the basis of an application to sell the land, for the proceeds of which the action was brought on the bond; and in the case of *Paine v. Fox*, 16 *Mass.* 129, the defendant had settled two accounts, and the object of the suit was to compel him to account for some trifling sum which he had received, but had not accounted for; there was no averment that it was re-

ceived before the settlement of the accounts. But the chief justice explicitly states, that if the money was received after, an action could not be maintained on the bond, until the administrator had been cited before the probate court; yet this is a case on which the counsel particularly relies. The chief justice further remarks that "perhaps it would not be material to allege that the defendant had been cited, if by distinct averment it appeared that the sum alleged to be received, was in fact received before the accounts were settled." He adds that if the omission to account for the money was fraudulent, it might be a reason for dispensing with the necessity of a citation. Both the above intimations of an opinion are mere *dicta*, not called for by the case, nor connected with the decision. It is true that the defendant must be considered as having, in his capacity of administrator, received the amount due on the notes in question as soon as he entered on the duties of his office, or at least as soon as it became due; but considering the strong and unequivocal language of our statute as to the necessity of a citation before the commencement of an action, we are of opinion that the time when the money was thus constructively received by the defendant does not vary the application of the statute principle. Whether the omission on his part to render an account of the money if fraudulent, would render a citation unnecessary, we apprehend it is not important for us to decide. The replication contains no averment of that kind, and fraud is never to be presumed. It is true that in the inducement to the traverse in the plaintiffs surrejoinder there is an allegation, that the defendant clandestinely and fraudulently concealed and kept back said notes and never made an inventory or rendered any account of them, but we apprehend that the defects and deficiencies of the replication are not to be supplied by averments borrowed from the surrejoinder. In the case *U. States v. Arthur*, 5 *Cranch*, 257, *Marshall*, C. J. says, "upon demurrer the judgment is to be against the party who committed the first error in pleading. The want of *oyer* is a fatal defect in the plea of the defendant; and the court cannot look to any subsequent proceedings. The plea was bad when pleaded." It is the office of the replication, in an action on bond, to assign breaches sufficient to support the action, if true. But in addition to

this decisive opinion on this point, we would go on and observe that the before mentioned allegations in the inducement are not admitted by the demurrer to be true; the fact stated in the traverse, namely that the debts due on the notes were never realized and forgiven by the intestate to the defendant, is considered as admitted by the demurrer. There are several authorities which seem to be decisive on this point. "When the inducement is made and concluded with a traverse of a title shewn by the plaintiff, there the plaintiff is enforced to maintain his title, and not to traverse the inducement to the traverse." *Lady Chichesley v. Thompson & al. Cro. Car.* 105. In the case at bar the traverse is of the defendants title to the amount due originally on the notes; of course he could only maintain his title and not traverse the allegation of fraud in the inducement in the surrejoinder. So in *Earl of Pembroke v. Bostock & al. Cro. Car.* 174, it is laid down that "a matter pleaded only by way of inducement, need not be answered." Again—"An inducement to a traverse is not traversable; but the defendant should have maintained his bar." *Stockman v. Hampton, Cro. Car.* 441. Again—"An inducement to a traverse does not require so much certainty as another plea; because, generally, it is not traversable." *Com. Dig. Pleader G.* 20. Now as the defendant, if he had not demurred to the surrejoinder, could not have traversed the facts stated in the inducement to the plaintiffs traverse, he ought not to be considered as admitting their truth, and, of course, cannot be affected by them in any manner whatever. As the replication, then, contains no averment that the defendant had been cited by the Judge of Probate to render an account of the sum due on the notes, prior to the commencement of the action, nor (whether necessary or not) that he had fraudently omitted to render such account, we feel bound to pronounce it bad and insufficient in law. The opinion thus expressed, renders it unnecessary for us to take any further notice of the motion to enter judgment; for the consequence of the opinion is that such must be the judgment, *non obstante veredicto.* We might have spared ourselves much of the labor of investigation by deciding the cause at once, upon the demurrer, without adverting to any other branch of the cause; but as every ground of objection was occupied

in argument by the respective counsel, we concluded to express our opinion on every point, as it may be useful to the parties to be apprised of it; and because we have perceived an unusual degree of interest manifested by all concerned as to the result.

Replication adjudged insufficient.

After this opinion was read, the counsel for the plaintiff filed a motion for leave to replead, by alleging that the defendant had never returned any *inventory* of the notes in question; and the cause stood over to *May* term, 1832, for the consideration of this motion, it being resisted by the defendant.

Fessenden and *Shepley*, previous to the argument upon this motion, prayed to be heard in behalf of the plaintiff upon a point which they deemed material, but which had not yet been argued;—viz. that the defendant's fourth plea was not what the court seemed to have assumed that it was, a plea of performance; but that it was a plea confessing and excusing nonperformance; and that therefore no allegation of a breach was necessary on the part of the plaintiff. And the court consenting to hear an argument upon this point, they contended that the plea in effect admitted a breach of the bond, because it did not set up a performance. The matter pleaded is in justification of nonperformance, and is altogether collateral in its character. The defendant does not pretend that he has paid the money, or done any act equivalent to it; but excuses the omission by alleging other facts. The plaintiff, then, is at liberty to take issue on the justification. He is not bound to assign a new breach, for no breach is denied. Nor ought he to allege that the defendant had been cited to account, unless he had previously admitted the existence of a state of things rendering a citation necessary. *Lawes on Pl.* 37, 38; *Ayer v. Spring*, 10 *Mass.* 83; *Griffin v. Spencer*, *Cro. El.* 320; *Palister v. Little*, 6 *Greenl.* 352; *Bailie v. Taylor*, *Cro. El.* 899; *Jeffrey v. Guy*, *Yelv.* 78; *Shelley v. Wright*, *Willes*, 9; 1 *Chitty's Pl.* 556, 598; *Fletcher v. Hemmington*, 2 *Burr.* 944; *King v. Phillips*, 1 *Str.* 394; *Nicholson v. Simpson*,

ib. 297; *Jones v. Bowdin*, 1 *Salk.* 123; *Attor. Gen. v. Elliston*, 1 *Stra.* 191; *Jay v. Kent*, *Hardr.* 418; *Smith v. Yeomans*, 1 *Saund.* 316; *Muscat v. Barrett*, *Cro. El.* 369; *Wotton v. Hele*, 2 *Saund.* 181; *Lenthall v. Cook*, 1 *Saund.* 161.

In support of the motion for leave to replead, and to show that it was within the power of the court to grant, even after joinder in demurrer, they cited *Walker v. Maxwell*, 1 *Mass.* 104; *Aiken v. Sanford*, 5 *Mass.* 494; *Perkins v. Burbank*, 2 *Mass.* 83; *Eaton v. Stone*, 7 *Mass.* 312; *Gerrish v. Train*, 3 *Pick.* 124; *Gray v. Jenks*, 3 *Mason*, 520; *Hallock v. Robinson*, 2 *Caines*, 233; *Potter v. Webb*, 5 *Greenl.* 330; 6 *Greenl.* 14; *Clement v. Durgin*, 1 *Greenl.* 300; 5 *Greenl.* 9; *McLellan v. Crofton*, 6 *Greenl.* 307; *Furman v. Haskins*, 2 *Caines*, 369; *Coffin v. Cottle*, 9 *Pick.* 287; *Williams v. Hingh. Turnpike*, 4 *Pick.* 349.

And they contended that the proposed replication would be good, and to the merits of the action. The statute makes it the duty of the administrator to render an inventory of all the rights and credits, as well as other property of the intestate in his hands. If he neglects this, it is a breach. He is further to account for any which may afterwards come into his possession. The neglect to return an inventory, is not a case requiring a citation. The remedy lies directly by suit upon his bond. The object of a citation is merely to compel an account, in the cases enumerated in the statute. *Walker v. Hall*, 1 *Pick.* 20; *Selectmen of Boston v. Boylston*, 9 *Mass.* 358; *Paine v. Gill*, 13 *Mass.* 365; *Parsons v. Mills*, 1 *Mass.* 431; 2 *Mass.* 80; *Prescott v. Pitts*, 9 *Mass.* 376.

Longfellow and *Daveis* argued for the defendant, that it was contrary both to principle and precedent to award a repleader after joinder in demurrer; 1 *Chitty's Pl.* 630; 2 *Saund.* 319, *note b*; *Cro. El.* 318; 5 *Com. Dig.* 497; *Staple v. Hayden*. 2 *Salk.* 579; it is granted only after joining an immaterial issue. *Holden v. Clap*, 1 *Mass.* 96. Nor is it ever allowed on the motion of him who committed the first fault in pleading. 1 *Chitty's Pl.* 664; *Eaton v. Stone*, 7 *Mass.* 312. Nor in any case where the court can give judgment on the whole record; *Parnham v. Pacey*, *Willes*, 532,

533; which in the case at bar, they may well render for the defendant, the plaintiff himself having shown that he has no cause of action. *Dr. Burnham's case*, 8 *Co.* 239; *Turnor's case, ib.* 265; *Mansfield v. Patterson*, 15 *Mass.* 491; 14 *Vin. Abr.* 586; *Worsley v. Wood*, 6 *D. & E.* 710; 5 *Dane's Abr.* 637.

They further contended that the matter of the plea itself was not collateral in its nature; but was direct, to the substance of the declaration; being an allegation of payment; which was sufficient, till a breach was shown by the plaintiff. 5 *Dane's Abr.* 426; 1 *Chitty's Pl.* 325, 329; *Harlow v. Wright*, *Cro. Car.* 195.

And that upon the whole case the defendant was entitled to judgment, the defect of citation being incurable. The proposed replication is virtually to bring to another trial the matter already disposed of. For the statute, in speaking of inventorying rights and credits, and property subsequently discovered, means only accounting for them. Having rendered an inventory, the defendant has saved the penalty of the bond, and is entitled to be dealt with according to the course of proceedings in Probate Courts, before he is sued at law. It is there, as in his proper forum, that an administrator is in the first instance amenable. He should first be charged by the Judge of Probate, upon a citation to account, and a decree be passed for the distributive proportion of each heir, before they can have a right to claim their respective shares by a suit upon the bond. To allow them the benefit of this remedy, *per saltum*, is to oust the Court of Probate of its legitimate jurisdiction, and to deprive creditors of all opportunity to obtain payment out of the fund sought to be recovered in this manner. The administrator, also, is but a trustee of the funds in his hands; and against such the remedy is to be sought, not at law, but in equity; and in the first instance before the Judge of Probate, by whom such subjects are by statute made cognizable. *Walker v. Hall*, 1 *Pick.* 20; *Hooker v. Bancroft*, 4 *Pick.* 53; *Winship v. Bass*, 12 *Mass.* 199; *Newcomb v. Wing*, 3 *Pick.* 169; *Robbins v. Hayward*, 16 *Mass.* 524; *Nelson v. Jaques*, 1 *Greenl.* 139.

The opinion of the Court upon the matters thus moved and argued was delivered in *August* 1832, at an adjournment of *May* term, by

MELLEN C. J. We have listened with close attention to the arguments of counsel respecting the point suggested in the application for an additional argument, and have critically examined the authorities which have been cited. In the course of the opinion delivered at *November* term 1831, the court observed that the plea did not "distinctly meet and answer any one of the particular stipulations on the part of the defendant." And they added, "it has no resemblance to a plea of general performance, which would have been good." It is manifest that the meaning of the court was, that the plea had no resemblance in form to a plea of general performance. It certainly has not. Still, though they decided that such was the case, and that the plea was not a good one, they intended to be understood as speaking of it, simply in respect to its merits as they would be considered on demurrer to the plea, and as unaffected by the replication, yet they did consider and decide the same, as it stands in the fourth set of pleadings, to be sufficient to compel the plaintiff to assign a sufficient breach in the replication. The court has not decided, nor does it now say that the plea would have been good, if the plaintiff, instead of professing to assign a sufficient breach, had at once demurred to the plea. We wish the above distinction may be kept in view. After having thus stated what we intended to decide, and have decided, on the point to which the second argument has been directed, it remains for us carefully to examine the authorities cited by the counsel for the plaintiff, as well as some others, and inquire whether the point in question was correctly decided.

The principles as cited from *Lawes* on pleading, and from *Chitty* are undoubtedly correct, as to the effect of pleas in avoidance, discharge and excuse; neither is there any doubt as to the general principle, that facts properly pleaded by one party, and not denied by the other, are to be considered as, by implication, admitted. Nor is the doctrine contested, applicable to the distinction between

a plea of general performance to a declaration on a bond, and a collateral plea, expressly or impliedly admitting a breach of the condition. The question under immediate consideration is, whether the plea in bar in the present case does admit such a breach; for, if not, then, whatever may be its character, it does not belong to that class of pleas which excuses a plaintiff, in his replication, from assigning a sufficient breach. In *Griffin v. Spencer*, the condition was, that the defendant should pay a sum of money after certain notice. He pleaded that no notice had been given. Here was a clear admission of nonpayment; and the verdict having falsified the plea, the plaintiff had judgment. In such a case the assignment of a breach would have been superfluous. So in *Bailie v. Taylor*, the condition was, that the defendant would pay off a certain mortgage; he pleaded that there was no such mortgage; which necessarily admitted the nonpayment; but the verdict falsified the plea, and therefore, as in the last case, the judgment was properly rendered for the plaintiff. In the same manner in the case of *Bothwright v. Harvey*, the plea distinctly admitted a breach. So in *Jeffrey v. Guy*, which was debt on bond; the defendant pleaded a special, material fact, which the plaintiff traversed, and the issue was found for him, and he had judgment. On error brought, the judgment was affirmed, though no breach had been assigned; because the plaintiff was compelled, by the special issue tendered, to make a special replication, so as thereby to falsify the plea. So in *Shelley v. Wright*, the condition was to pay the plaintiff the balance of certain fees and perquisites, due him; the defendant pleaded that he had not received any fees or perquisites; the plaintiff replied the recital in the condition, by way of estoppel, and the defendant demurred. The court decided that the estoppel applied; and, besides, that the plea admitted a nonperformance of the condition. The same answer is applicable to the cases of *Nicholson v. Simpson*, 1 *Stra.* 297; *Attor. Gen. v. Elliston*, 1 *Stra.* 191, and *Hawkshaw v. Rawlings*, 1 *Stra.* 33. In *Meredith v. Alleyn*, 1 *Salk.* 138; which was debt on a bottomry bond, the defendant pleaded that the ship was lost. The plaintiff replied that she was not lost, and the defendant demurred to the replication, thereby

admitting its truth and the falsehood of the plea. The plaintiff had judgment. *Holt C. J.* observing that the true difference is, where the plea admits and supposes a nonperformance, there a breach need not be alleged. Now, in each of the abovementioned cases, the fact stated in the collateral plea in bar, by necessary implication admitted a breach of the condition; and in each case the fact so pleaded was found by verdict or admitted by demurrer to be false. In *Smith v. Yeomans*, the defendant, after craving *oyer*, of the bond declared on, pleaded that in a certain indenture, described in the condition, there were no covenants to be performed on the part of one *Holloway*. The plaintiff craved *oyer* of the indenture, brought into court by the defendant; and the same, having been entered at large *in hæc verba*, was demurred to. By the indenture thus set forth, it appeared that there were diverse covenants to be performed on the part of *Holloway*. Judgment was given for the plaintiff on the ground that it appeared judicially to the court that the plea was false. In 5 *Bac. Abr.* 173, the law applicable to the point under consideration, is laid down thus: "In debt on bond with condition, defendant pleaded a collateral plea which was insufficient. The plaintiff demurred, and had judgment, without assigning any breach; for the defendant, by pleading a defective plea, by which he would excuse his nonperformance of the condition, saves the plaintiff the trouble of assigning a breach, and gives him advantage of putting himself on the judgment of the court, whether the plea be good or not; but if the plaintiff had admitted the plea and made a replication which shewed no cause of action, it had been otherwise." The case of *Sayer v. Glean*, 1 *Lev.* 54, is cited; and on examination, it is found fully to sustain the principle. The case of *Hayman v. Gerrard*, 1 *Lev.* 226, reported in 1 *Saund.* 102, under the name of *Hayman v. Gerrard*, seems also in accordance with *Sayer v. Glean*. It was debt on an obligation conditioned that the defendant should render an account of all such monies as should come to his hands, and pay the same to the plaintiff. The defendant pleaded that no money came to his hands. This was merely a collateral plea. The plaintiff replied that certain property came to his hands; upon which the defendant demurred, because it was not alleged that

he refused to account for it; and that it was not the receipt, but the refusal to account which was a breach of the condition. The court said the replication was insufficient in not assigning a breach that he refused to account. The case above cited from *Bacon's Abr.* is precisely like the case at bar. We have before observed, that if the plaintiff had demurred to the plea, he would have been entitled to judgment; but he waived that right, pursued a different course, admitted the truth of the plea, and gave a replication, disclosing new matter, but no legal cause of action. In direct affirmance of the principle and distinction above mentioned, we may appeal to the decision in *Rigeway's* case, cited by the plaintiffs counsel from 3 *Coke* 52; but before particularly examining it, we would observe that though, as stated in our former opinion, the plea does not, in terms, profess to be one of general performance, nor to contain distinct averments as to a compliance with all the particulars enumerated in the condition; neither does it necessarily imply a nonperformance, as was the case in the several authorities, cited by the counsel for the plaintiff, which have been the subjects of our examination. The plea states that many years since he paid, at two different times, certain sums to the heirs and creditors of the intestate and in the year 1825 he paid another large sum to them; and having settled an account with the Judge of Probate, soon after each of the two former payments was made, approving and allowing the same, he in the said year of 1825, settled his last administration account with the Judge of Probate, who accepted and allowed the same. The sums, so paid and allowed, amounting in all to more than the amount of the penalty of said bond; the nonpayment of which penal sum was the only breach alleged in the declaration; the truth of which plea is not denied in the replication. All this may be perfectly consistent with the fact, that he had performed every duty specified in the condition of the bond; and that the last important duty was the payment over to the heirs and creditors of the intestate of all the avails of the estate on which he had administered. Still we say again, the plea would not have been good, had it been demurred to; but taken in connection with the replication, decided cases seem to have settled the principle, that it is good and

sufficient, at least so far as to render the assignment of a sufficient breach in the replication indispensable.

We will now proceed to the examination of *Rigeway's* case. *William Grils* had recovered a judgment against *John Chawner*, who was taken in execution *April* 20, 33d *Eliz.* by *Rigeway*, the defendant, then sheriff, at *Stoke Cannon*; and on the 10th *Dec.* 34 *Eliz.* the defendant suffered him to escape in the parish of *St. Mary of the Arches*, in the ward of *Cheape*, *London*. The defendant pleaded and confessed that *Chawner* was taken in execution as alleged, and so continued in his custody till the 8th of *December* following, on which day, at *Stoke Cannon*, aforesaid, he broke the prison, and from the custody of the said *Thomas Ridgeway*, against the will of said *Thomas*, escaped; whereupon the said *Thomas* then and there made fresh pursuit after the said *John*, and in the fresh pursuit of the said *John*, in manner aforesaid, the said *Thomas Rigeway* on the 11th day of *December* then next, at *Stoke Cannon* aforesaid, by reason and in virtue of the execution aforesaid, and prior caption and execution aforesaid, took and arrested the said *John*. The plaintiff, by way of replication (by protesting that the defendant did not make fresh pursuit) for plea said, that after the said escape and before the said *John* was retaken, the same *John*, for one whole day and one whole night, viz. at *London*, in the parish and ward aforesaid, was out of the sight of the said *Thomas*, &c. and thereupon the defendant demurred in law. It was in the first place agreed by the whole court, that though the prisoner, who escaped be out of sight, yet if fresh suit be made, and he be retaken *in recenti insecutione*, he shall be in execution. In the second place it was resolved that the plea was insufficient; for the plaintiff had declared of an escape in *London*, and the defendant justifieth the retaking of him at *Stoke Cannon*, and so the escape at *London* is not answered; but forasmuch as the plaintiff, not denying the fresh suit but by protestation, hath only relied upon the matter, that the prisoner was out of his sight, the court will not intend other matter to maintain his action, than he himself hath shewed; and now, on the whole record, it doth not appear to the court that the plaintiff hath cause of action; but it was agreed that if the plaintiff had

demurred upon the bar, he would have had judgment. For the same reason it would seem that as the plaintiff in the present action, has relied upon a breach of the condition by defendant's not accounting for certain property, besides and beyond that accounted for and paid over to the heirs and creditors, as mentioned in the plea, the court ought not to intend any other breach or matter or cause of action, to maintain the plaintiffs action, than he himself hath shewed. This is the doctrine laid down in *Bacon*, as before mentioned, and in some of the cases there cited, and as established in *Rigeway's* case which the counsel for the plaintiff has himself cited. So in *Gewen v. Roll*, *Cro. Jac.* 132, the principle is stated, that " the Court shall not intend any other breach or cause of action than the plaintiff hath himself shown. See also *Spear v. Buknell* 5 *Mass.* 125.

From this view of the authorities bearing on the point under consideration, we perceive no occasion for changing our opinion as delivered in *November* 1831. It is true, the reasons in support of the principle, the supposed incorrectness of which has been the subject of the last argument, might have been more distinctly stated, and, perhaps, in more guarded language, and with more precise limitations; but we then did not deem it necessary; we have, however stated them now, and we cannot but consider them as sound. To the court, at least, they are satisfactory. But, after all, the subject is not one of great moment. As a rule of decision and guide in future, it is of no importance, inasmuch as special pleading has been abolished in this State, by a statute passed since the pleadings in this action were settled. And as it respects the interests of the parties, the question has less influence than may at first be supposed; because the court are always unwilling that a cause should be finally decided upon a point of technical learning, when a trial may always be had upon its substantial facts and legal principles applied to them, by granting leave to amend the pleadings. A motion to this effect is now before us. Both parties seem to have been less precise than they might have been, and it is desirable that both should be permitted to remove all technical difficulties out of the way as far as possible, that a decision may at last be had on the real merits of the cause.

Since the former opinion was delivered, we would observe that we have discovered an irregularity in the trial of the issues to the country, which escaped the notice of all the counsel, as well as of the judge who presided at the trial of the cause. We allude to a provision in the first section of the *Stat.* 1830, *ch.* 463, "that in all actions upon any bond or penal sum as aforesaid, if the verdict be for the plaintiff, the judgment shall be, as heretofore, for the amount of such bond or penal sum, and the jury shall ascertain by their verdict the damages for such of said breaches as the plaintiff, upon trial of the issue, shall prove." The language is explicit and unlimited, embracing all bonds, and it is evidently designed to take from the court the power of settling the amount of damages on a hearing in chancery, and vest it in the jury. The cause was tried at *November* term, 1830, and the jury merely found the several issues for the plaintiff; but did not assess the damages. No sum is found for which execution could issue. Under the peculiar circumstances of this case, our opinion is that the verdict must be set aside and a new trial granted. And the plaintiff has leave to amend his replication according to his motion on file, on payment of costs up to this time; but, in no event of the cause, are they to be again taxed by the defendant, or recovered back by the plaintiff. The defendant has also leave to amend his plea if necessary.

JORDAN *vs.* SYLVESTER.

In a writ of entry, the question being upon the fact of ouster by the defendant, and it appearing that he held a deed of the land, as security for a debt, given to him by a third person, who continued in possession, but under no certain agreement as to time or amount of rent; the defendant intending to take the land into his possession whenever he should think proper;—this was held to be no sufficient evidence of an ouster.

IN this case, which was a writ of entry tried before *Parris J.* upon the general issue, a verdict was returned for the demandant subject to the opinion of the court upon the sufficiency of the evidence to prove an ouster by the defendant.

Both parties deduced title from one *Thomas Skolfield*; the demandant claiming under an extent, the attachment having been made *May* 31, 1824; and the defendant claiming under a deed of prior date, which was impeached as fraudulent.

The evidence of ouster was derived partly from the deposition of *Marlborough Sylvester, Esq.* who testified that the defendant, who was his son, never had possession of the premises to his knowledge, except by putting up some fence after *Skolfield's* death. A disclosure made by the defendant, in a suit in which he was summoned as *Skolfield's* trustee, was also introduced by the demandant; in which he stated that *Skolfield* lived on his farm in *Harpswell;* that there was no particular time or amount of rent agreed upon between them; that the farm was conveyed to him for security of a debt; and that he "calculated to take the property into his own hands whenever he should think proper." And it appeared that *Skolfield* did reside on the farm till his decease in *January* 1826; and that his family had ever since continued to dwell there, as before; one of them testifying that she never knew the defendant to exercise any acts of ownership over the premises.

The trial proceeded upon the assumption, by both parties, that this suit was commenced before the passing of *Stat.* 1826, *ch.* 344, and that therefore the plea of *nul disseisin* was an admission of ouster, as at common law; and the fact was not discovered to be otherwise

till near the close of the trial. Neither party made the proof ouster a question to the jury; but argued upon the evidence of fraud in the conveyance.

The question was briefly spoken to by *Longfellow* for the demandant, and *Mitchell* for the defendant; and the opinion of the Court was delivered at the ensuing *May* term, in *Kennebec*, by

Mellen C. J. By the report of the Judge it appears that the only question reserved is, whether the evidence disclosed on the trial is sufficient to prove that at the time of the commencement of the action, the defendant held possession of the premises demanded or any part thereof. The *Stat.* of 1826, *ch.* 344, renders it necessary, even under the general issue, for the demandant to prove that fact. It seems to have been understood, until the testimony was nearly closed, that the action was commenced prior to the passage of the act, above mentioned, and so did not come within its provisions; and little evidence seems to have been directed to the point; the merits of the cause, depending on the agitated question of fraud, occupying the principal attention of the parties. The only proof of the alleged possession, arises partly from the deposition of *Marlborough Sylvester*, and partly from the defendant's disclosure. *Sylvester* testifies that the defendant never had any possession of the premises, except putting up some fence, which was after *Skolfield's* death; but it does not in any manner shew what was the state of the fact at the time the action was commenced. The defendant in his disclosure says, "*Skolfield* now lives on my property in *Harpswell*. There is no particular agreement between us on the subject" (of rent) "nor any understanding. I calculate to take the property into my hands, whenever I think proper." On these facts we cannot say that ever the relation of landlord and tenant existed between them; and the expression of the defendant as to his calculation to take the property into his hands at some future day, carries a strong implication with it that he had not done so, directly or indirectly, when the suit was commenced. It does not appear that the jury considered the question. On the whole, we think there must be a revision of the cause and the facts, touching the question of possess-

ion more particularly examined, so that the demandant may furnish more satisfactory evidence, if he can. In many instances parties have been led into mistakes by the new provision introduced by the act before mentioned; still, as the act requires proof of such possession, on the general issue, even where the whole question between the parties is a mere question of title, we must see that the law is carried fairly into execution. We doubt not that the act was passed with the best of motives, but in practice it has been found not only inconvenient, but sometimes leading to perplexity; and where, on the trial of the cause, a demandant may fail to sustain it, on the ground, merely, of an accidental absence of proof of possession, although he may have a legal title to the premises demanded, great attention must be paid to prevent uncertainty as to the real and true reasons of the verdict, inasmuch as the record will not show the principles on which it was returned in favor of the defendant. And in case of a second action brought to recover the same premises, there often may be great difficulty in showing that the merits of the title were not decided on the first trial, unless the precise ground on which the verdict was given, was stated in the verdict. In the present case we are of opinion that there must be a new trial.

Verdict set aside.

JUDD *vs.* PORTER.

The *lex loci* applies only to the interpretation or validity of contracts; and not to the time, mode, or extent of the remedy.

Therefore a discharge under the insolvent laws of another State, of which both the parties were citizens, releasing the person from arrest, but not impairing the contract itself, cannot avail to affect any remedy pursued in this State.

THIS was an action of debt on a judgment recovered in the State of *New York;* and it came before the court upon a case stated by the parties, to this effect:—

Execution on the original judgment having been returned *nulla bona*, the defendant obtained, under the insolvent law of New York, passed in 1819, a regular discharge of his person from future imprisonment; both the parties being at that time, and at the time of making the original contract, citizens of that State.

In the present suit the defendant was arrested, and gave bail; and the question submitted to the court was, whether the discharge, obtained in *New York*, could operate to exempt his body from being arrested in this State for the same cause of action, the exception being duly taken in abatement.

Greenleaf, for the plaintiff, cited *Valkenburg v. Dederick*, 1 *Johns. Ca.* 133; *Cross v. Hobsen*, 2 *Caines* 102; *Desobry v. Morange*, 18 *Johns.* 336; *Palmer v. Hutchins*, 1 *Cowen* 42; *Le Roy v. Crowninshield*, 2 *Mason* 151, 179; *Pearsall v. Dwight*, 2 *Mass.* 84; *Dwight v. Clark*, 7 *Mass.* 51; *Hubbard v. Wentworth*, 3 *N. Hamp.* 43; *Blanchard v. Russell*, 13 *Mass.* 5; *Tappan v. Poor*, 15 *Mass.* 419; *Woodbridge v. Wright*, 3 *Conn.* 523; *Peck v. Hozier*, 14 *Johns.* 346; *White v. Canfield*, 7 *Johns.* 117; *Whittemore v. Adams*, 2 *Cowen* 626; *Smith v. Brown*, 3 *Bin.* 201; *Sturgis v. Crowninshield*, 4 *Wheat.* 200; *Nash v. Tupper*, 1 *Caines* 402; *Ruggles v. Keeler*, 3 *Johns.* 263; *Byrne v. Crowninshield*, 17 *Mass.* 55; *Baker v. Wheaton*, 5 *Mass.* 511.

N. Emery, *Fessenden & Deblois*, argued for the defendant, citing *Ballantine v. Goulding*, *Ambl.* 25; *Hunter v. Potts*, 4 *D. & E.* 185; *Potter v. Brown*, 5 *East*, 130; *Melan v. D. of Fitzjames*, 1 *B. & P.* 138; *Baker v. Wheaton*, 5 *Mass.* 509; *Watson v. Brown*, 10 *Mass.* 337; *Stevens v. Gaylord*, 11 *Mass.* 265; *Mather v. Bush*, 16 *Johns.* 250; *Miller v. Hall*, 1 *Dall.* 229; *Thompson v. Young*, *ib.* 294; 2 *Dall.* 200; *Harris v. Mandeville*, *ib.* 256; *Ogden v. Saunders*, 12 *Wheat.* 213; *Shaw v. Robbins*, *ib.* 337; 11 *Johns.* 433; *Smith v. Smith*, 2 *Johns.* 235; *Stra.* 733.

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

The legal operation and effect of contracts are generally to be determined according to the laws of the State or country in which they are made and to be executed ; not however as an act of comity or courtesy, as intimated in some of the books, but upon the general principle that every contract is to be construed and carried into effect according to the intention of the parties thereto, and they are presumed to contract with reference to the laws of the place where they reside, unless a different construction is manifest from the instrument itself.

This law of the contract travels with it, wherever the parties thereto are to be found, and into whatever *forum* it is attempted to be executed.

So also as it respects the discharge of personal contracts ; they have been considered as subject to all the consequences attached to contracts of a similar nature by the laws of the country where they are made and to be executed, especially if all the contracting parties are domiciled in that country. 1 *Gall. Rep.* 375.

It is undoubtedly true, as resulting from these principles, that the discharge of a contract, or of a party from the obligations of a contract, by the bankrupt law of the country where the contract was made and the parties reside, is a discharge every where, and no action can be subsequently maintained to enforce such contract. By the operation of law it is as though it had never existed, or as if the debtor had fully cancelled his obligation by payment ; and the creditor is left without remedy either in the courts of his own or any other country ; for what would be a good discharge of his contract by the laws of the place where it was made and to be performed, would be good every where.

The contract under consideration, having been made in *New-York*, by parties resident there, our inquiry is, has any thing been done by which it has been discharged by the laws of that State? We perceive nothing in the case affecting its validity. It has not been satisfied by a compliance with its provisions ; it has not been

discharged by any act of the defendant, or by the operation of law. He has complied with certain provisions of a statute of *New-York*, under and by virtue of which, his person is declared to be forever exempt from imprisonment for or by reason of any debt or debts due at the time of the assignment of his property under that statute.

But a discharge under this law does not operate as a release of the debt, as it would if it had been granted under the insolvent law of that State, of 1813. 2 *Wend.* 457; 3 *Wend.* 135; 6 *Conn.* 480; 8 *Pick.* 195.

It is merely a release from personal arrest, and is no bar to the action. 8 *Pick.* 187. In the language of the Supreme Court of Massachusetts, it can have no effect upon the judgment on the contract, or the form of execution in another State. As imprisonment is no part of the contract, simply to release the prisoner does not impair its obligation. *Mason v. Haile*, 12 *Wheat.* 370; 4 *Wheat.* 201; 2 *Kent's Com.* 326.

No man can here be again imprisoned for the same debt, after having taken the benefit of our statute for the relief of poor debtors. His person is forever thereafter exempt from imprisonment, in this State, on that demand; but it will not be contended that the demand is discharged. It will still remain in full force; and to enforce its collection the proper remedial laws of the State, applicable to a contract thus situated, may be applied. And if the debtor remove to another State, the law of the contract will follow him, and may be executed by the remedial law of that State, without any restrictions growing out of the previous transaction. 3 *N. Hamp. Rep.* 43.

The laws of some of the States do not authorize the taking of real property on execution in payment of debts. Such is the law of *Virginia*. Suppose a debt contracted in that State, between citizens thereof, is put in suit here, the debtor having, subsequently to the contract, become domiciled in this State. Will it be contended that his real estate here would not be liable to be taken on execution for the payment of that demand? Or, suppose a debtor, in a contract entered into here, where sundry articles of personal property are exempt from attachment and sale for the payment of debts, should remove to a State where the like personal property is liable. Could

he urge the *lex loci contractûs* as exempting that property from attachment and sale for the payment of such a debt? Or if a contract, made in a State where the body of the debtor is not liable to imprisonment for debt, be enforced in a *forum* where imprisonment is authorized as a mode of compelling performance, would not the court, in entering up the judgment and issuing execution, be governed by the *lex fori* rather than the law of the place where the contract was made? *De la Vega v. Vianna*, 1 *B. & Adol.* 284.

He who makes a contract stipulates to perform it. The obligation follows him wherever he goes. A mere change of domicil or of jurisdiction will not dissolve or modify it; and the law of the place where he is found, and the *forum* into which he is brought will point out the mode and lend the power to enforce performance.

These principles, we think, are well supported by authority. In the notes on *Co. Litt.* by *Hargr. & Butl. Sect.* 104—97 *b.* it is said, the general rule is, that as to the construction, the *lex loci* is to govern; but that the remedy must be pursued according to the *lex fori.* In *Melan v. The Duke of Fitz James*, 1 *Bos. & Pull.* 142, it was said by the court, "we all agree that in construing contracts we must be governed by the laws of the country in which they are made, for all the contracts have reference to such laws. But when we come to remedies it is another thing; they must be pursued by the means, which the law points out where the party resides." The laws of the country where the contract was made can only have reference to the nature of the contract, not to the mode of enforcing it. Whoever comes into a country, voluntarily subjects himself to all the laws of that country, and therein to all the remedies directed by those laws, on his particular engagements. 1 *B. & Adol.* 284, before cited.

This we believe to be the law of *New York*, where this contract was made. Chancellor *Kent* says, "there is a difference taken in the cases between the construction and the execution of the contract. The *lex loci* has reference only to the nature and construction of the contract and its legal effect, and not to the mode of enforcing it. The remedy must be pursued by the means which the law points out where the party resides." 3 *Kent's Com.* 49. *Nash v. Tup-*

per, 1 *Caines' Rep.* 402; *Lodge v. Phelps*, 2 *Caines' Cas. in Error*, 321; see also *Titus v. Hobart*, 5 *Mason*, 378; *Green v. Sarmiento*, 3 *Wash. C. C. Rep.* 17; *Golden v. Prince*, *ibid.* 314.

This distinction is to be found in all the cases, that where the contract is discharged, either by a certificate of bankruptcy or otherwise, the body of the debtor is not thereafter liable to arrest, in any jurisdiction, for debts existing at the time of the bankruptcy; for the contract being at an end, there remains nothing upon which the remedial laws of any government can operate. But where the body only of the debtor is discharged, leaving the contract unimpaired, the discharge is effectual only to the extent of the jurisdiction under which it was granted, and *extra territorium* has no efficacy.

Judgment for the plaintiff.

WYER *& al. vs.* MERRILL *& al. & trustee.*

S. & C. M. contracted to build certain locks and portions of canal for the *Cumberland* and *Oxford* canal corporation, by *Aug.* 1, 1829, at a stipulated rate of payment; the work to be estimated monthly by the engineer, and three-fourths of the estimated sum to be paid monthly by the corporation; the residue to be retained till the whole should be completed. On the first day of *August*, 1829, the engineer made his monthly report of estimates of work performed, containing the sum of $700 as due to *S. & C. M.* for work done; which sum the directors, on the same day, voted and ordered to be paid. Afterwards, on the same day, before payment, and before an order was drawn by the president, in the usual course of business, for the sum thus voted, the corporation was summoned as trustee of *S. & C. M.*, who failed to fulfil their contract; which, in three days afterwards, was duly declared forfeit and abandoned by their non performance.

Hereupon it was held that the vote to pay the $700 was a waiver of any advantage resulting to the corporation from the failure of *S. & C. M.* to complete the contract; and bound the corporation to pay that sum; and that therefore it was chargeable as their trustee.

THE question in this case was upon the liability of the *Cumberland & Oxford* canal corporation, as trustee of the defendants.

It appeared, from the disclosure of the treasurer of the corporation, that the defendants had entered into articles of agreement with the corporation, by which they were to excavate and build certain portions of the canal and locks ; under the inspection and direction of the engineer ; who had power, upon any unreasonable neglect of the defendants in the prosecution of the work, to declare the contract abandoned and terminated ; that he should survey and certify the amount of work to be paid for ; that advances should be made to the defendants, monthly, to the amount of three-fourths of the engineer's estimates of the work done ; and that the whole should be completed by the first day of *August*, 1829.

It further appeared that on the day last mentioned, when the writ in this case was served, the accounts of the defendants were made up and stated by the treasurer, as follows :—

The whole amount of work done and materials furnished by the defendants, according to the estimate of the engineer, was		$7471,00
Deduct 25 *per cent.* as provided in the contract,		1867,75
		5603,25
Work on the aqueduct, - - - - -		320,00
Do. on the culvert and bridge, - - -		470,00
		$6393,25
They had received on account of locks,	$5798,00	
And on account of the aqueduct,	320,00	
And on account of the culvert and bridge,	470,00	
		6588,00
The corporation being in advance to them, the sum of		$194,75

On the same day the engineer made the monthly report of estimates due to *Aug.* 1, 1829 ; in which he reported " For *S. & C. Merrill*, (the defendants) On account of lock-pits, banks and walls, $700,00

On account of aqueduct, to be paid on its completion, 180,00"

On the morning of that day, before service of the writ, the directors met, and voted to pay the defendants " seven hundred dollars on account of the work on locks, and one hundred and eighty dollars more on account of the aqueduct ; the last mentioned sum

to be paid when said aqueduct is completed." For this sum an order was drawn on the treasurer on the same day, after service of the writ; which was signed by the president of the corporation in the expectation that the suit would be settled; but no adjustment being made, the treasurer paid them two hundred and fifty dollars, with the plaintiffs' consent; and would have paid the whole, had not this suit been commenced. And afterwards, on the same day, the defendants drew an order on the treasurer for the balance due them, in favor of a third person; which the treasurer accepted, "to pay if any thing be due." On the third day of *August*, 1829, the engineer, by his certificate in writing, declared the contract abandoned, by the failure of the defendants to prosecute the work, agreeably to its stipulations.

By a supplemental disclosure, made in this court at *November* term, 1830, it appeared that there had been a final settlement of accounts between the defendants and the corporation, *June* 24, 1830, since this suit was brought, in which the defendants were allowed, as equitably due, a balance of seventeen hundred and seventy-two dollars and sixty-nine cents.

Longfellow, for the plaintiffs, sought to charge the corporation as trustee of the defendants, on the ground that the vote to allow a further sum of seven hundred dollars to the defendants, for work already done, was in law a promise to pay that sum, on which an action could have been sustained.

Deblois, for the corporation resisted this claim. He contended that the defendants had no remedy against the corporation, except upon the written contract. By the terms of this instrument the corporation was bound to pay no more than seventy-five *per cent.* of the value of the work done, until the whole should be completed. The residue remained in the hands of the treasurer, as an inducement to the defendants to execute the contract, and a security to the corporation against any damages arising from a breach. This contract the defendants never performed; and of course forfeited all benefit from its provisions.

The subsequent settlement of accounts between them cannot affect the case; because the rights of the plaintiffs are to be determined by the state of things which existed between the defendants and the corporation at the time of the service of the writ. And at this time the defendants had no right of action. *Wilcox v. Mills*, 4 *Mass.* 218; *Wood v. Patridge*, 11 *Mass.* 488; *Ingalls v. Dennett*, 6 *Greenl.* 79; *Harris v. Aikin*, 3 *Pick.* 1; *Maine F. & M. Ins. Co. v. Weeks*, 7 *Mass.* 438; *Perry v. Coates*, 9 *Mass.* 537; *Webster v. Gage*, 2 *Mass.* 503; *Greenough v. Walker*, 5 *Mass.* 214. The vote was merely evidence of an intention on the part of the corporation to advance the defendants so much money on account of work to be afterwards done. It was inoperative till effect was given to it by the order of the president, in the usual forms of transacting similar business; but this was not done till after service of the writ.

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

The trustee process in this case was served *August* 1, 1829. *S. & C. Merrill* had by their contract with the corporation agreed to complete the work therein described by the same 1st day of *August*; but they did not so complete it; and on the 3d of the same month the contract on their part was duly declared abandoned, pursuant to a provision in the contract. By the disclosure it appears that the whole amount of work done by *S. & C. Merrill* on the locks, to the first of *August*, 1829, together with materials ready for further use was - - - - - $7471,00

Work on the aqueduct, - - - -	320,00
Do. on culvert and bridge, - - - -	470,00
	8261,00
By the terms of the contract one quarter part of the above sum of $7471 was not then payable,	1867,75
	6393.25
There had been paid to them before said day,	6588,00
So that they had been paid in advance,	$194,75

But still, at the time the writ was served, the corporation had received the benefit of the labor and materials, to the amount of the above sum of $1867,75; though the said *S. & C. Merrill* were not then entitled to demand that sum in payment, and though they had failed in the completion of their contract, which, on the third of *August*, was declared abandoned as before mentioned. In this state of things, at a meeting of the directors of the canal, on the morning of the first of *August*, and before the service of the writ, there was voted to be paid to *S. & C. Merrill* the sum of $700, on account of work on locks. *S. & C. Merrill* on the same day, but after the process was served, drew their order on the treasurer of the corporation for the $700, which was immediately accepted conditionally—that is, if any thing should be due. The corporation discovered a readiness to pay the money voted, to the person or persons legally entitled to demand and receive it; and by consent of the plaintiffs, did immediately pay $250, part of the $700, to another person, on the order of the Messrs. *Merrill;* and the treasurer states that he should then have paid the whole, had not the trustee process prevented. It is true that *S. & C. Merrill* did not complete their contract; and its non-completion must have been officially known to the directors. They must have known that in an equitable point of view *S. & C. Merrill* were entitled to payment for the labor and materials on and for the locks; one quarter part of which had not been paid for on the first of *August*—stated by the treasurer to be $1867,75; and after deducting the $194,75 paid in advance, it leaves an equitable balance of $1673 as due to the Messrs. *Merrill;* though not then payable by the terms of the contract; which states that "advances are to be made monthly to the amount of three fourths of the engineer's estimates of the work done:" and the before mentioned sum of $700, was his estimate to the first of *August* on account of lock-pits, banks and walls. The question is now prepresented, why was not the vote of the directors, passed on the first of *August*, and before the service of the trustee process, of the $700 to be paid to *S. & C. Merrill*, a contract instantly binding on the corporation? Why was there not a meritorious and valuable and legal consideration for such contract? Why was not this vote

a waiver of all objections to payment, on account of the non-compliance of *S. & C. Merrill* with the terms of their contract?

The corporation could make this contract only by a vote, and so they did make it. Suppose an individual had made the contract with *S. & C. Merrill*, and such individual knowing that they had not complied with the terms of it, had given them his due bill for the $700; surely this would have been a waiver. But on the question of consideration there is another fact of importance to be regarded. The vote of the $700 to be paid the Messrs. *Merrill* was "on account of work on locks." Here is a valuable consideration expressly stated. We may reasonably consider that this vote was passed on their request; indeed no other presumption is admissible; and when it was passed, it instantly became a complete contract. Besides, it is a principle of law that assent is to be presumed, where it operates in favor of the person assenting.

On the whole we are all of opinion that on the facts disclosed, the corporation must be adjudged the trustee of *S. & C. Merrill;* and this conclusion is strengthened and confirmed by the fact stated in the additional disclosure, *November* term, 1830; namely, that on a final settlement of accounts between the corporation and them on the 24th of *June* 1830, they were allowed, as equitably due, the sum of $1772,69.

Corporation adjudged Trustee.

Clark *vs.* Foxcroft.

Where the parties, pending an action of *assumpsit* between them, made a settlement of all their accounts, by which a balance was found due to the plaintiff, for which judgment was entered in his favor, by consent; and the settlement included some demands for which the writ contained no proper counts, and some which were not payable till after the action was commenced;—it was held that the lien created by the attachment was thereby dissolved *in toto*, so far as the rights of subsequent attaching creditors were concerned.

A surety has no right of action against the principal debtor, till he has paid or assumed the debt.

This was an action of the case against the late sheriff of this county, for the neglect of one of his deputies, in not levying and collecting an execution in favor of the plaintiff against one *Small*, where the deputy had attached goods on the original writ. The defendant pleaded the general issue, and filed a brief statement, setting forth that he had seized the same goods and sold them to satisfy other executions against *Small*, in which the attachments were subsequent to the plaintiff's; the creditors having given him a bond of indemnity, alleging that the judgment in favor of the plaintiff was obtained by fraud and covin.

At the trial, before *Parris J.* the original writ of the plaintiff against *Small* was produced, which contained—1st, a general *indebitatus assumpsit* for $287, being the amount of sundry charges and payments mentioned in the account annexed;—2d, a count on a written memorandum or promise to pay $50;—3d, a count on a promissory note for $23;—4th, a count on another note or memorandum for $22;—5th, a count for $70 money laid out and expended;—6th, a count for $300 money had and received. And it appeared by a paper produced by the defendant, that on the 20th day of *October*, 1826, while that suit was pending, *Clark* and *Small* made a general settlement of their dealings, upon which a balance of $705 was found due to *Clark*; whereupon *Small* signed a writing authorizing him to take judgment for that sum, in the suit then pending. The judgment was accordingly taken, for 700 dollars, being the amount of the *ad damnum*. The defendant also offered

in evidence an original statement, made by the parties at the time of their settlement, showing that at this settlement an account was stated by *Clark* of all his demands against *Small*, containing all the items, but one, in the account annexed to the writ, the notes declared on, and divers other sums; amounting in all to $817,90; and sundry credits of money and goods, which being deducted left the balance of $705 due as above stated; and which was receipted as paid by the judgment above mentioned. Among these other sums was one charge of a note of hand of $68,32,—a hogshead of molasses, at $27,16,—cash paid for *Small* at the *Casco* bank, $48,02 —room rent, $15,—charter of the schooner *Fame* from *May* 4, to *July* 29, (which was four days after the action was commenced) $108,—and the following—"To a note of hand that I indorsed for you, now in the hands of *George Willis*, that I have become responsible to pay, $134,20."

In relation to this last charge it was proved that the note was dated *March* 30, 1826, and payable to order in six months; and that *Clark* indorsed it for *Small's* accommodation, in consideration of *Small's* promise to secure him therefor, and keep him secured. This note was unpaid when the action was brought; but was taken up by *Clark* before the settlement of *October* 20, 1826.

The defendant hereupon contended that the judgment against *Small* covered charges which were not embraced in either of the counts in the declaration; particularly the charges for charter of the *Fame*, and for the note due to Mr. *Willis*.

The plaintiff contended—1st, that these charges were supported and covered by the last count in his declaration; and 2dly, that if they were not, and were included in the judgment, this did not affect the attachment, the judgment, or the defendant's liability in this suit, any farther than the amount of those charges.

The Judge instructed the jury that under the count for money had and received the plaintiff could not properly support either the charge for charter of the *Fame*, or that for his liability to Mr. *Willis* as indorser; and that if they were satisfied that said charges were not included in either of the other counts, and that they were allowed and included in the judgment by agreement of the parties, it was

such a fraud upon subsequent attaching creditors as would dissolve the attachment in the plaintiff's suit against *Small*. Under these instructions they returned a verdict for the defendant; which was taken subject to the opinion of the court upon the points raised at the trial.

Longfellow and *Greenleaf*, for the plaintiff, argued, *first*, that the paper shown in evidence by the defendant, containing the items in the settlement of *Oct.* 20, 1826, was admissible only for the purpose of proving *actual* fraud and covin. Nothing *dehors* the record can be shown for any other purpose than that. *Willis v. Crooker*, 1 *Pick.* 204. And as the case was not put to the jury on the ground of actual fraud, and their finding negatives that imputation, the paper cannot and ought not to be regarded by the court for any purpose.

2. But if it *may* be regarded, yet the counts are supported by the evidence. The note due to Mr. *Willis* was a liability actually incurred at the time of commencing the suit; and was extinguished before the judgment; which may be sustained by the rule adopted in an action of covenant for an existing incumbrance on land sold with warranty, where the incumbrance is paid off after action brought. *Prescott v. Trueman*, 4 *Mass.* 627; *Wyman v. Ballard*, 12 *Mass.* 304; *Tufts v. Adams*, 8 *Pick.* 550. The excess of four days charter of the *Fame* may be cured by applying part of the money credits to that error. The count for money had and received is fully supported by the debtor's subsequent admission of a debt due. *Jackson v. Mayo*, 11 *Mass.* 147.

3. Yet admitting that those two items were improperly involved in the judgment, they only affect it *pro tanto*. It was a mere mistake. And herein is a difference between actual covin, and constructive or legal fraud. The former vitiates the whole mass into which it enters. The latter infects only so far as it extends, if that can be ascertained. The former, in the present case, is not imputable; the latter is specifically defined.

4. But in any state of the case, in the absence of actual fraud, the judgment against *Small* cannot be impeached on the defendant's grounds, unless by writ of error.

Fessenden, *Daveis* and *Deblois*, for the defendant, to the point that no charter-money was due till the end of the voyage or term, cited *Wood v. Patridge*, 11 *Mass.* 488; *Lane v. Penniman*, 6 *Mass.* 244; *Weston v. Down*, *Cowp.* 23. That the liability to Mr. *Willis* was improperly charged; *Pierce v. Jackson*, 6 *Mass.* 244; *How v. Ward*, 4 *Greenl.* 202. That these items vitiated the judgment, in favor of subsequent attaching creditors; *Cushing v. Gore*, 15 *Mass.* 74; *Pickering v. Lovejoy*, 13 *Mass.* 50; *Hill v. Hunnewell*, 1 *Pick.* 192; *Bean v. Parker*, 17 *Mass.* 603; *Denny v. Ward*, 3 *Pick.* 199; 5 *Greenl.* 247; 5 *Pick.* 303; *Adams v. Page*, 7 *Pick.* 542; *Tucker v. Welch*, 17 *Mass.* 164; *Wilder v. Finley*, 4 *Wend.* 100; 1 *Burr.* 467; 2 *Kent's Com.* 403. And that under the money counts no evidence could be admitted of any article, except of money paid or received. *Chity on Contr.* 183; 5 *Burr.* 2589; 1 *East* 1; 4 *Pick.* 60; 4 *D. & E.* 687; 13 *East* 20; 9 *East* 378; *Sheppard v. Palmer*, 6 *Conn.* 95; 4 *Wend.* 267; 1 *Mass.* 138; 1 *Dane's Abr.* 195—197; 1 *Esp.* 221; 5 *Greenl.* 504; *Osborne v. Churchman Cro. Jac.* 127; *Mooney v. Kavanagh*, 4 *Greenl.* 277.

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

The plaintiff's attachment was prior to that of the other creditors named in the brief statement; but the defendant, representing those creditors contends that those proceedings which were had between *Clark* and *Small*, after the service of the writ and before the entry of judgment in the original action, have by legal operation released *Clark's* attachment *in toto*; and if so, the defendant is entitled to judgment on the verdict. We will first state certain principles which have been settled, having a relation to the subject under consideration; and then examine the facts reported, and see how far those principles are to influence the decision of this cause. In a civil action, when a special attachment of property has been made, or bail taken, on mesne process, if the plaintiff and defendant enter into a reference of that action and all demands, it is an admitted principle that such reference operates as an absolute and immediate release

or dissolution of the attachment or discharge of the bail; and no after circumstance in the trial of the cause, will prevent the application of the principle. *Hill v. Hunnewell*, 1 *Pick.* 192, and *Mooney & Ux. v. Kavanagh*, 4 *Greenl.* 277. In such cases, it makes no difference whether any new demand is introduced beyond the original cause of action; or if any such is introduced, whether it is allowed or not. The mere act of referring, is considered as producing the above mentioned effect, at least in those cases where the rule of reference is never discharged. This has been supposed to be founded on the principle that every man is presumed to know the law; and that for the sake of a general settlement with his adversary, or for any other reason satisfactory to himself, a plaintiff consents to waive and does waive the security he holds in virtue of the attachment or of the bail bond. Unless such a principle should be adhered to, a plaintiff's demand might be essentially increased by the introduction of new causes of action, and in this manner a second attaching creditor might lose the benefit of his attachment, and, though with no immoral motive on the part of the plaintiff, such second creditor would be, in legal contemplation, defrauded of his rights. *Bean v. Parker*, 17 *Mass.* 603; *Dana v. Ward*, 3 *Pick.* 199. The case of *Adams & al. v. Paige & al.* 7 *Pick.* 542 was sustained on the ground of actual fraud to injure another creditor, and so is not applicable to the present case; for in this there is no proof of such fraud.

Where A and B are creditors of the same person, and an attachment of the same property is made at the suit of each, A's attachment being prior to that of B; should A have leave to amend his declaration, and, under such general leave, insert one or more counts, and therein set forth a new cause of action, such a proceeding dissolves or releases the attachment. *Willis v. Crooker*, 1 *Pick.* 204. It does not appear that there was any fraudulent intention in that case in making the amendment; still, as the result of it would have prejudiced the rights of the second attaching creditor, had it been sanctioned, the court decided that its legal operation was to release the attachment. Whether this release is to be considered as the effect of a waiver of it, as in the case of a refer-

ence of all demands; or whether it is so considered, on the principle that it operates as a fraud in its consequences, in the same manner as a voluntary conveyance would, if sustained, in respect to creditors, is a question, perhaps, not necessarily requiring an answer. When such amendment is made for the very purposes of fraud on subsequently attaching creditors, there is no doubt as to its effect in the view of any one. In the case supposed, A loses the lien and benefit of his attachment, by inserting in his declaration a new cause of action under the common and general leave to amend. But such leave does not authorize the plaintiff to make such an amendment. In doing it, he in fact acts without any leave. The legal consequence must be the same if A, without asking any leave to amend, inserts one or more new counts, and thereby introduces one or more new causes of action; for the effect must be the same as to subsequent attachments. Such are the principles of law as applied to the cases we have mentioned; and it now remains for us to ascertain how far these principles are applicable to the case before us. No new counts have been added, with or without leave; and the question is whether, in virtue of the agreement referred to at the bottom of the account which is annexed to the report, in connexion with the several counts in the declaration, and the charges contained in the stated account, the plaintiff has lost the benefit of his lien. The writ contains six counts. [Here the Chief Justice stated the substance of the counts, as before mentioned.]

It does not appear by the report of the Judge, that there was any objection to the introduction of any of the proof of those facts contained in it; we are therefore to examine and judge of them in forming our opinion. The account on which the balance is stated, for which judgment was rendered, exhibits a debt against *Small* amounting to $817,90, and a credit to him amounting to $112,90, leaving, as due, a balance of $705,00. The *ad damnum* being only $700, judgment was rendered for no more than that sum. Among other items in this account, not stated or alluded to in the account annexed to the writ, is a charge of a note of hand for $68,32, principal and interest; and sundry other charges amounting to $366,-30. The defendant contends that the last mentioned note, and

charges in the account, were not sued for and demanded in the action; and, as the basis of this position, he says there is no count adapted to the note or to many of the charges; and that some of the charges must have been made before a right of action had accrued. On the contrary, the plaintiff contends that the last two counts are sufficient to embrace all those demands and charges which were not specially set forth or counted upon in the writ, though included in the judgment; and that so no new cause of action was introduced by consent of the parties. We do not say that the note last mentioned might not have been given in evidence on the last count; and that the five charges for money paid would not, *pro tanto*, support the fifth count; and it is said that the charges for molasses, rent and use of yard would have been good evidence on the last count, and indeed that the charter and the claim on the *Willis* note would have been so also; on the plain principle that when *Small* on the 20th of *October*, 1826, (a short time before judgment was entered) acknowledged that the sum of $817,90, as charged, and the sum of $112,90 as credited were both correct, and that the balance of $705 was then a debt justly due from him to *Clark*, that moment an action for monies had and received would lie for it. Admitting for the sake of the argument, that this reasoning and conclusion are correct, still the question returns, could such a count be good for the recovery of such sums, without such an agreement and liquidation? We apprehend the counsel for the plaintiff would not be willing to answer this question in the affirmative. We must then go back to the commencement of the action, and settle the legal rights of the parties as they then existed. But if it is conceded that the sum of $108 charged as due for charter of the schooner *Fame*, might be given in evidence in support of the last count, and therefore is no new cause of action, yet the last charge in the stated account, we are all clearly of opinion, was totally inadmissible. This charge cannot be called a new cause of action, for from the very language in which this charge is made (being $134,20) it is evident, that even then no cause of action for the recovery of that sum had accrued. The charge is in these words, "To a note of hand that I indorsed for you, now in the hands of *George Willis*, that I have be-

come responsible to pay." Now we have decided in *Ingalls v. Dennet*, 6 *Greenl.* 79, that 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 it himself; and neither of these things has yet been done. See also *McLellan v. Crofton* 6 *Greenl.* 307, and all the cases cited as to the point. From this review of the case it is manifest that the judgment contains at least $134,20 for which no right of action existed at the time of the judgment ; and we think at least $46,16 more which could not have been recovered on either of the counts, as the facts stood when the action was commenced, even if it could have been by reason of *Small's* consent. According to decided cases, no distinction exists as to a total or partial release of an attachment. On the ground of voluntary waiver, or fraud in law, and injury affecting the subsequently attaching creditors, we are all of opinion that the transaction of the 20th of *October*, 1826, between the plaintiff and *Small*, operated to dissolve the attachment made of his property ; and the result is that there must be

Judgment on the verdict.

Brown *vs.* Attwood *& al. & trustee.*

Where *S.* sold a vessel to *A.*, who promised, in consideration thereof, to pay *B.* a debt due from *S.* to him; upon which promise *B.* brought his action against *A*; it was held sufficient for the plaintiff to set forth so much of the promise as enured to his own benefit; and that proof of other and further particulars of the contract did not affect the action.

It was also held that such promise was good, though not in writing; for it was a promise to pay *A.'s* own debt, though it enures to the benefit of *B.*

It was also held that *S.* was a competent witness for the plaintiff, his interest being equally balanced.

Where judgment was rendered in the court below on a verdict for the plaintiff, from which the defendant appealed, and in this court a verdict was again returned for the plaintiff, but for a lesser sum than before; and the judgment here was delayed by the defendant's motion for a new trial, till the interest on the verdict increased the amount of the judgment to a larger sum than it was rendered for in the court below;—yet it was held that the defendant was entitled to his costs since the appeal, under *Stat.* 1826, *ch.* 347, *sec.* 4, he having obtained a reduction of the damages by his appeal.

Where a trustee was summoned to appear out of his county, and made his disclosure before a magistrate of his own county, charging himself as trustee of the goods of the principal, which disclosure was transmitted to the court, without his personal attendance;—it was held that the only costs he was entitled to retain, out of the effects in his hands, under *Stat.* 1828, *ch.* 382, were his constructive travel of forty miles, three days' attendance, an attorney's fee, and the fee paid to the magistrate before whom the disclosure was made.

In this case, which was *assumpsit*, tried before the Chief Justice, the questions reserved for the consideration of the court arose upon the third count, which was in these words:—

"Also for that one *David Spear*, at said *Portland*, on the seventeenth day of *July*, A. D. 1828, being indebted to the plaintiff in the just sum of six hundred and eighty-nine dollars and twenty-one cents, for the duck and cordage, for the sails and rigging of a certain schooner called the *Morning Star*; said *Spear*, for the purpose of paying said debt, among other things, sold and conveyed said vessel to the defendants; in consideration whereof, said *Attwood & Gould* promised to pay said debt so due from said *Spear*

to the plaintiff, when said vessel should be sold. And the plaintiff avers that said vessel has been sold for one thousand dollars."

In support of this count the plaintiff read a bill of sale from *David Spear* to the defendants, corresponding to the description given in the count; being absolute in its terms. But it appeared in evidence that there was a condition, so far as respected the amount of the consideration ultimately to be allowed for the vessel; by which, this amount was to depend on the sum for which they should afterwards sell her.

The counsel for the defendants contended that the bill of sale did not support the declaration, when taken in connexion with the above facts proved; and they also contended that the promise declared on was void by the statute of frauds, not being in writing.

David Spear was offered by the plaintiff as a witness to prove the promise alleged; and though objected to as interested, in consequence of the situation in which he stood as stated in the count; yet he was admitted on the ground that it was of no importance to the witness, in legal contemplation, whether the present action was maintained or not. If maintained, then the sum sued for, would extinguish the debt due from him to *Brown*;—if not maintained, then he could recover from *Attwood & Gould*, the amount sued for in this action; which would then belong to the witness, as a part of the price of the vessel conveyed to them; and that, of course, his interest was balanced. Being admitted, he testified, among other facts not relating to the points reserved, that the cordage in question was originally sold to him by the plaintiff in or about *June*, 1828, on a credit of six months; and that in *July* following he conveyed the schooner to the defendants, upon their promise to pay for the cordage. She was to run a while and then be sold by them; and if for any thing more than $2000, he expected to have a part of it; but the defendants were to pay only at the rate at which she was sold. He further testified that he was indebted to the defendants, in about $4000, and that it was agreed by them, at the time of the conveyance, that they should pay for the cordage to *Brown*, who was not present, and that the witness refused to make the con-

veyance except on those terms. The debt due from *Spear* to the plaintiff had not been discharged.

A verdict was returned for the plaintiff. And if the witness was properly admitted, and the declaration was supported by the evidence, and the promise was not within the statute of frauds, judgment was to be rendered on the verdict.

Daveis and *Deblois*, for the defendant, contended, *first*, that the count was not supported by the evidence; the plaintiff having declared on an absolute sale, and proved a conditional one. 4 *Barnw. & Ald.* 392; *Clark v. Gray*, 6 *East* 564; *Roscoe on Evid.* 33; *Churchill v. Wilkins*, 1 *D. & E.* 447; *Colt v. Root*, 17 *Mass.* 234; *Stanwood v. Scovel*, 4 *Pick.* 422; *Baylies v. Fettyplace*, 7 *Mass.* 325; *Golding v. Skinner*, 1 *Pick.* 162; *Clark v. Manston*, 5 *Esp.* 239; *Lyman v. Knox*, 3 *D. & E.* 67; *Hocking v. Cook*, 4 *D. & E.* 314; *Smith v. Barker*, 3 *Day*, 312; 3 *Stark. Ev.* 1548. The promise too, by the plaintiffs, as proved by *Spear*, is different, in the time of payment, from the promise declared on.

2. The promise was void by the statute of frauds; being to pay the debt of another, and yet not in writing. *Fell on Guar.* 10; *Rowe v. Haugh*, 1 *Salk.* 29; *Skelton v. Brewster*, 8 *Johns.* 376; *Packard v. Richardson*, 17 *Mass.* 122; *Crocker v. Whitney*, 10 *Mass.* 316; *Fish v. Hutchinson*, 2 *Wils.* 94. Here also was no consideration moving between the plaintiff and defendants. *Barbour v. Fox*, 1 *Stark. Rep.* 215; *Stevens v. Squire*, 5 *Mod.* 205; *Tileston v. Nettleton*, 6 *Pick.* 509; *Wagoner v. Gray's adm'rs.* 2 *Hen. & Munf.* 611; *Roberts on frauds*, 223; *Jackson v. Rayner*, 12 *Johns.* 291.

3. *Spear* was improperly admitted as a witness, having a direct interest in the event of the suit. The verdict for the plaintiff will forever discharge him of that debt. *Emerton v. Andrews*, 4 *Mass.* 653; 14 *Mass.* 312; *Bayley on bills*, 374; *Revere v. Leonard*, 1 *Mass.* 93; *Commonwealth v. Snell*, 3 *Mass.* 85; *Bliss v. Thompson*, 4 *Mass.* 488; *Page v. Weeks*, 13 *Mass.* 199.

Longfellow, for the plaintiff, cited to the *first* point, 1 *Bos. & Pul.* 98, 101; *Dearborn v. Parks*, 5 *Greenl.* 83; 3 *Bos. & Pul.*

149 *note ;* 1 *Roll's Abr.* 32 ; *Hardr.* 321 ; *Cowp.* 442 ; *Hammond on parties, p.* 8. To the *second* point he cited *Packard v. Richardson,* 17 *Mass.* 122 ; *Colt v. Root, ib.* 229 ; *Lent v. Padelford,* 10 *Mass.* 230 ; *Hall v. Marston,* 17 *Mass.* 575 ; *Arnold v. Lyman, ib.* 400.

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

It is contended in this case, that there is a variance between the contract declared on, and that proved. The whole consideration moving from *Spear,* the debtor of the plaintiff, viz. the sale of the vessel, is stated, but the whole agreement on the part of the defendants is not set forth. The amount to be paid for the vessel, as agreed between the defendants and *Spear,* was to depend upon what she might produce upon a resale, which was to be made by them. This part of the agreement is not stated in the declaration, but all is stated of which the plaintiff complains, or which appears to be in controversy. Nor is it pretended that the part omitted in any manner varies or qualifies that part of the contract, upon which the plaintiff has declared. Whatever may be the liability of the defendants in respect to other stipulations, unless they succeed upon other grounds of defence, they expressly assumed to pay to the plaintiff the amount of his claim. The variance above alluded to, was the only one suggested at the trial, which is reserved in the report. Another variance has been pointed out in argument, viz. that by the declaration, the defendants were to pay the plaintiff, when the vessel was sold. In the testimony of *Spear* as reported, there is nothing stated as to the time of payment ; but the report professes to set forth only so much of the testimony of *Spear* as related to the points reserved, which upon this head were limited to the amount of consideration to be paid for the vessel, and not to the time of payment.

Mills v. Sherwood, 8 *East* 7, was an action brought upon the warranty of a horse. The declaration averred, that the defendant warranted the horse to be young, and worth £80. The horse, though young, was proved not to be worth £80. The evidence was, that the defendant warranted it sound and worth £80, and that it

was a young horse, and had never been in harness. It was objected that the evidence did not support the count; but the court decided otherwise. It was there distinctly held that if the plaintiff stated the whole consideration for the promise, which has been done here, it was sufficient if the plaintiff stated those parts of the defendant's promise, the breach of which he complains of, and states those truly, without setting forth other parts of the contract irrelevant to that breach. The same doctrine was held in *Stanwood v. Scovel*, 4 *Pick.* 422. Indeed the whole promise, made by the defendants for the benefit of the plaintiff, is set forth. They made other stipulations for the benefit of *Spear*, in which the plaintiff had no interest. It may be said that if an action may be maintained by the plaintiff, the defendant may also be liable to *Spear*, and thus chargeable in two actions upon one contract. And doubtless this may be the consequence, if it results from their agreement. There can be but one action upon an entire contract, but there may be more than one upon a promise to pay money, or to perform any other duty at successive periods. So if a party upon legal consideration, the purchase of merchandize, for instance, promise or covenant to pay part of the price to *A*, and part to *B*, and part to *C*, the proportions being settled, upon a breach, he is liable to each for his proportion, in which it will be sufficient for each to aver so much of the promise or covenant, as enures to himself.

It is further objected, that the promise is void under the statute of frauds. But we must regard this case as within the principle of *Dearborn v. Parks*, cited in the argument. The defendants promised *Spear*, that they would pay a portion of the purchase money to the plaintiff. It was their debt they stipulated to pay. And the authorities referred to in the case last cited, show that the party, to whom performance is to be made, may have the action. Whether that party is or is not the creditor of him, from whom the consideration moved, is not essential to the liability of him who promises. In most of the cases cited in *Dearborn v. Parks*, the sum stipulated to be paid was a gratuity from him, from whom the consideration moved. But whether it is a gratuity, or whether it is intended to extinguish an antecedent debt, is no concern of him who promises.

It is sufficient that he has promised, for a valuable consideration, to the person, whom the party paying the consideration thought proper to appoint. When he pays, he pays his own debt, and if it operates also to discharge the debt of another, it does not change the original character of his own engagement. In order to determine whether a promise is conditional or collateral, it is often a decisive criterion, that the party receiving the consideration is held liable; but the case before us is one where there is a new consideration, between the newly contracting parties.

The interest of the witness, which is the last objection, in the subject in controversy, was exactly balanced. If the plaintiff prevails, his debt to him is extinguished; if not, his debt to the defendants is extinguished to the same amount.

Judgment on the verdict.

NOTE. In the above case a question arose, as to the taxation of costs, between the plaintiff and the principal defendants; and another between the plaintiff and the trustee. In relation to the former the facts were these. In the Court of Common Pleas the jury returned a verdict in favor of the plaintiff for $712,28. The defendants appealed; and in this court the jury gave a verdict for the plaintiff for $697,37. The cause was then continued from *Nov.* term to *May* term, 1831, on a motion for a new trial made by the defendants. Judgment being entered on the verdict for the above sum and interest from *November*, amounting to $720,73, the defendants' counsel moved for their costs since the appeal, according to *Stat.* 1826, *ch.* 347, *sect.* 4; and cited 1 *Greenl.* 15; 2 *Greenl.* 66, 397.

The COURT decided that the defendants were entitled to their costs since the appeal, as by means of such appeal they had obtained a reduction of the damages; observing that if judgment had been rendered at the same term at which the trial was had, no question could have arisen as to the defendants' title to costs; and though the motion of the defendants caused the delay of judgment till *May* term, the only penalty they must suffer for this was the payment of interest on the verdict from the time it was returned until the judgment was rendered, leaving the above provision of the

statute as to the question of costs, unaffected by the motion and the addition, though such addition increased the sum for which the judgment was entered to more than the amount of the verdict in the Court of Common Pleas.

As to the latter question the facts were these. The trustee lived at *Belfast* in the county of *Waldo*, and there made his disclosure under oath before a justice of the peace for that county, therein expressly charging himself as trustee. The *Stat.* 1821, *ch.* 61 *sect.* 6, provides that when a supposed trustee dwells in any other county than that in which the writ is returnable, he shall not be required to attend court personally, but may, by attorney, declare what goods, effects or credits of the principal he had in his hands at the time of the service of the writ, and offer to submit himself to an examination on oath ; and if the plaintiff shall think proper to examine him on oath, the answers may be sworn to before a justice of the peace of the county where such supposed trustee dwells. In the present instance the trustee never personally attended court, but transmitted his disclosure to his attorney, who presented it to the Court of Common Pleas at the first term. The Justice's fee for taking the disclosure was only one dollar. There is no statute which give costs to a trustee, unless he attends personally at the first term for the purpose of disclosure on oath. The *Stat.* 1828, *ch.* 382 provides that "in all actions where any person or persons shall be summoned as trustee or trustees, such trustee or trustees who shall appear at the first term and disclose, shall be entitled to costs, in the same manner as parties in civil actions who have an issue joined for trial"—and the section further provides that such trustee may deduct, from the money in his hands, the amount of his costs, and pay over the balance to the officer holding the execution.

The COURT observed that after the trustee in this case had charged himself by his disclosure and transmitted it to court, or carried it there, he had nothing more to do ; his presence there in person or by attorney was wholly useless. No judgment was to be rendered for the costs ; he was to pay himself—and even if the plaintiff had failed in his action against the principals, there was no provis-

ion for a judgment and execution for the trustee's costs. And they were clearly of opinion that the trustee could not, in justice, be entitled to anything more for his services in transmitting his disclosure to court, than his constructive travel of forty miles—three days attendance—attorney's fee, and the one dollar charged for the disclosure.

The inhabitants of WESTBROOK *vs. The inhabitants of* BOWDOINHAM.

Being taxed in any town for five successive years, does not gain a settlement, if the party during that period has left the town with an intention of never returning; though such intention was changed, and he did in fact return, within the same year.

The assessment of taxes for five successive years, on a person afterwards a pauper, does not estop the town, in a question of settlement, from showing that during part of that period his domicil was in another town.

THE question in this case was upon the settlement of one *Bright*, a pauper. It was admitted that his settlement was once in *Bowdoinham;* but the defendants contended that he had subsequently acquired one in *Westbrook*, by residence, being taxed, and paying taxes there, for five successive years. The taxation and payment, being proved, were relied upon by the defendants as conclusive evidence of his residence in *Westbrook* during the term, which this town was estopped to deny; but the Chief Justice, before whom the cause was tried, overruled this position, and admitted parol testimony to the fact of his domicil. It was then proved that *Bright* came to *Westbrook* early in *April*, 1821, where he lived as a hired workman with one *Torrey*, till *August* 24, 1824; when, being dissatisfied with his wages, he took his trunk, which contained all his property, and left the town; proceeding to *Charlestown* and *Boston*, in Massachusetts, and thence to *New York*. But in *March* or *April* following, he returned to his former employer in *Westbrook*, where he resided ever since. He testified that when he went away

he never intended or expected to return; that he bid his friends, as he supposed, a final farewell; but after trying in vain at the above mentioned places to improve his condition, he concluded to return.

Upon this evidence the Chief Justice left the fact of his intentions to the jury; instructing them that if *Bright*, when he left *Westbrook*, intended never to return, but abandoned the place, then his legal residence there was terminated; and that he did not again become an inhabitant of that town till his return in the following spring. And the jury found a verdict for the plaintiffs; which was taken subject to the opinion of the court upon the correctness of those instructions.

Greenleaf and *Jewett*, for the defendants, argued that the assessment, being matter of record, ought to estop the party making it; and to furnish conclusive evidence of settlement, against the town. But if not, yet the statute requiring a residence of five years and payment of taxes, means only such residence as subjects the party to taxation; intending that every town, which has had the benefit of a man's taxes for five successive years, shall be holden to support him when in want.

If, however, a continuation of the domicil during that term is requisite, here is no evidence to the contrary. For it is laid down in the case of *Doctor Munroe*, 5 *Mad. Ch. Rep.* 379, that "a domicil cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto;* and necessarily remains until a subsequent domicil be acquired, unless the party die *in itinere* towards an intended domicil." And the learned Chancellor *Kent* is of opinion that the original domicil of the party always continues until he has fairly changed it for another. 2 *Kent's Com.* 346, *note c.*

Deblois, for the plaintiffs, cited 2 *Stark.* 1059; *Davenport v. Mason*, 15 *Mass.* 85; 3 *D. & E.* 474; *Rex v. Laindon*, 8 *D. & E.* 379; *Billerica v. Chelmsford*, 10 *Mass.* 394; *Abington v. Boston*, 4 *Mass.* 312; *Granby v. Amherst*, 7 *Mass.* 1; *Cambridge v. Charlestown*, 13 *Mass.* 501; *Athol v. Watertown*, 7 *Pick.* 42; *Putnam v. Johnson*, 14 *Mass.* 488.

The defendants also moved for a new trial, on the ground of newly discovered evidence, not necessary here to be stated.

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

The jury by their verdict have decided that the pauper gained a settlement in *Bowdoinham*, in virtue of the statute of 1821, *ch.* 122, by his dwelling and having his home in that town on that day; and under the instructions given them they have also decided that he had never lost that settlement and gained one in *Westbrook* by five years continued residence therein, as was contended at the trial. It was urged, that as it appeared that the pauper had been assessed in *Westbrook* for five successive years after the year 1821, that town was estopped to deny that he was, during all that time, one of its inhabitants; but we think the Judge very properly overruled that objection; because, as the assessment of taxes has relation to the first day of *May* annually, and to facts as they then existed, such assessment was not inconsistent with his having, between the first day of *May* in one year, and the first day of *May* in the next year, changed his habitancy and home, and become and continued an inhabitant of another town, eleven months of the intervening year. So that the only question arising on the report, is whether the pauper did, during the five years before-mentioned, dissolve his connexion with the town of *Westbrook*, remove from, and abandon it, with an intention never to return to it. The evidence to prove the fact, and the intention, was submitted to the jury, under the instruction of the Judge that if they believed there had been such removal, with such intention, it terminated his habitancy there; and that he did not again become an inhabitant of *Westbrook*, until his return to it, eight or nine months after he had left it. We are not dissatisfied with this instruction. Without repeating the facts stated in the report in relation to this point, we are of opinion that the motion for a new trial, founded on those facts and instructions is not sustained. See *Catlin v. Gladding*, 4 *Mason*, 308.

As to the motion at common law, on account of newly discovered evidence, we cannot discern its merits; a part of it is merely

cumulative; and comes from a quarter where it might have been found before; it is merely to throw doubts in the way, as to the pauper's intentions in removing. And in respect to the *exparte affidavit* of the pauper touching the question of intention, we can place no reliance upon it. He was a witness on the trial, and was carefully cross-examined, and testified explicitly, as stated in the report. We are all of opinion that there ought to be

Judgment on the verdict.

DRINKWATER *vs.* SAWYER.

When one held a farm by two several deeds of separate parcels thereof, made by the same grantor at different times; and afterwards made a deed to a third person, using language sufficiently indicating the whole farm, and then adding that the premises were the same which he purchased by deed of such a date, referring to the latter only of his title deeds;—it was held that the whole farm passed by this conveyance; and that the recital of the source of the grantor's title was superfluous, the description being otherwise sufficient.

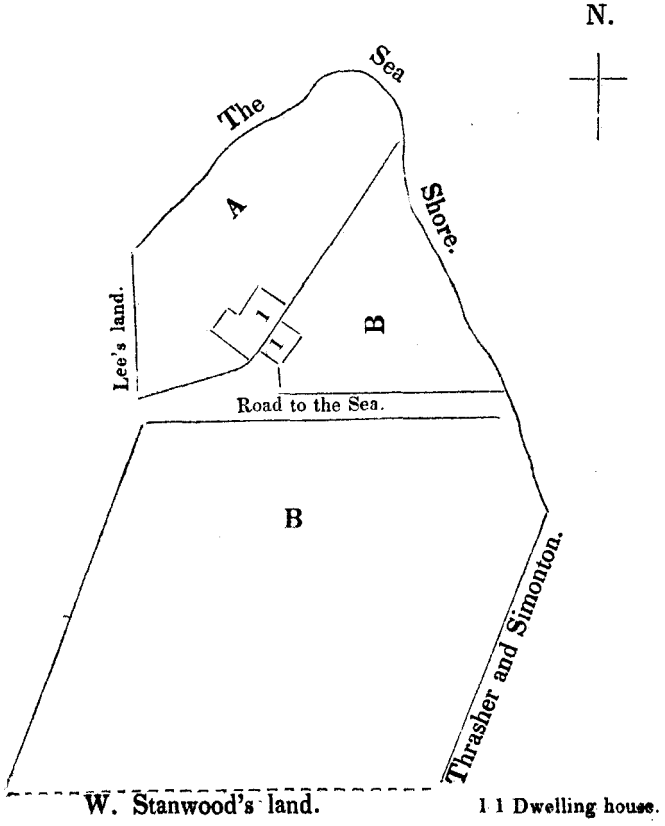
THIS was a writ of entry on a mortgage, made by the tenant to one *Gooding*, and assigned to the demandant; and was tried before the Chief Justice.

It appeared that the tenant purchased part of the demanded premises of *John Cushing*, by deed dated *Dec.* 28, 1808; conveying a piece of land "in that part called *Cushing's* point, with the northerly half of the house" in which he then dwelt. This parcel is marked *A* in the diagram below. On the 15th day of *February* 1821, *Cushing* made another deed to the tenant, describing the land marked *B* on the same plan, as bounded northeasterly by the sea shore, southeasterly by land of the heirs of *T. Simonton*, and *E. Thrasher*, southwesterly by land of *W. Stanwood*, and northwesterly by land belonging to said *Sawyer*;—"including the land whereon the dwelling house stands, which terminates at *Cushing's* point, so called." On the 29th day of *December* 1828, the tenant

made the mortgage declared on, describing the tract *B* in the language of *Cushing's* second deed to him, with this addition,—"including land whereon the dwelling house stands, which terminates at *Cushing's* point, so called, with all the buildings thereon, and is the same premises which were conveyed to me by *John Cushing* by deed dated *Feb.* 15, 1821." No other proof was offered, except a plan of the premises.

Hereupon a verdict was taken for the demandant, subject to the opinion of the court upon the question whether the mortgage included both the parcels originally purchased by the tenant; and to be amended accordingly.

NOTE.—The following sketch shows with sufficient accuracy the situation of the land in controversy.



F. O. J. Smith, for the tenant, argued that the language of the mortgage deed was fully satisfied by confining it to the land marked *B* on the plan; and that such was the obvious intent of the parties was apparent both from their reference only to the deed of that parcel, though the other was on record and known to the mortgagee, and from the omission to notice *Lee's* land, which, upon any other construction, would have been an important boundary. 3 *Mass.* 352; 4 *Mass.* 205; 5 *Mass.* 401; *Vose v. Handy*, 2 *Greenl.* 230; 9 *Mass.* 238; *Child v. Fickett*, 4 *Greenl.* 475; 7 *Johns.* 217; 5 *East* 51.

Deblois, for the demandant, cited *Shep. Touchst.* 87; 1 *P. Wms.* 487; 5 *Mass.* 411; 4 *Cruise's Dig. tit.* 32, *ch.* 19, *sect.* 3; 3 *Greenl.* 71; *Worthington v. Hylyer*, 4 *Mass.* 205.

WESTON J. delivered the opinion of the Court.

The extent and limits of the land conveyed in mortgage by the tenant, in *December*, 1828, to *Gooding*, and by him assigned to the demandant, are well ascertained by the particular description given. The large piece south of the road is described by its bounds; and in respect to this no question is made. Then follow the words "including the land whereon the dwelling house stands, which terminates at *Cushing's* point so called, with all the buildings thereon." This embraces very manifestly the land north of the road, that terminating at *Cushing's* point, and the dwelling house standing upon it. The construction contended for by the tenant, would exclude a part of *Cushing's* point, and the greater part of the dwelling house, of which the grantor was the undoubted owner at the time. Had there been no further description, the right of the demandant to all the land he claims, would have been too clear to admit of question.

But it is insisted by the counsel for the tenant, that the demandant's right is restrained and limited by other parts of the description. The part, relied on to establish this limitation, is in these words, "and in the same premises, which were conveyed to me by *John Cushing*, by deed dated *February* 15, 1821." And it appears that the land in dispute had been previously conveyed to the tenant by the same *John Cushing*, by deed dated *December* 28, 1808. A

purchaser looks to the terms in which his purchase is described, rather than to the source from which his grantor derived title, unless reference is made to a prior deed for a description of the premises. There was no such reference in the deed in question. It is merely recited that the land conveyed is the same conveyed by *Cushing* to the tenant, in *February*, 1821. In the case of *Worthington & al. v. Hylyer & al.* 4 *Mass.* 196, *Parsons C. J.* says "if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected. Thus if a man convey a house in *D*, which was formerly *R C*'s, when it was not *R C*'s but *T C*'s, the house in *D* shall pass, because by the description of his house in *D* the estate intended to be conveyed is sufficiently ascertained." And this rule is very necessary to give effect to conveyances; for it often happens that through inadvertency, some particulars not essential to the description, may be erroneously stated. Suppose the tenant, by design or accident, had misrecited altogether the source from which he derived title, the land upon which the deed was intended to operate, would clearly appear from the particular description given. So that if *Cushing's* last deed had in terms embraced only a part of the land, or had embraced none of it, or if he had never had any deed whatever from *Cushing*, all the land described in the tenant's deed to *Gooding* must by law have passed, he being the owner of it at the time. *Cushing's* second deed is bounded northwesterly by *Sawyer's* land, and the piece in dispute is bounded, in that direction, by *Lee*'s land and the sea shore; but *Sawyer* had other land on the northwesterly line, which would satisfy this part of the description. But whatever may have been the effect and true construction of *Cushing's* second deed, the essential parts of the description in the deed made by the tenant are too strong and unequivocal to sustain the construction for which he now contends, which would exclude from its operation the piece in dispute.

Judgment on the verdict.

JOHNSON *vs.* FARWELL, *& als.*

The time of the actual making of a writ, with an intention of service, is the time when an action is "commenced and sued" within the meaning of the statute of limitations; (1821 *ch.* 62,) for it is the acquiesence of the plaintiff for six years, that bars him, whether it be known to the defendant or not.

The date of a writ is not conclusive evidence of the time when it was sued out, so as to affect a plea of the statute of limitations.

In an action of trespass for demolishing certain dwelling houses, it was held incompetent for the defendant to prove, in mitigation of damages, that they were occupied as houses of ill fame.

THIS was an action of trespass for demolishing and destroying five dwelling houses, the property of the plaintiff; to which the defendants pleaded the general issue, and the statute of limitations. To the latter plea the plaintiff replied that the action was commenced and sued within six years after the trespass was done; on which issue was joined.

The trespass was alleged to have been done *Aug.* 20, 1824. The writ bore date *Aug.* 9, 1830, on which day the officer returned an attachment of the defendants' property; but no summons was delivered till *Sept.* 21. The defendants hereupon contended that the action was not commenced within the meaning of the statute, till the writ was actually served; and that therefore it was barred by the previous lapse of six years. But the Chief Justice, before whom the cause was tried, ruled that suing out the writ within six years was a sufficient commencement of the action; and instructed the jury that the only question, under the second issue, was whether the writ was actually sued out within six years after the trespass was committed.

The defendants offered to prove, in mitigation of damages, that the dwelling houses demolished were at that time houses of ill fame, and on that account were incapable of being profitably rented for any lawful purpose; and that they were on that account so worthless that they could not be let to persons of honest reputation. But this evidence the Chief Justice excluded; observing that the

Court had no authority to presume that future tenants would be violators of the law ; or that the houses would have been leased for any unlawful purposes.

To these decisions of the Chief Justice the defendants took exceptions, a verdict having been returned for the plaintiff.

Fessenden and *Neal*, in support of the exceptions, argued from the difference of phraseology in the seventh and eighth sections of the statute of limitations ; the former speaking of actions of trespass "commenced and sued," and the latter describing other actions "actually declared upon in a proper writ ;"—that a difference was intended by the legislature between the actions mentioned in the two sections ; and that in the former case personal notice to the defendant was necessary to the commencement of the suit ; or at least there should be a complete service of the writ, in some mode prescribed by law. *Cook v. Darling*, 2 *Pick.* 605. If the mere purchase of a writ is to be "deemed and taken to be a due commencement of the action" in all cases, then the eighth section of the statute must be held wholly superfluous ; which is contrary to the established rules of statutory exposition.

The greatest mischiefs also would result from the adoption of any rule which would put it in the plaintiff's power to save the statute by his own secret act, while the defendant, being lulled into security by the lapse of time, might lose the evidence necessary for his protection. It is imposing no hardship on an honest and vigilant plaintiff, to require him to give notice, within six years, that his claim will be enforced. To show that the principles of the English practice were consonant with those now contended for, they cited, 1 *Saund.* 63 ; 7 *Mod.* 5 ; *Hollister v. Coulson*, 1 *Stra.* 550 ; *Willes*, 255 ; *Leader v. Moxon*, 2 *H. Bl.* 927 ; *Harris v, Woolford*, 6 *D. & E.* 617 ; 2 *Ld. Raym.* 883.

To the point of damages, they contended that the evidence offered was admissable ; its tendency being to show that the buildings, having been used for base purposes, had acquired so bad a character that persons of honest fame would not occupy them ; and that

consequently their value was very small, except for purposes forbidden by law. 4 *Stark. Ev.* 1460 ; *Cowp.* 511 ; *Bull. N. P.* 27.

Longfellow, for the plaintiff.

PARRIS J. delivered the opinion of the Court.

By the seventh section of the *Stat.* 1821, *ch.* 62, it is provided that all actions of trespass, &c. shall be commenced and sued within six years next after the cause of such action ;—and we are called upon to decide whether this action was so commenced.

The statute does not declare what shall be deemed the commencement of such an action ; but in the 8th section it is provided that any action of the case or of debt, grounded upon any lending or contract, &c. which shall be actually declared upon in a proper writ, returnable according to law, purchased therefor, within the term of six years next after the cause of such action accrued, shall be deemed and taken to be duly commenced and sued within the meaning of this act.—It has been ingeniously argued that inasmuch as the actual suing out the writ is, by statute, the commencement of the suit, in certain actions mentioned in the 8th section, the various kinds of actions mentioned in the 7th section, are not considered as thus commenced ; the peculiar phraseology in the 8th section, defining the commencement of the suit, being omitted in the 7th section, which provides for the limitation of actions of trespass. The cause of this apparent inconsistency of the two sections may, perhaps, be explained by a reference to the statutes of limitations of Massachusetts, from which these sections were exactly copied ; the 7th from an act passed in 1787, and the 8th from the act of 1794.

But from whatever cause it may have arisen, inasmuch as what shall be deemed the commencement of the action under the 7th section is not defined, we must construe these words, " commenced and sued" as we should any others, by applying to them the common law definition, when not defined by statute. We know of no other guide or safe rule of construction.

At what time then, is an action commenced and sued? The defendants' counsel have referred to the practice of the King's

Bench and Common Pleas, in England, and cited sundry cases to show that the suit is not commenced until the writ is served and returned.

Suits are commenced in this State by original writs issuing from the office of the clerk of the court to which they are made returnable. The declaration is a necessary part of the writ, essential to its validity, and without which it is void. As no amendments are allowed which are inconsistent with the nature of the count or counts originally inserted, or for a different cause of action, the writ discloses to the defendant the whole subject matter to which he is called to answer.

But this course of practice differs so essentially from that of the English practice, that sometimes similar expressions convey meanings entirely different, and the same principles are inapplicable to the same nominal stage of the proceedings. Thus in the King's Bench the writ issues merely to bring the defendant into court, and not at the same time to apprise him of the cause of action. The cause of action may not even exist until the filing of the bill, and then, for the first time it is technically set forth to the defendant.

For some purposes an action in the King's Bench may not be considered as commenced until after the date of the writ and the service, and even the appearance of the defendant in court; inasmuch as the cause of action may neither exist or be set forth till then; but for most purposes an action is considered as commenced at the date of the writ. *Johnson v. Smith*, 2 *Burr.* 950. In *Bronson v. Earl*, 17 *Johns.* 65, it is said, that it is the intention and act combined, which in fact constitutes the commencement of the suit. Because a writ filled up with no intention of service is altogether inoperative, as it may be filled up before the cause of action commences, or be antedated. The presumption is that the date of the writ is the true time when the action is brought; but this presumption may always be rebutted and the true time settled by actual proof of the fact. The date is not conclusive, and if the writ is antedated, the defendant will be allowed to show the time when it was actually issued. 6 *Com. Dig. Temps, G.* 6. *Ballantine on Limitations*, 119, 120, 122.

The phraseology of the *Stat. of* 21, *James* 1, being the English statute of limitations, is the same as ours, viz. actions shall be commenced and sued within certain periods ; and the form of pleading under that statute refers to the suing out and not to the service of the writ, the former and not the latter being considered as the commencement of the action. So in Massachusetts the action is considered as commenced at suing out of the writ. *Ford v. Phillips*, 1 *Pick.* 202. So in *New York*, it is not necessary to show that the writ has been returned, nor even that it was actually delivered to the sheriff, but it is sufficient if it appear that the writ was made out and sent to the sheriff or his deputy by mail or otherwise, with an absolute and *bona fide* intention of having it served. *Burdick v. Green*, 18 *Johns.* 14. Suing out the writ with a view to service is an act of legal diligence within the time of limitation. It shows that the party has not slumbered the period prescribed to bar his rights. *Ballant.* 121.

It is contended that the action is not commenced and sued within the meaning of the statute, so as to avoid the limitation, unless such service is actually made on the defendant as will give him notice of the subject matter of the plaintiff's demand, thereby making the effect or avoidance of the limitation to depend upon the defendant's knowledge of the plaintiff's intention to enforce his demand. But Lord *Mansfield* held that the statute did not bar unless the plaintiff had acquiesced six years, without reference to the defendant's knowledge of such acquiescence, and he adds that he who sued out a *latitat*, (which never includes the declaration) to bring the defendant into custody, did not acquiesce within the true meaning of the act. *Ballant. on limitations*, 121. Chief Justice *Kent* held that the action is commenced at the time of suing out of the writ, and that the good sense as well as truth on the subject concurred that the writ issues when it is delivered to the sheriff or his deputy, or sent to either of them with a *bona fide* intention to be served upon the defendant.

In the case at bar, the facts show such intention most conclusively. The writ had not only been sued out and placed in the hands of the officer before the limitation took effect, but had been partial-

ly executed, the officer having made a special attachment by virtue of it on the ninth of *August*, a number of days previous to the time when the statute of limitations could have taken effect. We are clear that the action was "commenced and sued" within the meaning of the statute on the day of the attachment, which, in this case, was the day of the date of the writ.

The next question is as to the admissibility of the testimony offered by the defendants to prove that the houses described in the declaration were houses of ill fame, at the time of their demolition; and that, on this account, they were so worthless that they could not be rented to persons of honest reputation. The only application which it is pretended such testimony could possibly have, is upon the question of damages; and upon this question the burden of proof was upon the plaintiff. As the jury found the defendants guilty, the plaintiff must have proved that the houses demolished were his property, and that they were destroyed by the defendants. Having done so, he was entitled, at least, to the full value of the property destroyed as a compensation for the injury he had received, and he must have established the amount of such injury by competent proof. That he is presumed to have done, as the jury awarded him a sum in damages. We think with the Judge who presided at the trial, that the court had no authority to presume that future tenants would be violators of the law, or that the houses would have been leased or used for any unlawful purpose, if they had not been destroyed.

In estimating the damages the jury would properly inquire into the value of the property destroyed; and in ascertaining that value, one correct rule would be what it would be worth to a person who wished to purchase property of that description. So they might arrive at the probable value by ascertaining what it would rent for; and in either case the plaintiff must prove such facts as would be necessary to enable the jury to find the value. But that, in consequence of the property having been occupied by tenants of any particular character, it had thereby become of more or less intrinsic value, as the moral character of the tenant ranged higher or lower,

would be a rule too uncertain and difficult in its application to be relied upon.

Besides, it was admitted at the argument that the buildings destroyed were not leased by the plaintiff for improper purposes; neither does it appear that he had knowledge of any improper use of them. No case can be found in the books where the value of property is to be estimated by the reputation of its occupant. What was the intrinsic worth of the buildings for honest occupation, by tenants of such employment and character as would be likely to hire houses of the like kind, was the proper inquiry for the jury, and we do not perceive that they were deprived of any testimony offered, having a tendency to establish that fact.

The exceptions are overruled, and
judgment is to be entered on the verdict.

GROSVENOR *vs.* LITTLE.

If a tract of land mortgaged is situated in more towns than one, it is necessary that the sheriff, in making sale of the mortgagor's right in equity of redemption, under *Stat.* 1821, *ch.* 60, should post up two notifications in every town where any part of the land is situated.

THIS was a bill in equity to redeem certain mortgaged premises, the plaintiff having acquired the title of the mortgagor under a sheriff's sale of the right in equity of redemption. It appeared, at the hearing, that though the main body of the land was in *Minot*, yet that a small portion fell within the limits of *Poland*, by the establishment of the line between those towns subsequent to the original laying out of the lots; and that the officer, in advertizing the right in equity, which he had seized in execution, had posted up two notifications in *Minot*, but only one in *Poland*.

Hereupon *Longfellow*, for the defendant, objected that the sale was void, for want of a compliance with the statute, which requires the posting of two notifications in the town where the land lies.

Greenleaf, for the plaintiff.

WESTON J. delivered the opinion of the Court.

By the act respecting the attachment of property on mesne process, and directing the issuing, extending, and serving of executions, *Stat.* 1821, *ch.* 60, *sec.* 17, when an equity of redemption is seized on execution, the officer is required to give public notice of the time and place of sale, by posting up notifications thereof, in two or more public places, in the town or plantation where the mortgaged estate is situated. The sale operates a statute transfer of the interest; and it is essential to the title of the purchaser, that the requisites of the statute should be complied with. A part of the land mortgaged was situated in the town of *Poland*. The officer posted up a notification in but one place in that town. The omission to do it in two places there, we are satisfied is fatal to the title of the purchaser. Nor is it in our opinion the less so, because the mortgage also embraced land lying in another town.

THOMPSON *vs.* CHANDLER.

If the first mortgagee afterwards acquires the right in equity of redemption, such purchase, and union of titles, will not affect the rights of an intervening second mortgagee; but he may still redeem the first mortgage, until foreclosure.

If the purchaser of a right in equity to redeem a mortgage, takes an assignment of it, this shall not operate an extinguishment of the mortgage, if it is for the interest of the assignee to uphold it.

THIS was a bill in equity to redeem certain lands mortgaged, brought by a second mortgagee, against one claiming under a prior mortgage. The principal facts were these :—

On the 23d day of *March*, 1818, one *Jacob Merrill*, being owner of the premises in fee, mortgaged them to *Moses Woodman*; and afterwards, on the 5th day of *October*, 1820, made a second mortgage of the same to *Thompson* the plaintiff.

On the 29th of *January*, 1821, *Merrill* made a third mortgage of the same land to *Dexter Bearce* and *Solomon H. Chandler*, the defendant.

May 28, 1828, *Woodman* and *Thompson* both entered for condition broken.

June 3, 1828, *Samuel Fessenden*, Esq. a creditor of *Merrill*, attached his right in equity of redemption, recovered judgment in the same suit at *June* term in that year ; and on the 16th day of *July* following purchased *Woodman's* mortgage, taking an assignment of the same to himself.

August 29, 1828, at a sheriff's sale made under and by virtue of that attachment, the lien created thereby having been duly preserved, Mr. *Fessenden* purchased *Merrill's* right of redemption. And on the 28th day of *August*, 1829, *Merrill* never having redeemed this right, Mr. *Fessenden*, believing and representing himself to be the absolute owner of the whole fee, conveyed the premises to the defendant, by deed with general warranty.

Nov. 5, 1829, the plaintiff, protesting that he considered *Woodman's* mortgage extinguished by the act of Mr. *Fessenden*, tendered to the defendant the amount of that debt and interest, which was refused.

Greenleaf, for the plaintiff, contended *first*, that *Fessenden's* purchase of the right in equity had relation back to the time of his attachment ; and that therefore the case was that of a purchase of a prior mortgage, by one owning the right in equity of redemption ; which operated an extinguishment of the mortgage. *Wade v. Howard*, 6 *Pick.* 492 ; *Spencer v. Exrs of Harford*, 4 *Wend.* 381. *Secondly.* If *Woodman's* mortgage is not extinct, then the defendant stands in the place of the first mortgagee, against whom the second mortgagee has a right to redeem ; the incumbrances being payable in the order of time in which the respective liens attached. *McKinstry v. Mervin & al.* 3 *Johns. Ch.* 466 ; 4 *Kent's Com.* 156 ; *Newhall v. Wright*, 3 *Mass.* 138 ; *Howard v. Agry*, 9 *Mass.* 179 ; *Bigelow v. Wilson*, 1 *Pick.* 485 ; *Patch on Mortg.* 193, 194 ; 2 *Vern.* 601, 663, 135 ; 4 *Dane's Abr.* 195—6 ; *Atkyns v. Saw-*

yer, 1 *Pick.* 351. The registry itself is notice, which all must regard at their peril. *Frost v. Beekman*, 1 *Johns. Ch.* 298 ; *Parkist v. Alexander*, *ib.* 394 ; *Johnson v. Stagg*, 2 *Johns.* 510 ; *Peters v. Goodrich*, 3 *Conn.* 146 ; *Evans v. Jones*, 1 *Binn.* 522 ; *Whalley v. Whalley*, 1 *Vern.* 484.

Fessenden and *Daveis*, for the defendant, contended that, by the lapse of a year after sale of the right in equity of redemption, this right was forever gone ; and that by the union of both titles in the purchaser, all intervening liens and incumbrances were displaced and the mortgage foreclosed. *Hills v. Elliot*, 12 *Mass.* 26 ; *Ward v. Adams*, 15 *Mass.* 233 ; *Bigelow v. Wilson*, 1 *Pick.* 485 ; *Cushing v. Hurd*, 4 *Pick.* 253 ; *Ingersoll v. Sawyer*, 2 *Pick.* 276 ; *Porter v. King*, 1 *Greenl.* 297 ; *Reed v. Bigelow*, 5 *Pick.* 281 ; *Crane v. Marsh*, 4 *Pick.* 131. And they relied strongly on the principle that whenever the mortgagee acquires the right in equity of redemption, he may elect to treat both titles as merged in one, or not, at his pleasure. *Gibson v. Crehore*, 3 *Pick.* 475 ; 5 *Pick.* 159 ; *Russell v. Austin*, 1 *Paige*, 192 ; *Norton v. Soule*, 2 *Greenl.* 346 ; *Barker v. Parker*, 4 *Pick.* 505 ; *Perkins v. Pitts*, 11 *Mass.* 125 ; *Shep. Touchst.* 85 ; *Co. Lit.* 301, *b* ; *Hayward's case*, 2 *Co.* 35 ; 3 *Powel on Mortg. (Rand's Ed.)* 939 *note.*

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

The counsel for the respondent insists, that by a union in him of the right to redeem in the original mortgagor, and the interest of *Woodman*, the first mortgagee, he has a right to hold the land discharged of all intervening incumbrances. The counsel for the plaintiff contends, *first*, that the transactions between *Samuel Fessenden*, Esq. under whom the respondent claims, *Fessenden* at the time being the owner of the equity of redemption by relation, from the day of his attachment, operated an extinguishment of *Woodman's* mortgage, and that he is entitled to the land, as the next incumbrancer. *Secondly*, that if *Woodman's* mortgage was not there-

by extinguished, he has a right to recover the land, upon payment to the respondent, of what may be due upon that mortgage.

If *Fessenden*, at the time of his payment to *Woodman*, and taking from him a release and conveyance of his interest, was not the owner of the equity, it is conceded that *Woodman's* mortgage was not extinguished. This was done on the sixteenth of *July*, 1828, and *Fessenden* purchased the equity, at a sheriff's sale, on the twenty-first of *August* following. His attachment was made on the third of *June* preceding. The attachment prevented the creation of intervening incumbrances to his prejudice, but did not give him an inchoate title to the equity, for it was altogether contingent, whether he or another person would become the purchaser of it. He might deem it convenient or prudent to do so, because he had bought the interest of the first mortgagee. And upon this view of the case, there is certainly great reason for regarding him as the owner of the mortgage, before he acquired a title to the equity. But we deem a decision of this point entirely unimportant, as we are clearly of opinion that whether *Fessenden* was or was not, at the time he took a release or conveyance from *Woodman*, the owner of the equity, the mortgage was not thereby extinguished.

The counsel for the plaintiff, to make out an extinguishment, relies upon the case of *Wade v. Howard*, 6 *Pick.* 492. The reporter, in his marginal abstract in that case, states that where the purchaser of an equity of redemption of land, which is subject to two mortgages, pays and takes an assignment of the first mortgage, it seems that he does not thereby acquire the rights of the first mortgagee, but that the first mortgage is discharged. Upon an examination of that case, it will be found that the question reserved for the consideration of the court was, whether the mortgage had been assigned or discharged. If assigned, the tenants were to be defaulted; if discharged, the demandants were to become nonsuit; and the court upon the facts held the mortgage to have been discharged. This was the point decided. There are, it is true, to be found in that case, *dicta* of the Chief Justice, by whom the opinion of the court was delivered, which may be thought to favor the doctrine,

which in the opinion of the reporter seems to be deducible from it. If however the reasoning of the Chief Justice, instead of being regarded as general, is limited and restrained, as it doubtless ought to be, to the facts in the case then under consideration, no such principle is to be drawn from it. The learned Chief Justice, in *Gibson v. Crehore*, 3 *Pick.* 475, had himself laid down a different doctrine with great strength of illustration and weight of authority, in a case in which the question, whether the first mortgage was extinguished or not, was directly presented; which was again sanctioned by the court in a bill in equity between the same parties, 5 *Pick.* 146. The principle stated in the first of these cases, and recognized in the second, is, that when the purchaser of the right to redeem a mortgage, takes an assignment of it, this shall not operate an extinguishment of the mortgage, if it is for the interest of the assignee to uphold it. And this doctrine has been clearly settled in the English court of chancery, and in New-York, and also in our own State, upon full consideration, in *Freeman v. Paul*, 3 *Greenl.* 260. Now it cannot admit of a question that in the case before us, it was manifestly for the interest of *Fessenden* to uphold *Woodman's* mortgage.

By the conveyance from *Woodman*, Mr. *Fessenden* acquired the rights of the first mortgagee, and by his purchase at the sheriff's sale, he acquired also the equity of redemption. According to the English law he might exclude intervening incumbrances, unless he had actual notice at the time of their existence, and the registry is not there held sufficient to prove such notice, 4 *Kent*, 167. But their doctrine of tacking has not been adopted in this country, but has been in fact expressly repudiated; and Mr. *Fessenden* frankly admits that he does not expect to prevail on this ground. But he insists that the right of the mortgagor, and those claiming under him, is gone unless he or they avail themselves, within the year, of the right allowed by the statute to redeem an equity, seized and sold on execution; and that under the circumstances under which he held, the right to redeem at any time within three years, which exists in ordinary cases, became restricted to one year. But this position is

taken without due regard to the distinct interest of incumbrancers, whose rights accrued before the seizure of the equity. After each successive incumbrance, there still remains in the mortgagor a right to redeem upon payment of all the mortgages created. This right a creditor may seize and sell, and this sale is a statute conveyance from the mortgagor to the purchaser. But although there remains nothing valuable, in the eye of the law, in the mortgagor, which another creditor may take, the law allows him to redeem his interest from such purchaser within a year. This is a distinct and independent limitation of a new right, created by the law. It operates between the purchaser of the equity and the former owner, the judgment debtor, and only upon the interest acquired by the purchase. It is what the judgment debtor had remaining in him, a right to redeem upon payment of all antecedent mortgages. The interests of preceding incumbrancers remain unaffected. The first mortgagee, which *Fessenden* was by substitution, cannot by the purchase of the last equity, exclude intervening rights, any more than the purchaser of the last equity might do so, by taking an assignment of the first mortgage. And whether the purchaser of the last equity takes an absolute conveyance of it, or whether subject to the right of the former owner to redeem it within a year, makes no difference in principle. The rights of a second mortgagee, or of any subsequent mortgagee, who duly records his title, cannot be extinguished or foreclosed, except upon the lapse of three years, after the entry of an antecedent mortgagee for condition broken. His interest cannot be impaired by any transactions between the party from whom he derives title and his creditor, or other persons claiming under him. The principle is, that until a foreclosure takes place, the claims of each incumbrancer are to be allowed in due order, having regard to the time of their creation. 4 *Kent*, 171.

It appears from the answer of the respondent, that *Woodman* entered for condition broken, on the twenty eighth of *May* 1828. In three years from that time the mortgage would have been foreclosed, and *Woodman*, and those claiming under him, would have had an absolute title. But long prior to the lapse of that period, viz. on the fifth of *November* 1829, the plaintiff in equity, who was sec-

ond mortgagee, tendered to the defendant, who stood by substitution in the place of *Woodman*, the amount due on the first mortgage, and thereby saved his rights from foreclosure.

The decree of the court is, that the defendant state the amount due on *Woodman's* mortgage, and that upon payment of that sum, when it shall have been liquidated, by the plaintiff, the respondent is to surrender to the plaintiff the possession of the land in controversy, and also make and execute to him a release and conveyance of the right he acquired, as assignee of *Woodman's* mortgage.

BRACKETT *Ex'r vs.* LEIGHTON.

Where one devised to his wife "her full and reasonable dower in all his estate, according to the laws of this State;" it was held that the term "dower" must be taken in its legal acceptation, and limited exclusively to the realty.

THIS cause, which was *assumpsit*, came up by exceptions taken in the court below.

The defendant pleaded the general issue, and the statute of limitations. To prove a new promise within six years, the plaintiff called the widow of his testator, the late Dr. *Samuel Brackett;* to whose competency the defendant objected, on the ground that by the will of the testator she was entitled to a third part of his personal estate; and therefore had a direct interest in the subject of this action.

The devise to the widow was in these words: "*First.* It is my will that my beloved wife *Teresa Brackett* shall have, hold and enjoy her full and reasonable dower in all my estate, according to the laws of this State." The testator then bequeathed five dollars to each of the children of his first wife; and gave "all the rest and residue of his estate, real and personal," to his five other children, in equal shares.

Upon this evidence *Whitman C. J.* was of opinion that the widow was entitled, by the will, to a third part of the personal estate which might remain after the payment of the debts; and therefore rejected her, as an incompetent witness by reason of her interest. To which the plaintiff excepted.

Longfellow, in support of the exceptions, contended that by the term "dower" the widow was excluded from any share in the personal estate; and cited *Perkins v. Little*, 1 *Greenl.* 148.

Deblois, for the defendant, argued that the words of the will ought to be taken in their popular sense; and that wills should receive a "favorable and benign interpretation;" by which is meant an interpretation to the advantage of the devisee. *Shep. Touchst.* 417, 436, 437; *Hogan v. Jackson*, *Cowp.* 299; 6 *Binn.* 94; *Cook v. Holmes*, 11 *Mass.* 528; 9 *Mass.* 161; *Kermon v. McRoberts*, 1 *Wash.* 96; *Doug.* 323; *Jeffries v. Poyntz*, 3 *Wils.* 141; *Ibbotson v. Beckwith*, *Cas. temp. Talb.* 157; *Sherman v. Sherman*, 1 *Wash.* 266. Upon the rules adopted in these cases, the words "all my estate" which were employed by the testator, include all his property, real and personal. It is evident that he meant to dispose of all he had; by giving one third to the wife, and the rest to her children. And by referring to the laws of the land, he would have her take what the law would have given her had he died intestate. The word "dower" here is equivalent to the popular term "dowry;" meaning all which the law gives a woman, out of her husband's property. The purposes of the testator towards his wife were manifestly those of generosity and affection; and to apply to his language the rules of an arbitary, technical construction, of which he was wholly ignorant, is in effect to make a new will for him, to which he never would have set his hand. *Palmer v. Richards*, 3 *D. & E.* 356; *Barnes v. Patch*, 8 *Ves.* 604; *Tanner v. Wise*, 3 *P. Wms.* 94; *Bearcroft v. Bearcroft*, 2 *Vern.* 619; 5 *Burr.* 2638; *Grayson v. Atkinson*, 1 *Wils.* 333; *White v. Barber*, 5 *Burr.* 2703; 4 *Dane's Abr.* 530; *Blanford v. Applin*, 4 *D. & E.* 82; *Bean v. Halley*, 8 *D. & E.* 5; *Doe v. Micklin*, 6 *East* 486.

WESTON J. delivered the opinion of the Court.

If the witness rejected had no interest in the personal estate of the testator her late husband, she was competent to testify. And this depends upon the true construction of the first clause in the will of the deceased, making provision for her. It is in these words, "it is my will that my beloved wife, *Teresa Brackett*, shall have, hold, and enjoy her full and reasonable dower in all my estate, according to the laws of this State." Dower is a term well known to the law; and has reference only to real estate. It is also a term of familiar and general use in the community; and we are not aware that it has any popular acceptation, varying from its technical meaning. Indeed dower is an interest so generally known, and so well understood, that there are probably few persons competent to do business, who would be at any loss as to the construction of the term. And we do not feel at liberty to extend its meaning in the will in question. It is possible the testator might have used it in a larger sense; although whether he did so or not is altogether conjectural. He intended it is said to be generous to his wife; but we have no other evidence of his intentions in this respect, than what appears in this clause in his will. He gives her dower in all his estate, but it was to be according to the laws of the State, which allow it only in lands, tenements, or hereditaments.

After bequeathing five dollars each to the two sons of his former wife, in the third clause of his will, the testator devises and bequeaths all the rest and residue of his estate, real and personal, to his other children. Here the term, personal, is used that his meaning might not be misunderstood, although the word, estate, is a general term, embracing every species of property. Had he used the same terms in the clause providing for his wife, viz. dower in all his real and personal estate, although dower, as applied to the personalty, would have been used in an improper sense, yet it might fairly have been understood to carry a third part of his personal estate. But we find him using it in the third clause, and omitting it in the first. He gives her dower in all his estate, according to the laws of the State. The law gives her dower in all his real estate;

and we find nothing in the will, which warrants the construction, that he intended to give her any thing more.

The exceptions are accordingly sustained; and there must be a new trial at the bar of this court.

LOOMIS *vs.* GREEN.

A plaintiff having caused goods to be attached and returned as the property of the defendant, is not thereby estopped from showing that they were the property of another.

It is only where the damages recovered include the value of the article for the taking of which the action was brought, that the chattel is transferred by operation of law, and the property therein vested in the trespasser.

Therefore where, in an action of trespass for breaking and entering the plaintiff's close, and cutting down and carrying away divers timber trees, the plaintiff attached the timber, and took it into his own possession as reclaimed by himself; the defendant confessed the trespass; and the plaintiff entered a formal abandonment of so much of the action as related to the carrying away of the timber, and proceeded for damages for breaking and entering his close and prostrating his trees; for which he had judgment for nominal damages only;—it was held that by this judgment the title to the timber was not changed.

Where one has wilfully confounded his own goods with others of the same kind belonging to a stranger, and would reclaim them by law, the burden of proof is on himself, to distinguish his own goods from those of the stranger.

In an action of trespass for breaking and entering the plaintiff's close, and cutting and taking away a large quantity of his timber trees, it is not competent for the defendant, in mitigation of damages, to prove that the estate is made more valuable by his labor and expenses in opening the forest and making improvements.

THIS was an action of trover, to recover the value of twenty five pine mill logs, with certain marks thereon, particularly described in the writ; and it came up by exceptions taken to the opinion and decisions of *Whitman C. J.* in the court below.

It appeared that the plaintiff, at a former period, without lawful authority, had entered upon a township of land in New Hampshire, belonging to the trustees of *Dartmouth* college, from which he had

cut and taken away a large number of pine logs, turning them into the *Dead Diamond* river, a tributary stream of the *Androscoggin* river, flowing through the township, to be floated to the mills in *Brunswick* and *Topsham*. He also had another large quantity of logs of his own, which in the same winter, were turned into the *Magalloway* river, another branch of the *Androscoggin*, to be floated to the same mills. Both these parcels of logs were marked with the same marks. On the 13th day of *March* 1830, before the river had broken up, the trustees of the college sued *Loomis* in an action of trespass *quare clausum fregit*, for cutting down and carrying away five hundred of their pine timber trees of the value of two dollars each, between *Jan.* 1st and the date of the writ; and the officer returned on the writ, that by direction of the agent of the trustees he had attached four hundred and seventy five pine mill-logs, marked as described in the present action, lying in *Dead Diamond* river, as the property of *Loomis*. These logs were receipted for by the agent; and afterwards were driven down the river to *Brunswick*, by *Loomis*, in pursuance of an agreement between him and the agent. This suit was entered at *September* term following, in the county of *Coos;* at which time, in consequence of the trustees agreeing to proceed forthwith to trial, and to give *Loomis* a bond of indemnity against the claims of all other persons, he gave them, for the purposes of that suit, a written admission of the trespass as alleged in their writ. The general issue was then pleaded to the action; which the trustees joined; and further said " that as to the defendant's said plea, so far as relates to the carrying away of the pine trees in their declaration mentioned, they the said trustees will not further prosecute the said *Loomis*, but only for the breaking and entering the said close, and for cutting and prostrating the pine timber aforesaid." The cause then proceeded to trial, and a verdict was returned in favor of the trustees, for one dollar damages.

It also appeared that *Magalloway* river, the mouth of which is ten or twelve miles below that of the *Dead Diamond*, broke up a week or ten days before the latter river; and that the logs in the *Dead Diamond* river were delayed in their course to the *Androscoggin* by a freshet, which carried them into the lakes; and that it

was uncertain, as the season was in that year, which parcel of logs would first reach *Brunswick*. The boom-master at *Brunswick* delivered the first logs that came down with the mark in question, to the agents of the trustees; and they were manufactured by the defendant, seventeen of them in *August* 1830, and the residue in *October* following.

The defendant in the present action admitted that he took and converted to his own use twenty two logs, marked as described in the plaintiff's writ; which he claimed under a bill of sale made to him by the treasurer of the college, after the rendition of the judgment against *Loomis*, but without the authority of any special vote of the corporation.

It further appeared that neither the trustees nor the defendant had any actual possession of the logs, till they were taken from the boom in *Brunswick;* otherwise than as the trustees were owners of the land from which they were taken.

Upon this evidence, *Loomis* the plaintiff contended that the trustees, having caused the logs to be attached as his property, in their action of trespass against him for taking them, were now estopped to deny his title;—that the agreement and pleadings in that action amounted to a *retraxit*, and not to a *nolle prosequi;*—that by the judgment for the trustees in the same action, the title to the logs sued for became vested in *Loomis;*—and that as the present defendant admitted the taking of some logs having the plaintiff's mark, and the plaintiff had shown a good title to a much larger quantity which came down from the *Magalloway*, the burden of proof was on the defendant, to show that the logs which he took were those which came from the *Dead Diamond* river, and not from the *Magalloway*. All which points the chief justice ruled to the contrary.

The plaintiff further offered to prove that even if the logs were cut on the college township, yet the roads he had made through it, and the canals he had dug, at great expense, for the purpose of conveying the timber to the *Androscoggin*, and his labors in exploring and opening the forest, were of such value, that the property of the corporation was on the whole increased rather than diminished, by what he had done; the facilities which he had created for the

transportation of the remaining timber having augmented its value by a greater sum than the logs were worth which he had taken away; and he insisted that the jury might fairly presume that the trustees, from a sense of equity and justice, were willing to abandon to the plaintiff, as his property, the timber they had attached, asserting their title to the land by a verdict and judgment for only nominal damages. But this evidence the chief justice refused to admit.

To which opinions and decisions the plaintiff tendered a bill of exceptions, which was allowed; a verdict having been returned for the defendant.

Fessenden and *Deblois*, for the plaintiff, argued in support of the positions taken in the court below; and to the point of estoppel, resulting from the original attachment and return of the loss, cited *Olivant v. Berino*, 1 *Wils.* 23; *Power v. Wells*, *Cowp.* 819; *Curtis v. Groat*, 6 *Johns.* 168; *Broome v. Wootton*, *Yelv.* 67; *Adams v. Broughton*, 2 *Stra.* 1078; *Cro. Jac.* 74; *Floyd v. Brown*, 1 *Rawle* 121; *Kitchen v. Cammett*, 3 *Wils.* 304; 2 *W. Bl.* 831; 3 *Stark. Ev.* 1505, *notes*; *Smith v. Gibson*, *Cas. temp. Hardw.* 319; *Earl v. Sawyer*, 4 *Mason* 13; *Toller's Ex.* 239. To the effect of the pleadings and record in the suit in New Hampshire, as showing a *retraxit*, and therefore being a good bar to any farther pursuit of the same property, they cited *Sellon's Pr.* 338; 3 *Bl. Com.* 296; *Beecher v. Shirley*, *Cro. Jac.* 211; *Co. Lit.* 139, *a*; *Greene v. Charmock*, *Cro. Eliz.* 762; 1 *Wils.* 89; *F. N. B.* 78, *f*; *Bridge v. Sumner*, 1 *Pick.* 371. And as to the *onus probandi*, they cited 3 *Stark. Ev.* 1488; 1 *Campb.* 551; *Bassett v. Maynard*, *Cro. Eliz.* 819.

Longfellow and *Everett*, for the defendant, cited *White v. Philbrick*, 5 *Greenl.* 147; *Somes v. Skinner*, 16 *Mass.* 357; 1 *Saund.* 207, *a. note*; *Tidd's Pr.* 629, 630; 1 *Com. Dig. tit. Abridgment A.* 1, 2; 2 *Com. Dig. tit. Estoppel B. C. E.* 3, 4, 9; *Wallis v. Truesdell*, 6 *Pick.* 455; *Jewett v. Warren*, 12 *Mass.* 300; *Higginson v. York*, 5 *Mass.* 341.

PARRIS J. delivered the opinion of the Court.

To maintain this action it is incumbent on the plaintiff to prove that he has either a general or special property in the logs mentioned in his declaration. It is admitted that he cut them on lands belonging to the trustees of *Dartmouth* college, under whom the defendant claims, and that in so doing he was a trespasser. They were then the property of that corporation, and no act of the plaintiff's could divest the trustees of their property so long as it could be identified, wherever it might be found, or through whatever channel it might have passed. They asserted their claim to this property by prosecuting the plaintiff in the courts of New Hampshire for detaching it from the soil; and inasmuch as the officer, on the original writ in that suit, attached the logs as the property of *Loomis*, he contends that the trustees and the defendant claiming under them, are estopped to deny that the property was in him. But we are not aware that the principles of estoppel have ever been, or can properly be applied to this extent; and it is not in accordance with the policy of the law that their application should be extended. There would seem to be no reason why the creditor should be estopped, that would not operate with equal force against the officer making the attachment. They both may have been under a mistake. The property may have been removed by the trespasser, or so mixed with his own, as to render it difficult to distinguish the one from the other; and yet it would not be doubted but the original owner might claim his, whenever it could be designated with proper certainty. Any intermediate attachment of it, as the property of the trespasser, would be operative no farther than as an admission by the plaintiff founded upon erroneous information, and, of course, not binding. It has been repeatedly decided that an officer, who has attached personal property on an original writ, may defend successfully, in an action against him for not taking the same property on execution, by showing that it was not the property of the judgment debtor. But even if the return of the officer, taken by itself, would amount to an estoppel, the plaintiff cannot avail himself of it here, inasmuch as the whole record of that case is introduced by him-

self; and although, as he contends, it may appear, by the return of the officer, that the logs were attached as *Loomis's* property, yet by the judgment and other papers in the case, which will presently be adverted to, it clearly appears that they were not his. Under such circumstances how can there be an estoppel? If, as the plaintiff contends, it could have been created by the return, it would be enlarged by the judgment.

We are of opinion that the instructions of the Judge in the court below, that the trustees were not estopped from denying that the logs were *Loomis's* property, were correct.

The next exception is to the instruction, that the agreement and pleadings filed on the part of the trustees amounted merely to a *nolle prosequi*, as to the taking and carrying away the logs, and not to a *retraxit*.

Perhaps it is not very material to the decision of this cause whether it is a *retraxit* or *nolle prosequi*, although we are inclined to think it technically a *retraxit*. It related merely to the carrying away the pine trees mentioned in the declaration, and not to "breaking and entering the close, or cutting down and prostrating them." The carrying away complained of was between the 1st of *January*, and 13th of *March*, 1830. A nonsuit is a mere neglect and default of the plaintiff to prosecute his suit, and he is not thereby barred from commencing a new action for the same cause. But a *retraxit* is an open and voluntary renunciation, by the plaintiff of his suit, in court, and by this he ever loses his action. If, as contended by the plaintiff, it amounted to a *retraxit*, it was a renunciation of so much of his suit as related to carrying away the pine trnes previous to the 13th of *March*. But, unless by this the property was changed, it still continued in the trustees, and any further interference with it by *Loomis* would amount to a new trespass, upon which the *retraxit* would not operate. Did it so change the property? As the proceedings then stood, the trustees, in their declaration, had charged *Loomis* with breaking and entering their close, cutting down and prostrating their trees, and carrying them away.

They had, through the intervention of the law, caused the logs cut from those trees to be taken from his possession and be placed

where they could be reclaimed, and they afterwards released him from so much only of the trespass as consisted in carrying them away. The attachment appears to have been abandoned. It would be difficult to perceive how these proceedings could operate as a a change of property.

But it is contended by *Loomis* that the effect of the judgment was to transfer the property to him. A moment's attention to the facts will settle that point. *Loomis* was charged with cutting "five hundred pine timber trees, each of the value of two dollars, and all of the value of one thousand dollars." By his agreement in the case, dated *Sept.* 15, 1830, he "admits that all the timber alleged to be cut, and the trespasses committed, are on the trustees' land, and were cut and committed by him;" and the jury find him guilty in manner and form as the plaintiffs have declared, and assess damages at one dollar, and judgment was rendered for that sum only. From these facts a doubt cannot remain that the judgment was for a sum merely nominal; that the trustees, having regained the possession of their property, and *Loomis* having admitted their right to hold it, they abandoned so much of their suit as was for the recovery of the value of the timber, and prosecuted it for the injury sustained by the entering and cutting only.

But the title to the timber is not altered by such a judgment. It is only where the damages recovered include the value of the article for the taking of which the action is brought, that the chattel is transferred by operation of law, and the property therein vested in the trespasser. That not being the case here, the property in the timber was not transferred by the judgment, but remained in the trustees.

Under this view of the case, we think it immaterial whether the agreement and pleadings amounted to a *retraxit*, or a *nolle prosequi*, as, in either case, the rights of the parties to this suit could not be affected by it.

The next instruction complained of relates to the burden of proof. From the exceptions it appears that the logs cut by *Loomis* on the college lands were marked by him with his private mark, and deposited in the *Dead Diamond* river, a tributary stream of the *An-*

droscoggin; and that he at the same time owned a small quantity of logs, which he acquired by purchase, on the *Magalloway* river, also a tributary stream entering into the *Androscoggin*, on which he also put the same mark; and that both parcels were floated down said last mentioned river for upwards of one hundred miles by the current, without any particular superintendence. At the trial below, plaintiff contended that the burden of proof was on the defendant to show that the logs he took were not those purchased on the *Magalloway* by the plaintiff, but that they were those cut on the college lands and floated down the *Dead Diamond* river. But the judge ruled otherwise, and, as we think, correctly. It is one of the most familiar principles of practice, in courts of common law, and which matured reason and obvious convenience dictate, that the burden of proof rests on him who supports the affirmative; that he who takes the affirmative of any proposition shall prove it; for the negative does not admit of the simple and direct proof of which the affirmative is capable. Surely, there is nothing in this case at all calculated to relieve the plaintiff from this obligation. On the contrary, as he had marked the logs cut on the college lands, which were the property of the trustees, with the same marks as those which he owned on the *Magalloway*, and turned the whole into the *Androscoggin*, so that they might go down promiscuously, he had effected what the law terms a confusion of goods; and this having been done wilfully, and without the mutual consent of the owners of both parcels, it is for the party creating the confusion to distinguish his own property satisfactorily, or lose it.

Another objection to the ruling of the judge is that he excluded certain depositions exhibited by the plaintiff relating to his labor, expenses, and improvements on the college lands, where the trespass was committed. As an offset to the trespass this was clearly inadmissible, and could not have been offered for such purpose. Neither do we perceive that the judge erred in excluding it, if offered to show an inducement operating upon the trustees to abandon the timber to the plaintiff. If there was actually a transfer, proof of that fact would be sufficient without proving the consideration, unless upon attempt to impeach it. If there was no actual transfer by the

trustees, then does the judgment operate to change the property? If it did, parol proof was unnecessary;—if it did not, such proof could not make it effectual for that purpose.

Having thus considered all the questions raised by the exceptions, we cannot perceive any material error in the ruling or instructions of the judge at the trial, and consequently the exceptions must be overruled.

GAGE *vs.* COOMBS *& trustees.*

C and *D* entered into a written contract, by which *C* agreed to pay to *D* $3500 within six months, for one fourth part of a certain ship; and *D* agreed that "when *C* should pay the full amount of the consideration aforesaid," he should receive a bill of sale of that part of the ship. *C* paid part of the money; the six months elapsed; and then *D* was summoned as the trustee of *C*. In his disclosure he disclaimed any intention of availing himself of the lapse of the six months to avoid the contract on his part; and stated that he had received *C's* part of the ship's earnings on account of the balance due on the purchase-money; but insisted that he had never waived his right to payment of the whole in six months; that he was under no legal obligation to convey the fourth part to *C*; and that as between *C* and his creditors he should insist on his legal rights:—

Yet it was held that the facts disclosed by *D* amounted to a waiver of his right to punctual payment at the time stipulated; and that he was chargeable, as the trustee of *C* for the value of one fourth part of the ship.

FROM the disclosure of the house of *N. & L. Dana & Co.* who were summoned in this case as the trustees of *Coombs*, it appeared that they had entered into a contract with *Coombs*, of the following tenor:—

"Memorandum of an agreement made this fourteenth day of *March*, 1826, between *N. & L. Dana & Co.* of the one part, and *James Coombs* of the other part, all of *Portland* in the State of *Maine*, witnesseth;—That the said *Danas & Co.* agree to sell to the said *Coombs* one fourth part of the ship *Aurora* and appurtenances, with her ballast and ship stores on board, as she now lays at

Central wharf, for the consideration of three thousand five hundred dollars, to be paid to them in cash, or with interest, from this date, until paid. And they further agree that when said *Coombs* shall pay to them the full amount of the consideration as aforesaid, that they will make and execute a bill of sale of the one fourth of said ship as aforesaid, and allow to him the nett earnings of said one fourth part of said ship, deducting premium for insurance thereon. And the said *Coombs* covenants with said *Danas & Co.* that he will truly pay over to said *Danas & Co.* the full amount of said thirty-five hundred dollars within six months from this date, with interest; together with one foutth part of all and singular the charges for manning and victualling said ship, and all port charges, premium for insurance, repairs or other charges; in the same manner as if he was now the actual owner of said one fourth part of said ship; deducting, as before stipulated, one fourth part of her earnings previous to the time she shall be conveyed by said *Danas & Co.* to said *Coombs.* And it is further agreed between the parties that the advance wages to the crew, and all supplies of cordage, duck, paints, oil and other articles deemed necessary for the future use of the ship, are to be paid by the parties in proportion to their interest therein as expressed by this instrument; it being understood that the said *Danas & Co.* are to fit her for sea only."

On the following day they received of *Coombs* twenty-eight hundred dollars in part of the price he had undertaken to pay; and soon afterwards he sailed as master of the ship on a foreign voyage. During his absence on this voyage the six months expired; and after his return the trustees were summoned in this action. In their disclosure in the court below, in *October*, 1827, in a former action between these parties, which was made part of this case, they stated that the time of payment had elapsed; but that they did not intend to avail themselves of that circumstance, but expected to receive the money on his return, and make him a conveyance of the property as described in the contract, and were ready so to do. They further stated that what they had received as *Coombs's* part of the ship's earnings had been received in part pay for the proportion sold to him, by agreement between them. And in their disclo-

sure made in the present action, they declared that they had never waived their right to insist on a strict compliance with the terms of the contract; and were advised by their counsel that *Coombs* had no right to a conveyance of any part of the ship, and that what he had paid in part of the intended purchase was forfeited to them; and they said that whatever they might intend hereafter to do, on a settlement with *Coombs*, they felt bound, in a controversy between him and his creditors, to stand upon their legal rights. They also exhibited an account of the ship's earnings and expenses; and stated that it was their understanding that the earnings were to be applied to the payment of the purchase-money.

The other material facts disclosed by the trustees, will appear in the opinion of the Court, which was delivered at *May* term in *Oxford* by

MELLEN C. J. Two questions are presented by the disclosure. 1. Whether by the true construction of the agreement between *N. & L. Dana & Co.* the alleged trustees, and *Coombs*, dated the 14th of *March* 1827, he lost all remedy on the same, without the aid of extrinsic facts, by the nonpayment of the $3500, within six months from its date according to his stipulation. 2. If he did so, then whether the *Danas & Co.* have not waived all objections on account of the nonpayment within the six months.

As to the first question; by the terms of the agreement it appears that though *Coombs* on his part agreed to pay the $3500 within six months, yet the *Danas & Co.* agreed that "when said *Coombs* shall pay to them the full amount of the consideration aforesaid, they will make and execute a bill of sale of the one fourth part of said ship as aforesaid, and to allow to him the nett earnings of said one fourth part of said ship, deducting premium for insurance thereon." We do not perceive why a construction should be given to this agreement, which should deprive *Coombs* of all right to a conveyance of the greater part of the ship, if the payment was not made within six months. There seems to be no reason for imposing such a limitation upon the word "when." Had they said "if said *Coombs* shall pay said sum within said six months, then," &c. a dif-

ferent construction would seem necessary. But we do not rest merely on this view of the case, because

2. We are satisfied that the *Danas & Co.* have distinctly waived all objections on account of the nonpayment within the six months, by their explicit declarations and avowals; honorably disclaiming all intention of taking any advantage which might operate as a hardship on *Coombs*. In their disclosure in this action they refer to one made in a former case, and it thereby becomes a part of the present disclosure. In the former one, made in *October* 1827, they say, "said *Coombs* paid us twenty eight hundred dollars in part of the purchase money, and sailed in the vessel, and has not yet returned. The last payment has fallen due since he sailed; but we do not intend to avail ourselves of that circumstance, but expect to receive the money on his return, and make him a conveyance of the property as described in the contract, and are now ready so to do." In the same disclosure they say, "what we have received of said earnings, belonging to said *Coombs*, has been received in part pay for the part of said ship sold to said *Coombs*, by agreement with him." In the disclosure in the present action they say, "as said *Coombs* never complied with the terms of the contract, and we never waived our rights under the same, we are advised by our counsel that he has no right to a conveyance of any part of the ship." They also say that it was their understanding that the earnings of the ship were to be applied to the payment of the sum due on the agreement; and by the terms of the agreement *Coombs* was to receive one fourth of her earnings, and bear one fourth of the expense, in the same manner as though he was then actual owner. Whatever opinion the *Danas & Co.* entertained on the subject of waiver, it is a question of law for us to decide, whether the facts and declarations stated in their disclosure amount to a waiver. The inquiry now is, whether prior to the service of the present process on the 21st of *August* 1830, the *Danas & Co.* had received, by way of the quarter part of the earnings of the ship, belonging to *Coombs*, the balance due, after deducting the $2800 paid and indorsed on the agreement. The trustees refer to the account annexed to their disclosure for a statement of the facts as to this point. By his it appears that on

the 17th of *July* 1830, a month before the service of the writ, the owners had received from the ship the amount of $12465 12

And that the amount at and before that time paid by them, was - - - - - - 7357 32

The balance being - - - - - $5107 80

One quarter part of the above balance belonged to *Coombs* amounting to - - - - - - - 1226 95

It is stated that there was due from *Coombs* as master, 512 16

Leaving a balance of - - - - $764 79

On this view of the cause and the account annexed to the disclosure, it appears that the balance of the purchase money, and more, was in the hands of the *Danas & Co.* before the service of the writ; that as early as *July* 1827, the owners had received 3885 87

And had then paid but - - - - 1369 17

Leaving in their hands a balance of - - $2516 70

A quarter part of which is - - - 629 17

So that at that time there were but about seventy one dollars of the principal due; and, of course, it is manifest that the abovementioned balance of $764 79, was more than sufficient to extinguish the debt due from *Coombs* to the owners of the ship, sometime before this process was commenced. And even as early as *September* 1828, it would seem by the account, that the debt was extinguished by the appropriation of *Coombs's* quarter part of the earnings, by agreement with him. In either view of the case, as to the time of payment, we do not consider that it would have been necessary for *Coombs* to make any demand, to entitle him to maintain an action against the owners for the nonfulfilment of their engagement to convey one quarter part of the ship to him. Certainly such a demand is not necessary to sustain this trustee process. *Staples v. Staples, & tr.* 4 *Greenl.* 532. As owners and receivers of the earnings, they were bound to know, and we must presume they did know, that the whole consideration money and interest had been paid. It is evident that the parties contemplated a bill of sale as the completion and as the

evidence of *Coombs's* title to the quarter part of the ship; and for the reasons assigned by them, they never considered him as entitled to one, or as lawful owner. They have excluded him from all rights as joint owner, and appropriated the ship to their own use and benefit, and claim to hold the quarter part as their property; and we think that the plaintiff may also so consider them, and claim to hold them as responsible to *Coombs*, before the service of the writ, in damages for the violation of their contract; the amount of which is not at this time a subject of inquiry. Our opinion is that the *Danas & Co.* must be

Adjudged trustees.

Longfellow, for the plaintiff.

Greenleaf, for the trustees.

DENNETT *vs.* NEVERS *& als.*

Overseers of the poor are justifiable in advancing money, employing counsel, and rendering assistance in the prosecution of a bastardy process, the complainant being poor, and an inhabitant of their town.

And where they had done so, and procured a judgment of filiation, with costs, which were collected by the attorney of record for the complainant, and passed to the credit of the town, to which he had charged his fees; and the record was afterwards quashed on *certiorari*; it was held that neither the overseers, nor the town, nor the attorney, but the complainant alone was liable to refund the costs so paid.

THIS was an action of *assumpsit* for money had and received; and came up by exceptions taken by the plaintiff to the opinion of *Whitman C. J.* before whom it was tried in the court below.

It appeared that one *Nancy Kneeland*, residing in *Sweden*, in the county of *Oxford*, had charged *Dennett*, before a magistrate of that county, with being the father of a bastard child, of which she had been delivered. *Dennet*, being an inhabitant of *Bridgton* in this

county, was arrested on a warrant issued upon that complaint by a magistrate of this county, and bound over to appear at the next Court of Common Pleas to be holden at *Paris* in the county of *Oxford ;* where, upon trial by the jury, he was found guilty, and was adjudged to be the father of the child ; and judgment was rendered for the complainant for her costs. These costs were collected by execution, and paid into the hands of *N. S. Littlefield*, Esq. the complainant's attorney of record.

The record in that case was afterwards brought before this court by *certiorari* sued out by *Dennett ;* and was quashed for want of the accusation in the time of travail, required by the statute. See 6 *Greenl.* 460. And the present suit was brought to recover back the costs recovered and paid as aforesaid.

It further appeared that the present defendants were selectmen and overseers of the poor in the town of *Sweden ;* and as such had employed and instructed Mr. *Littlefield* in the prosecution, and had procured evidence to support it; that Mr. *Nevers*, the principal defendant, advanced him ten dollars towards his fees ; that the complainant had never personally applied to Mr. *Littlefield ;* but on the contrary he considered the inhabitants of *Sweden* as his clients; had charged to them his fees and expenses, amounting to about fifty-five dollars ; and had passed to their credit the money collected of *Dennett* for costs, being forty-three dollars and thirty-two cents.

It was also proved that *Nevers* said he had got the execution in the prosecution he had been carrying on against *Dennett ;* that he had advanced the money, and that it was coming to him, and he should want it in a fortnight ; and that at subsequent times he spoke of the prosecution as his own, or as the business of himself and the other defendants. And it did not appear that the town of *Sweden* had ever authorized the prosecution, or given any special instructions concerning it.

Upon this evidence, which was offered by the plaintiff, *Whitman C. J.* was of opinion that he had no right of action ; and ordered a nonsuit ; to which the plaintiff excepted.

Fessenden and *Deblois*, in support of the exceptions, referred to the statutes prescribing the duties and powers of overseers of the poor; and argued that the power of instituting and conducting prosecutions of this sort, not being expressly given, nor necessarily incident to the exercise of any other power, was by strong implication excluded. *Hill v. Wells*, 6 *Pick.* 109. And having no authority from the town, the defendants must be considered as prosecuting in their own behalf as individuals; and so bound in their private capacity to refund the money paid. *Sumner v. Williams*, 8 *Mass.* 162. It was their money, received by their agent; *Ilderton v. Atkinson*, 1 *D. & E.* 480; *Matthews v. Hayden*, 2 *Esp.* 509; who, being attorney of record, might well receive it. *Langdon v. Potter*, 14 *Mass.* 309; *Lewis v. Gamage*, 1 *Pick.* 347; *Lazell v. Miller*, 15 *Mass.* 207.

Longfellow, for the defendants.

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

We are unable to discover any legal principle, upon which this action can be maintained. There was no privity whatever between the plaintiff and the defendants. His controversy was with *Nancy Kneeland*. She complained, and obtained judgment against him. This judgment has been vacated; and he is entitled to recover back what he has paid under it. But he must seek his remedy against the party, on whose complaint he was charged. If the money she recovered has been received by others, they are liable to her for the amount, unless they have a claim against her for monies advanced in her behalf, and she permits them to retain it for their reimbursement. It appears that the defendants were active in promoting and forwarding the prosecution by advances and otherwise. But all must have been done with her privity and consent. Without her acquiescence, and indeed without her direct aid as a complainant and a witness, nothing could have been done. *Littlefield* must have been her attorney, although his retainer as such may have been procured upon the credit of others. When he received the

money, it was received by him as her attorney. He was liable to account with her for it; and if he credited it to the town, he undertook to pay her debt, arising from advances made professedly in behalf of the town. She probably approved of this course; but whether she did or not, neither the town nor the defendants were liable to refund the money to the plaintiff, if the judgment against him should be vacated; any more than if she had received it with her own hand, and had paid it away for the purchase of goods, or in payment of an antecedent debt, the party to whom she might thus pay the same money could have been held liable to the plaintiff. *Littlefield* when he received it, received not the plaintiff's money, but *Nancy Kneeland's* to whom it had been adjudged. The plaintiff has now, by judgment of law, a right to reclaim the amount; but it must be from her, and not from those to whom she may have paid the money she received. Whether the defendants would be able or not, to justify what they did in the prosecution, we are not aware of any ground upon which they can be charged in this action.

It has been contended that she was only nominal in the original suit, and that the defendants were then the real plaintiffs. But no private interest of theirs has been disclosed. She had not assigned to them what she might recover. She was not even their debtor, except for their advances, in which they claimed to act as public officers, in behalf of the town. They might assist her in her suit as a poor neighbor, without being liable to the charge of maintenance. The law admits of this, as a charitable and meritorious act.

But we see no reason why their official interposition may not be justified. The town had an interest in the prosecution, to be relieved from the maintenance of the child. Their interests are provided for in the final adjudication. She might be entirely without funds to conduct the prosecution, and the defendants well justified in making the necessary advances, as officers to whom were entrusted the prudential concerns of the town. It must therefore be regarded as a prudent and discreet official act. They had a right to stipulate in behalf of the town with *Littlefield*, that he should be paid for his services and disbursements.

It has been urged, that as the statute has expressly provided that after a prosecution of this kind has been commenced, the overseers of the poor of the town, liable for the support of the mother or the child, may prevent a settlement between the complainant and the putative father, they can have no other authority to interpose by implication. The interest of their town in the adjudication, is a sufficient ground for their official acts, as between them and the town, in aiding the prosecution with her assent and acquiescence, which must have existed in this case. They are authorized by statute to prevent a settlement, after her accusation and examination has been taken under oath, which she may be desirous of making. The only implication arising from this express provision is, that she is at liberty to institute a prosecution or not at her pleasure, but that she cannot settle it against the will of the overseers of the poor of the town.

The exceptions are overruled and the judgment affirmed.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF OXFORD, MAY TERM, 1831.

FARRAR *vs.* PERLEY *& al.*

The provincial statute of 1738, [11 *Geo.* 2,] authorising the sale of delinquent proprietors' lands after thirty days notice, was not, by any necessary or fair implication, repealed by that of 1753, [26 *Geo.* 2 *An. Char. p.* 598,] which required a delay of six and twelve months and a subsequent notice of forty days, they not being in *pari materia.*

An article to raise money for certain purposes, inserted in the warrant for a meeting of the proprietors of lands, is not exhausted of its efficacy by a single vote raising a certain sum; but further sums may from time to time be lawfully raised at subsequent adjournments of the same meeting, till the objects of the proprietors are accomplished.

THIS was an action of trespass *quare clausum fregit,* for cutting trees on lot *No.* 45, in the second division in *Lovel,* drawn to the original right of *Robert Moor;* and it was tried before *Parris J.* upon the general issue.

The plaintiff showed that the township was originally granted to *Noah Johnson* and others, *Feb.* 5, 1774, upon the usual conditions

that the grantees should, within six years, settle thirty families thereon, build a meeting house, settle a protestant minister, &c.; and return a plan within twelve months, for confirmation. The plan was returned, and the grant confirmed *April* 13, 1779; and the time for settlement was prolonged to *February* 1784, and afterwards to *February* 1787. *Robert Moor* was shown to have been one of the original grantees; to whose right the lot *No.* 35, was drawn *Oct.* 12, 1780; and the lots *No.* 45 and 113, at a subsequent meeting *Dec.* 18, 1783. The plaintiff claimed under a quit-claim deed from *Moor*, dated *June* 3, 1819, by which he, for a valuable consideration the amount of which was not stated, released and conveyed to the plaintiff all his right, title and share, being one right, to lands in *New Suncook*, *Lovel* and *Sweden*. And the plaintiff proved his own entry on lot *No.* 45, being the *locus in quo*, in *March* or *April*, 1820, at which time it was wholly wild and uncultivated; and again in *April* 1821, after the defendants had cut the timber in question.

It further appeared that the proprietors held a meeting *March* 23, 1780, to act on various matters touching the settlement of their township; and among others the fourth article was to raise money for the clearing of roads, building of bridges, bringing forward settlements, and paying of debts; under which article they voted to raise a tax of one hundred dollars on each right, not saying for what purpose. At an adjournment of this meeting in *November* 1780, a further tax of five dollars on each right or share was raised, for the purpose of building mills and making roads; and on *December* 18, 1781, after several intermediate adjournments of the same meeting, it was voted to raise a tax of three silver dollars on each right, to defray the charges of the proprietors. For the nonpayment of this last tax, the whole right of *Robert Moor* was sold *Dec.* 26, 1782, by the proprietors' collector, who was duly authorised for that purpose. And the title of the purchaser under this sale was regularly deduced to the defendants.

It was also shown that at another meeting of the proprietors, in *May* 1783, it was voted that a tax of four dollars be laid on each right. And the defendants offered in evidence a deed of *Moor's* right, made *Oct.* 30, 1783, by the proprietor's collector, for nonpay-

ment of this tax, and recorded *Dec.* 27, 1796; under which also the defendants claimed the *locus in quo*. But this deed the judge refused to admit.

It was also proved by the defendants that *John Wood*, one of the intermediate grantees of the *Moor*-right under the collector's sale in 1782, had an agent in the vicinity to take care of his land; that in *June* 1798, he sold the lot *No.* 35, by deed of general warranty, recorded *May* 16, 1799; that this lot had been cultivated as a farm, under *Wood's* title, more than twenty-eight years; and that the lot *No.* 113, had been cultivated as a farm more than twenty three years, under claim of title adverse to *Moor*. It further appeared that for the last thirty five years neither *Moor*, nor any person claiming under him, except the plaintiff, had ever claimed the lands in question, or paid the taxes thereon; but that the taxes had been paid by the defendants and their grantors, down to the present time.

Upon this evidence, intending to reserve the questions of law for the decision of the court, the judge directed the jury to find for the plaintiff, which they did; and the verdict was taken subject to such decision.

Longfellow and *Greenleaf*, for the defendants, contended—1st, that nothing passed by the deed of *Moor* to the plaintiff, which was a naked release of his right; because the grantor had abandoned his claim, and the lands were held by an adverse possession. The deeds from the collector, and his grantee, having been duly recorded, and being accompanied by payment of taxes and other usual acts of ownership, operated a disseisin of *Moor*. 2dly,—That the deed of *Oct.* 30, 1783, from the collector, though made within six months from the assessment of the tax, ought to have been admitted, and was good evidence of title, under the provincial statute of 1738. *Vid.* 2. *L. L. Mass.* 1016, *app.* For the conditions of the grant not having been fulfilled, the case was within the provisions of that statute, which in such cases authorises a sale at thirty days notice. 3dly, That the entry and occupancy by the grantees, of lots *No.* 35 and 113, under deeds of general warranty, were good entries to disseise *Moor* of the whole right. 3

N. Hamp. Rep. 27; 4 *Dane ch.* 104, *art.* 3, *sec.* 1. And 4thly, That these sales, even if irregular, might be supported, after so long a time, by the acquiescence of the proprietor. *Gray v. Gardiner*, 3 *Mass.* 399; *Knox v. Jenks*, 7 *Mass.* 488; *Stat.* 1821, *ch.* 52, *sec.* 12.

Fessenden, for the plaintiff, argued that the entry into lots *No.* 35 and 113, could not operate to disseise *Moor* of any other than those particular lots, because the persons claimed no others. He denied that the case disclosed any act of adverse occupancy affecting the legal seisin of the plaintiff's grantor. And he avoided the operation of the statute of 1738, by insisting that it was virtually repealed by that of 1753, 2 *L. L. Mass.* 1035 *app.* which he said was in *pari materia*; and which required a longer notice of the sale than was given by the collector in either year. As to the tax of three silver dollars, on the validity of which the defendants' title depended, he contended that the efficacy of the article under which it was raised was exhausted by the first vote, raising one hundred dollars on each right; so that this tax was wholly without authority in the warrant to support it, and was therefore illegal. Moreover, it was not for any purpose specified in the article in question. *Bott v. Burnell*, 11 *Mass.* 163; *Bott v. Perley*, *ib.* 169.

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

Weston J. It sufficiently appears that the title to the *locus in quo* was in *Robert Moor*, and that it passed from *Moor* to the plaintiff in *June* 1819, unless his seisin had been previously divested. The defendants trace back their title to a period long anterior, derived however from the same source; and depending originally upon two sales of *Moor's* right, for delinquency in the payment of sums voted to be raised by the propriety, of which he was a member. If both or either of these sales can be supported, the plaintiff has failed in his proof of title. And this will depend principally upon the provincial statute, under which the sales were made. If that of 1738, 2 *LL Mass.* 1016, was not repealed by that of

1753, 2 *LL. Mass.* 1035, both the sales may be understood to have been made under the authority of the first act. There is no repealing clause in the act of 1753, and if the previous act was thereby repealed, it was by implication. And it is insisted that the second act ought to be regarded as having this effect, because its provisions are general, affording an effectual remedy in all cases of delinquency in the payment of assessments, and indicating the last determination of the provincial legislature as to the extent and limitations of that remedy. In looking however at the two statutes, the former will be found applicable to a class of cases of a special character. The latter is general enough in its terms to embrace the former; but it may have a very extensive operation, without regarding the former as abrogated. The act of 1753 is entitled an act, in addition to an act, directing how meetings of proprietors of lands lying in common may be called; but it authorises the raising of money for the common service, and the sale of the land of delinquent proprietors. From the preamble, it would seem to have been designed for cases, for which no effectual provision had before been made by law. The first act referred to grants, made or to be made by the general court; and it made effectual provision to enforce payment of monies raised. The second, to all lands owned by a considerable number of proprietors, not lying within the bounds of any town or plantation, from whatever source the title might be derived. The first is confined to sums raised on lands granted upon conditions not fulfilled. The second has no such limitation. The remedy by sale under the former act might be more speedily enforced; and the legislature might well think that the exigency was more pressing in regard to lands so circumstanced. A very common condition imposed by the general court upon the grantees was, that they should locate upon the tract granted a certain number of settlers within a limited period. It was one of the conditions of the grant under consideration. The fulfilment of this and other conditions might require the raising of funds as speedily as possible, to be expended in causing surveys, making roads, and providing other facilities for bringing forward the settlement of the land. And we are not satisfied that the act of 1738 was intended to be abro-

gated by that of 1753. The several committees, under whose superintendance the editions of the Massachusetts laws in 1801 and in 1807 were published, were of opinion that the former act was not repealed by the latter; for in the margin of the former, it is stated to have been revised in 1784. Upon the first committee was the Hon. *Nathan Dane*, deservedly eminent for the accuracy of his knowledge, and for his great industry.

One, if not both these sales, was manifestly made under the act of 1738. The original proprietor acquiesced for thirty-eight years. This acquiescence is not to be accounted for by the minority of his heirs for a portion of the time, or their ignorance of his title; but he himself survived during that whole period, and when he conveyed to the plaintiff, he did it by release, without covenants, and without any valuable consideration expressed in the deed. Whether other sales under the act of 1738, subsequent to 1753, have been made is not within our knowledge. It has been insisted in argument that there have been, and that many titles will be affected, by holding the former repealed by implication. A contemporaneous construction, in a doubtful case, has very properly great weight in determining the effect of ancient statutes. This is to be sure but a single case, and could have little influence in settling the construction; but so far as it goes, it is in accordance with the conclusion to which we have arrived, that the act of 1738 was not repealed by that of 1753, by fair or necessary implication.

It appears that the grant to *Noah Johnson* and others, in which *Moor* was interested, was made by the General Court upon conditions, and at the time of the assessments and sales, upon which the defendants rely, the conditions had not been fulfilled.

An objection is made by the counsel for the plaintiff to the vote of three dollars to each share to defray the charges of the proprietors, for the nonpayment of which the first sale was made; and to the vote of four dollars on each share, for the nonpayment of which the second sale was made. There had been a previous assessment of one hundred dollars in paper money, then greatly depreciated; the first made at an original meeting, and the second and third at successive adjournments of the same meeting. It is insisted that the sum

first raised exhausted the efficacy of the article, by which it was authorised; and that there remained no authority whatever for the sums subsequently voted. Whenever a vote of a propriety or other corporation is evidence of a contract with others, or of a grant to third persons, it is no longer revocable, or subject to be changed or modified at the will of such corporation. It is otherwise with respect to transactions, affecting their interest only. So long as the subject is before them at a regular meeting, they may dispose of it at pleasure. Unless the rights of third persons are affected, whatever they might have done on the first day of the meeting, they might do on the days of adjournment. The warrant was before them, and it was competent for them to reconsider or to modify any vote already passed, or to pass any further vote, falling within the scope of any of its articles. The warrant, and the various matters brought before the meeting by it, were subject to their disposition, until the final adjournment. The sums successively voted under the fourth article, made in the aggregate the sum they thought proper to raise under its authority.

This is an ancient transaction, which remained without question for nearly forty years; and every reasonable presumption is to be made to uphold it. A verdict was returned, by the direction of the Judge who presided at the trial, for the plaintiff, subject to the opinion of the court, upon the evidence reported. And upon that evidence as reported, the opinion of the court is, that the plaintiff has not entitled himself to judgment thereon. The verdict is accordingly set aside, and a new trial granted.

Osgood *vs.* Bradley.

The *Stat.* 1821, *ch.* 135, did not dissolve territorial parishes, but left them as they stood before it was enacted.

Therefore the sons of the members of such parishes, on coming of age and continuing to reside within the limits of the parish, become *ipso facto* members of the same.

So also persons who come to reside within the limits of a territorial parish, and do not belong to any other religious society, do thereby become members of the parish within which they come to reside.

It it no longer necessary, in order to entitle a man to vote in parish affairs, that he should have been assessed in the last parish tax; that part of *Stat.* 1786, *ch.* 10, being virtually repealed by *Stat.* 1821, *ch.* 135, *sec.* 3. But the other provisions of *Stat.* 1786, *ch.* 10, so far as they are not inconsistent with our statutes of 1821, *ch.* 114, and 135, are still in force in this State.

An action against the moderator of a parish meeting, for refusing the plaintiff's vote, is maintainable without proof of malice or intent to oppress.

This was an action of the case against the defendant for refusing the vote of the plaintiff at a meeting of the first parish in *Fryeburg*, *March* 16, 1829, of which the defendant was moderator. The principal question was whether the plaintiff was a member of the parish, entitled to vote.

It appeared that the plaintiff's father was a member of the parish, and died previous to the passing of the statute of 1821 concerning parishes;—that his mother continued afterwards to be a member of the same, paying taxes, and contributing liberally to its funds;—that the plaintiff was born, and has always resided, within the territorial limits of the first parish;—that he became of age *June* 16, 1827;—that he was possessed of property to the amount of several thousand dollars, liable to assessment for parish purposes;—that he owned and usually occupied pews in the meeting house in which the members of the first parish usually assembled;—but that he had never been taxed in the parish; there having been no tax assessed since he came of age; and the parish having a productive fund of upwards of eight thousand dollars. It was admitted that a poll-parish existed in *Fryeburg*, at the time of the meeting in question.

Upon this evidence the defendant contended that as the plaintiff was not of age at the time of the passing of the parish-act of 1821, and had not since been accepted as a member at any legal meeting of the parish, he was not a member of the same. But this point was overruled by *Parris J.* who presided at the trial. The defendant further insisted that if the plaintiff were a member, yet not having been assessed in the last parish tax, he had no right to vote. But this also was overruled. He further contended that the plaintiff was not entitled to recover damages, unless he could prove that his vote was rejected with an intent to oppress, or deprive him of his rights. This also the judge ruled against the defendant; and a verdict was taken for the plaintiff, subject to the opinion of the court upon the points raised at the trial.

Greenleaf and *Fessenden* argued for the defendant, that the constitution of Maine, and the act concerning parishes, had essentially altered the principle on which parish membership was founded, by changing its basis from residence to contract. In Massachusetts, the consent of the individual was not necessary. The law made him, *de facto*, a member of the territorial parish within which he resided. He could not belong to no parish. It was made the duty of the legislature to enforce public worship, and to compel every citizen to contribute somewhere to its support. And all the decisions in that Commonwealth are founded upon these principles of its constitution and laws. But in Maine all parochial rights and obligations are made to depend on contract; on the consent of the parish, on the one hand, or of the individual, on the other. The citizen may contribute to the support of public worship, or not, at his pleasure. He may belong to any parish that will receive him, or to none at all. By *Stat.* 1821, *ch.* 135, *sec.* 8, no man can be classed in any parish without his own consent. Neither is any parish compelled to receive members against its will. The statute was designed to change the mode of becoming members; and this, not only in the case of a removal from one parish to another, but also of original membership.

The act of becoming a parishioner being thus a matter of mutual contract and obligation between the individual and the parish, it is

obvious that no minor can acquire that character; because generally he is incapable of making a contract, and this case is not within any exception to the rule. The plaintiff, therefore, being a minor when the statute of 1821 was enacted, and not having been admitted a member of the parish at any meeting since he came of age, had never gained a right to vote.

That this statute has introduced a change in the principle of parish membership, is farther evident from the case of *Dall v. Kimball*, 6 *Greenl.* 171, in which it is settled that the lands of nonresident proprietors are not liable to parish assessments; which they must have continued to be, if parishes continued to be territorial. If it has not, then the eighth section is absurd, in requiring the assent of the parish to admit perhaps the only class of men it could desire to receive; while every profligate and atheist, residing within its limits, becomes, even against its will, *ipso facto* a member.

But if no such change of principle has been effected by this statute, then it contains nothing "inconsistent" with the statute of 1786, *ch.* 10, which is therefore not repealed by implication, and remains in force, at least so far as the right to vote is concerned. And by this act, none have a right to vote in parish meetings, except those who were assessed in the last parish tax. As the plaintiff was not thus assessed, he had no right to vote, even if he were a parishioner. *Sparrow v. Wood*, 16 *Mass.* 457.

Dana and *D. Goodenow*, for the plaintiff, cited *Terrett v. Taylor*, 9 *Cranch*, 43, 52; *Brown v. Porter*, 10 *Mass.* 93; *Winthrop v. Winthrop*, 1 *Greenl.* 208; *Lincoln v. Hapgood*, 11 *Mass.* 350; *Lord v. Chamberlain*, 2 *Greenl.* 72.

This cause was argued at *May* term 1830; and at this term the opinion of the Court was delivered by

Mellen C. J. Our constitution has so carefully guarded the rights of conscience and secured to every man the privilege of worshipping God in the manner most acceptable to himself; and our laws are also so liberal in their provisions for giving effect to the principles of the constitution, that every supposed attempt to de-

prive a citizen of any of his rights derived from these sources and protected by their sanctions, is met with a spirit and resolution which frequently causes an appeal to our judicial tribunals ; and from the very nature and subject of the controversy, there is generally a degree of peculiar feeling and excitement attending the prosecution of such causes. This circumstance should operate as an additional argument with the court, so to examine them in all their relations and consequences, as that the decision may not only be as correct as possible, but exhibit satisfactory proof that it reposes on principles which feeling and excitement are incapable of disturbing.

Our statute concerning parishes was passed on the 13th of *March*, 1821, the last section of which repealed all laws then in force inconsistent with its own provisions ; and the act of *June* 18, 1811, respecting public worship and religious freedom was also repealed by the general repealing act of *March* 21, 1821.

The provisions of our parish act are numerous and important, and some of them are new and peculiar ; but the decision of the present cause, we apprehend, must depend on the construction, more especially, of the eighth section, which is in these words, viz :

"*Sect.* 8. Be it further enacted, that any person may become a member of any parish or religious society now existing or hereafter to be created, by being accepted by the society of which he wishes to become a member, at a legal meeting of the same, and giving notice in writing to the clerk of the society which he is about to leave ; which notice and the time of receiving the same, it shall be the duty of such clerk to record. But every person ceasing to be a member of any parish or religious society, shall be liable to be taxed for all monies raised by such parish or society before his ceasing to be member thereof : Provided that no person shall be compelled to join or be classed with any parish or religious society without his or her consent, and when any person shall choose to withdraw from any parish or religious society, and shall leave a written notice thereof with the clerk of such society, he or she shall be no longer liable to pay any part of any future expenses which may be incurred by such society."

It is contended, as the basis of the defence, that the parish act abovementioned put an end to all territorial parishes; or in other words, that, in connexion with the provisions of the constitution as to the subject, it produced that effect. This general proposition we cannot admit to be a correct one. We perceive no language in any part, authorising such a conclusion. It is a revision of the parish act passed in *June*, 1786; at which time there were only two poll parishes in existence, excepting those in a few large sea-port towns, where territorial parishes could not be formed; and the new provisions contained in the parish act of 1821, were introduced in accommodation to existing circumstances, and in special reference to the interests of poll parishes. We have no occasion to question the extent of legislative power on the subject, but only to ascertain legislative meaning. We can never believe that such an extensive change on so important a subject, involving so many important interests and leading to such important consequences, should have been left as a subject of mere implication. A distinct and explicit declaration would have been made in the form of an express dissolution of all such incorporated territorial parishes. It cannot be believed that the legislature intended to derange, disperse and destroy all parish funds then belonging to such parishes, or leave them destitute of owners and protection; especially when we consider they had been created and preserved by the commendable solicitude and care of a long succession of preceding legislatures of the parent commonwealth. Our opinion clearly is that the parish act of 1821, was not designed to dissolve any parishes or religious societies then existing, territorial or otherwise; but to introduce certain provisions, additional to those then existing in *Massachusetts;* some of which are more restrictive and some more liberal than those. This construction is in harmony with that which we have witnessed in practice ever since the act was passed.

It appears by the report that the plaintiff at the time he offered his vote, which the defendants refused to receive, was more than twenty one years of age; and it is admitted that he was a minor of the age of sixteen or seventeen when the parish act was passed; and it is neither proved nor pretended that he was ever accepted as

a member of said first parish at a legal meeting of the same. On these facts and the others in the report, was the plaintiff a legal voter at the meeting on the 16th of *March*, 1829 ? or, in other words, was he then a member of the first parish? This may be an interesting question to him in many respects. It is the parish to which his parents belonged, and in which he has attended public worship before and since he became twenty one years old ; there a valuable estate, belonging to him, is situated, and he seems anxious to rank himself as a member of the parish. But if the question be interesting to the plaintiff for the reasons mentioned, it is of vast and extensive importance in respect to all who have arrived at the age of twenty one, being inhabitants of territorial parishes, or removed into such parishes, since the act of 1821 was passed ; and it is of importance too as to such parishes. In relation to poll parishes, every one knows whether he has legally become a member of any such.

The case of *Lord v. Chamberlain*, 2 *Greenl.* 67 furnishes us with a rule of decision in the present case, should it be found that our parish act was not intended to affect the legal rights of members or inhabitants of territorial parishes, (wishing to continue such,) as the counsel for the plaintiff has contended.

The counsel for the defendant contend that the 8th section has placed the whole subject of parochial connnexions on the ground of contract and consent; that a minor, for that reason, cannot legally join himself to a parish and become a member of it; and that a person of full age cannot become a member of a parish without its previous vote of acceptance. This argument is in perfect consistency with the construction they gave to the section we are considering, and, indeed, to the whole act, as amounting to an abolition of all territorial parishes. In their view, they necessarily consider the provisions of the 8th section as applying exclusively to poll parishes. The counsel for the plaintiff also contend that with some exceptions, such is the true construction of it; that its provisions were designed more fully to give effect to the liberal principles of the constitution, and simplify the means of enjoying perfectly those privileges, which, under the government of Massachusetts were secured by

special acts, incorporating poll parishes, and afterwards by the act respecting religious freedom which was passed in 1811. We must now, with the best lights we can obtain, decide which of the foregoing views is the correct one. On this ground our opinion must rest, because we do not perceive any weight in the objection to the plaintiff's qualifications as a voter, provided he was then a member of the first parish. For though there is a provision in the parish act of Massachusetts of 1786, by which it is declared that none shall be considered as qualified voters, except those who pay in one tax, exclusive of the poll or polls, a sum equal to two thirds of a poll tax; and though there is no explicit and express repeal of this provision, in terms, in our parish act, yet the language of the 3d section evidently introduces a new principle on this subject, by declaring that "the inhabitants of each parish or religious society may annually meet, and being so assembled may by written ballot, or otherwise, elect a clerk, two or more assesors, a collector, treasurer, and a standing committee or such other officers as may be deemed proper for the convenient management of their concerns." Any inhabitant, twenty one years of age or upwards is thus, by this act, constituted a qualified voter. The same idea is preserved in the act regulating town meetings and the choice of town officers, passed *March* 19, 1821, six days after the parish act was passed. It contains this proviso, viz. "Whenever the inhabitants of any town are legally assembled to act on any subject relating exclusively to parishes, no person, who is not a member of said parish and liable to be assessed for parochial charges, shall be permitted to vote in such meeting." Taxation is not required; liability to taxation is sufficient.

We have already decided that the parish act of 1821 cannot be construed as having any effect upon the legal existence or character of territorial parishes. All such parishes were incorporated by acts of the legislature of Massachusetts; and those acts have never been repealed. Parishes of that kind are not mentioned by that name in any part of our parish act, much less are they abolished by it. We have before intimated the objects of its new provisions. This circumstance affords one aid in the construction of the act.

The first section provides "that any persons, twenty one years of age or upwards, desirous of incorporating themselves into a parish or religious society, may apply to any justice of the peace," &c. This section can have no relation to any parishes except poll parishes. The second section defines the powers of parishes and religious societies. The third prescribes the mode of calling meetings. The fourth relates to the government of such meetings. The fifth directs the mode of calling meetings in special cases. The sixth gives them power to raise, assess and collect monies, and points out the mode of proceeding. The seventh relates to pew taxes. The eighth has been copied at large into this opinion. The ninth relates to the records of the parish. The tenth gives power to take and hold property in succession. And the eleventh repeals other laws inconsistent with its provisions. But the parish act of Massachusetts, of *June* 28, 1786, has not been repealed by the general repealing act of *March* 21, 1821. All its provisions, not inconsistent with our own parish act, and *ch.* 114 of our revised statutes, are now in force in this State; some of which are important. The very language of the repealing section in our parish act shows that there was no intention of impairing or affecting any rights enjoyed or secured under the act of Massachusetts, any further than the new provisions of our own act extend. But an examination of it shows that the principal object in view was, as has been contended, to increase the facilities for enjoying religious freedom in respect to opinions and practice, to articles of faith, modes of worship and regulation of the concerns of churches and religious societies. By the act respecting public worship and religious freedom, passed in 1811, a person might, at his pleasure, withdraw from one parish and join himself to another, by performing certain conditions as to notice. But it was considered desireable and proper to extend the liberal principle one step farther, and permit a person to withdraw himself from one parish, and dissolve his pecuniary connexion with it, and still not be obliged to join any other society, or contribute any thing towards the expense of maintaining public worship any where. Another idea in support of the construction we are giving is this. The section contemplates the case of a person who joins a

parish or religious society, having previously withdrawn himself from another society; for it provides that on joining a society, he shall give "notice in writing to the clerk of the society which he is about to leave;" evidently implying that the object was to grant relief to persons desirous of changing their parochial relations for others more acceptable to them; not of depriving inhabitants of territorial parishes of the privilege of continuing to worship where their parents worshipped with their families; where they themselves may have their dwelling places and their property; and where, on arriving at the age of twenty one, they would, without any act or declaration on their part, become members of such parish. As the act has a manifest reference to the accommodation of those whose religious opinions and feelings prompt them to seek the object of their desire in originating or in joining self-incorporated parishes or religious societies by virtue of the act, we perceive no sound reasons for extending the construction of it so as to embrace those whose opinions and feelings lead them to continue in the faith and worship of their fathers, and who seek no relief from burthens on their consciences or the pressure of taxation. The foregoing provision which we have just been noticing, is as applicable to a person leaving a society in one town and joining a poll parish in another town, as to a person leaving one parish and joining another in the same town.

There is one other view of the section in question. The language is, "any person may become a member of any parish, &c. by being accepted by the society of which," &c. It does not declare that to be the only mode; nor in terms take away the mode of becoming a member of a territorial parish by moving into it, or living in it before and after the age of twenty one, according to our decision in *Lord v. Chamberlain*. But we do not wish to place the decision of the cause on this ground; we prefer the broader one.

In former days each town generally composed one parish. Some larger towns contained two or more parishes, which, with very few exceptions are territorial parishes; and commonly of the same denomination and religious opinions. Changes of opinion gradually appeared, and with these new denominations of christians, claiming

the right to enjoy those opinions and attend upon the instruction of their own selected teachers, and be relieved from expense towards maintaining those on whose ministrations they could not conscientiously attend. Though a minority, they claimed equal rights with the majority in this respect. This led to the incorporation of poll parishes; and this produced, as to them, the desired effects. Contested questions in matters of doctrine served to multiply the numbers of such parishes and religious societies; and most of the legislation on these subject has had immediate, and almost exclusive reference to such societies, and the protection of their privileges; while the territorial parishes have remained generally as they were, in respect to their own rights and those of their members, though the number of their members has been reduced.

We apprehend that the practical construction of the parish act, so far as territorial parishes have been concerned, accords in substance with that which we have given in this opinion; and that as to them, the doctrine laid down in *Lord v. Chamberlain* has been considered as applying; and that applications for admission and acceptance of new members, as minors arrived at the age of twenty-one, or as others moved into the parish, have seldom, if ever, been made or deemed necessary since the act in question was passed. Though this practical construction has not continued ten years, it has continued long enough to lay the foundation for disputes, and lead to unpleasant consequences, if all is founded in error and illegality.

The section in question declares that "no person shall be compelled to join or be classed with any parish or religious society without his or her consent." Here, exemption is granted, in the most express terms, from what was deemed an unreasonable subjection to the control of a majority, in a case where the mind ought to be free, and the man and his property at his own disposal. And why should those who do not wish for any such exemption, in consequence of any change of opinion, or mode, or place of worship, be deprived of the privilege of listening to religious instructions from a teacher whose doctrines and principles they believe and approve, and subjected to other inconveniences and privations, by mere implication; or by any language which is not express and unequivocal?

The instruction of the judge, that the action was maintainable without proof of malice or intention to oppress the plaintiff and deprive him of his rights, we consider as in accordance with approved decisions. Our opinion is that there must be

Judgment on the verdict.

HAVEN *& al. vs.* BROWN *& al.*

Where the meaning of the parties to a written contract cannot be collected from the instrument itself, by reason of its ambiguity or illegibility; it seems that parol evidence of the acts of the parties, contemporaneously with and immediately after the execution of the instrument, is proper for the consideration of the jury.

The subsequent declarations of a general agent, touching a contract he has entered into in the name of his principal, being made to a stranger, cannot be received to affect the rights of the principal, already acquired.

The death of one of several joint plaintiffs, in an action of trespass *quare clausum fregit*, does not abate the suit.

THIS was an action of trespass *quare clausum fregit*, for cutting timber trees on the land of the plaintiffs; which the defendants justified under an alleged license.

In support of the justification, the defendants produced a bond signed by the plaintiffs by *William C. Whitney*, Esq. their agent conditioned, upon the payment of the purchase-money, to give them a deed of a tract of land, being the lot numbered five in the second range of lots in *Hebron*, according to the new survey, containing one hundred acres more or less; bounded beginning at a certain hemlock tree, and from thence "a southwestern course, on the old line, to the *Hogan* pond," and thence by the pond, and other bounds, to the beginning. The trespass was done on the northward side of a line drawn southwest from the hemlock tree; which the plaintiffs contended was the course mentioned in the bond. But the writing being somewhat obscured and worn, the defendants read it "a northwestern course"; and undertook to show an old line lead-

ing off northwestwardly from the hemlock tree, and inclining circuitously to the west, in a direction to strike the pond ; insisting that this was the line intended by the parties, within which the trespass was done.

To support their construction, the defendants offered evidence to prove that when the bargain was made and the bond executed, *Whitney* and *Brown* examined the old line last mentioned, which the former showed as the line to which he sold. To the admission of this testimony the plaintiffs objected ; but *Parris J.* before whom the cause was tried, overruled the objection.

The defendants also offered the testimony of *Samuel H. King*, one of the assessors of *Hebron* at some period after the execution of the bond ; to prove that Mr. *Whitney*, still continuing the agent of the plaintiffs, and while giving in the valuation of their property, had pointed out on the plan of the town the line in controversy, and made sundry declarations relative thereto ; neither of the parties being present at the time. To the admission of this testimony also, the plaintiffs objected ; but the judge admitted it ; and the witness was further permitted to testify that it was the custom and practice of Mr. *Whitney*, in the course of his agency, to permit those who held bonds for deeds to occupy the premises under their bonds.

A verdict was returned for the defendants, which was taken subject to the opinion of the court upon the admissibility of the testimony above stated.

After the trial *Thomas Foster*, one of the plaintiffs, died ; whereupon the defendants moved that the writ, for this cause, should be abated.

Fessenden and *Deblois*, being called on by the court to sustain the admission of *Whitney's* declarations as testified by *King*, argued that they were admissible as part of the *res gesta*, *Whitney* stil continuing the general agent of the plaintiffs. And they cited, 1 *Stark. Ev.* 42 ; *Thallimer v. Brinckerhoff*, 4 *Wend.* 394 ; *Farley v. Hastings*, 10 *Ves.* 193 ; 5 *Esp. Rep.* 134, 145 ; 2 *Esp. Rep.* 211 ; *Cobb v. Lunt*, 4 *Greenl.* 503 ; *Lunt v. Holland*, 14 *Mass.* 149 ; *Hall v. Leonard*, 1 *Pick.* 97 ; 1 *Stark. Ev.* 411,

444; *Harwood v. Goodright*, *Cowp.* 87; *Peisch v. Dixon*, 1 *Mason* 10; 1 *Wils.* 215; *Fonbl. Eq.* 25; *Newland on Contr.* 100, 101; 3 *Dane's Abr.* 363; *Cook v. Booth*, *Cowp.* 819; *Blakeley v. Winstanly*, 3 *D. & E.* 279; *Rex v. Laindon*, 8 *D. & E.* 356; *Davenport v. Mason*, 15 *Mass.* 85; *Fowle v. Bigelow*, 10 *Mass.* 379; *Leland v. Stone*, *ib.* 459.

N. Emery, *Greenleaf* and *L. Whitman*, for the plaintiffs.

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

Parris J. If a written contract be perfect in itself, and be capable of a clear and intelligible exposition from the terms of which it is composed, it cannot be contradicted or varied by oral testimony upon the principle that the language used by the parties in their contract is the best evidence of their intent.

In this case the language of the written instrument is the principal subject of controversy; the one party contending that the literal reading is "south western course to the old line," the other, that it is "north western course on the old line." It is the language itself, and not its construction, which was to be ascertained. The existence of an old line in a north westerly direction from the hemlock tree would coincide with the reading contended for by the defendants; and inasmuch as it would not contradict the clear and intelligible language of the written instrument, we are inclined to think it a fact proper to be proved, and that the evidence offered for that purpose was rightly admitted. So, also, the fact that when the bargain was made and the bond executed, *Whitney* shew the north westerly line as the one to which he sold, was also corroborative of the position taken by the defendants, that such was the true reading of the instrument.

In *Fowle v. Bigelow*, 10 *Mass.* 379, the jury were instructed that the meaning of the parties being uncertain from the words used, and it being out of the power of the court to ascertain their meaning by reference to the body of the instrument, evidence of the acts and doings of the parties contemporaneously with and immediately

subsequent to the execution of the instrument was proper for their consideration. This instruction, so far as it related to the admissibility of the evidence, was sanctioned by the court. In all the cases cited by the plaintiffs' counsel, the language in the deed was clear, explicit and free from ambiguity, and parole evidence was, of course, held inadmissible to control or vary it. Such is not the case before us.

But it is not necessary to decide the above points definitively. The testimony of *King*, proving the declarations of *Whitney*, at another time, relative to the line in controversy, the value of the plaintiffs' land, and sundry other statements relating thereto, is of a different character.

The declarations of an agent, so far as they constitute a part of the *res gestæ*, or in other words, such as are made by him at the time he is engaged in making a contract on the part of his principal, and having reference to the subject matter of such contract, may be given in evidence to affect his principal. They are admitted as the representations of the principal himself, whom the agent represents while engaged in the particular transaction to which the declaration refers. Representations made by an agent, at the time he is contracting for his principal, constitute a part of the contract, as much so as if they had been made by the principal ; and a fact stated by an agent in relation to a transaction in which he is then engaged, and while it is in progress, forms a part of that transaction. But what he says at another and a subsquent period cannot be evidence against the principal. The agent's declarations are received not as admissions but as a part of the *res gestæ*. *Fairlie v. Hastings*, 10 *Vesey*, 123 ; *Westcott v. Bradford*, 3 *Wash. C. C. Rep.* 500 ; *Thallimer v. Brinckerhoff*, 4 *Wend.* 394. *Whitney's* declarations therefore to *King* could form no part of the contract between the parties in this suit ; nor could he, by virtue of his general agency, explain that contract by any subsequent declaration to a stranger, not a party, so as to prejudice the previously acquired rights of his principal. As the declarations testified by *King* were not made to the party concerned, nor in relation to the bond, nor in the course of the transaction out of which it grew, they cannot

be considered as the declarations of the plaintiffs by their agent, touching the particular transaction with the defendants, which was the subject for the consideration of the jury, and we think they ought not to have been addmitted. As this evidence may have influenced the jury in forming their verdict, it must be set aside and a new trial granted.

Since the verdict in this case, one of the plaintiffs has deceased, and the defendants contend that the action is consequently abated. It is clear that in actions of *tort*, such as trespass *quare clausum*, or for taking of goods, trover, and case for misfeasance &c. tenants in common must all join, or the suit will abate, if the omission be properly and seasonably pleaded; and at common law, in all actions, where there were two or more plaintiffs, the death of one of them, pending the suit, was an abatement of the action.

But by *Stat.* 8 *&* 9, *Will.* 3, *chap.* 11, *sect.* 7, if there be two or more plaintiffs and one or more of them die, if the cause of such action survive to the surviving plaintiff or plaintiffs, the writ or action does not thereby abate, but such death being suggested upon the record, the action is to proceed at the suit of the surviving plaintiff or plaintiffs. In this case does the cause of action survive to the surviving plaintiffs? *Chitty* says, "in personal actions, as for trespass to land, tenants in common may join, because in these actions, though their estates are several, yet the damages survive to all," 1 *Chitt. Pl.* 53. And again, "when one or more of several parties interested in the property, at the time the injury was committed, is dead, the action should be in the name of the survivor;" *ibid.* 55; as in cases *ex contractu*, where one or more of several obligees, having a joint legal interest in the contract, dies, the action must be brought in the name of the survivor.

Where damages are to be recovered for a wrong done to tenants in common, in a personal action, and one of them die, the survivor of them shall have the action; for although the property or estate be several between them, yet the personal action is joint, *Co. Litt.* 198, *a.* As if two tenants in common be of land, and one doth a trespass therein, of this action they are joint tenants, and the survivor shall hold place. So it is if two tenants in common sow their

land, and one doth eat the same with his cattle, though they have the corn in common, yet the action given to them for trespass in the same is joint, and shall survive, for the trespass and damage done to them was joint.—*ibid.*

In this case, we think that the cause of action, if any there was, at the death of *Thomas Foster*, survived to the surviving plaintiffs, and that the action is not abated.

TUTTLE *vs.* CARY.

The legality of a town meeting for the choice of officers is sufficiently proved by showing that it was notified and warned in due form, by those claiming to act as the legally qualified officers of the preceding year.

The return of the constable or collector on the back of the warrant for calling a town or parish meeting, is the only proper evidence that the meeting was legally warned.

And such return must show the manner in which the meeting was warned, or it will be bad. Nor can a defect in this particular be supplied by parol evidence.

But if the constable's return is thus defective, it does not follow that the proceedings of the inhabitants at the town or parish meeting are necessarily void, to all intents; since in some cases the objection may be lost, on the ground of waiver or estoppel.

Yet in an action against the moderator of a parish meeting, for refusing the plaintiff's vote, the constable's return not showing how the meeting was warned, this defect was held to be incurable, and fatal to the action.

THIS was an action of the case to recover damages against the defendant as moderator of a meeting of the first parish in *Turner*, holden *April* 28, 1825, for refusing the plaintiff's vote; and it was tried before *Parris J.* upon the general issue.

To prove the fact of the meeting, the plaintiff offered the parish records, by which it appeared that the warrant for the meeting was signed by *Francis Cary* and *William Cary* as parish committee, and was directed to *John Dresser* as collector of the parish; and he showed the record for the preceding year, by which it appeared

that at a parish meeting holden *April* 19, 1824, they were duly elected to those offices. To the sufficiency of this evidence the defendant objected, because the returns of the collector did not show in what manner the meetings were warned. These returns were dated on the day of each meeting, and were both of the same tenor, thus :— "Pursuant to the within warrant, I have notified and warned the freeholders and other inhabitants of the first parish in *Turner*, qualified by law to vote in parish meetings, to meet at the time and place, and for the purposes therein expressed."

The defendant also objected to the sufficiency of the record of the parish meeting in *April* 1824, because it appeared that *Alden Blossom* was chosen parish clerk at that meeting, and *Philip Chamberlain* was appointed clerk *pro tempore;* whereas it did not appear by the record, though it was proved by parol, that *Blossom* was absent when the clerk *pro tempore* was chosen ; nor did it appear that the latter was a member of the parish.

He further objected to the authority of *Francis* and *William Cary* to act as parish committee for 1824, and issue the warrant for the meeting in *April*, 1825, because it did not appear that they were sworn.

All these objections the Judge overruled.

The plaintiff then offered to prove by parol that the notice for calling the meeting in *April* 1825 was seasonably posted up at the outer door of the meeting house, as the law requires; to the sufficiency of which evidence the defendant objected. But the Judge admitted the evidence for the purpose of bringing all the facts before the court.

The defendant contended that the plaintiff was not a legal voter in the parish, because, as was the fact, he was not assessed in the last parish tax ; which it was admitted was raised as long ago as the year 1811 ; but the Judge ruled otherwise. The defendant also insisted that if the plaintiff was not possessed of personal taxable property, for which he was liable to be taxed to the amount of two thirds of a single poll tax, he was not entitled to vote. The Judge however, decided otherwise ; but directed the jury to ascertain whether he had personal property to that amount ; and they found

that he had not. The defendant also objected that the plaintiff could not maintain this action, unless he should prove that the defendant rejected his vote maliciously, and with intent to injure and oppress him. This point also the Judge overruled; but instructed the jury to find whether the vote was rejected maliciously; and they found that it was not.

A verdict was thereupon returned for the plaintiff, for $20,10; which was taken subject to the opinion of the Court upon the question whether, upon the whole case as reported, the plaintiff was entitled to judgment.

Fessenden, for the defendant, to show the insufficiency of the collector's returns, cited *Wellington v. Gale*, 13 *Mass.* 483; *Davis v. Maynard*, 9 *Mass.* 242; *Purinton v. Loring*, 6 *Mass.* 388; *Winslow v. Loring*, 7 *Mass.* 396; *Saxton v. Nimms*, 14 *Mass.* 315; *Lancaster v. Pope*, 1 *Mass.* 86. And that the rejection of the vote was only *damnum absque injuria; Thayer v. Stearns*, 1 *Pick.* 109. The case of *Bangs v. Snow*, 1 *Mass.* 181, *Mr. Dane* considers as apocryphal. 3 *Dane's Abr.* 490.

N. Emery and *W. K. Porter*, for the plaintiff, supported the returns of the collector on the ground of the contemporaneous exposition of the statute; contending that the practice of town officers generally had always been to make returns similar to the present; and that the presumption of law in favor of the regularity of all official transactions, was sufficient to throw on the objecting party the burden of proving the contrary. *Bangs v. Snow*, 1 *Mass.* 181; *First parish in Sutton v. Cole*, 3 *Pick.* 232; *Thayer v. Stearns*, 1 *Pick.* 109; *Mussey v. White*, 3 *Greenl.* 290; *Waldron v. Lee*, 5 *Pick.* 323.

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

Mellen C. J. The plaintiff has averred in his declaration that the parish meeting at which his vote was offered and rejected by the moderator, was then duly and legally holden, and that the defendant had been duly elected moderator. To sustain the present

action, it was necessary that those averments should be proved; for the defendant was charged with having violated the plaintiff's rights. It is certain that a moderator of a town or parish meeting is often called upon to discharge an unwelcome duty, especially in those cases where contending interests and feelings are in full operation; and where he is obliged to decide on the qualifications of voters, without time for deliberation, and even without a knowledge of many of the facts on which those rights depend; where, to a certain extent, he acts judicially, and must pronounce a decisive opinion, and yet thereby may be rendered responsible in damages to the persons whose votes he rejects, however pure may have been his motives, or however sincerely he may have endeavored to decide with exactness and impartiality. Yet such are the legal principles which must regulate us in the decision of such causes. Several objections have been urged by the counsel for the defendant against the sufficiency of the proof adduced by the plaintiff in support of his action. Some of them we consider as entirely destitute of foundation; for instance, we are not called upon to examine into the regularity of the meeting in 1824. The only inquiry is as to that of the meeting in 1825. If we should require proof of the legality of the choice of the assessors who issued the warrant for the meeting in 1825, we should be obliged to go back and prove the legality of the meeting in 1823, and thus be compelled to go back to the organization of the town or parish in the first instance. Hence, in all these cases the party relying for the support or defence of an action on the regularity and legality of a town or parish meeting, is required only to prove that it was notified and warned in due form by those claiming to act as the legally qualified officers of the preceding year. The objections made and urged against the qualifications of *Tuttle* as a voter, and the decision of the judge as to proof of malice, we have considered and recently decided in the case of *Osgood v. Bradley*. So that the principal questions deserving our consideration are, first, whether the parish meeting of 1825, at which the plaintiff's vote was rejected, was legally warned, according to the facts appearing on the return; and if not, secondly, whether parol evidence was admissible to supply the deficiencies.

1. As to the first question. Our statutes relating to town and parish meetings do not in terms require that the proof of warning should be in writing, in the form of a return on the warrant; but from the nature of the thing, and as the only practicable mode of furnishing lasting evidence of the fact, it seems indispensable that such notice should appear on the return of the person appointed to notify and warn such meeting; and such, we presume, has been the invariable practice from time immemorial in the towns and parishes in Massachusetts, and in this State since its organization. Our parish act of 1821, *ch.* 135, *sect.* 3, requires that parish meetings shall be "notified, seven days, at least, before the holding of the same, by written advertisements posted up at the principal outer door of the meeting house or place of worship of such parish or society." It is believed to have long been the usage to date the return on the day of the meeting. No objection can be grounded on that circumstance; but it does not appear how the meeting was warned, or how many days before the date of the return. Standing alone, is not this return fatally defective? In *Bangs v. Snow & al.* cited by the plaintiff's counsel, such a return was admitted to go to the jury, with the warrant "for the purpose of showing who was the parish clerk," as it is stated in the report of the case; and thereupon he was sworn and produced a book which he identified, as containing the records of the north parish in *Harwich*. With respect to this case, the general remark may here be made, which has often been made before, that little reliance can be placed on the decisions of any court, made in the course of a jury trial, on the exigence of the moment, without the advantage of books, interchange of thoughts, or time for any deliberation. It is a familiar principle that returns made by sheriffs, deputy sheriffs and coroners must of themselves be sufficient; and they cannot be contradicted or aided by parol testimony. The counsel for the plaintiff has cited several cases to this point. The reason of the principle is that as the rights of third persons, as well as of the parties in any particular case, are thereby affected, established, changed or transferred, it is of importance to the community that there should be the permanency of record evidence, to which access may always be had by those who may be

interested. This same reason, as well as the principle itself, may be, and generally is extensively applicable to the returns upon warrants issued for town and parish meetings.

The case of *Saxton v. Nimms & al.* 14 *Mass.* 315, was an action of trespass against the assessors of the town of *Deerfield.* They justified, as such, the assessment of a sum of money which had been voted to be raised in a school district in the town, at a meeting warned for the purpose; the vote was duly certified to the assessors; and the plaintiff was assessed his proportion, for the nonpayment of which to the collector the plaintiff's property was taken. It appeared that the person to whom the warrant was directed, had certified that he had warned all the inhabitants of the district as the law directs. Parol evidence was admitted at the trial to prove that many of the inhabitants were not notified in due season, but one day too late. The whole court, however, set aside the verdict and granted a new trial, on the ground that such parol proof was inadmissible. *Parker. C. J.* speaking of the defendants, says "they have a right to presume that the meeting at which the money was raised, was lawfully warned;" for by the records it appeared to be so.

So in *Thayer v. Stearns,* 1 *Pick.* 109, the defendants justified as assessors of *Milford.* The court say the defendants "must show that they were legally chosen, and that the town were then legally assembled. This should be proved by the records; and if so proved, parol evidence cannot be admitted to contradict the fact." In that case the constable stated in his return that he had posted up notifications, without saying for what time; and it is true that the court overlooked the imperfection of the return, noticing among other things that it was an annual meeting, and that it did not appear that the notification was out of season, adding that every presumption should be in favor of its regularity; but in the same case no parol proof was offered, though the court observed that if records are burnt, mutilated or otherwise destroyed, parol evidence may be let in to supply the defect.

The case of *First Parish in Sutton v. Cole,* 3 *Pick.* 232, differs from this in several particulars. The regularity of the parish meeting was objected to, as having been called by a warrant from a justice of

the peace, when there was no application therefor signed by ten or more voters. There was no question as to the return. The chief justice observes, "it does not appear that any exception was taken to the meeting at the time; and we think if there were regular notice appearing of record, and the inhabitants proceeded to transact the business for which they were called together, no defect of authority in the magistrate appearing of record, the legality of the meeting cannot afterwards be called in question; certainly not by any but the inhabitants themselves." Here we find the court paying the same respect to the record of the return, as in the last case; to its importance and its sufficiency, as perpetual proof for those who may have a legal right to make use of it.

The case of *Waldron v. Lee*, 5 *Pick.* 323, originated in an assessment of a sum of money which had been voted in a school district meeting, and regularly certified to the assessors of the town of *Dudley*. The return of the person to whom the warrant for the school district meeting was directed, merely stated that he had warned the inhabitants, without stating the time or the manner of the warning. This objection, it is true, the court overruled; and in so doing, they assign a good reason, but one not applicable to the case at bar. The court say, "this is not a sufficient objection, for the inhabitants met and voted, and the vote to raise the money was duly certified to the assessors, who were obliged to proceed in the assessment, without inquiring into the regularity of the proceedings antecedent to the meeting of the inhabitants of the district." In *Saxton v. Nimms & al.* and *Waldron v. Lee*, the justification of the assessors was sustained on the ground that they were not answerable for the irregularity of the proceedings in the warning of the school district meeting; having conducted regularly themselves. But in *Thayer v. Stearns* they were required to show the regularity of the town meeting at which they were elected, by record evidence, not affected by any parol proof. Is more proof necessary to establish a man's innocence, when charged with a wrong, than to establish a charge of wrong against a man who, as the jury have found in the present case, acted with no improper motive, though by law made

responsible in damages even for an error in judgment? We should think not.

2. The second question is whether the deficiencies of the return can be supplied by parol proof? We have, in examining the first question, in a great measure anticipated this, from necessity. We have not been able to find any case where such evidence has been admitted; and in *Saxton v. Nimms* it was expressly decided to be inadmissible when offered to contradict a return of a constable. The reason for excluding it must have been that the proceedings of such an officer in relation to the warning must be in writing, and a part of the parish record, for the guidance and protection of all concerned: and it would seem that, for the same reason, the return should not be enlarged and perfected by parol. If in either case parol proof may be admitted, the return loses its character, and no one can with safety place any dependence upon it. It would be dangerous to establish a principle which may place the rights of so many persons in danger of being impaired or lost, when memory can furnish no assistance, or the only witness of the additional fact relied on to perfect the return, may be in his grave, or beyond the reach of process. After a careful examination of this cause in all its relations, in respect to the parties and the community, we cannot but believe that the parol evidence as to the time and manner of notice was not admissible. It answers no good purpose for us to indulge in relaxation of principles and go in search for excuses for noncompliance with plain requirements. A collector of a parish who is competent to do his duty in warning a parish meeting in the manner explicitly pointed out by law, is also competent to write his return and state in plain terms what he has done under his warrant, and it is his duty so to do. It is not easy to perceive why such a distinction should be made between the returns on warrants for parish or town meetings, and returns on writs and executions. In these latter cases a strict compliance with legal requirements is never dispensed with; and how can the court excuse gross carelessness in the former cases in the official conduct of perhaps the same men? The law must be impartial and so must the court. It is a familiar principle that no matter can be legally acted upon in a town, parish or pro-

prietors' meeting, unless the vote be authorized by a proper article in the warrant for calling the meeting. The obvious reason is that, without such article, the members of the corporation can have no sufficient and proper notice that the subject would be considered and acted upon. If such be the case in a meeting legally warned and assembled, is it not of equal importance that the meeting should have been legally warned and notified, and so appear to have been, by the return of the proper officer? Else how will it appear that due notice has been given to all the members, of the time and place of the meeting, in the manner and time by law appointed? The parish meeting not having been legally warned, or, in other words, there being no legal evidence of such a warning, we are not aware how the present action can be maintained. We do not mean to decide that the proceedings were necessarily void to all intents and purposes. In some cases such proceedings might be considered as valid, on the ground of waiver or estoppel, and not open to objection. On this occasion it is not necessary to particularize. We decide the present case more especially on the ground that the plaintiff's cause of action of necessity depends on the legality of the parish meeting. Without such legality, the plaintiff could have no more right to give a vote then, than on any other occasion, and of course the defendant's act could not have deprived him of any right. The plaintiff in his declaration has expressly averred that the parish meeting was a legal one, and that the defendant was the moderator of the meeting and legally chosen. For the same reason that it was necessary for the plaintiff to make these averments, it was necessary for him to prove them; but the records which he introduced for the purpose do not prove the alleged facts, and the plea denies them. The defects of the return we have before stated, and they must not be supplied by parol evidence. In such an action as this the burthen of proof, from first to last, rests on the plaintiff, and his proof has failed him. We are all of the opinion that the verdict must be set aside and (though it will be useless) a

New trial granted.

HALE *vs.* JEWELL *& al.*

Parol proof to show that a deed of conveyance, absolute on its face, was intended only as a security for money lent, is not admissible.

Where the title to real estate is absolutely vested by deed of bargain and sale, it shall not be disturbed by proof that all or part of the consideration was a usurious debt.

THIS was a writ of entry upon the plaintiff's own seisin of two lots of land, and a disseisin by the tenants; and was tried before *Parris J.* upon the general issue, with a reservation of liberty to give usury in evidence, in the same manner as if specially pleaded.

The demandant claimed title under a deed from *Danford Jewell*, and *Betsey Jewell*, the tenants, dated *Oct.* 11, 1828, conveying the premises to him absolutely in fee, with general warranty, for the consideration of $431,61.

It appeared that afterwards on the 28th day of the same *October*, the demandant gave *Danford Jewell* a bond, conditioned that upon the payment of $431,61 in four years, with interest annually, he would reconvey to him the same land. And on the same day he gave to said *Danford* a lease of one of the lots, on which the lessee lived, for four years, he paying annually for rent the interest on the money mentioned in the bond of the same date; with a clause rendering the lease void in default of punctual payment.

The tenants offered to prove, by the magistrate who was a subscribing witness, and took the acknowledgment of the deed, that it was at that time stated by the parties that the deed was a security for money loaned, and that the grantee was to give a bond, to reconvey the land, upon repayment of the consideration money in four years. They also offered to prove that the consideration of the deed consisted of certain usurious notes, which were given up to the tenants upon the execution of the deed; and that *Betsey Jewell* signed the deed upon the demandant's own suggestion, she being surety for her brother *Danford*, in one of the notes in which usury was secured.

This evidence the judge rejected, but reserved the question of its admissibility for the consideration of the court; a verdict being returned for the demandant.

Fessenden, for the demandant.

N. Emery, for the tenants.

The opinion of the Court was delivered at the ensuing *July* term, in *Waldo*, by

PARRIS J. If the bond and deed had been executed at the same time, had been between the same parties, and were parts of the same transaction, the bond would unquestionably operate as a defeazance, and the deed, instead of being an absolute conveyance in fee simple, would, with the bond, become only a "mortgage or assurance." But such are not the facts. The deed was executed and delivered on the 11th of *October*; the bond not until the 28th. The deed was made by *Danford Jewell* and *Betsey Jewell*, the tenants; the bond was given to *Danford Jewell* alone. Nothing appears in either instrument from which it may be inferred that they are parts of the same transaction. On the contrary, from the phraseology of the bond it is manifest that the purchase had been made by *Hale*, and the conveyance to him executed, at a time previous to the execution of the bond. If the absolute fee passed to the demandant on the 11th of *October* by the deed of that date, no subsequent agreement or instrument could so affect the original character of the conveyance as, in law, to render it conditional. Unless the conveyance was a mortgage at the time of its inception, it can never become such, in law, by any subsequent act of the parties. The seisin vested in *Hale* immediately on the execution and delivery of the deed, which was on the 11th of *October*, and the bond not having been executed until the 28th, and being between different parties, is to be considered a subsequent contract, not in law so affecting or qualifying the prior conveyance, as to render it a "mortgage or assurance for the payment of money."

The tenants offered to prove at the trial, by parol evidence, that it was stated by the parties at the time the deed was executed, that

it was security for money loaned, and that the grantee was to give a bond to reconvey, upon payment of the consideration. The effect of such parol evidence, if admitted and believed, would be materially to change the character and operation of the deed. In its terms it is absolute, purporting to be for a valuable consideration received by the grantor, and vesting the subject matter unconditionally in the grantee. The parol proof would make it a conveyance in mortgage, a mere security for the loan of money, and defeazable upon the performance of conditions, which do not appear in the instrument, and which are inconsistent with its legal operation. It is well settled that parol evidence is inadmissible to explain a deed, or to alter, control or vary a contract in writing, unless it contain some latent ambiguity; as in *Kimball v. Morrell*, 4 *Greenl.* 368, it was held that "where the declarations of parties are admitted as part of the *res gesta*, it is because they go to explain the true intent and meaning of the parties at the time. But this rule is not applicable to the contents of a deed; which is not to be limited, restrained, or enlarged by any parol declarations of the parties." We think the ruling of the Judge was correct in excluding parol evidence of the declarations of the parties, that the deed was security for money loaned.

The tenants also offered to prove by parol, that certain notes formed a part of the consideration of the deed from them to the demandant, and that such notes were usurious. If the deed had been a mortgage, and security for the payment of the note alleged to be usurious, the evidence offered would unquestionably have been relevant and material to the issue; but if the deed was absolute, as it purported to be, and as we must consider it, the evidence was properly rejected, as tending to show what the law will not permit to be shown in avoidance of such a conveyance. This question is discussed in *Boardman v. Roe & trustee*, 13 *Mass.* 104, and *Flint v. Sheldon ibid.* 443. In the first of these cases the trustee disclosed the purchase by him of a certain dwelling house of the defendants, and he was then inquired of whether he had not received more than six per cent interest on certain sums, which were included in and made part of the consideration of the deed. The court say

"if the object of the interrogatory is to avoid the deed of real estate, it is improper, because no man shall be held, by his answers, to disparage his title. Nor indeed would the effect be such as is contemplated; for the bargain and sale being executed, the title under it would not be disturbed by proving that a part of the consideration was an usurious debt." The case of *Flint v. Sheldon* is more directly in point. That was a case of absolute conveyance of land, and the tenant offered to prove that the consideration was usurious. But the court say, "in making out this defence, the first step is to prove that the deed was a mortgage or assurance made for the payment of money. Unless it was so, the question of usury does not arise." In that case, also, as in the one before us, the tenant offered to prove that the conveyance, though absolute on the face of it, was made on the express condition that it should be void, or that the grantee should reconvey on repayment of the money. But the court say, such an agreement, if not reduced to writing, would have no effect whatever. It would neither make the conveyance a conditional one, nor would it bind the grantee to reconvey the premises. The admission of such evidence would violate the fundamental principle that deeds and specialties cannot be explained or varied in their signification by parol evidence, if the terms made use of in the instrument are capable of a sensible explanation of themselves.

These principles are also fully recognized in *Richardson v. Field*, 6 *Greenl.* 37.

Upon the whole, we perceive no good reason for disturbing the verdict in this case, and judgment must consequently be rendered thereon.

THOMPSON & *al.* *vs.* KNIGHT.

In a writ of entry for wild land, it was held that proof that the tenant had been once on the land three or four years before, claiming it as his own, looking for the lines, and offering to sell it to a stranger; and that at another time he had spoken of the land as his own; did not amount to such evidence of possession and *ouster* as is required by *Stat.* 1826, *ch.* 344.

THIS was an action of entry upon disseisin, for two lots of wild land; and was tried before *Parris J.* upon the general issue.

After proving their title to the land, the demandants, in order to show that the tenant was in possession, offered a witness who testified that the tenant told him he had a vendue-title to one of the lots demanded; and that on a certain time, three or four years ago, he went on the lot, with the witness, showed him the land, offered to sell it to him, and looked for the lines, but found none, except the town line adjoining; and immediately went away without doing any other act, or completing the contract. Another witness testified that he had heard the tenant speak of these lots, claiming them as his own; and about defending this suit.

This evidence the Judge thought did not amount to such proof of possession as is required by *Stat.* 1826, *ch.* 344; and thereupon a nonsuit was entered by consent, subject to the opinion of the court, upon the demandant's motion to set it aside.

Fessenden and *Deblois*, in support of the motion, argued that the case disclosed all the acts of ownership on the part of the tenant of which wild land was susceptible; and that the most the statute intended was that the demandant should not have a verdict unless, besides showing his title, he could show some act of ownership exercised by the tenant, such as an entry on the land with claim of title, or the like. *Robison v. Swett*, 3 *Greenl.* 316; *Pray v. Pierce*, 7 *Mass.* 381; *Kennebec Proprietors v. Springer*, 4 *Mass.* 416.

N. Emery, on the other side, was stopped by the court; whose opinion was delivered by

MELLEN C. J. At common law, when the defendant in an action of entry on disseisin pleads *nul disseisin*, he thereby admits himself to have been tenant of the freehold and in possession of the demanded premises; and if he was not in possession at the time the action was commenced against him, he could avail himself of that defence, only by a plea of disclaimer. Many authorities in the Massachusetts reports, which it is unnecessary to cite, recognize this principle. But the law in this respect has been changed by our Statute of 1826, *ch.* 344; the second section of which is in these words :—" Be it further enacted, that in the actions aforesaid, " (real actions) " a plea of the general issue shall not be taken as an admmission by the defendant that he has possession of the premises demanded, or that he withholds the same from the demandant; and the jury shall on the evidence, consider not only the question of title, but whether the defendant holds possession of the same, or any part thereof, and return their verdict accordingly." Upon the evidence offered by the demandants to prove such possession, a nonsuit was ordered by consent; and the question of its sufficiency for the purpose is submitted to the decision of the court.

By the report it appears that the title to the premises is in the demandants; of course, the declarations of the defendant, as to his vendue title, amount to nothing. They have no tendency whatever to prove his possession. His going on to the lot four years ago, showing it to another person, and looking for the lines, and offering to sell it, are circumstances, at most, showing a claim, even at that time; but this claim does not appear to have ever been asserted afterwards. A claim of wild land is no possession, nor proof of possession. The facts reported are such as clearly show the land to have been in such a situation that the demandants might at any time have entered and enjoyed it at their pleasure; and needed not to have resorted to an action for the purpose of obtaining possession. Neither can the action be maintained on the principle of a disseisin by election, as the counsel for the demandants has contended. We apprehend that the above quoted section precludes the application of the principle. There must be proof of actual possession by the defendant in person, or by his tenant or agent. Con-

sidering the defendant as destitute of all title, it cannot be pretended that he had such a possession as would enable him to maintain an action of trespass *quare clausum fregit*, even against a stranger, and much less can it be a possession as against the true owner. The nonsuit is confirmed.

Judgment for the defendant.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF LINCOLN, MAY TERM, 1831.

SPRINGER *vs.* *The inhabitants of* BOWDOINHAM.

In an action against a town for damages occasioned by a defect or obstruction in the highway, it is not necessary to prove that the surveyor or selectmen had notice of the existence of the nuisance, if it were seasonably known to other inhabitants of the town.

Therefore, where a stick of timber was deposited in the highway, on the confines of a village, between one and two hours before sunset, which was seen by several inhabitants of the town, though not known to the selectmen or the surveyor; and in the same evening the plaintiff's chaise wheel struck the timber, whereby he was thrown out and injured; it was held that the town was liable, under *Stat.* 1821, *ch.* 118, *sec.* 17.

What is reasonable notice to a town, of the existence of a nuisance in the highway, is a question of law.

But if a question of law has been erroneously submitted to the decision of the jury, it seems that the court will not, for this cause alone, disturb the verdict, if it appears that they have decided it correctly.

THIS was an action on the case, for the recovery of damages sustained by the plaintiff, by reason of an obstruction placed in one of the principal highways in *Bowdoinham*.

It was proved that in the afternoon of *May* 1, 1828, about an hour and a half or two hours before sunset, one of the inhabitants of *Bowdoinham* left a large stick of hewn timber on the causeway near the village, where the injury was sustained. It was so dropped that the westerly end of the timber extended eleven feet into the road, and upon the usual wheel-track or carriage-path; leaving a space of only thirteen feet between the end of the timber and the other side of the travelled path; the causeway being twenty-six feet wide. The plaintiff was riding towards the east, with another person in his chaise, about dusk; and by running against or over the timber, was either thrown from the chaise, or compelled suddenly to leap from it in order to save himself, by reason of which his ancle was badly fractured.

Several of the inhabitants of the town, as well as others, passed over the causeway after the timber was dropped there, and before dark. The surveyor of highways for that district dwelt about seventy rods from the place; but was not informed of the existence of the obstruction till the next morning. Nor did appear that the fact came to the knowledge of either of the selectmen. It further appeared that on the southerly side of the causeway two masts, of upwards of twenty inches in diameter, had laid for several months, covering about five feet of the causeway in the travelled road; and that the western end of them extended about half way from the eastern to the western end of the stick of timber above mentioned.

The Chief Justice, before whom the cause was tried, instructed the jury to decide, upon the facts before them, how long the timber had laid in the highway, and whether the town, by the nature of the nuisance, and of the means of knowledge which so many of the inhabitants possessed and might have communicated, if necessary, to the surveyor, had not sufficient notice of the incumbrance.

In this stage of the cause he was requested by the counsel for the defendants to give the jury the following instructions upon the point of notice;—

1. That the town was not liable, unless either the surveyor or the selectmen had actual notice of the defect or nuisance, or might have known it by the exercise of reasonable diligence.

2. That under the circumstances of this case, the lapse of time was not sufficient to afford a presumption of notice, and thus to conclude the town.

3. That the notice to the town, required by the statute, does not mean notice to any inhabitant; but that the statute contemplates notice to the surveyor or selectmen, or to some other officer of the town having authority to act in the premises.

But the Chief Justice declined giving these instructions; leaving all the evidence to the jury. And a verdict was returned for the plaintiff, subject to the opinion of the court upon the question whether the jury ought to have been so instructed.

Greenleaf and *Jewett*, for the defendants, argued in support of the points taken at the trial; contending that the statute, by requiring reasonable notice to the town, as the condition of its liability, meant something more than notice to any inhabitant, however ignorant or remote. Its language was not satisfied without notice, express or implied, to the proper officers of the town, by whom alone the corporation acts in similar cases. It speaks of notice to the corporations. This position they sustained by the analogies of the pauper laws, where no notice is sufficient unless given to the overseers of the poor; and of the mode of service of writs and process in law, which must formerly have been on a principal inhabitant, which was held to mean a principal officer of the town, and now must be on the town clerk or selectmen. The policy of the legislation on these subjects is that of reason and common sense;—to touch those organs of the corporation through which it perceives. But if notice to any inhabitant is sufficient, this mischief may ensue, that the person notified may be the one most interested tn concealing the fact, or in suffering the obstruction to remain. *Lobdell v. New Bedford*, 1 *Mass.* 153; *Jones v. Lancaster*, 4 *Pick.* 149; *Bigelow v. Weston*, 3 *Pick.* 267. The statute giving this remedy is a mere arbitrary regulation, penal in its character, and ought therefore to receive a strict construction. *Mower v. Leicester*, 9 *Mass.* 247; *Commonwealth v. Springfield*, 7 *Mass.* 9.

The jury, moreover, should have been instructed to find the facts, from which the court should have determined whether the notice was the reasonable notice to the town, which the statute requires; this being a question of law. *Ellis v. Paige*, 1 *Pick.* 43; *Barre turnp. corp. v. Appleton*, 2 *Pick.* 430; 6 *Pick.* 470; *Hussey v. Freeman*, 10 *Mass.* 84; *Ulmer v. Leland*, 1 *Greenl.* 135; *Davis v. Maynard*, 9 *Mass.* 242; *Wellington v. Gale*, 13 *Mass.* 483; *Attwood v. Clark*, 2 *Greenl.* 249.

Mitchell, for the plaintiff.

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

The present action is founded on the 17th section of *Stat.* 1821, *ch.* 118, as modified by the act of *February* 23d, 1825, by which the double damages mentioned in the former act, are reduced to single damages. In other respects the revised act is similar to the act of Massachusetts on the same subject. We have not been able to find more than one decision directly on the point of reasonable notice; that is, what facts constitute such notice to a town of the nuisance occasioning an injury to an individual. The statute first mentioned renders a town liable for such an injury, after having reasonable notice of the nuisance or defect complained of in a bridge or highway. In the case of *Lobdell v. New Bedford*, 1 *Mass.* 153, which was defended by the late Chief Justice *Parsons*, then at the bar, he contended that either the surveyor or some principal inhabitant should have been notified of the defect. The concessions of such distinguished counsel as to the evidence which he considered sufficient to subject his clients to the payment of double damages are worthy of our regard on this occasion. In the same cause *Sedgwick J.* delivered to the jury what he stated was the opinion of the court, (then consisting of *Strong*, *Sedgwick*, *Sewall* and *Thatcher*) viz. "As to the question of reasonable notice, he said he did not think that for every defect, an action on the statute could be maintained; such as sudden defects by floods, &c.; but open and visible defects, and such as could be prevented by common and ordinary

diligence, towns are, by law, bound to take notice of, and guard against." If these are correct principles of law, applicable to an action for double damages, *a fortiori* they are applicable in the present case, where only single damages are claimed and recovered. The incumbrances on the causeway were a nuisance, and the stick of timber which caused the disaster, was placed there by one of the inhabitants; and from one to two hours before sunset, was suffered to lie across a considerable portion of the width of the road, while several other inhabitants of the town, as well as persons belonging elsewhere, were passing and repassing; yet no one attempted to remove it or give notice to the surveyor, who lived in the neighborhood, so to do.

But it is contended that the question of reasonable notice is a question of law, and should not have been submitted to the jury. Admitting this to be a correct principle of law, in those cases where there is no contest as to the facts which must form the basis on which the question must rest, still where there is conflicting testimony, as to those facts, we do not perceive how the court can decide the question of reasonable notice, without trespassing on the province of the jury. It was undoubtedly a question of law whether it was necesssary to prove such notice, as the judge was requested to instruct them to be necessary; and that question he did decide, by declining to give the requested instructions. In so doing, we think he was correct. But even if we thought the question of reasonable notice should not have been submitted, as it was in part, to the jury, there would be no sound reason for setting aside the verdict, inasmuch as we are all of opinion that the facts reported show that the town had reasonable notice.

Judgment on the verdict.

ERSKINE *vs.* PLUMMER.

A sale of timber by parol, to be cut and carried away by the vendee, seems not to be within the statute of frauds.

THIS was an action of *assumpsit*, brought by *George Erskine*, for the proceeds of certain timber sold by the defendant. The material facts, developed on the trial, which was had before the chief justice, were the following:—

Levi B. Erskine, being the owner of a lot of land in *Alna*, on which the timber in question grew, mortgaged the same, *Dec.* 11, 1819, to *W. & G. Tuckerman*, to secure the payment of $444,03, with interest. On the 8th of *April*, 1822, his right in equity of redemption was duly sold on execution, and purchased by the plaintiff, to whom a deed was accordingly made. On the 15th of *October* 1822, the *Tuckermans* assigned their mortgage to the defendant, who entered to foreclose on the 19th of *November* following. A short time before the expiration of the three years, the plaintiff sent his son *Levi* to the defendant to ascertain what amount he claimed to be due on the mortgage; to whom the defendant replied that he claimed $564,25, and would take nothing less. A few days afterwards, *Levi* paid this sum for his father.

Early in *January* 1822, *Levi* the mortgagor sold the timber on this lot, or a part of it, by parol, to the plaintiff, (he agreeing to cut it,) for the estimated value of $150; which sum the plaintiff paid *Levi* about the time of the sale, and before much of the timber was cut. The defendant was employed to haul the timber to the mill, which he did, partly in the winter of 1822, and partly in the following year; but withheld it from the plaintiff; and afterwards sold and converted it to his own use. The *Tuckermans* thereupon commenced an action against the defendant, his brother, and *Levi*, to recover the value of the timber so cut and hauled; pending which the parties entered into an agreement that certain arbitrators should appraise the value of the land, and of the timber and wood cut as above mentioned; that the defendant should pay these two sums to

the *Tuckermans*, who should thereupon give him an assignment or conveyance of their title to the land. Under this agreement the land was estimated at $252, and the timber and wood at $200; which sums were paid by the defendant, and the mortgage was assigned to him according to the contract.

Upon these facts the defendant contended that the plaintiff was not entitled to recover; because, 1st. The sale of the timber from *Levi B. Erskine* to the plaintiff, being by parol, was void by the statute of frauds. 2dly. The timber was partly cut and hauled before the plaintiff purchased the right in equity of redemption. 3dly. Whatever was received by the defendant out of the timber and wood, and by him paid over to the *Tuckermans*, extinguished, at the moment of payment, so much of *Erskine's* debt; and for this sum, therefore, the defendant was not accountable to the mortgagor, nor to the plaintiff; and if the plaintiff paid more than was due to redeem the land, it was a voluntary payment, and could not be recovered back.

The chief justice, however, overruled these positions, instructing the jury in favor of the plaintiff's right to recover. And a verdict being returned for the plaintiff, the foreman, in answer to an inquiry from the bench, stated that in the estimate of damages they had not included the two hundred dollars, being the appraised value of the timber, but left it in the defendant's hands. The verdict was taken, subject to the opinion of the court upon the plaintiff's right to recover.

Allen and *Greenleaf*, for the defendant, maintained the positions taken at the trial; and to the first objection cited *Crosby v. Wadsworth*, 6 *East*, 602; *Teal v. Auty*, 2 *Brod. & Bing.* 99; *Cook v. Stearns*, 11 *Mass.* 533; 2 *Stark. Ev.* 598, and cases there collected. The plaintiff, they said, had no title to the trees till he purchased the equity of redemption; which was not till after most of them were cut. And even then he had no title against the *Tuckermans*, whom the defendant had paid for the trees. Whatever the mortgagees thus received, extinguished, *eo instante*, so much of the debt due to them. For this sum, therefore, the defendant is not accountable to the plaintiff. And if the plaintiff paid more mon-

ey than was due on the mortgage, it was a voluntary payment, which cannot be recovered back. If too much was demanded, he might have brought his bill to redeem.

As to the answer of the foreman, being neither the point in issue, nor a special verdict, it was extra-official and ought to be disregarded.

Sprague and *Child*, for the plaintiff, to the point that the sale of the trees was not within the statute of frauds, cited *Gardiner Manufacturing Comp. v. Heald*, 5 *Greenl.* 331; *Parker v. Staniland*, 11 *East* 362; *Warwick v. Bruce*, 2 *Maule & Selw.* 205; 1 *Phil. Ev.* 365, 366; *Whipple v. Frost*, 2 *Johns.* 418; *Newcomb v. Ramer*, 2 *Johns.* 421, *note*; *Bostwick v. Leach*, 3 *Day*, 476; *Anon.* 1 *Ld. Raym.* 182; 4 *Stark.* 599; *Sugd. Vend.* 58, 59, 60; *Fitz. Abr. Trespass*, 149; *Bro. Abr. Trespass*, 273; *Freer v. Hardenburg*, 5 *Johns.* 271; *Cook v. Stearns*, 11 *Mass.* 533; *Viner's Abr. tit. License, A. E. D. G.*; *Hob.* 173; 1 *Atk.* 175; 1 *Dane's Abr.* 650; *Benedict v. Bebee*, 11 *Johns.* 145; *Hare v. Celey*, *Cro. El.* 143; *Bradish v. Schenck*, 8 *Johns.* 151; *Jackson v. Brownell*, 1 *Johns.* 267. That at any rate, it was an executed contract, and so valid. *Davenport v. Mason*, 15 *Mass.* 92; *Winter v. Bockwell*, 8 *East*, 310; *Ricker v. Kelley*, 1 *Greenl.* 117; *Parkhurst v. Van Cortlant*, 14 *Johns.* 15; *Tucker v. Bass*, 5 *Mass.* 164; 2 *Stra.* 783; 2 *Vern.* 455; 3 *Ves. jr.* 378; *Wilkinson v. Scott*, 17 *Mass.* 249; *Pomeroy v. Winship*, 12 *Mass.* 514.

And that the mortgagor might well recover in this action upon the general counts, as for rents and profits received, over and above the sum due; or for money paid to avoid a forfeiture; or extorsively taken; *Turell v. Merrill*, 17 *Mass.* 117; *Taylor v. Townsend*, 6 *Mass.* 270; *Joy v. Oxford*, 3 *Greenl.* 131; *Taylor v. Weld*, 5 *Mass.* 109.

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

Weston J. The title of the plaintiff to the timber, for the proceeds of which this action is brought, is contested by the defen-

dant. The timber, with the land upon which it stood, originally belonged to *Levi B. Erskine*, who, at the time he made the sale relied upon by the plaintiff, had a right to dispose of it against all persons except the *Tuckermans*, to whom the land had been mortgaged. Was the sale of the timber, being by parol, good between the contracting parties, so as to pass the property in the timber to the plaintiff? Upon this question there has been some vacillation in the authorities. In an anonymous case, reported in 1 *Ld. Raymond*, 182, the court held that the sale of growing timber by parol was not void by the statute of frauds, it being regarded as a chattel, and not as an interest in land. But a sale of growing grass, in *Crosby v. Wadsworth*, 6 *East* 602, was held to be within the statute. In *Parker v. Staniland*, 11 *East* 362, a sale of potatoes by parol in the ground, then grown, was sustained; but a sale of growing turnips was held by the court, in *Emerson v. Heelis*, 2 *Taunt.* 38, to be within the statute. In *Warwick v. Bruce*, 2 *Maule & Selw.* 205, a sale of potatoes then growing was decided not to be an interest in land, requiring a written contract. *Teal v. Auty*, 2 *Brod. & Bing.* 99, was *assumpsit* for the price of certain poles, which had been sold while standing and growing, to the defendant. The original contract was held to embrace an interest in land, which could not be enforced without evidence in writing; but the contract being executed, and the poles actually cut and carried away by the defendant, the court decided he was liable for their value, if that could be proved. In New York the sale of a growing crop by parol has been held good, and the authority of *Crosby v. Wadsworth* questioned. *Newcomb v. Ramer*, 2 *Johns.* 421, in note. *Freer v. Hardenburgh*, 5 *Johns.* 271. In Connecticut the sale of gravel, stones, timber trees, which by the contract are to be separated and carried away, and the boards and bricks of a house, to be pulled down and taken off, is deemed not within the statute.

Standing timber is annexed to the freehold, passes with it, and often constitutes a great part of its value. A parol sale of the timber, to remain on the land during the pleasure of the buyer, or for an indefinite period, might affect injuriously subsequent purchasers of the land; but if to be cut and carried away within a reasonable

time, or as soon as it can conveniently be done, is not liable to the same objection. Trespass would not lie by the original owner, for entering and cutting under such a contract; for it would at least amount to a license, which need not be in writing. *Cook v. Stearns*, 11 *Mass.* 533. The trees when cut may clearly be sold by parol, like any other chattel. But a license is in its nature revocable; and a sale of the land, without reservation, before the timber is cut, would doubtless be held to be a revocation or determination of the license. And this would sufficiently protect the interest of the purchaser of the land. Upon this ground, the sale of timber to be cut and carried away when cut, would pass the property. And the purchaser would be thereby licensed to enter for this purpose, so long as the license remained unrevoked. If these principles are tenable, the sale in question was good, although made by parol. But upon this point we give no decided opinion, being fully satisfied that the sale was good between the parties as a contract executed. The plaintiff entered under the contract, and by permission of the owner, cut the timber, carried it away, and paid the full consideration demanded. The actual receipt of the price constituted a sale of the timber, after it was severed, if it was not consummated before. After it was severed, there could be no pretence that it constituted an interest in land, and a sale thus made is entirely relieved from any objection arising under the statute of frauds.

But this sale was made, subject to the paramount rights of the *Tuckermans*, in whose place the defendant claims to stand, by substitution. Had the proceeds of this timber been applied to the payment of their demand, either before the assignment or afterwards, it would have extinguished the demand *pro tanto;* but the defendant, having claimed and received the whole without deduction, cannot be permitted to say that it was so applied. It would be false as well as unjust. The defendant was employed by the plaintiff to haul the timber for him, and he sold it and converted the proceeds to his own use. Upon these facts, he is answerable to the plaintiff for the sum received, unless he applied it in part payment of the mortgage; but this he has not done; and if he ever

intended to do it, he waived his right to make such application when he received the whole amount, without allowing it.

Judgment on the verdict.

STETSON *& al. vs.* HEALEY *& ux.*

Where certain of the heirs at law of an intestate, entitled to different proportions of the personal property, joined with the administrator in a submission of their claims to an arbitrator, who awarded a gross sum against the administrator, which he further proceeded to apportion among the heirs; it was held that they all might well join in an action on the award.

THIS was an action of *assumpsit* on an award; in which a verdict was taken for the plaintiffs, subject to the opinion of the court upon the question whether they might lawfully join in this action.

The facts were these. Mrs. *Healey* was the widow of the late *Joseph Sprague*, Esq. and administratrix on his estate; against whom the plaintiffs, who were some of his heirs at law, claimed different sums as their proportions of the residue of the property in her hands; under his will and that of his ancestor, executed by him. To adjust these claims, they all joined in a parol submission of the whole subject to an arbitrator, who made a report in writing, in which he awarded a gross sum as payable by the administratrix; which he proceeded to apportion into different sums to be paid to the respective heirs. The verdict was for the gross sum thus awarded.

Allen, for the defendants, argued that the plaintiffs might have sued severally, each for the sum awarded as his part; and wherever they may sever, they cannot join. If they might, the other party could be deprived of his set-off. *Brand v. Boulter*, 3 *Bos. & Pul.* 235; *Bean v. Blanchard*, 4 *Wend.* 432.

Greenleaf, for the plaintiffs, cited 1 *Saund.* 153; 1 *East*, 226, 497; 5 *East*, 225.

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

The objection of the defendants goes merely to the form of the action, and has no connexion whatever with the merits. A joint action, if maintainable, is more convenient and less expensive than several actions founded on the award. The submission was a joint one on the part of the plaintiffs, of their claims against the estate of *Joseph Sprague*; and Mrs. *Healey*, his widow, before her marriage, as administratrix on her late husband's estate, was a party to this submission, making no objection to the joinder at the time of the submission or at any subsequent stage of the proceeding. The arbitrator found that the sum of $825,80 was due to the plaintiffs; and for this amount he awarded in their favor; and this is all he was authorised to do by the terms of the submission. It is true that in the award he goes on, and makes a division of that sum, appropriating to each plaintiff a certain proportion of it. It does not appear that this appropriation was incorrect or unsatisfactory to either of them. Suppose they had made an amicable arrangement among themselves, apportioning the $825,80 in the same manner, no one would contend that the form of action on the award would in the least be affected by it. The verdict is for a gross sum, and if judgment be rendered thereon, and the money paid on execution, the plaintiffs will apportion it among themselves, according to the terms and provisions of the award. No informality will appear on the record. The verdict will support the judgment. If it be said that by a joinder of all the plaintiffs in the action, either of them may release the whole judgment, to the prejudice of the others, it may be answered that the plaintiffs voluntarily placed themselves and their rights in this situation, and they apprehend no danger or loss; and why should the defendants be so anxious for the preservation of others' rights, when payment to any one of the plaintiffs will be a discharge and satisfaction of the judgment? Besides, if either should receive more than his proportion, he would be accountable to the others for the surplus, in an action for money had and received. Supposing therefore that independently of the joint submission

and prosecution of the plaintiffs' claim by the express consent of the defendants, they could not by law have joined in an action; still we think that consent must be considered as extending to the present action, which is a necessary measure to compel a performance of the award founded on a joint submission. If several persons should improperly join in an action as plaintiffs, and the defendant should make no objection, and a verdict should be returned in their favor; in an action of debt on the judgment rendered on such verdict, the same plaintiffs not only might, but must be joined. In the present case, the injury occasioned by Mrs. *Healey* in not performing the award, was an injury to all the plaintiffs jointly; for the award when made was binding on her as to all or none of them. Its virtue and obligation were not capable of severance, so as to afford a remedy for one of the plaintiffs and not another. But considering that the principal question submitted to and decided by the arbitrator, had relation to the construction of a will in which all the plaintiffs had a joint interest, we do not think it clear by any means that the plaintiffs might not have joined in an action against Mrs. *Healey*, had there not been any submission. In the case of the *Tunbridge Wells dippers*, 2 *Wils.* 423, it was decided that several persons might join in an action against a stranger for disturbing them in their employment, in which they were all jointly concerned in point of interest, although they were severally entitled to receive, for their own several use, such voluntary gratuities as the company were disposed to give them. In *Coryton & al. v. Lithebye*, 2 *Saund.* 115, it was settled that persons may join in an action for a joint injury done by a stranger, though their interests are several. So where the cattle of A and B, owned by them severally, were distrained, and C for ten pounds agreed and promised that the cattle should be restored to their respective owners; an action by A and B jointly was sustained against C, for the non-performance of his agreement. 1 *Roll. Abr.* 31. We however prefer placing our decision on the ground of the joint submission by consent, the powers of the arbitrator, and the necessary connexion of this action with his award, as we have stated in the former part of this opinion.

Judgment on the verdict.

Paul & al. vs. Moody.

Where a deed, though containing the name of the person who paid the consideration-money, and with whom the covenants were made, did not express the name of any grantee; and the *habendum* was to the grantor and his heirs and assigns forever; and the covenantee had entered and held possession several years, and afterwards conveyed the land in fee; it was held, in a writ of right against his grantee, brought by the heirs of the original grantor, that as nothing seemed to have passed by the deed, it could not operate to qualify the possession of the covenantee; the character of which was therefore purely a question for the jury.

This was a writ of right, brought by the children and heirs at law of *Matthew Paul*. The tenant claimed title under one *William Bearce*, who entered into the premises under a deed from the ancestors of the demandants, dated *April* 13, 1793; of the following tenor:—"Know all men by these presents, that I *Matthew Paul* and my wife *Anne* of *Bristol*, in the county of *Lincoln*, and Commonwealth of Massachusetts, yeoman, for and in consideration of eighty pounds, lawful money, to me in hand, before the ensealing and delivery hereof, well and truly paid by *William Bearce*, of the town" &c. "do freely quit all our rights, title, interest, property, claim or demand, which we have or by any way or means ought to have, in of or unto a certain tract of land situated" &c. "To have and to hold the said granted and bargained premises, with all other appurtenances and privileges to them belonging or any ways appertaining unto us the said *Matthew Paul* and my wife *Anne*, our heirs and assigns forever. And I the said *Matthew Paul*, for myself, my heirs, executors, administrators, or assigns, to covenant and grant unto and with the said *William Bearce*, his heirs or assigns, that I am lawfully seised in fee of the premises, and have good right, full power, and lawful authority to dispose of the same in manner aforesaid; and will warrant and defend the same against the lawful right or claims of any person or persons claiming their rights from, by, or under me, or my procurement." *Bearce* occupied the land till the year 1826.

The demandants contended, and requested the Chief Justice, before whom the cause was tried, to instruct the jury, that this deed conveyed nothing to *William Bearce*; and that for this reason, and also by the terms of the deed, *Bearce's* entry and possession were for the benefit of *Matthew Paul*, and a continuance of his seisin. But the Chief Justice declined so to instruct them; leaving the question of intention to the jury, and directing them to settle the nature and character of the possession, whether adverse to *Paul* or not, from the other evidence in the cause; much of which was adduced on either side. And a verdict having been found for the tenant, the question was whether the jury ought so to have been instructed.

Mitchell and *Hazeltine*, for the demandants, maintained the affirmative, and cited *Wiswall v. Bard*, 4 *Johns.* 230.

Allen, for the tenant, cited 9 *Cowen*, 556; *Ricard v. Williams*, 7 *Wheat.* 59.

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

This is a writ of right in which the demandants declare on the seisin of *Matthew Paul* their late father, who died in 1814. The writ bears date *August* 28, 1829. In the defence, a deed was offered signed by *Matthew Paul* dated *April* 13, 1793, by which it is contended that the demanded premises were conveyed to *William Bearce*, under whom the tenant claims title to one moiety thereof. In this deed the name of *Bearce* is twice mentioned: once, as the person of whom the consideration was received; and once, as the person with whom the covenants were made; but neither he nor any other person is named as grantee; and beyond all this, the *habendum* is to said *Matthew Paul* and *Anne* his wife, their heirs and assigns forever: so that nothing seems to have passed to *Bearce* by the deed. But it appears that he entered into possession in 1793, and continued to occupy and improve the land till the year 1826; and the question before the jury was whether such long continued possession was in submission to the title of

said *Matthew Paul* and a continuance of his seisin and for his benefit; or whether *Bearce* claimed to hold the property as his own, and adversely to *Matthew Paul*, and all others. This was certainly a question of fact, and properly submitted to the jury for their determination; and for that reason the requested instruction would have been improper, respecting the character of *Bearce's* possession. The jury have decided that this possession was in his own right, and of course adverse to the claims of all others. Such being the facts established by the finding of the jury, there is no proof of the seisin on which the demandants have declared. There must be

Judgment on the verdict.

BOWES *vs.* TIBBETS.

Where a poor child is bound an apprentice by the overseers of the poor, to do any work in which his master may see fit to employ him; this is understood to mean any lawful work; and the indenture is valid within the statute.

Where an apprentice is employed by a third person, without the knowledge or consent of his master; the master is entitled to recover the value of his earnings against the employer, even though the latter did not know that he was an apprentice.

THIS was an action of *assumpsit*, for the value of services rendered to the defendant, by *Abraham Collamore* the plaintiff's apprentice.

In a case agreed by the parties, it was admitted that the boy was properly bound by indenture to the plaintiff, by the overseers of the poor of the town of *Washington*, *May* 22, 1820, "to any work he might see fit to place him;"—that in *June* 1828, he left his master without leave, was advertised by him as an absconding apprentice, in the newspaper printed in *Thomaston*, and had never returned to his service; that about fourteen months ago he came with his father

to the defendant, in *Wiscasset*, and with his own consent was hired to the defendant, by his father, and performed the services sued for in this action; and that he was still a minor. It did not appear that the defendant ever knew that the boy was an apprentice to the plaintiff; or had been advertised; nor had the plaintiff demanded payment for his services before the commencement of this action. The indenture contained the usual covenants for the instruction and benefit of the apprentice.

Upon these facts the case was submitted to the decision of the court.

Reed, for the plaintiff, relied on *James v. LeRoy*, 6 *Johns.* 274.

Sheppard, for the defendant, resisted the plaintiff's claim, arguing that as no action would lie for enticing away another man's servant or apprentice without knowledge that he was such; 1 *Bl. Comm.* 429; 1 *Com. Contr.* 124; *Eades v. Vandeput*, 5 *East*, 39; *Co. Lit.* 117, *a. note*; by parity of reason none would lie for his services, where the party had no cause to suspect that he was employing the apprentice of another. In such case a previous demand, at least, was necessary, to establish a privity of contract between the parties.

The case of *James v. Le Roy*, he contended, was not in point, because the facts were not similar to those of the case at bar.

But if that case is deemed conclusive upon the point of notice; yet here the plaintiff's long neglect to seek and recover his apprentice, and that of the overseers in not inquiring into the treatment he was receiving, which they were bound to do as long as he remained an indented apprentice, must be regarded as an assent to his departure, and an abandonment of the contract of service; leaving the father's rights as they stood before. *Day v. Everett*, 7 *Mass.* 145.

But the indenture itself is void, not pursuing the statute, which seems to intend that the child should be bound out to learn some useful art, trade or mystery, by which he might earn his livelihood; instead of being a servant of all work, as in the present case. *Butler v. Hubbard*, 5 *Pick.* 250.

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

The case finds that *Abraham Collamore*, for whose services this action is brought, was duly and legally bound as an apprentice to the plaintiff, for a period which has not yet expired. The indenture is made part of the case, and it is insisted by the counsel for the defendant, that notwithstanding he has admitted in the statement of facts that the binding was legal, he may take exceptions thereto, if the indenture appears to be insufficient. The indenture is executed by the plaintiff and the overseers of the town of *Putnam*, now *Washington*, under the act for the relief, support, and employment of paupers. The term, apprentice, is used, although no trade, art or mystery is mentioned therein, in which the apprentice was to be instructed by his master; but he was to do any work, by which must be understood lawful work, in which his master might think proper to employ him. Although called an apprentice, he was not one either according to the general meaning of the term, or in the sense in which it is used in the statute. But notwithstanding the unskilful or improper use of this word by the overseers, we are of opinion that the minor was substantially and legally bound as a servant. They had authority thus to bind him. They undertook that he should serve his master; and the covenants on the part of the latter, for the benefit of the minor, undertake to afford him the education required by the statute, and are in other respects favorable and liberal. The plaintiff thereby became entitled, instead of the father, to the services of the minor, until he arrived at the age of twenty one years. He continued with his master for eight years, and then left his service, without authority or discharge; and it does not appear that he had any cause of complaint.

The defendant has had the benefit of the services of the minor, and the law raises a promise on his part to make a reasonable compensation therefor. To whom shall this be paid? Not to the minor, whose rights and interests were otherwise provided for, under the protection of the law. Not to the father; for his parental rights and duties had been transferred to another. But to the plaintiff, who

had purchased his services, for a valuable consideration paid or secured. The defendant's obligation to pay the plaintiff, arises from his use of his property, and although he might suppose the right to be in another, or might be ignorant of the plaintiff's rights, his misapprehension or ignorance cannot change his legal liability.

Where the action is for enticing the plaintiff's servant or apprentice, it must be made to appear that the defendant did it with a knowledge of the plaintiff's rights. And it seems from the authorities that this is the only action, which can be sustained for employing the servant of another of full age. In the case of a minor indented as an apprentice or servant, his services actually become the property of his master. A right may be acquired to the labor of a servant of full age; but it is a right resting in contract, for the breach of which there may be a recovery in damages. The master has no lien upon his subsequent earnings; but may obtain satisfaction for the injury he has sustained by the ordinary process of law, of the servant, or of any other person, who knowingly seduces him.

The case, cited from 6 *Johns.* 274, is an authority for maintaining this action upon the facts agreed; and we are satisfied that it is maintainable also upon principle.

Judgment for the plaintiff.

GREENOUGH *vs.* BALCH *& al.*

Where one, being indebted on the books of a lottery ticket vender for tickets in various lotteries, some of which might lawfully be sold and others not, made a remittance of money to be passed to his general credit, exceeding the amount he then owed; and afterwards made further purchases which were lawful, and which were entered in the same account, it being still open, bringing him again in debt; and the account was then settled by his note for the balance;—it was held that the remittance having been intended to apply to all the charges on book, illegal as well as legal, the parties, as to that part of the transaction were *in pari;* and the law would not lend its aid to the defendant to recover back the amount paid for the tickets illegally sold, by suffering those charges to affect the validity of the note; which was therefore to be regarded as given for the balance of the subsequent and legal charges.

THIS was an action of *assumpsit* on a promissory note; and came before the court on a motion to take off a default, in a case reported by the chief justice, before whom it was opened for trial.

The plaintiff was a vender of lottery tickets, and had sold a large amount to the defendants, which were charged in account, some of the tickets being in lotteries authorized by the laws of this State, and others being in lotteries granted by other States, and therefore sold here contrary to the statute. On the 15th day of *March* 1826, the defendants remitted a large sum of money to the plaintiff which was placed to their credit, amounting to more than the charges then standing against them by about five hundred dollars. The account still continued open and current, the defendants making other purchases which were not unlawful, till *July* 14, 1827; when it was settled by a note given by the defendants for the balance of five hundred and forty dollars then due from them to the plaintiff. This note was partly paid, and then taken up by substituting a new note for $258, 50, bearing date *July* 11, 1828, which was sued in the present action. No foreign tickets were charged after *March* 15, 1826.

Allen, for the defendants, considered the account as open and unsettled till *July* 14, 1827, when the first note was given; and argued that as there had been no specific appropriation of the money

previously paid to the plaintiff, it was applicable equally to the whole body of the debits; and some of these being in violation of the statutes, the whole transaction was infected with illegality, and the note was void. In support of this position he cited *Bliss v. Negus*, 8 *Mass.* 46; 2 *Stark. Ev.* 283; *Scott v. Gilmore*, 3 *Taunt.* 226; *Hunt v. Knickerbocker*, 5 *Johns.* 326; *Featherstone v. Hutchinson*, *Cro. El.* 199; *Greenwood v. Curtis*, 4 *Mass.* 93; 6 *Mass.* 358; *Wheeler v. Russell*, 17 *Mass.* 258; *Springfield Bank v. Merrick*, 14 *Mass.* 322; *Law v. Hodson*, 11 *East*, 300; *Patton v. Nicholson*, 3 *Wheat.* 204; *Craig v. Missouri*, 4 *Pet.* 410, 436; *Mitchell v. Smith*, 4 *Dal.* 269; *Maybin v. Coulon*, 4 *Dal.* 298; 2 *Stark. Ev.* 87.

Ruggles, for the plaintiff.

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

The position, taken by the counsel for the defendants, that if a part of the consideration for a promise be fraudulent, unlawful or immoral, the promise is void, is undoubtedly law, and is well supported by the authorities cited. Nor are we disposed to find fault with the doctrine, that where the consideration, or a part of it, is *malum prohibitum*, it vitiates and invalidates the promise, as much as if it had been *malum in se;* both being unlawful, and neither entitled to favor or indulgence. In order to apply the principle to the case before us, it must be made to appear that some portion of the consideration of the note in question was unlawful. The sale of tickets not authorized by a law of this State, was illegal; and if the note was given in part for tickets of this description, it cannot be recovered.

Prior to the fifteenth of *March*, 1826, there was due from the defendants to the plaintiff, a balance of about three hundred dollars, on an account, in which there was charged to him foreign tickets to a considerable amount. On or before that day, the defendants sent to the plaintiff, to be credited on account, about eight hundred dollars, which left a balance in their favor of five hundred dollars. We

must regard so much of this as was necessary for this purpose, as paid in discharge of the balance before existing against the defendants. The report states that the tickets, delivered prior to that period, were thus paid for. The plaintiff had a right so to appropriate the money; nor did the defendants, at the time they sent it, or at their final settlement, claim to have it differently appropriated. It does not present a case, in which a question may arise, to which of several debts, a payment had been applied. If the defendants had been indebted to the plaintiff, on lawful charges, to the full amount of the money forwarded, although he gave no directions at the time, he might perhaps have insisted that it should be so applied. But as it overpaid every species of demand which the plaintiff claimed, there can be no ground of controversy upon this point.

There was no liquidation of accounts in form between the parties, on the fifteenth of *March* 1826, but on that day the plaintiff was the debtor of the defendants. The balance was subsequently changed by new items of charge on the part of the plaintiff, liable to no legal objection. And for the balance thus subsequently accruing, the note, for which the one in question was in part substituted, was given. Upon the facts, it cannot admit of question but that the defendants, on the fifteenth of *March* 1826, intended to pay and did pay for the tickets unlawfully sold, and although not compellable by law to make the payment, they have no legal title to reclaim it. They were equally guilty with the plaintiff in violating the law, which will lend its aid to neither, either in enforcing contracts of this description, or in recovering back the consideration upon which they may be founded. Besides, in this case the defendants have as little claim in equity as at law, for they had the full value of the charges, which they think proper at this late period to dispute, after having once paid for them, and after having subsequently given a note at two successive times, on account of lawful tickets, afterwards purchased. The accounts being kept in continuation, does not change the principle.

In *Maybin v. Coulon*, 4 *Dall.* 298, the court express a wish that the sum reported to be due from one of the parties, could be distinguished from the general mass of illicit transactions; which they

pronounce impossible, and therefore refused to sustain an award made in favor of one of the parties. It is otherwise here. It manifestly appears that the new balance, after *March* 1826, in favor of the plaintiff, arises from lawful charges, and to these the consideration of the note must be referred. The motion to take off the default is overruled.

KENT *& al. vs.* PLUMMER.

If land be attached on mesne process, and afterwards the creditor have notice of a prior conveyance made by the debtor, yet such notice does not impair or affect the lien created by the attachment.

If land be conveyed to *A* whose deed is not recorded; and he gives bond to *B* to convey the same land to him upon certain conditions; and in the meantime *B* enters into and occupies the land, with the consent of *A*; such occupancy is implied notice of title, and will protect the land against an attachment by the creditor of *A*'s grantor.

IN this case, which was a writ of entry against *Joseph Plummer*, and came before the court upon a case stated by the parties, the facts appear in the opinion of the court, which was delivered by

PARRIS J. The facts, placed in chronological order, are these. On the 10th of *March* 1823, *Eli Nelson*, then the undisputed owner of the demanded premises, for a valuable consideration conveyed the same to one *Nathan Plummer* in fee.

On the 13th of *May* 1826, the demandants caused the same premises to be attached as the property of said *Nelson*, in their suit against him. On the 27th of *September* 1826, *Nelson's* deed to *Nathan Plummer* was registered.

In *April* 1827, the demandants recovered judgment against *Nelson*, and within thirty days, in due form, levied their execution on the land in question.

Thus it appears that the attachment of the premises was prior to the registry of the deed, but that the levy was subsequent to it. The question is whether the title of the demandants is defeated by express or implied notice of the deed from *Nelson* to *Plummer*. It is agreed that express notice of it was not given to the plaintiff's attorney until after the attachment; this therefore, cannot avail the tenant. The point was expressly decided in the case of *Stanley v. Perley & al.* 5 *Greenl.* 369. The court there say "the very object of an attachment is to bind the property attached. It is the incipient step towards acquiring a title; and if this step be fairly taken, and without notice of any existing conveyance from the debtor, it may be lawfully followed by a levy within thirty days after rendition of judgment, and the title be thus perfected; though at the time of the levy, the creditor may have such notice."

As to implied notice, the facts are these. On the day when the deed was given by *Nelson* to *Nathan Plummer*, he entered into the premises under his deed, and on the same day exchanged farms with *Joseph Plummer* the tenant, who conveyed his farm to *Nathan Plummer*, and received from him a bond for a deed of conveyance to the tenant of the premises demanded; and on that day, or a few days after, he took possession of the same, and has ever since remained in the quiet and peaceable possession, and during all that time has occupied and improved the same. Judge *Trowbridge*, 3 *Mass.* 575, says, "if one seised in fee of land, for a valuable consideration, by deed bargains and sells the same to another in fee, the deed gives the bargainee a right to enter, and when he enters by force of that right, he then is possessed of the land, and complete tenant in fee; and such entry being followed by a visible improvement of the land and taking the profits thereof, is such an evidence of an alteration of the property as will amount to implied notice."

The same principle is recognized and established in the following cases. *Farnsworth v. Child*, 4 *Mass.* 637; *Prescott v. Hurd*, 10 *Mass.* 60; *Marshall v. Fisk*, 6 *Mass.* 24; *Davis v. Blunt*, *ib.* 487; *Priest v. Rice*, 1 *Pick.* 164; *Newhall v. Pierce*, 4 *Pick.* 450; *Hurd v. Cushing*, 7 *Pick.* 169; *McMahan v. Griffin*, 3

Pick. 149. An attaching creditor, without notice, stands on the same ground as a second purchaser.

So far as it respects the principle of implied notice from change of property and possession, we do not perceive any ground for distinguishing the possession and improvement of the tenant under his exchange of farms, and the bond given him for a deed, from such possesion and improvement under a deed from *Nathan Plummer* to him, had such a deed been given. He was the rightful possessor under the exchange, with an assurance for, and a right by a bill in equity to obtain the conveyance of the legal title. In legal operation, we think, the facts present the defence on the same ground as if *Nathan Plummer* were the defendant in this action, and had occupied and improved the premises to the present time, in the same manner as the tenant has held them since he entered.

A nonsuit must be entered.

Wood, for the demandants.

Barnard, for the tenant.

O'Dee *vs.* McCrate.

The Judge of Probate has power, by *Stat.* 1821, *ch.* 51, *sec.* 23, 24, to call before him and examine under oath as well the executor or administrator of an estate, when suspected and charged by the heir with embezzlement of the property, as any other person entrusted with property by the executor or administrator.

Such process can only result in a discovery of facts, to serve as the basis of ulterior proceedings.

The lapse of thirty years since the transactions inquired into, is no bar to such examination.

And such executor may be held to answer under oath respecting the existence of the will, his appointment as executor, the nature and value of the estate of which the testator died possessed, and any facts relative to his administration, and the existence of any muniment touching the estate; but not respecting any conveyance of real estate to him in trust, by the testator, prior to his decease.

This was an appeal from a decree of the Judge of Probate. The complainant represented that she was the only child and heir at law of *John O'Dee*, who died in the year 1799, leaving a large estate both real and personal; and that she had reason to believe and did believe that the personal estate came into the hands of the respondent, and that he had embezzled and concealed, or had conveyed away the same. She therefore prayed process against him, and that he might be examined under oath touching said property.

The respondent appearing before the Judge of Probate, the complainant prayed that he might be required to answer the following interrogatories, viz:—

1st. Whether he was appointed executor of the last will and testament of *John O'Dee*, and caused the will to be proved.

2d. Whether any and what goods and effects of said *John* came to the hands of the respondent after his decease, and of what value.

3d. Whether he had caused such goods and effects to be appraised, and had returned an inventory thereof; and whether he had any of them still in his possession.

4th. Whether he had ever rendered any account of said goods and effects to the Judge of Probate.

5th. Whether he had the original will, or a copy of it, in his possession; and the particulars of his knowledge of, and control over, the same.

6th. Whether he paid any and what consideration to said *John* for a deed of a certain house and lot of land in *Wiscasset*, dated *Aug.* 9, 1799, made by him to one *John Anderson*, in trust for the respondent; how long before the decease of the grantor was it made; and whether it was a *bona fide* conveyance for the respondent's own benefit, or in further trust for some other person.

7th. Whether, at the time of such conveyance, he gave back to the grantor any writing touching the same.

8th. Whether, and when, and in what manner, he paid or secured any and what part of the consideration money.

9th. Whether, after the death of the grantor, the respondent ever considered said house as belonging to this complainant, spoke of it as such, and accounted for the rent of it.

10th. What was the amount in value, and the nature of the property belonging to said *John* at the time of his decease.

11th. Whether, and in what capacity, the respondent lived with said *John*, from the time of his coming to *Wiscasset*, till his decease.

12th. Whether the complainant was the reputed child of said *John O'Dee.*

The respondent protested against being held to answer, alleging that *John O'Dee* died at *Wiscasset*, in *October* 1799, more than thirty years ago; and that if he left any goods or estate to be administered, they were left within the jurisdiction of the Judge of Probate for this county; and if any administration was granted upon his estate, it was granted by said Judge, within twenty years after the death of said *O'Dee;* that the Probate records would show when, how, and to whom such administration was granted, and what became of the property; and that no proceedings touching the estate or administration thereof were known by the respondent to be still pending.

And as to the second, fifth and tenth interrogatories, the respondent further protested against being held to answer, because it did not appear that the complainant was executor, administrator, heir,

creditor, legatee, or a person having lawful right or claim to any part of the estate of said *John O'Dee;* again alleging, as before, that said *John* died at *Wiscasset* in *October* 1799, and that the disposition of his effects should appear by the Probate records, and not otherwise; and if at any time any money, goods, or chattels, of said *John* came into his possession, they came more than thirty years ago to him as executor of said *John*, and have been fully administered; and that no further proceedings touching the estate were known by him to be now pending in the Probate Court.

He also objected against being held to answer further to the third, fourth, sixth, seventh, eighth, ninth, eleventh and twelfth interrogatories, as being irrelevant and improper, or put to him as executor, or concerning real estate.

The Judge of Probate hereupon decreed "that the said *Thomas McCrate* is not held to answer further as to said second, fifth, and tenth interrogatories; it appearing by his answer that if any money, goods or chattels came to his hands and possession, he received them as the executor of said *John O'Dee*, and cannot be charged with concealing, embezzling, or carrying away property, the rightful possession of which is in himself. And that the said *McCrate* is not held to answer further as to any of the remaining interrogatories, because they are not pertinent, but irrelevant as to the discovery of money, goods or chattels of said deceased."

From this decree the complainant appealed to this court; assigning the general reasons that the respondent was bound by law to answer, and that his objections were insufficient.

Allen, for the complainant, cited *Higbee v. Bacon*, 8 *Pick.* 484; 4 *Mass.* 318; *Stearns v. Brown*, 1 *Pick.* 530; *Stebbins v. Lathrop*, 4 *Pick.* 33; *Saxton v. Chamberlain*, 6 *Pick.* 422; 7 *Pick.* 14.

Sprague, for the respondent, argued that he was not bound to answer further. The transactions inquired after were of more than thirty years standing; papers and vouchers were lost; witnesses dead; and the complainant herself had long acquiesced. The lapse of twenty years, too, terminates the original jurisdiction of the Judge of Probate over all estates.

The mode of remedy is not warranted by law. It is in derogation of the right to trial by jury, and is therefore not to be favored.

Nor is it sought here to charge the respondent as executor or administrator. As such he is not liable to this process; the only remedy being by action on his official bond. He may call others, by the statute, to answer for embezzlement; but is not amenable in this mode himself, for the reason that the property is already vested in and possessed by him. If he is not executor nor administrator, then the complainant cannot require him to answer, she not appearing in that charcter, nor in any other connected with the estate, and entitling her to complain. *Abp. of Canterbury v. Willis*, 1 *Salk.* 315, 316; 1 *Dane's Abr.* 560, 562; 5 *Dane's Abr.* 262, 388; *Toller's Ex.* 96; 6 *Pick.* 426; *Jenison v. Hapgood*, 7 *Pick.* 1; 1 *Burr.* 434; 3 *Dane's Abr.* 505; 4 *East* 130; 14 *Mass.* 257.

He further contended that under the statute, he could be held to answer touching none but personal estate. If any thing was sought respecting real property, it could be done only by bill in equity. If matter of record is inquired after, the record alone can be resorted to. But if the respondent refuse to answer, the court can make no decree which can be carried into effect.

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

MELLEN C. J. The original complaint made to the Judge of Probate, upon which the decree appealed from was passed, is founded on the 24th section of *Stat.* 1821, *ch.* 51. The first paragraph of it is in these words:—"That each Judge of Probate, within his county, be, and hereby is authorized and empowered to call before him and to examine upon oath any person suspected by any executor or administrator, heir, creditor, legatee or other person having lawful right or claim to the estate of any person deceased, of having concealed, embezzled or conveyed away, any of the money, goods or chattels left by the testator or intestate." The residue of the section provides that, on his refusal to be examined and answer interrogatories, the Judge of Probate is empowered to commit him to prison, there to remain until he shall consent to be examined and

answer interrogatories, or be duly discharged. The first question is as to the construction of the above clause. In the case of the *Selectmen of Boston v. Boylston*, 4 *Mass.* 318, *Sewall J.* in delivering the opinion the court observed, that it was at least questionable whether an executor or administrator could, under any circumstances, be liable to an examination pursuant to the provision of the statute; but if he were, that it was clear the authority of the court extended, under it, only to an examination for the purpose of discovery; that no other power was given by the statute; and, that in that extent, it was analogous to the power exercised by the court of chancery in England upon a bill for discovery. We presume nothing further than a discovery of facts is anticipated, as the legal result of the present proceeding; and the coercive power exercised for the purpose of obtaining such a discovery by the court of chancery, is all which the complainant prays for in the present application.

The 23d section of the abovementioned act declares, "that the several Judges of Probate, be, and hereby are empowered to convene before them any person that has been or hereafter may be entrusted by any executor or administrator with any part of the estate of the testator or intestate, who shall refuse, upon a citation issued by the Judge of Probate for that purpose, to appear before him and render a full account upon oath of any money, goods or chattels, and of any bonds, accounts or other papers belonging to the estate of the testator or intestate, which he shall have taken into his hands or custody, and of his proceeding for and in behalf of such executor or administrator in his capacity as such;" and on his refusal to render such account, he may be committed to prison as mentioned in the 24th section. Taking both the foregoing provisions into consideration, we do not perceive any substantial objection to the exercise of the power given in the 24th section in the present case. The section says, "any person" suspected, &c. by any executor, administrator, heir, creditor, legatee, &c. By the 23d section an executor or administrator may complain against any person entrusted with any property, &c. and, by the 24th section, against any person suspected by an executor or administrator of having concealed, embezzled or carried away any property, &c. And as the person so

suspected has no right to intermeddle with or hold possession of any of the personal estate of the deceased, without permission, the executor or administrator is the proper person to complain and institute proceedings against such intermeddler; but if an executor or administrator is suspected by an heir, creditor or legatee of having concealed any part of the personal estate of the decased, why should not the statute provision be applicable to such a case? It is within the language of the section, and we apprehend also within the spirit and meaning of it. For though an executor or administrator has a legal right to the possession of the personal estate, it is for the purpose of lawfully administering it for the benefit of all concerned; but not for the purpose of concealing it from their knowledge and clandestinely appropriating it to his own use, in violation of his duty. Hence the propriety of holding him liable to answer on oath as to his possession or disposition of property suspected and alleged to have been concealed by him. Such an appeal to his conscience often being the only proof which can be obtained of such concealment and unlawful appropriation. We think the present case within the statute in this view of it, if *McCrate* is an executor of the will of *O'Dee*, or an administrator on his estate.

In *Higbee v. Bacon*, 7 *Pick.* 14, the court entertained no doubt that an executor or administrator is liable to an examination on oath, upon complaint of those interested. And though in that case the complaint was not founded on the foregoing statute, but the object of it was to compel the administrator to account for a certain obligation on which he was bound to pay a sum of money to the intestate, they reversed the decree of the Judge of Probate, and commanded him to proceed upon the complaint, and in the examination of the subject matter of it, according to law. It appears in 8 *Pick.* 484, that the same parties were again before the court on a second appeal. The Chief Justice says, "it should be recollected that an administrator is a trustee, accepting the trust voluntarily, and so having no right to complain of the liabilities of the trust." The same principle is equally applicable to an executor. An honest man, whether an executor, administrator or a private individual, has no

occasion to avoid or to fear such an examination. He is merely called upon to state the truth under oath.

In the case before us the complainant alleges in her complaint, that she is the only child and heir at law of *John O'Dee*; and she has made oath to the truth of the statement. She does not make the charge against *McCrate* in any particular capacity, but according to the provision of the statute, she, as heir, has a right to the benefits which the answers to the proposed interrogatories may afford her, in obtaining redress for the alleged injuries of which she complains. The age of the transactions to which the interrogatories have reference, furnishes no ground to *McCrate* for refusing to answer, and in his answer to state such facts as are within his knowledge and recollection. We do not perceive any thing irrelevant or improper in most of the proposed interrogatories, nor any legal ground for a refusal to answer them.

Accordingly the decree of the Judge of Probate, appealed from, is hereby reversed; and he is hereby commanded to proceed upon the complaint, and in the examination of the said *Thomas McCrate*, touching the estate of the deceased *O'Dee*, as expressed in the first, second, third, fourth, fifth, tenth, eleventh and twelfth interrogatories aforesaid only; but may examine the said *McCrate* as to his knowledge of the existence of the paper mentioned in the seventh interrogatory, and of its present situation, and in whose possession it is and as to its contents; but not as to its execution by said *McCrate*. All which said Judge of Probate will proceed to do, according to law, after proof has been adduced to the satisfaction of said Judge that the complainant is the daughter and heir at law of said *O'Dee*. And the cause is remitted to the Probate Court for the above purposes.

The proprietors of side-booms in ANDROSCOGGIN *river vs.* HASKELL *& al.*

The *proviso* in the private act of *March* 15, 1805, incorporating the Proprietors of the side-booms in *Androscoggin* river, with the right of toll, and in the additional act of *Feb.* 29, 1812, "that the fees aforesaid shall, at all times hereafter, be subject to the revision and alteration of the legislature," is not satisfied by a single act of revision of the tolls therein established; but is a subsisting and perpetual reservation of the right to increase or reduce the fees from time to time, at the pleasure of the legislature.

Therefore, where, by a subsequent statute, the fees were increased above the rate first established, but without any new reservation of the power of revision, it was held that the legislature still had the power of reducing them at its pleasure.

The provision in the private act of *March* 21, 1829, that the same corporation shall not be entitled to receive toll till the logs in their booms are surveyed by a surveyor appointed by the selectmen of *Brunswick* or *Topsham*, is constitutional; and it is the duty of the corporation, and not of the owner of the logs, to cause such survey to be made.

THIS was *assumpsit* for tolls, for securing the timber logs of the defendants in the plaintiff's booms above the bridge, at the lower falls in *Brunswick*, charged at fifty cents the thousand.

The corporation was created by the private act of *March* 15, 1805, authorizing certain individuals to lay and maintain side booms in *Androscoggin* river, from the bridge between *Brunswick* and *Topsham*, down to the narrows, for the purpose of stopping and securing masts, logs and other lumber. In the fourth section of this act various tolls were established for the timber so secured, and among them for board-logs at the rate of forty cents for a thousand feet of boards, concluding thus:—"*Provided nevertheless*, that the fees aforesaid shall, at all times hereafter, be subject to the revision and alteration of the legislature." By the additional act of *Feb.* 29, 1812, the proprietors were authorized to extend their booms above the bridge, to any place within the limits of *Brunswick* and *Topsham*; the tolls generally were revised; and the toll for board-logs was re-

duced to thirty cents, with a similar reservation of the power of alteration and revision. Another act was passed *Jan.* 31, 1820, authorizing the proprietors to extend their booms at the carrying place to within eight rods of the *Topsham* shore; and raising the toll for board-logs alone, to fifty cents the thousand; without any express reservation of any farther right to revise or alter the tolls. By another act of *March* 15, 1821, this toll was again reduced to forty cents, with an express reservation of the legislative right to revise and alter, as before. By the resolve of *Feb.* 15, 1828, the proprietors were required, on or before a certain day, to make such piers and booms for the security of lumber as should be adjudged sufficient for that purpose by certain commissioners therein named, upon pain of prosecution to judgment of forfeiture of their charter; and their right to receive tolls was in the mean time suspended. This resolve was complied with. And by another statute passed *Feb.* 27, 1829, the selectmen of *Brunswick* and *Topsham* were required annually to appoint two or more suitable persons to be surveyors of logs at the side booms in those towns; who were to be duly sworn, and liable to certain penalties for any fraud or falsehood in the exercise of their office; and the proprietors were prohibited from receiving any tolls for logs, unless such logs, after having been rafted out, had first been surveyed by such surveyor, and a certificate of the survey delivered to the person receiving the same. The tolls for board-logs were by this act again reduced to thirty cents the thousand, with an express reservation of the right of future revision, as before.

It appeared, at the trial of this cause before the Chief Justice, that prior to the act of 1829, it was the practice of the boom-master to survey the logs as they were rafted out, in order to enable him to return an account of the quantity to the treasurer, whose duty it was to collect the tolls; and that no charge was made for such survey. If the owner of the logs was dissatisfied, he had the right to procure another survey, at his own expense. After the passage of the act of 1821, and until that of 1829, the treasurer claimed no more than forty cents the thousand; but after the passage of the latter act, the proprietors passed a vote disapproving the conduct of

their officers in receiving a less sum than fifty cents, asserting their title to this latter toll, and directing the adoption of legal measures to collect it; after which he demanded fifty cents.

The defendants brought into court, upon the common rule, the sum of seventeen dollars, being the amount of their tolls at the rates mentioned in the statutes, up to the time of the appointment of surveyors under the act of 1829. At the time of taking out their logs, the defendants required that they should be surveyed by a surveyor appointed by the selectmen of one of the towns, according to the act of 1829, which the boom-master declined, denying it to be his duty to procure such survey; but he offered to survey and deliver them according to the usage which existed before the passage of that statute; which the defendants declined; and the logs were delivered without survey into the defendants' hands, saving the rights of both parties.

Upon these facts the cause was reserved for the decision of the court; a verdict *pro forma* being returned for the plaintiff; which was to be amended, or set aside and the plaintiff nonsuited, as the court should determine.

Fessenden and *Sprague*, for the plaintiffs, argued that the right reserved by the legislature to alter the rates of toll could be exercised but once; and when thus exercised, the force of the proviso was spent. The act of 1820, increasing the toll, to fifty cents, was a new and distinct grant to the corporation, absolute in its terms; and which could not constitutionally be resumed, nor abridged. The acts of 1821 and 1829 are therefore unconstitutional and void, as they are an attempt to take away rights already vested, and against the will of the corporation. *Fletcher v. Peck*, 6 *Cranch*, 87; *Dartmouth College v. Woodward*, 4 *Wheat.* 518; *Calder v. Bull*, 2 *Dall.* 386; *Dask v. Van Kleeck*, 7 *Johns.* 477; *Society, &c. v. Wheeler*, 2 *Gall.* 139; *Charles river bridge v. Warren bridge*, 7 *Pick.* 344; *Propr's Ken. purchase v. Laboree*, 2 *Greenl.* 275.

But if those statutes are constitutional, yet being merely contracts, they are not binding on the corporation till accepted; and here is no evidence of any corporate act of acceptance. *Andover & Medf.*

turnp. v. Hay, 7 *Mass.* 102; *Essex turnp. corp. v. Collins*, 8 *Mass.* 292; *Hayden v. Mid. turnp. corp.* 10 *Mass.* 397; *Prop'rs Canal bridge v. Gordon*, 1 *Pick.* 297.

The act of 1829, they contended, was not to be understood as imposing on the corporation the duty of procuring a surveyor. If it did so, it was unconstitutional, as superadding a new obligation to a subsisting contract.

Allen and *Packard*, for the defendants.

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

MELLEN C. J. The plaintiffs contend that ever since the act of 1820 was passed, they have been entitled to boomage for logs at the rate of fifty cents per thousand, because, as that act contains no proviso, as the other acts do, the legislature had no constitutional power to reduce the amount of boomage thereby granted to the corporation. The correctness of this position the defendants deny; and whether the legislature had such right is one of the questions to be decided. It is a correct principle that a grant is a contract; and that rights absolutely vested under it, cannot be divested by an act of the legislature; to this point we will merely cite *Fletcher v. Peck*, 6 *Cranch* 87; *State of New Jersey v. Wilson*, 7 *Cranch* 164; *King v. Dedham Bank*, 15 *Mass.* 454; *Foster & al. v. Essex Bank*, 16 *Mass.* 270; *Charles river bridge v. Warren bridge*, 7 *Pick.* 344. But it is urged as a settled principle, and not denied, that where by the terms of a charter the legislature reserve to themselves the right to declare it void or revoke it, if certain events should take place, or to modify the terms of it in certain particulars according to their pleasure, they have a constitutional right so to do; because the charter is accepted on these conditions: and the principle here applies, *cujus est dare, ejus est disponere.* The logs, for the boomage of which the present action is brought, were boomed and secured in virtue of the act of 1812, extending the charter above the falls and bridge. As has been before observed, the same proviso is found in both the acts granting the right of maintaining

booms to the corporation; and both acts have been accepted. Here then we are led to the inquiry, "what is the legal import of the proviso in the act of 1812, and what is its effect? Its language is, "the fees aforesaid shall at all times hereafter, be subject to the revision and alteration of the legislature." Does the expression refer merely to the fees particularly stated in that act? If so, then they could never be subject to the revision and alteration of the legislature but once; and if instead of being increased to fifty cents per thousand, they had been reduced to twenty-five cents by the act of 1820, they could never have been raised again by virtue of the proviso merely; for on this principle the proviso would have been satisfied—have done its office, and spent all its force. Nearly at the same time, the proprietors of *Saco* boom were incorporated. The language of the proviso there is, "the fees or toll shall at all times hereafter," &c. Besides, such a construction is expressly repugnant to the language of the proviso, which is, "the fees aforesaid shall at all times hereafter be subject to the revision and alteration of the legislature." This must mean something more than one alteration. We apprehend the true construction to be more liberal than that for which the plaintiffs contend; and in order to give effect to the plain language of the proviso, we must understand it in the same manner as though it had been this: "provided nevertheless, that the amount of fees for stopping in said river and rafting and properly securing logs and other lumber as aforesaid, shall at all times hereafter be subject to the revision and alteration of the legislature." Such a construction makes the language of the proviso sensible and consistent; and gives effect to every part of it. Such, certainly, must have been the manner in which the legislature understood it, when they passed the act of *March* 15, 1821, as in the act of *January* 1820, the proviso was not inserted. In aid of our construction we may well suppose that the right of revision and alteration was reserved to the legislature, because the experiment, being a new one, and the anticipated profits uncertain, such a power might be highly useful, if not necessary, to prevent an undue or unreasonable income to the corporation; and the frequent changes and gradual reduction, as to the amount of boomage, furnish us with proof of the wisdom of those who in-

serted this proviso in the first and second acts before mentioned. It is true the same proviso is contained in the acts of 1821 and 1829; it was probably transcribed from the former acts without any particular motive, or else from abundant caution; but as, in our opinion, the insertion of the proviso, in any of the acts subsequent to that of 1812, was wholly unnecessary, the omission of it in the act of 1820, could not operate as a limitation upon the constitutional power of the legislature in 1821, to reduce the boomage in question from fifty cents to forty cents per thousand; or of the legislature in 1829, to reduce it from forty to thirty cents per thousand. In the case of *Holbrook v. Holbrook*, 1 *Pick.* 254, the court observe that the general system of legislation on the subject matter, may be taken into view, to aid the construction of any one statute relating to the same subject. In the numerous acts, establishing turnpike corporations, it will be found on examination that no right is reserved to the legislature to revise and alter the established toll at pleasure or until after a limited period. It is true they may increase the tolls without any such reservation, though not reduce them. So far as we have examined other acts granting tolls to bridge proprietors or canal proprietors, we have found no such reservation as that contained in the proviso under consideration. The natural inference from this distinguishing fact is that the legislature intended, in the present instance, to place the subject of fees or boomage, completely under their own control; so that at all times afterwards, they might have the undisputed power of regulating the income of the proprietors from this source, according to circumstances, by increasing or reducing the boomage. We cannot conceive that a proviso so unusual should have been introduced, to enable the legislature to make a single alteration—say, a reduction of two cents per thousand on logs, and in the same proportion on other timber and articles, and there be compelled to stop for want of authority to proceed any further. From a cursory examination of the acts of Massachusetts granting charters of the kinds before mentioned, it appears that no proviso of the kind in question is introduced until the year 1804, and very few are found till our own government was organized; since which time

it seems to have been the practice to introduce it in cases where tolls or fees are granted.

As to the boomage of all the logs boomed and received after the 21st of *March*, 1829, the defendants contend that the plaintiffs have no right to maintain their action, because the same were not legally surveyed, according to the provisions of the first and second sections of the act of 1829. The first section declares "that it shall not be lawful for the proprietors to ask, demand or receive the toll established by this act, of the owners of logs, by said corporation rafted out of said booms and secured for the several owners thereof, unless said logs, after they are rafted out of said booms and secured, shall be duly surveyed by a surveyor appointed and sworn as is hereafter provided; and a bill of the survey of said logs shall be delivered to the person receiving the same." The second section provides for the appointment of such surveyors and their qualification; which appointment is to be made by the selectmen of *Brunswick* and *Topsham*. The case finds that the logs referred to in this objection were never surveyed in the manner prescribed by the statute above mentioned; and the answer made to this objection is that the first section is unconstitutional, as it impairs the rights granted to the corporation by subjecting them to burdens and expenses, inconsistent with those rights, and, in their operation, destructive of them. By the terms of their charter, the proprietors have the control of the logs, until delivered to the owners; and a right to retain them until the toll or boomage is paid or secured to their satisfaction. They, of course, were obliged to have the logs surveyed by some person or persons, before the act of 1829 was passed, in order to ascertain the amount of toll or boomage which they had a right to demand and receive of the owners; and the report states that prior to that act "it was the practice of the boom-master to survey the logs as they were rafted out, in order to enable him to return an account of the quantity to the treasurer and collector, whose duty it was to collect the boomage; and no charge for such survey was made." It is understood that the nature of the survey is such as to be attended with very little trouble; and if there formerly was any expense attending it, that expense was borne by

the corporation. The act of 1829 has only provided, and doubtless for good reasons, that some indifferent and disinterested person or persons should make this survey; being appointed in the manner before mentioned, and acting under the sanction of an oath. It does not appear that such a survey is more troublesome or onerous to the corporation than any other, though probably it is more satisfactory, if not more correct and important; and, in order to insure such a survey, a certificate, in conformity to the act, is made a necessary preliminary to a recovery of the toll or boomage. We do not perceive how the provisions of the act now under consideration operate to destroy or impair any of the rights granted to the corporation by their charter. The cases, or several of them, cited by the counsel for the defendants, presented to the consideration of the court questions arising out of acts of the legislature, at least as liable to objection on constitutional grounds as the section of the act under examination. See also 4 *Peters* 514. It is not retrospective in its provisions; even if it compels the corporation to incur a small additional expense in the survey, it is no more than was required of the banks in procuring and using stereotype plates. It declares that proof of a survey, according to its provisions, shall be necessary to entitle the corporation to recover their fees. The legislature may surely prescribe what evidence shall be necessary to support actions of a particular kind; and, if in writing, how it shall be obtained and certified. Unless an act of the legislature, or some part of it, is evidently unconstitutional, this court would never feel at liberty to pronounce it so. The section imposes no new duty, but only requires that an existing duty shall be performed by persons of a certain character. The resolve of *February* 15, 1828, declared that unless this same corporation should, on or before the 15th day of *September* then next, make, erect and finish such piers and booms, at and above the carrying place in said river, between *Brunswick* and *Topsham*, as should be adjudged, upon view by certain persons specially designated, sufficiently strong, substantial and extensive to stop and secure all masts, logs and other lumber floating down said river, it should be the duty of the attorney general to take legal measures for causing their charter to be vacated; and that until

such piers and booms should be completed, and certified to be so by such designated committee, the corporation should have no right to receive any toll or fees. Here were duties and conditions imposed, not embraced in the charter; but the report states that pursuant to the resolve the piers and booms were completed and a certificate given accordingly. The corporation considered the subject under the control and jurisdiction of the legislature, and conducted accordingly. On the whole ,we are satisfied that the objection as to the constitutionality of those parts of the act of 1829 which we have been examining cannot be sustained. On this principle it appears that nothing more was due to the plaintiffs when the action was commenced, than the sum of seventeen dollars, which was brought into court on the common rule, and now belongs to the plaintiffs; and according to the terms of the report the verdict must be set aside and a nonsuit entered.

APPENDIX.

NO. I.

STATE OF MAINE.

EXECUTIVE DEPARTMENT,
Portland, February 13, 1830.

To the Justices of the Supreme Judicial Court.

GENTLEMEN,

Pursuant to the 3d section, 6th article of the constitution, I request your opinion on the questions growing out of the following statement of facts.

On the 9th of *December* 1829, the officiating Governor and the Council examined the returns of votes for Senators; and it appearing that sixteen Senators in the districts of Cumberland, Oxford, Lincoln, Kennebec, Hancock, Penobscot and Somerset were elected by a majority of the votes in each district, said sixteen Senators were duly summoned to appear; and it appearing, that in the districts of York and Washington no person had a majority of votes, the officiating Governor and Council declared, and so entered on their records, that there were three vacancies in York, and one in Washington. And the said sixteen did appear, were qualified by taking their oaths of office agreeably to the constitution, and took their seats at the Senate board. On the 14th of *January* 1830, the Senate having been organized by the choice of *Joshua Hall*, Esq. as President, and he having taken the chair, a committee was appointed to ascertain who was elected, what number of vacancies existed, and who were the constitutional candidates; which committee on the 26th of *January* reported, that the sixteen Senators abovementioned were duly elected, and also that, in the district of

York, *Benjamin Pike* and *Abijah Usher*, jr. were duly elected; and that there was one deficiency; and that *Moses Swett* and *James Goodwin* were the constitutional candidates to supply the deficiency; and also that in the district of Washington, there was one deficiency, and that *Obadiah Hill* and *Charles Peavey* were the constitutional candidates to supply the deficiency.

On the 26th of *January*, so much of this report, as respects the sixteen Senators first above mentioned, was accepted by the Senate; so much of the report as related to the election of *Abijah Usher*, jr. and *Benjamin Pike*, on motion made to accept the same, was negatived; and so much of the report as related to the district of Washington was negatived. No other vote was taken on this report, unless it be considered that the statement and determination signed by the eight Senators, and which is hereinafter named, is a vote or an equivalent to a vote; or unless the votes hereinafter mentioned, recognizing the right of the members from York and Washington to their seats, and to all the privileges of Senators elected by the people, are predicated on this report. On the first of *February* the House of Representatives sent a message to the Senate "requesting such Senators as have been elected, to meet the members of the House in the hall of the House of Representatives, on the second of *February*, at 11 o'clock, A. M. and elect by joint ballot the number of Senators required;" which message was communicated to the Senate on the same day. On the 2d of *February*, at 10 o'clock, A. M. a communication signed by the eight Senators hereinafter mentioned was sent to the House of Representatives expressing their consent and determination to meet the members of the House in convention, at eleven o'clock of that day, according to the message of the House of the 1st of *February*.

On the 2d of *February*, at 11 o'clock, A. M. the Senate being in session, Mr. *Kingsbury*, one of the sixteen Senators, moved an adjournment, that the members of the Senate might meet the members of the House of Representatives in convention; which question was decided by yeas and nays, the said eight Senators voting in the affirmative, seven Senators voting in the negative; and *Joshua Hall*, Esq. claiming to act as presiding officer, voted in the negative, and declared it not to be a vote; whereupon one of the Senators, who voted in the affirmative, read in his place the following protest and

determination, signed and subscribed under the hands of said eight Senators and requested that the same should be entered on the journal of the Senate, which was done.

"Whereas by the decease of the Hon. *Enoch Lincoln*, late Governor of the State of Maine, it became the duty of the President of the Senate to exercise the office of Governor until another Governor shall be duly qualified, and by the constitution his duties as President, while so exercising the office of Governor, shall be suspended: And whereas the Hon. *Joshua Hall* was on the fourteenth day of *January* last duly elected President of the Senate, and accepted the office, and still continues to hold the same, and no other person having been duly qualified to act as Governor, we the undersigned, Senators of the State of Maine, hereby protest against the right of the said *Joshua Hall* to preside and act and vote at the Senate board, believing such a course to be incompatible with the provisions of the constitution: And whereas it has been ascertained by the Senate that sixteen Senators have been elected, and there are four vacancies, to wit, three in the district of York, and that *John Bodwell*, *Abijah Usher*, Jr., *Nathan D. Appleton*, *Moses Swett*, *Benjamin Pike* and *James Goodwin*, are the constitutional candidates to fill said vacancies; and one vacancy in the district of Washington; and that *Obadiah Hill* and *Charles Peavey* are the constitutional candidates to fill said vacancy: And the members of the House of Representatives having communicated to the Senators a message proposing a meeting of the Senators elected and the members of the House of Representatives, in the hall of the House of Representatives, at eleven o'clock this forenoon, for the purpose of electing by joint ballot the number of Senators required by the constitution to fill said vacancies: We hereby concur with the members of the House, and consent to meet them at the time and place and for the purposes aforesaid, and we claim to have this statement and determination entered upon the Journal of the Senate." Which statement and determination was signed by the eight Senators who voted in the affirmative on the question of adjournment. The Senator who read and presented said protest, then declared, in presence of the Senate, that he considered the Senate as regularly adjourned, said *Hall* having no right to vote on the question of adjournment; and thereupon the said eight Senators left the senate chamber and

repaired to the hall of the House of Representatives to meet the members of the House in convention. At which convention, it was resolved, "that the members of the House of Representatives present" (there being at this time a quorum present) "and the Senators present do now form themselves into a convention for the purpose of filling the vacancies at the Senate board."

The eight Senators above mentioned presented a statement and declaration of the same import and tenor as the one above recited, and claimed to have the same entered on the journal of the convention, which was done. The report of the committee appointed by the Senate to examine the votes for Senators and the votes and proceedings of the Senate on the same, and also the proceedings of the officiating Governor and Council of the 9th of *December* above mentioned, were read to the convention, and entered on the journal of the same. Whereupon the following preamble and order was moved and passed.

"Whereas it is provided by the constitution, that, 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 Representatives, and such Senators as shall have been elected, shall, from the highest numbers of the persons voted for on the lists, equal to twice the number of Senators deficient in every district, if there be so many voted for, elect by joint ballot the number of Senators required: And whereas it appears by the records of the Governor and Council, that on the 9th day of *December* last, the votes for Senators in the several Senatorial districts were counted, and that sixteen Senators were elected and that there were three vacancies in the district of York: And whereas it appears, by a report made by a committee appointed by the Senate to report on the election of Senators, and the proceedings of that body on the same, as appears by their journal, that sixteen Senators have been elected by the people, and that three vacancies exist in the district of York: And whereas it appears, by the records of the Governor and Council, and the proceedings of the Senate above referred to, that the constitutional candidates in said district, to supply the deficiencies in the same, are *John Bodwell*, *Abijah Usher*, jr. *Nathan D. Appleton*, *Benjamin Pike*, *Moses Swett*, and *James Goodwin*, and that they are the constitutional candidates for said district to supply the deficiencies in the same:

Therefore, resolved, that this convention now proceed to elect by joint ballot three Senators from the six candidates above mentioned to fill the vacancies in the county of York."

And thereupon *John Bodwell*, *Abijah Usher*, jr. and *Nathan D. Appleton* were elected to fill the vacancies in the district of York. A similar preamble and resolve relating to the district of Washington was moved and passed; and thereupon *Obadiah Hill* was elected to fill the vacancy in the district of Washington.

The four gentlemen thus elected were duly qualified as Senators, and took the seats at the Senate board which were assigned to them by the Senate; and one of them was afterwards appointed by the Senate on two committees. On the 5th of *February*, when the Senators from York took their seats, a vote was passed that they should be allowed to vote in the choice of a President *pro tem.* And from that day till the 10th of *February* inclusive, they were allowed without objection to participate in all the votes and privileges of the Senate, and answered to their names at the call of the Secretary, and their yeas and nays were counted and recorded.

On the 8th day of *February*, the following preamble and order was moved and passed. "Whereas on the first day of *February* instant, a message was communicated by the House of Representatives to the Senate, requesting such Senators as had been elected to meet the members of the House of Representatives in the hall of the House of Representatives, on the 2d instant, at 11 o'clock in the forenoon, and elect by joint ballot the number of Senators required: And whereas eight of the Senators elected, in compliance with such request, and in conformity with the requirements of the constitution, at the time assigned repaired to the hall of the House of Representatives, and there met the members of the House of Representatives, and in conjunction with them, proceeded to elect three Senators to supply the vacancies in the senatorial district of York, and one Senator to supply the vacancy in the senatorial district of Washington: Therefore, ordered, that said four Senators were duly and constitutionally elected to fill vacancies existing; and that the three first above named, having been qualified, are entitled to seats at this board, and to all the rights and privileges of Senators elected by the people:" Which passed in the affirmative; the yeas being eight and the nays seven. At the time this order passed,

Messrs. *Bodwell*, *Usher*, and *Appleton*, the members from York, being in their seats, requested to be and were excused, and did not vote. Mr. *Hill*, from Washington, had not at this time taken his seat at the board. On the 11th of *February*, a vote passed the Senate, without a previous vote to reconsider any former vote on the subject, and without dispensing with the rule of the Senate hereafter named, that the members from York and Washington were not legally elected, nor entitled to seats at the board; eight Senators voting in favor of it, and six against it; the presiding officer refusing to count or allow the names of the members from York and Washington to be called. By the rules of the Senate, a motion to reconsider any vote can be made only by a member who voted with the majority, and on the same succeeding day after such vote was taken. And no rule can be dispensed with, except by a vote of two thirds of the members. No motion has been made to reconsider any of the votes above mentioned touching the election, or right to a seat, or right to vote, of any of the Senators from York or Washington.

Mr. *Hall* vacated the chair as presiding officer of the Senate on the 5th *February*, and assumed the duties of the Executive until the afternoon of the 10th *February*, when, the Governor being qualified, he resumed the chair as presiding officer of the Senate.

QUESTIONS. As *article* 4th, *part* 2d, *section* 1st, provides that "the Senate" shall consist of not less than twenty, and as the 2d *section* of the same article provides that "the number of Senators shall not exceed twenty at the first apportionment," can any number less than twenty compose "the Senate" with power to determine who are elected by a majority of votes to be Senators in each district, or can any number less than twenty compose a Senate? In other words, must not any vacancies in the elections of the people, while the Senate is composed of the least number that constitutes a Senate, be filled by a convention of the members of the House of Representatives and such Senators as shall be elected, to constitute a Senate?

2. Has the President of the Senate, when the office of Governor is vacant, and when he ought to be acting as Governor, a right to preside and vote at the Senate board?

3. If the President of the Senate, has not such a right, are the acts of the majority of the other members of the Senate to be con-

sidered as valid acts of the Senate, although not declared a vote by such President?

4. Can a member of the Senate, who has been declared to be duly elected by a vote of the Senate, be deprived of his seat in any other way than by a vote of expulsion, two thirds concurring?

5. On the foregoing statement of facts, are Messrs. *Appleton, Bodwell, Usher* and *Hill*, constitutionally entitled to retain their seats?

JONATHAN G. HUNTON.

Cambridge, February 15, 1830.

To the Governor of Maine,

Your communication bearing date the 13th instant, addressed to the Justices of the Supreme Judicial Court, was received this forenoon. I have examined the several facts it contains with such lights as my present situation affords, and avail myself of the earliest opportunity of answering the several questions you have proposed, growing out of those facts; in doing which, some allusion to a part of them seemed necessary, as explanatory of the grounds of my opinion.

As to the first question, my opinion is that a less number than twenty Senators can form "the Senate." Because the constitution declares that a majority of that number shall constitute a quorum for doing business; that is, such business as the Senate constitutionally do. In this sense, I apprehend, the term is used in the constitution; and in this sense, the words "the Senate" are certainly employed in the first line of the second paragraph in your communication.

As to the second question, my opinion is that while the President of the Senate, in virtue of his office, as such, is clothed with the power of exercising the office of Governor, he has no right to preside over the Senate, or vote as a member of that body.

As to the third question, I would respectfully observe, that it is one which seems to me to be more proper for the Senate than for the Judiciary to decide. It may, and probably does, in some mea-

sure depend on the rules and regulations of the Senate, as a deliberative body, with which the court are not acquainted. But, in further reply to this question, as the facts out of which it grows are presented also for consideration, I deem it proper to remark, that it appears from them that the question on which the President of the Senate voted on the second of *February*, was merely a question of adjournment; a question which had not, and could not have any effect or influence as it respects the constitutionality or unconstitutionality of the convention on that day for the purpose of supplying the vacancies in the Senate.

As to the fourth question, my opinion is that a member of the Senate, who has been duly elected and declared so to have been by the proper tribunal, cannot be deprived of his seat in any other way than by a vote of expulsion, two thirds concurring. But the court have already decided, that the convention, by the major vote of which the four persons, whose claims are in question, were chosen as Senators, was not constitutionally formed; or in other words, in reply to the questions proposed to them, they have decided that a convention of the Senate and House of Representatives could not be constitutionally formed for the purpose of supplying deficiencies in the Senate, without a concurrence of the two branches; and that a convention, formed without such concurrence, and before certain preparatory proceedings were had by the Senate, could not constitutionally proceed to fill vacancies. I do not perceive by the statement of facts before mentioned that any vote of concurrence was passed by the Senate as to forming the convention; or that, before it was formed in the manner stated, any vote had been taken, ascertaining the deficiencies that existed; but only that the Senate refused to accept a report of a committee as to the choice of two Senators in the county of York.

The constitution has provided only two modes in which Senators can be elected; one by the qualified votes of the districts for which they are respectively chosen; the other by a constitutional convention of the two branches. It is true, the Senate are authorized and directed to examine the returns to ascertain who are elected; and in so doing they may in many cases settle the question, and arrive at conclusions different from those drawn by the Governor and Council, from an inspection of the returns of votes. But still, in this pro-

cess they do not elect Senators, but only ascertain and decide whom the qualified voters have elected. But they cannot by their votes and proceedings give validity to an election of Senators by a convention unconstitutionally formed, and clothe them with the qualifications, rights and powers of Senators constitutionally chosen. To remove doubts, as far as in my power, I have, perhaps, given a broader answer than was necessary. But I hope it may not prove unprofitable. From the facts now before me, I perceive no sufficient reason for giving an opinion respecting the unconstitutionality of the convention, different from that which the court have recently given. The result is plain that the four persons were unduly elected by the convention, and by that election acquired none of the rights of Senators.

As to the fifth question, it seems clear to my mind, that according to the view I have taken of the subject, the Senate is the only tribunal constitutionally authorized to decide it. The returns of votes are before them, subject to their examination ; and their decision upon them and their consequent proceedings will, of course, be in accordance with the constitution, as understood and construed by the court in their opinion delivered in answer to your questions, in connexion with their former opinion respecting the constitutionality of the convention and its proceedings.

All which is respectfully submitted.

PRENTISS MELLEN,
Chief Justice S. J. C.

The undersigned concur in the foregoing opinion.

NATHAN WESTON, JR.
ALBION K. PARRIS.

NO. II.

To the Hon. the House of Representatives of the State of Maine.

The undersigned, Justices of the Supreme Judicial Court, have been furnished with copies of your order of the 26th of *January* last, requesting the opinions of the Justices of said court, on the following questions:

Question 1. Is a citizen of the United States, under the first section of the second article of the constitution, who has had an established residence in this State for the term of three months next preceding any election, an elector for Governor, Senators and Representatives in the town or plantation where he has an established residence at the time of such election, but where he has had such established residence for a less period than three months?

Question 2. Do printed ballots come within the meaning of that part of the same section which requires that elections shall be by written ballots?

In answering the questions proposed, especially the first, it will be necessary to examine with care the whole of the above mentioned section; they have therefore deemed it advisable to insert it here at large. It is in these words:

"Every male citizen of the United States, of the age of twenty one years and upwards, excepting paupers, persons under guardianship, and Indians not taxed, having his residence established in this State, for the term of three months next preceding any election, shall be an elector for Governor, Senators and Representatives, in the town or plantation where his residence is so established; and the elections shall be by written ballots. But persons in the military, naval or marine service of the United States, or this State, shall not be considered as having obtained such established residence, by being stationed in any garrison, barrack or military place, in any town or plantation; nor shall the residence of a student at any seminary of learning entitle him to the right of suffrage in the town or plantation where such seminary is established."

The framers of the constitution must be presumed to have selected, employed and arranged the language of its several provisions with care and attention as to its import, its extent and its limitations;

using no more words than were necessary, and intending that all should be considered as inserted for some good purpose, and to be regarded in the construction of those provisions.

In respect to the first question submitted, it may be observed that a person, in order to be entitled to vote for Governor, Senators and Representatives must possess three qualification, namely :

1. He must be a citizen of the United States.

2. He must have had a residence established in this State for three months next preceding any election of Governor, Senators and Representatives ; and

3. His residence must be in the town or plantation where he exercises the right of an elector ; but whether it must have been for the full term of three months next preceding such election is the question.

The section under examination, after stating the prerequisites of citizenship and established residence in this State for three months, as before mentioned, declares that a person, possessing these qualifications "shall be an elector for Governor, Senators and Representatives in the town or plantation where his residence is so established." What then is the meaning of the word "so," as used in the quoted sentence? It is not to be rejected at the pleasure of any one, for it is a word of meaning—a qualifying term ; equivalent to the expression "as aforesaid ;" and the extent and nature of its qualifying character are to be ascertained by reference to the antecedent, to which, and to which only, it can be applicable ; that is, to the residence in this State for the term of three months next preceding the election. The undersigned apprehend that the same construction should be given to the sentence as it stands in the section, as would at once be given, if the expression had been "in the town or plantation where his residence had been established for three months next preceding the election ;" and that such is the only fair and sensible construction. The undersigned are confirmed in this opinion by the phraseology of the next paragraph in the section, which is in these words : "But persons in the military, naval and marine service of the United States or this State, shall not be considered as having obtained such established residence by being stationed in any garrison, barrack or military place in any town or plantation." What residence? None is described in the preceding

paragraph, but a residence of three months next preceding the election. It is not perceived how it can, by legitimate construction, refer to, or intend, any other, or for any less term of time. In addition to the reasons already assigned, the undersigned cannot but feel impressed with the idea that it is more consistent with the purity of elections, and more promotive of that purity, than any other construction; and for that reason also, it may be considered as proper to infer that such was the construction contemplated by those who framed the constitution. In forming and correcting the list of voters in any particular town, it is easy for the proper officers to ascertain whether a certain person has had an established residence therein for three months or more next preceding any election of State officers. The means of information are within their reach and at their command. But suppose a person should come into one of the frontier towns of the State, and have an established residence therein for one month, and should then immediately remove to another town in the interior and have a similar residence there for another month, and should then remove to a third town in another part of the State and have a similar residence there for one or two months; what means of information could the proper officers of the last town have, on which to decide, even to their own satisfaction, as to the qualification, by residence, of such person, to exercise the right of an elector in such town? A construction that would give such person a right to vote there, would, in the opinion of the undersigned, open a door for innumerable frauds in practice. They are unwilling to believe that such a course of proceeding was ever intended to be sanctioned by the article of the constitution we have been considering. It is provided in article 4th, of first part, section 4th, that no person shall be a member of the House of Representatives, unless, among other qualifications, he shall have been resident in the town or district which he represents, for three months next preceding the time of his election. Was not this provision intended to give electors an opportunity of knowing the character and qualifications of a candidate before electing him to so responsible an office? And, in its spirit, is it not in harmony with the construction above given as to one of the qualifications of an elector? With this remark the undersigned close their reasoning in relation to the first question proposed.

As to the second question proposed, it may be observed that those who framed the constitution undoubtedly intended to guard against many inconveniences in the before named elections, by excluding all those other modes by which questions are often decided in popular assemblies. This was the general object. The word "ballot" may be considered as opposed to a vote by word or by signs; as, for instance, a vote by yeas and nays, or the common mode of voting by holding up the hand, or by rising and standing till counted. It may well be supposed that the mode prescribed was preferred on account of its vast superiority in point of convenience and certainty, to any other mode; and also because it secures a greater degree of independence than any other in the exercise of the elective franchise, by enabling every elector to express and give operation to his opinion, without subjecting that opinion to the control, influence, or knowledge of any other person. In this view of the subject, which is presumed to be a correct one, the desired and contemplated objects are all attained with equal care and with much more convenience and facility by printed ballots, than by those written in the usual manner with a pen. Such, then, having been, as it is believed, the general design of the provision, the only question is whether printed ballots come within the meaning of it.

In common parlance nothing is more frequent than for people to speak of the writings of certain distinguished authors; meaning their printed works in volumes. "To write," says Doctor Johnson, "is to express by means of letters; to engrave—to impress." Hence it follows that the participle "written" may, and often does mean not only what is expressed by letters, but what is engraved or impressed; the latter word meaning printed. A printed sheet is called an impression. Law books define a deed, to be "a writing sealed and delivered by the parties." Judge *Blackstone*, says, "a deed must be written, or, I presume, printed upon paper or parchment." Now it is a familiar fact that a great majority of deeds of conveyance are partly printed and partly written; but if those parts of a deed which are usually impressed or printed were to be erased or considered as wholly inoperative, the deed itself would be a dead letter. It would only present to the eye the names of certain persons, and a description of certain real property. But a case more in point still may be mentioned. The statute of frauds declares cer-

tain contracts to be void, unless proved "by some memorandum thereof in writing and signed by the party to be charged therewith." Still, if every word of the memorandum should be printed, yet if signed by the party to be charged, such contract would be completely protected from the operation of the statute. The law looks to the substance more than the mere form, and gives a sound and sensible construction, to carry into effect the intent of the legislature. Without assigning any further reasons for their opinion, the undersigned conclude by saying that to the first question proposed, they answer in the negative; and to the second question proposed, they answer in the affirmative.

All which is respectfully submitted.

PRENTISS MELLEN,
NATHAN WESTON, JR.
ALBION K. PARRIS.

NO. III.

To the Governor and Council of the State of Maine.

We, the undersigned Justices of the Supreme Judicial Court, on the second day of April last, received an order of the House of Representatives, dated March 28, 1831, requesting the opinion of the court upon the following questions; and requesting also, they then being about to adjourn, that we would transmit our answer to the proposed questions, as above addressed, for the purpose of publication.

Question 1. Can persons who are under the care and direction of the overseers of the poor of any town, and who have been disposed of for the term of one year or less, for and in consideration of the labor of such persons, constitutionally vote for State officers during that term?

Question 2. Can persons who are not under the care and direction of the overseers of any town, who have received partial supplies from the town where they reside, constitutionally vote for State officers; or can any person who has received supplies as a pauper in any town in this State, be an elector for State officers, until he shall have paid said town, or been discharged from the expenses incurred in his support; and, if so, what length of time after receiving said supplies is necessary to restore him to the privileges of an elector?

Question 3. Can a person who supports his family in one town, and resides, to transact business, in another town during the three months next preceding the annual election, constitutionally vote for State officers in the town where his family resides; and if he cannot so vote, can he vote for said officers in the town where he has so resided?

Question 4. Can ballots having the names of persons on them, who do not possess the constitutional qualifications of a representative, be counted as votes under the 5th section of 4th article, part 1st of the constitution, so as to prevent a majority of the votes given for eligible persons constituting a choice?

Question 5. Is a ballot containing a less number of names for Senators than is assigned to any senatorial district, a legal and constitutional ballot?

Having carefully examined and considered the several questions above proposed, the following reply is respectfully submitted.

By the first section of the second article of the first part of the constitution, it is declared that "every male citizen of the United States, of the age of twenty one years and upwards, excepting paupers, persons under guardianship, and Indians not taxed, having his residence established in this State for the term of three months next before any election, shall be an elector for Governor, Senators and Representatives in the town or plantation where his residence is so established." The first inquiry then is "who are paupers within the true intent and meaning of the above mentioned clause in the constitution?" Property is not one of the necessary qualifications of an elector of the officers described in that clause. Paupers, then, are not excepted merely on account of their poverty. There must have been some other reason for their exclusion from the class of qualified voters. Persons under guardianship may often possess property, and at the same time be more than twenty one years of age, and yet they are excepted as well as paupers; and so are Indians unless taxed. We apprehend that persons under guardianship are excepted, because their civil capacities are suspended on account of an actual or presumed want of understanding, discretion or power of self-government; and that paupers are excepted because they are dependant upon and under the care and protection of others, and necessarily feel that they cannot exercise their judgment or express their opinions with any independence.

As our constitution was formed while the laws of Massachusetts were in force in Maine, we must, and it is natural that we should presume that the framers of it used the word "paupers" in the same sense in which it was, and for a long time had been employed in those laws, and commonly understood; most of which laws, so far as they respect the support and employment of the poor, were re-enacted *verbatim*, in this State, in the year 1821. We have carefully examined our statute on this subject, and it appears that the words "poor and indigent persons" standing in need of support in towns where they have their legal settlement, and those found in towns where they do not belong, but "standing in need of immediate comfort, and relief," are both considered to be and are called "paupers." In numerous places, in many of the sections of the

act, such persons are indiscriminately described by both names. There is not an instance in which those terms are not used as synonymous. We know of no course more safe and correct than to adopt the established import of the word, and give that as the true one, in our construction of the clause in the constitution which we are examining.

Having thus ascertained the meaning of the word "pauper" and who those are whom it embraces, we proceed to consider some of its incidents and limitations.

A person is to be considered as a pauper while he receives supplies, as such, from the town where he is resident or found, whether for a year, or a portion of a year; whether in an alms house, or at his own dwelling; and whether furnished directly by the overseers of the poor, or indirectly by the person to whom he has been disposed of and consigned by such overseers for support, in consideration of his services for a year, or any less period. We are of this opinion, because in each of the situations above described, the pauper is dependant upon the town, and under the care and protection, if not the personal control, of the overseers. The very fact of his being under the care of a third person by the disposal of the overseers, is proof of his being a statute pauper; for unless such be the fact, the overseers would have had no authority to make such disposition. Nor do we consider that it is material whether the pauper makes compensation by his labor to the person to whom he has been consigned, or to the overseers of the poor when they directly support him; for surely paupers do not change their character, even if by their labor they defray all the expenses of the alms house where they are supported.

Again, a man is to be considered a pauper so long as he receives supplies, as such, from the town where he resides, but no longer. Some limit must be fixed, for some must have been intended: and as residence in a particular town for three months next preceding an election, authorizes a citizen of the United States to be an elector of State officers in that town, we are of opinion that such a person cannot constitutionally be considered as an excepted pauper, unless within that term, he shall have been directly or indirectly furnished with supplies, as such, from or under the sanction of the overseers of the poor of such town. If such have not been the fact, then he

cannot be disqualified as a voter for such State offiers; because, not falling within the intent and spirit of the exception. We are not aware of any other construction of it, as to limitation of time, which so well harmonizes with the general principle on which the framers of the constitution have proceeded in the section under consideration. By this section it appears that none of the qualifications of an elector are required to have existed prior to the commencement of the term of three months next before any election; and that all of them are declared to be indispensable during that term. Such a term seems to be proof of something like definite intention as to residence. It would seem equally clear that a person who had before been a pauper, should also have been during three months preceding an election, in possession of and continuing to enjoy the rights of an elector; for unless some such limit be established, every pauper might be discharged from the alms house, or otherwise deprived by the overseers of all supplies, the day before such election; and thus, by losing the means of subsistence, acquire the right of suffrage.

We are also of opinion that if such a person shall have received such supplies prior to the commencement of such term of three months, but none after such commencement, he will be a qualified voter, although he shall not have reimbursed to the town the amount of the supplies furnished for his support or immediate relief. Unless this be a correct principle, a man in debt, and a man living on those supplies which are furnished by the hand of charity, would both be placed on the same level; which inference can never be admitted as correct.

The foregoing observations and reasoning are applicable to the subject of the first and second questions proposed, and, in substance, fully express our opinions upon them; but for the purpose of being formally explicit, we reply as follows: To the first question proposed, our answer is that the persons therein described, if otherwise qualified, are to be considered as entitled to vote for State officers, unless they shall have been paupers within three months next preceding the day of election. To the second question proposed, we give the same affirmative answer; subject to the same limitations as before expressed.

To the third question proposed, we answer that a person, being a citizen of the United States, who supplies his family in one town and resides, to transact business, in another town, during the three months next preceeding the annual election, can vote for State officers in the town where his family resides, and in no other town. Under the circumstances stated, his domicil must be deemed to be where his family resides; his residence in the other town is only temporary, and while there he cannot be considered at his home.

To the fourth question proposed, without a particular statement of reasons, we merely answer in the negative; and

To the fifth question proposed, we also merely reply in the affirmative.

PRENTISS MELLEN,
NATHAN WESTON, JR.
ALBION K. PARRIS.

June, 1831.

NO. IV.

STATE OF MAINE.

IN COUNCIL, JUNE 30, 1831.

Ordered, that the Justices of the Supreme Judicial Court, be requested to give their opinion upon the following questions :—

1st. Have the Governor and Council a right to charge the managers of the several lotteries granted by this State, with the scheme price of the tickets, as advertised by the managers from time to time in the public papers; and have the Governor and Council a right to settle with the managers for a sum less than said price, or to deduct more than six per cent from that price, when said tickets are sold by them to any person or persons for the purpose of being resold ?

2d. Are bad debts made by trusting out tickets to venders, to be considered as money raised, so far as to authorize the Governor and Council to allow on said debts the twenty five per cent to the managers for their services and expenses, as permitted by the laws granting said lotteries ?

3d. Is the twenty five per cent referred to in the second question, to be considered a part of, or in addition to the amount authorized to be raised by the lotteries ?

To the Executive Council of Maine.

We, the undersigned, Justices of the Supreme Judicial Court, have received a copy of your order of the 30th of June last, requesting our opinion on certain questions of law, respecting the construction of certain parts of the acts granting the several lotteries in this State, the objects of which have not yet been completed.

The provisions of those acts to which the proposed questions have reference, and on which our opinion is founded, are essentially the same, and we shall quote them, for the sake of a clear examination of them.

1. "The said managers, before they enter on the duties of their office, shall be sworn to the faithful performance of said duties."

2. "That said managers shall from time to time publish in one or more of the public newspapers printed in this State, the scheme of each class in said lottery, the time and place of drawing and list of prizes; and shall keep a book, in which they shall charge themselves with the amount received for each ticket, numbering the same."

"And it shall be lawful for said managers to deduct from the amount of each ticket sold, six per cent; when sold by said managers for the purpose of being sold again."

"And the managers of said lottery, within sixty days after each class in said lottery is drawn, shall pay into the Treasury of the State, the whole proceeds of said class, after deducting the amount allowed them by the Governor and Council for their services and expenses, not exceeding twenty five per cent on the sum raised by said lottery."

In making the provisions above quoted, it is evident that the legislature foresaw that various incidental expenses must necessarily be incurred in the execution of the duties devolved upon the managers before the sum authorized by the acts respectively to be raised, could be raised or realized; and that it was never intended or expected that all the tickets in any class should be sold by the managers in person; hence the deduction of six per cent which they were allowed to make from the price of each ticket sold by them for the purpose of re-sale. Without the aid of this subordinate arrangement, by means of which tickets are placed within convenient distance from persons in all parts of the State who are desirous of purchasing them, the sale of the tickets in a single class would be attended with great difficulty and delay. It is not to be presumed that the managers, after publishing a scheme from time to time, containing the price of each ticket, would sell the tickets for more or less than the scheme price. They can have no motive for so doing. Besides, they are bound to render an account of the amount received for each ticket, under the sanction of the oath administered to them before entering on the duties of their appointment. The acts granting the lotteries repose the whole superintendence of them in the managers; and, therefore, the sum at which venders may sell

them, after having purchased them of the managers, seems not to be a subject for the consideration of the Governor and Council, if the scheme price of the tickets is accounted for according to the directions above quoted, with a deduction of six per cent from the price of those sold for the purpose of being sold again.

With respect, therefore, to the first question proposed we answer that our opinion is, that the Governor and Council have a right to charge the managers of the several lotteries granted by this State with the scheme price of the tickets as advertised by the managers from time to time in the public papers; but that the Governor and Council have not a right to settle with the managers for a sum less than said price or to deduct more than six per cent from that price, when tickets are sold by them to any person or persons, for the purpose of being resold.

With respect to the second question proposed, our opinion is that bad debts, made by trusting out tickets to venders, are not to be considered as money raised, so far as to authorize the Governor and Council to allow on said debts the twenty five per cent to the managers for their services and expenses as permitted by the laws granting said lotteries; and our opinion is founded on the following reasons. The doubts implied by the question, originated probably in the use of the word "raised" as it stands in the several acts. The word is used three times in each of the acts, and the word "raise" is used once in each act. Thus, "a lottery is hereby granted, &c. to raise the sum of," &c. As here used, the word means "to create or produce a fund;" and the word "raised" as used, means "actually produced and realized in cash" ready to be paid into the treasury of the State; and not a sum of money ineffectually attempted to be raised. Besides, if the legal per centage could be allowed on bad debts, or on sums attempted to be raised, but never realized, the consequence would be that the same per centage would be claimable by the managers on the amount of the bad debts, when actually raised and realized by a second process in a subsequent class. Whereas, the Governor and Council are limited, as to the amount of compensation to the managers, to twenty five per cent on the sum raised by the lottery.

As to the third question proposed, we are of opinion that the twenty five per cent referred to in the second question is to be con-

sidered in addition to the amount authorized to be raised by the lotteries. The design of the legislature, in granting the several lotteries, was in each case to raise a certain sum for a specified purpose; and such sum, of course, was not to be reduced by those expenses necessarily incidental to the attainment of the contemplated object. If twenty five per cent were to be deducted from the amount raised by the lottery, it would produce a complete loss of that proportion, so far as it respects the purposes intended by the lotteries, and those interested in the anticipated operation and result of them, in a pecuniary point of view. All which is respectfully submitted.

PRENTISS MELLEN.
NATHAN WESTON, JR.
ALBION K. PARRIS.

Portland, Sept. 1831.

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2. A surety has no right of action against the principal debtor, till he has paid or assumed the debt. *Clark v. Foxcroft.* 348

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1. An offer to purchase of the true owner, made by the tenant in possession of land not his own, does not prejudice his right to the benefit of the act for the settlement of certain equitable claims arising in real actions; if such offer has not ripened into a contract between them. *Blanchard v. Chapman.* 122

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2. Therefore, where, by a subsequent statute, the fees were increased above the rate first established, but without any

new reservation of the power of revision, it was held that the legislature still had the power of reducing them at its pleasure. *ib.*

3. The provision in the private act of *March* 21, 1829, that the same corporation shall not be entitled to receive toll till the logs in their booms are surveyed by a surveyor appointed by the selectmen of *Brunswick* or *Topsham*, is constitutional; and it is the duty of the corporation, and not of the owner of the logs, to cause such survey to be made. *ib.*

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1. It is not against the policy or rules of the law, that an insolvent debtor should assign all his property to secure a part of his creditors. *Brinley v. Spring.* 241

2. Nor that the assignment should be by way of mortgage, with a stipulation that the mortgagor shall retain possession of the property, changing that which is personal by manufacturing and selling; and that such possession shall continue for a length of time beyond the day when the money becomes due;—provided such possession is not inconsistent with the security of the mortgagee; and there be not mingled in the contract any intention to delay or defraud other creditors, or to withhold the property from them beyond what may be necessary for the mortgagee's protection. *ib.*

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2. Though an attorney of record may have had knowledge of a prior conveyance of land attached in the suit in which he is retained, this does not affect the attachment, if his client had no such knowledge. *Lawrence v. Tucker.* 195

3. If land be conveyed to *A* whose deed is not recorded; and he gives bond to *B* to convey the same land to him upon certain conditions; and in the meantime *B* enters into and occupies the land, with the consent of *A*; such occupancy is implied notice of title, and will protect the land against an attachment by the creditor of *A*'s grantor. *Kent v. Plummer.* 464

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2. Though there be no funds in the hands of the drawee of a bill of exchange; yet if the bill be drawn under such circumstances as might induce the drawer to entertain a reasonable expectation that the bill would be accepted and paid, he is entitled to notice. *Campbell v. Pettengill.* 126

3. If the holder of a bill of exchange, who is entitled to an absolute acceptance, takes a special and conditional one, he cannot resort to the drawer but upon failure of the drawee to pay according to the terms of such limited and conditional acceptance. *ib.*

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3. A less number than twenty Senators, if it be a majority of that number, may organize the Senate, and transact any business in the filling of vacancies, &c. which is authorized by the constitution. *App.* 489
4. While the President of the Senate, in virtue of that office, is clothed with the power of the chief Executive, the office of Governor being vacant, he cannot lawfully preside or vote in the Senate. *ib.*
5. In order to form a convention for the purpose of filling vacancies in the Senate, it is necessary that both branches of the legislature, being duly organized, should concur, and if vacancies be filled by a convention formed without such previous concurrence on the part of the Senate, the elections so made will be void, *App.* 490
6. If a Senator is not constitutionally elected, his being afterwards suffered to sit and vote as a Senator does not cure the defect, or give any validity to his election. *ib.*
7. To qualify a citizen to be an elector of State officers, he must have resided the three preceding months not only in the State, but in the town or plantation where he claims to vote. *App.* 492
8. Elections of State officers may be as well by printed as by written ballots within the meaning of the constitution. *ib.*
9. Persons who have received assistance from any town as paupers, or been disposed of in service as such by the overseers of the poor, may still vote for State officers, if otherwise qualified, provided they have not been paupers within three months next preceding the day of election. *App.* 497
10. A person who supports his family in one town, and resides to transact business in another town, can vote for State officers only in the town where his family has resided for the three months next preceding the election. *ib.*
11. Ballots for persons who do not possess the constitutional qualifications of a representative cannot be counted as votes, under *Part* 1. *art.* 4, *sec.* 5. of the constitution, so as to prevent a majority of the votes, given for eligible candidates, from constituting a choice. *ib.*
12. A ballot containing a less number of names for Senators than is assigned to the Senatorial district in which it is given, is still a constitutional ballot. *ib.*
See ANDROSCOGGIN RIVER 2, 3.

CONTRACT
1. Where one conveyed "four clapboard machines and two shingle machines," then being in a certain place in the town of L. "and likewise *the patent right* for L. and J.—during the term of the *patent*, which is fourteen years from *Sept.* 3, 1813"—this was held to be a conveyance of a patent right to use *both* the clapboard and shingle machines. *Judkins v. Earl.* 9
2. And the vender, having no such patent right to the clapboard machine, was held liable to refund to the vendee so much of the consideration money as he had paid him therefor. *ib.*
3. If the party, entitled to repudiate a contract because it has not been performed in reasonable time, does any act which amounts to an admission of the existence of the contract, he cannot afterwards elect to treat it as void. *Brinley v Tibbets.* 70
4. Thus, where one in possession of land not his own, bargained with the

true owner for a title, and gave his promissory notes for the purchase money, the owner stipulating in writing to give a deed in a reasonable time; which was not done; but the purchaser continued in possession, and afterwards sold his interest in the land, his grantee undertaking to procure and deliver up the notes; it was held, in an action brought to recover payment of one of these notes, that the want of a seasonable delivery of the deed was cured by the subsequent conduct of the purchaser; and that he was bound to pay the notes; having his remedy still, on the contract to deliver the deed. *ib.*

5. One contracted to build a road for the inhabitants of a town, for a certain sum; one half of which was to be paid when the work should be completed, and the other half in a year after. He made the largest portion of the road; having underlet a portion of it, which was not completed; and the town made the first payment, with knowledge of the facts, and without objection. Afterwards, and before the whole was finished, he sued for the stipulated price, counting upon the special contract, and on a *quantum meruit*. Hereupon it was held—that the payment of the first instalment by the town, was a waiver of the terms of the special contract, and entitled the plaintiff to recover on the *quantum meruit* for as much as was completed. *Hayden v. Madison.* 76

6. The rule in such cases, it seems, is to take the stipulated price as the true value of the whole services agreed to be performed. *ib.*

7. A promise by a third person to indemnify an officer for neglecting his duty in the service of a precept, being founded in an illegal consideration, is void. *Hodsdon v. Wilkins.* 113

8. It therefore does not disqualify the promissor from being a witness for the officer, in a suit brought against him for such breach of duty. *ib.*

9. A promise may be implied on the part of a corporation, from the acts of its agent, whose powers are of a general character. *Abbot v. Hermon.* 118

10. Therefore where one built a school house under a contract with persons assuming to act as a district committee, but who had no authority; yet a district school was afterwards kept in it by direction of the school agent; this was held to be an acceptance of the house on the part of the district, binding the inhabitants to pay the reasonable value of the building. *ib.*

11. If one accepts, or knowingly avails himself of the benefit of services done for him without his authority or request, he shall be held to pay a reasonable compensation for them. *ib.*

12. Where the plaintiff was requested by a third person, by letter, to do certain work, the letter being in these terms:—"Sir, I want you to bring a load of hay and five bushels of corn, and four oxen, and come as soon as possible;' to which the defendant subjoined the following postscript:—'Sir, I will see you have your pay, if you will come and work with your team for Mr. G. as you and he agrees;"—it was held that this was an original, and not a collateral undertaking by the defendant; that the hay and corn were within its terms; that the agreement between the plaintiff and the third person might be proved by any one who knew the fact; and that the presence of the defendant, at the making of such agreement, was not necessary, in order to bind him. *Copeland v. Wadleigh.* 141

13. A promise to pay a certain sum in the wares of a particular trade, must be understood to mean such articles as are entire, and of the kind and fashion in ordinary use; and not such as are antiquated and unsaleable. *Dennett v. Short.* 150

14. Where three brothers entered into written articles of agreement not under seal, with a fourth, for the support of their parents, fixing the ratio of contribution by each; and therein providing for a new ratio, in case a fifth brother should be able and liable to pay; which was signed by all the five;—it was held that the fifth, though not named as one of the contracting parties, yet by his signature assented to the terms of the contract, and became liable, if able, to pay his proportion. *Kendall v. Kendall.* 171

15. Held also, that such contract was upon sufficient consideration;—and that the ability and liability of the fifth brother might as well be tried in an action of *assumpsit* on this agreement, as by a complaint under *Stat.* 1821, *ch.* 122. *ib.*

16. *W.* gave his promissory note to a manufacturing corporation, in consideration of the written engagement of *R.* who signed as agent of the corporation, but without authority, to procure the obligation of the treasurer for certificates of two shares of their capital stock. *R.* obtained the obligation of the treasurer to deliver certificates of two shares on payment of the note; and requested *W.* to call at his house and receive them. Hereupon it was held, that *R.* was personally bound by his engagement;—that this was a sufficient consideration for

the note, the promises being mutual and independent; that no tender of the treasurer's obligation was necessary, the possession of *R.* being the possession of *W.*;—and that the condition of payment of the note, therein inserted, was proper, and not inconsistent with *R*'s engagement. *Saco Manuf. Co. v. Whitney.* 256

17. *S. & C. M.* contracted to build certain locks and portions of canal for the *Cumberland* and *Oxford* canal corporation, by *Aug.* 1, 1829, at a stipulated rate of payment; the work to be estimated monthly by the engineer, and three-fourths of the estimated sum to be paid monthly by the corporation; the residue to be retained till the whole should be completed. On the first day of *August*, 1829, the engineer made his monthly report of estimates of work performed, containing the sum of $700 as due to *S. & C. M.* for work done; which sum the directors, on the same day, voted and ordered to be paid. Afterwards, on the same day, before payment, and before an order was drawn by the president, in the usual course of business, for the sum thus voted, the corporation was summoned as trustee of *S. & C. M.*, who failed to fulfil their contract; which, in three days afterwards, was duly declared broken and abandoned by their non performance. Hereupon it was held that the vote to pay the $700 was a waiver of any advantage resulting to the corporation from the failure of *S. & C. M.* to complete the contract; and bound the corporation to pay that sum; and that therefore it was chargeable as their trustee. *Wyer v. Merrill.* 342

18. *C* and *D* entered into a written contract, by which *C* agreed to pay to *D* $3500 within six months, for one fourth part of a certain ship; and *D* agreed that "when *C* should pay the full amount of the consideration aforesaid," he should receive a bill of sale of that part of the ship. *C* paid part of the money; the six months elapsed; and then *D* was summoned as the trustee of *C*. In his disclosure he disclaimed any intention of availing himself of the lapse of the six months to avoid the contract on his part; and stated that he had received *C*'s part of the ship's earnings on account of the balance due on the purchase-money; but insisted that he had never waived his right to payment of the whole in six months; that he was under no legal obligation to convey the fourth part to *C*; and that as between *C* and his creditors he should insist on his legal rights:—Yet it was held that the facts disclosed by *D* amounted to a waiver of his right to punctual payment at the time stipulated; and that he was chargeable, as the trustee of *C* for the value of one fourth part of the ship. *Gage v. Coombs.* 394

19. Where one, being indebted on the books of a lottery ticket vender for tickets in various lotteries, some of which might lawfully be sold and others not, made a remittance of money to be passed to his general credit, exceeding the amount he then owed; and afterwards made further purchases which were lawful, and which were entered in the same account, it being still open, bringing him again in debt; and the account was then settled by his note for the balance;—it was held that the remittance having been intended to apply to all the charges on book, illegal as well as legal, the parties, as to that part of the transaction were *in pari*; and the law would not lend its aid to the defendant to recover back the amount paid for the tickets illegally sold, by suffering those charges to affect the validity of the note; which was therefore to be regarded as given for the balance of the subsequent and legal charges. *Greenough v. Balch.* 461

See EVIDENCE 21.
LEX LOCI 1, 2.
PLEADING 5, 6.

CONVEYANCE.

1. Where one contracted to build a road for the State through four of its townships, in consideration of a contract made by the State's agents to convey to him 8000 acres of land as soon as the road should be completed, the land to be surveyed and laid off in any of the State's lands through which the road might pass; and afterwards, but before any such survey or conveyance, the party having made the road, sold and conveyed an undivided third part of the 8000 acres;—this was held sufficient to pass the fee; the land being afterwards designated by a survey agreeably to the contract. *Fairbanks v. Williamson.* 96

2. And the deed of the whole tract from the State being afterwards made to the original contractor, it was held to enure to the benefit of his grantee; and to estop the grantor and all others claiming under him adversely to such prior grantee. *ib.*

3. The grant of four townships of land in 1799 by the Commonwealth of Massachusetts to *Henry Knox*, containing an exception of the lots occupied by settlers, not exceeding one hundred acres to each, certain lots were afterwards laid out to settlers, fronting on the *Penobscot* river, and bounded by monuments

erected on the bank, being the lots in their actual occupancy prior to the grant. It was held that the flats fronting these lots were within the fair construction of the exception, and belonged to the settlers as riparian proprietors. *Knox v. Pickering.* 106

4. If land be sold with a parol reservation of the standing trees, the reservation is good, and the trees do not pass to the grantee. *Safford v. Annis.* 168

5. Where one conveyed land to his son, the deed expressing a valuable consideration, but the son verbally engaging to support the grantor during life, as a consideration for the land; and a year afterwards the son, being about to die insolvent, gave a mortgage to the father, conditioned for the support of his father during the residue of his life;— it was held, in action by the father against one claiming the land by virtue of a sale by the son's administrator, that the mortgage was good, even against the creditors of the son; and that parol proof of the contract was admissible, notwithstanding the deed. *Tyler v. Carlton.* 175

6. In cases of implied notice of a conveyance not recorded, the facts must be of such a nature as to leave no reasonable doubt of the existence of the conveyance. *Lawrence v. Tucker.* 195

7. A "settler," within the description given in the resolve of 1784, received from the Commonwealth a deed of a hundred acres of land, described as being the land on which he lived, but further described by metes and bounds which excluded a large portion of his actual possession.—It was held that the general language of the deed could not control the particular description, so as to include the whole of his possession; notwithstanding the declared intent of the legislature to quiet the settlers in their possessions. *Allen v. Littlefield.* 220

8. Where one held a farm by two several deeds of separate parcels thereof, made by the same grantor at different times; and afterwards made a deed to a third person, using language sufficiently indicating the whole farm, and then adding that the premises were the same which he purchased by deed of such a date, referring to the latter only of his title deeds; it was held that the whole farm passed by this conveyance; and that the recital of the source of the grantor's title was superfluous, the description being otherwise sufficient. *Drinkwater v. Sawyer.* 366

9. Where a deed, though containing the name of the person who paid the consideration money, and with whom the covenants were made, did not express the name of any grantee; and the *habendum* was to the grantor and his heirs and assigns forever; and the covenantee had entered and held possession several years, and afterwards conveyed the land in fee; it was held, in a writ of right against his grantee, brought by the heirs of the original grantor, that as nothing seemed to have passed by the deed, it could not operate to qualify the possession of the covenantee; the character of which was therefore purely a question for the jury. *Paul v. Moody.* 455

CORONER.

See SHERIFF 1.

CORPORATION.

See CONTRACT 9.
EVIDENCE 2, 3.

COSTS.

1. The *Stat.* 1829, *ch.* 444, *sec.* 1, inflicting, in certain cases, an addition of twenty five *per cent.* to the costs recovered against a defendant appellant, does not apply to cases brought up by demurrer to the plea, with the usual reservation of leave to waive the pleadings in this court. *Anonymous.* 161

2. Where judgment was rendered in the court below on a verdict for the plaintiff, from which the defendant appealed, and in this court a verdict was again returned for the plaintiff, but for a lesser sum than before; and the judgment here was delayed by the defendant's motion for a new trial, till the interest on the verdict increased the amount of the judgment to a larger sum than it was rendered for in the court below;—yet it was held that the defendant was entitled to his costs since the appeal, under *Stat.* 1826, *ch.* 347, *sec.* 4 he having obtained a reduction of the damages by his appeal. *Brown v. Attwood.* 356

3. Where a trustee was summoned to appear out of his county, and made his disclosure before a magistrate of his own county, charging himself as trustee of the goods of the principal, which disclosure was transmitted to the court, without his personal attendance;—it was held that the only costs he was entitled to retain, out of the effects in his hands, under *Stat.* 1828, *ch.* 382, were his constructive travel of forty miles, three days' attendance, an attorney's fee, and the fee paid to the magistrate before whom the disclosure was made. *ib.*

COVENANT.

1. Where one granted all the growing timber on his land, and covenanted that the vendee should have seven years in which to remove it without being a trespasser; and afterwards sold the land to a stranger, without reserving the trees or giving notice of the grant;—it was held that the sale alone of the land was no breach of the covenant, the vendee of the timber not having been molested. *Safford v. Annis.* 163

See ESTOPPEL 3.

DAMAGES.

1. If the party entitled to the benefit of a contract, can protect himself from a loss arising from the breach thereof, at a trifling expense, or with reasonable exertions, it is his duty to do it. And he can charge the delinquent party with such damages only as, with reasonable endeavors and expense, he could not prevent. *Miller v. Mariner's Church.* 57

2. In action of the case against an officer for not serving an execution, the jury are to allow the plaintiff such damages only as he has sustained by the breach of duty; unless the neglect was wilful, with a view to injure the plaintiff; in which case they are to allow him his whole debt. *Hodsdon v. Wilkins.* 113

See CONTRACT 6.
EVIDENCE 18, 20.

DEED.

1. Where the parties to a deed were both present at the time of its execution, and the grantor was bound by his previous contract to make the deed; yet the grantee having taken it up and carried it away without the consent of the grantor, this was held to be no delivery of the deed. *Woodman v. Coolbroth.* 181

DEPOSITION.

1. A leading interrogatory, in a deposition taken when both parties are present, must be objected to at the time it is put to the witness, if at all. *Woodman v. Coolbroth.* 181

DEVISE.

1. One devised his estate to his son *S.* "provided and on condition he lives to the age of 21 years AND has issue of his body lawfully begotten; but in case he shall die under the age of 21 years and without issue as aforesaid," then to his son *E.* and his heirs. The "and" in the first part of the devise was construed to mean "or," in order to carry into effect the intent of the testator. And hereupon it was held;—that this was an executory devise to *E*;—that *S.* took a fee simple conditional, defeasible only on the subsequent condition of his dying under 21 *and* without issue;—and that on his arriving at 21 it became an absolute estate in fee simple. *Sayward v. Sayward.* 210

2. Real estate devised, is not liable to contribute to the payment of legacies, on a deficiency of personal assets, unless specially charged. *Hayes v. Seaver.* 237

See DOWER 5.

DOWER.

1. The wife of a mortgagor is dowable of the equity of redemption; and may enforce her claim by writ of dower at common law, against all persons but the mortgagee. Against *him*, her remedy is by bill in equity. *Smith v. Eustis* 41

2. And though she joined with her husband in the mortgage, releasing to the mortgagee her right of dower, yet the release enures only to the benefit of the mortgagee and his assigns. *ib.*

3. The wife of a mortgagor, or of one claiming under him, cannot have dower at common law against a mortgagee or his assigns, whose title commenced previous to the marriage. *Carll v. Butman.* 102

4. If the widow of the grantee of part of a tract of land, mortgaged before the marriage, would have her dower against the mortgagee it can be had only by bill in equity, and upon payment of her just proportion of the sum due on the mortgage. The proportion to be paid by the husband's parcel, is such proportion of the principal debt, as the value of the parcel conveyed to him bears to the value of the whole tract mortgaged. And of the sum thus found, the widow must pay that proportion which the present value of an annuity for her life, equal to one third of the rents and profits, bears to the value of the whole parcel conveyed to her husband. *ib.*

5. Where one devised to his wife "her full and reasonable dower in all his estate, according to the laws of this State;" it was held that the term "dower" must be taken in its legal acceptation, and be limited exclusively to the realty. *Brackett v Leighton.* 383

ELECTIONS.

See CONSTITUTIONAL LAW, 7, 8, 9, 10, 11, 12.

ESTATES UPON CONDITION.

1. An estate was granted upon condition that the grantor should be per-

mitted to occupy part of the premises, and that the grantee should cultivate the land in a husbandlike manner, and render to the grantor half the produce; provide him with fuel; and pay him certain sums of money. And they both occupied the land accordingly. The money being unpaid, the grantor notified the grantee that the condition was broken, and ordered him to quit the premises. But afterwards he received his proportion of the produce actually raised, though the farm was badly managed. The grantee then sold the land, subject to the condition. Hereupon it was held—

That here was a sufficient entry for condition broken.

2. That the acceptance of the produce was no waiver of the breach in the non-payment of the money:—

3. And that this forfeiture was not within the provisions of *Stat.* 1821 *ch.* 50. *sec.* 2, the land not having been granted by way of pledge, by the party seeking relief. *Frost v. Butler.* 225

4. Whether the case of such tenant is within the equity powers vested in this court by *Stat.* 1830, *ch.* 462:—*quære.* *ib.*

See DEVISE 1.

ESTOPPEL.

1. A party is not estopped by every averment made by the other side which he does not deny; but only by averment of facts material and traversable, alleged directly and precisely, and not by way of argument, inference or recital. *Adams v. Moore.* 86

2. Therefore where, to an action by the sheriff against a surety on his deputy's official bond, the surety pleaded that on a certain day notice was given to the sheriff by another surety that he would no longer be responsible for the official conduct of the deputy, who became insolvent; and that the sheriff still carelessly and fraudulently continued him in office; and that all his defaults happened after such notice:—to which the sheriff replied by alleging a breach previous to the notice, without denying or protesting against the other facts alleged; and had judgment upon a general demurrer to the replication;—it was held, in a *scire facias* for further execution, that the facts so stated in the plea, and not denied, did not constitute an estoppel; the fraud not being directly alleged, nor necessarily deducible from the other facts in the plea. *ib.*

3. A covenant that neither the grantor nor his heirs shall make any claim to the land conveyed, though not technically a warranty, is a covenant real, which runs with the land, and estops the grantor. And wherever the grantor is estopped, all claiming under him are estopped also. *Fairbanks v. Williamson.* 96

4. The extent of an execution raises an estoppel, as much as if the conveyance were made by deed. *ib.*

5. In replevin of a horse, the defendant pleaded property in one *G* and denied the title of the plaintiff; who replied that *G*'s title was by sale from the defendant, after which the defendant again sold and delivered the horse, with warranty, to the plaintiff, who knew nothing of the prior sale; and relied on this by way of estoppel.—On demurrer it was held that the defendant was not estopped to set up the title of *G* against the plaintiff; and that the replication was ill. *Boies v. Witherell.* 162

6. A plaintiff having caused goods to be attached and returned as the property of the defendant, is not thereby estopped from showing that they were the property of another. *Loomis v. Green.* 388

See CONVEYANCE 2.
SURETY 1.

EVIDENCE.

1. A witness, upon the *voir dire*, may be examined respecting contracts, records or documents not produced at the trial, so far as relates to his interest in the cause. *Miller v. Mariners' Church.* 51

2. A member of a corporation who is its surety for the payment of a debt not in controversy in the suit on trial, is not on that account an incompetent witness for the corporation. *ib.*

3. A member of an eleemosynary corporation, having no pecuniary interest, is a competent witness, in a suit in which the corporation is a party. *Semble.* *ib.*

4. In an action for contribution, between the sureties of a collector of taxes, for money paid by one of them without suit, the town treasurer is a competent witness to prove the collector's delinquency. *Nason v. Read.* 22

5. Where the collector of a town had given bond with sureties, conditioned for the faithful collection of the town taxes; and afterwards had given another bond, with other sureties, for the faithful collection of a school-house tax; after which he paid over a large sum of money to the treasurer, taking his receipt, in which he promised to account for that sum to the town; it was held, in an action for contribution between the sureties on the first bond, one of whom had voluntarily paid the amount of an alleged delinquency,—that parol testimony was admissible to prove that

the sum thus paid included the amount of the school-house tax, which had accordingly been paid over by the treasurer, by direction of the collector; and that therefore the deficiency existed only in the first bond. *ib.*

6. In an indictment for lewd cohabitation, adultery, or bigamy, the prisoner's confession of the fact of his marriage, if the marriage was in another State or country, is sufficient proof of the fact. *Cayford's case.* 57

7. And it seems that such evidence might be received if the marriage were in this State. *Sed quære.* *ib.*

8. Whether, in the absence of better proof of marriage in this State, evidence of long continued cohabitation, birth of children, and uniform reputation of a lawful marriage, is admissible in criminal cases,—*quære.* *ib.*

9. The husband of the tenant in a real action, having entered under the title of *J. C.* who was the true owner, afterwards conveyed the premises to the demandant in fee, and then died; the tenant pleaded that she was not tenant of the freehold, but was merely tenant at will to *J. C.*; whose title was traversed by the demandant; and it was held that the plea was maintained by proof of the better title of *J. C.* without any evidence of actual attornment. *Ware v. Wadleigh.* 74

10. Where a witness testified to certain facts, which were contrary to his own admissions in a written contract made by him with the adverse party;—it was held that such party might read this contract in evidence to impeach his testimony, without first calling the subscribing witness thereto; the witness on the stand, who signed the contract, testifying that the signature was his own. *Drew v. Wadleigh.* 94

11. An indictment for forgery with intent to defraud *A* is supported by proof of intent to defraud *A* and *B*. *Veazie's case.* 131

12. Office-copies of deeds of conveyance, to which he who offers them is not a party, are in all cases admissible in proof of title. And where such office-copy was rejected, though the party then produced, proved and read the original, yet the verdict, being against him, was for this cause set aside. *Woodman v. Coolbroth.* 181

13. Where, at a trial by jury, certain depositions were objected to by one party, but were used by consent, upon condition that the Judge should direct the jury what parts of them to disregard as inadmissible; and no such direction was in fact given; but the Judge, before the jury retired, offered to give them further instructions on any point which either party might desire; yet none were desired; it was held, that this silence of the party amounted to a waiver of any objection to the testimony. *Buckley v. Woodsum.* 204

14. In an action of replevin against the sheriff, for goods attached by him under a writ, which had never been returned, the suit having been settled by the parties, it was held that he might prove the attachment by parol. *Frost v. Shapleigh.* 236

15. In an action on an administrator's bond, to compel him to account for and pay over the amount of a private debt due from him to the intestate, the lapse of more than twenty years since the date of the bond affords no ground for the presumption of payment to the heirs; because such payment, without a previous decree of distribution, would be a violation of his duty, which the law will not presume. Neither does the presumption arise that the debt was forgiven by the intestate; for gifts, as well as wrongs, are not to be presumed. *Potter v. Titcomb.* 302

16. The presumption of payment, arising from the lapse of twenty years, does not seem applicable except in cases of bonds or other contracts for the payment of money, &c. or the performance of a specific duty, at a fixed time, from which the term of twenty years might be computed. *ib.*

17. The date of a writ is not conclusive evidence of the time when it was sued out, so as to affect a plea of the statute of limitations. *Johnson v. Farwell.* 370

18. In an action of trespass for demolishing certain dwelling houses, it was held incompetent for the defendant to prove, in mitigation of damages, that they were occupied as houses of ill fame. *ib.*

19. Where one has wilfully confounded his own goods with others of the same kind belonging to a stranger, and would reclaim them by law, the burden of proof is on himself, to distinguish his own goods from those of the stranger. *Loomis v. Green.* 386

20. In an action of trespass for breaking and entering the plaintiff's close, and cutting and taking away a large quantity of his timber trees, it is not competent for the defendant, in mitigation of damages, to prove that the estate is made more valuable by his labor and expense in opening the forest and making improvements. *ib.*

21. Where the meaning of the parties

to a written contract cannot be collected from the instrument itself, by reason of its ambiguity, or illegibility; it seems that parol evidence of the acts of the parties, contemporaneously with and immediately after the execution of the instrument, is proper for the consideration of the jury. *Haven v. Brown.* 421

22. The subsequent declarations of a general agent, touching a contract he has entered into in the name of his principal, being made to a stranger, cannot be received to affect the rights of the principal, already acquired. *ib.*

23. Parol proof to show that a deed of conveyance, absolute on its face, was intended only as a security for money lent, is not admissible. *Hale v. Jewell.* 435

24. Parol evidence is inadmissible to show a mistake in the computation of the amount for which a recognizance of debt was taken, under the statute; so as to enable the conusor, after having paid the money, to recover back the excess. *Morton v. Chandler.* 44

See ACTIONS REAL 3.
ASSIGNMENT 3.
CONTRACT 8.
CONVEYANCE 5.
EXECUTION 2.
MILITIA 5.
OUSTER 1.
PARISH 6, 7.
PLEADING 7.
TOWN OFFICERS 1.

EXCEPTIONS.

1. If the court below improperly reject a report of referees appointed by a rule of court, the remedy is by exceptions regularly filed and allowed. If the defendant, after the report is rejected, plead to the action, and the cause is brought up by appeal from a judgment rendered upon the pleadings or verdict, no question is open respecting the report. *Vance v. Carle.* 164

See PRACTICE 1.

EXECUTION.

1. A deputy sheriff, holding a commission of the peace, and extending an execution on real estate, cannot lawfully administer the oath to the appraisers. *Bamford v. Melvin.* 14

2. Where the officer, in his return of the extent of an execution, states that the appraisement was made under oath, but does not refer to the certificate of the magistrate; the court, in an action between other persons touching the title acquired by the extent, will not look beyond the officer's return to take judicial notice of any defect in the administration of the oath, though apparent on the face of the magistrate's certificate indorsed on the execution. *ib.*

3. Where the brother of one of several judgment debtors advanced the amount of the execution to the officer, in order to obtain the control of it, and to satisfy it out of the property of another debtor, which was done; the brother for whose relief the money was advanced being absent, but afterwards approving the act, and reimbursing the money;— it was held that by such payment the execution was satisfied and *functus officio;* and that therefore the subsequent levy was void. *Stevens v. Morse.* 36

4. In this case the officer delivered up the execution, undertaking thereby to assign it, to the person advancing the money; and it was extended on land attached on the original writ; the creditor subsequently ratifying this arrangement. But it was held that the officer had no authority to make the assignment; and that this ratification, even if the execution had remained in force, could not so relate back as to defeat a *bona fide* conveyance made after the attachment. *ib.*

5. If a tract of land mortgaged is situated in more towns than one, it is necessary that the sheriff, in making sale of the mortgagor's right in equity of redemption, under *Stat.* 1821, *ch.* 60, should post up two notifications in every town where any part of the land is situated. *Grosvenor v. Little.* 376

See TENANT AT WILL 1.

EXECUTORS AND ADMINISTRATORS.

1. In order to compel an administrator, on his official bond, to pay the amount of a debt due from him to the intestate, it is necessary that he should first be charged with the amount, in an administration account, by a decree of the Judge of Probate. *Potter v. Titcomb.* 302

2. In an action on an administrator's bond, brought for the benefit of the heirs at law here, it was held to be no good objection, in arrest of judgment, that the intestate was a foreigner, having a foreign domicil at the time of his death, and that the administrator here was therefore accountable to the administrator abroad for the assets, if any, in his hands. *ib.*

3. The Judge of Probate has power, by *Stat.* 1821, *ch.* 51, *sec.* 23, 24, to call before him and examine under oath as well the executor or administrator of an estate, when suspected and charged by the heir with embezzlement of the prop-

erty, as any other person entrusted with property by the executor or administrator. *O'Dee v. McCrate.* 467

4. Such process can only result in a discovery of facts, to serve as the basis of ulterior proceedings. *ib.*

5. The lapse of thirty years since the transactions inquired into, is no bar to such examination. *ib.*

6. And such executor may be held to answer under oath respecting the existence of the will, his appointment as executor, the nature and value of the estate of which the testator died possessed, and any facts relative to his administration, and the existence of any muniment touching the estate; but not respecting any conveyance of real estate to him in trust, by the testator, prior to his decease. *ib.*

See BOND 1.
EVIDENCE 15.

EXTENT.

1. It is essential to the validity of the return of an extent, that it should show that the debtor was duly notified to choose an appraiser. *Means v. Osgood.* 146

2. If it does not, the officer will not be permitted to amend it, if a third person has in the meantime acquired a vested right in the land. *ib.*

See AMENDMENT 1.
ESTOPPEL 4.

FISHERY.

1. The powers given to the committees appointed under the private statutes regulating the taking of fish in *Denny's* river and its tributary streams, cannot be exercised by an individual member, but are confided to a majority of the committee of any town named in the acts. *Stephenson v. Gooch.* 152

2. Whether, by these statutes, the committee may open a passage for the fish by force,—*dubitatur.* *ib.*

FOREIGN ATTACHMENT.

1. A trustee who has once been examined and charged as trustee in the original suit, cannot be again examined on *scire facias*, even to correct an error in the judgment upon his former disclosure. *Taylor v. Day.* 129

See COSTS 3.

FRAUDS.

1. A sale of timber by parol, to be cut and carried away by the vendee, seems not to be within the statute of frauds. *Erskine v. Plummer.* 447

See CONVEYANCE 4.

FRAUDULENT CONVEYANCE.

1. *W. S.* devised certain lands to the children of his daughter *M. W.* who were minors, living with their parents; but the will, being defectively executed, and inoperative, was never proved. Afterwards the heirs at law undertook to settle the estate agreeably to the will, without administration; and accordingly *M. W.* with *S. W.* her husband, released all right in the land to the executors, who at the same time conveyed it to the children; a large debt due from *S. W.* to the deceased being also extinguished. It was held that this conveyance was good against the prior creditors of *S. W.* who subsequently extended an execution on his life estate in the land. *Wilson v. Ayer.* 207

FRYEBURG CANAL.

1. The statute incorporating the proprietors of the *Fryeburg* canal having prescribed a particular remedy for all damages occasioned by opening the canal, all other modes of remedy are by necessary implication excluded. *Spring v. Russell.* 273

2. The proprietors of the *Fryeburg* canal are not liable to an action for consequential damages occasioned by turning the channel of *Saco* river as directed by their act of incorporation. *ib.*

GUARANTY.

1. In the case of a continuing guaranty, given for whatever goods may be delivered from time to time, limited only in its general amount, but not in the duration of the term for which it is to stand, notice of its acceptance is as necessary, as it is in the case of one given for a specific debt, to be contracted at one time. *Tuckerman v. French.* 115

2. The essence of the engagement of a guarantor of a pre-existing debt, is that the debt shall be paid if the creditor shall take the usual legal steps to secure it, or to render the principal debtor's liability absolute. But where the original debt was due and payable and absolute before the guaranty was given; or where the rights of the creditor of an indorsed note or bill of exchange have become absolute against all the parties chargeable upon it; or where, from the absolute character of the debt guarantied, nothing of a preliminary nature on the part of the creditor is by law required, to perfect his rights;—demand and notice are not essential to the maintenance of an action against the guarantor. *Read v. Cutts.* 186

3. Therefore where *H* was indebted to *R* in a certain sum then due and payable; and *C* in consideration of an indemnity given by *H* and of *R*'s engagement not to sue *H* for twelve months, promised to pay *R* the debt at that time unless the same should have been paid by *H*:—it was held that this was an original and absolute undertaking; and that no demand and notice, nor diligence in pursuing *H* were necessary in order to entitle *R* to an action on the guaranty *ib.*

HIGHWAYS.
See WAYS 1.

INDICTMENT.
See EVIDENCE 11.

INTEREST.
1. The law does not allow interest upon interest even where a promissory note is made, payable with interest annually. *Doe v. Warren.* 48

JUDGMENT.
See EXECUTORS AND ADMINISTRATORS 2. PLEADING 4.

JURY.
1. What is reasonable notice to a town of the existence of a nuisance in the highway, is a question of law. *Springer v. Bowdoinham.* 442
2. But if a question of law has been erroneously submitted to the decision of the jury, it seems that the court will not, for this cause alone, disturb the verdict, if it appears that they have decided it correctly. *ib.*
See ACTIONS REAL 2.
CONVEYANCE 9.

JUSTICE OF THE PEACE.
See SHERIFF 1.

LAND AGENT.
1. The resolve of Massachusetts passed *Feb.* 18, 1829, authorizing its land agent to sell such small gores and tracts in Maine as might from time to time come to his knowledge, and evidently appear to belong to the Commonwealth, is sufficiently complied with if the agent knows of the general title of the Commonwealth to the tract sold, without having knowledge of its particular location or quantity. *Allen v. Littlefield.* 220

LEX LOCI.
1. The *lex loci* applies only to the interpretation or validity of contracts; and not to the time, mode, or extent of the remedy. *Judd v. Porter.* 337
2. Therefore a discharge under the insolvent laws of another State, of which both the parties were citizens, releasing the person from arrest, but not impairing the contract itself, cannot avail to affect any remedy pursued in this State. *ib.*

LIEN.
1. In real actions, no lien can be created by attachment of property. *Holmes v. Fernald.* 232
2. Where the parties, pending an action of *assumpsit* between them, made a settlement of all their accounts, by which a balance was found due to the plaintiff, for which judgment was entered in his favor, by consent; and the settlement included some demands for which the writ contained no proper counts, and some which were not payable till after the action was commenced;—it was held that the lien created by the attachment was thereby dissolved *in toto*, so far as the rights of subsequent attaching creditors were concerned. *Clark v. Foxcroft.* 348
3. If land be attached on mesne process, and afterwards the creditor have notice of a prior conveyance made by the debtor, yet such notice does not impair or affect the lien created by the attachment. *Kent v. Plummer.* 464
See ATTACHMENT 1.

LIMITATIONS.
1. A promissory note payable in *specific articles* is not within the meaning of the *proviso* in the statute of limitations, (1821, *ch.* 62,) by which promissory notes for the payment of *money*, if attested by a subscribing witness, are excepted from its operation. *Gilman v. Wells.* 25
2. The acknowledgement of a debt by one of several joint defendants, is sufficient to take the case out of the statute of limitations as to them all. *Getchv. Heald.* 26
3. The time of the actual making of a writ, with an intention of service, is the time when an action is "commenced and sued" within the meaning of the statute of limitations; (1821 *ch.* 62,) for it is the acquiescence of the plaintiff for six years, that bars him, whether it be known to the defendant or not. *Johnson v. Farwell.* 370
See ATTORNEY 1.
EVIDENCE 17.
EXECUTORS, &c. 5

LOTTERIES.
1. The Governor and Council have a right to charge the managers of lotteries granted by this State with the scheme price of the tickets, as adverti-

zed by them; and have not a right to settle with them for a less sum; nor to deduct more than six per cent. from that price where the tickets are sold for the purpose of resale. *App.* 502

2. Bad debts, made by sales on credit to venders, are not to be considered as money "raised" by the lotteries, so far as to authorize the allowance of 25 per cent. thereon to the managers. *ib.*

3. Nor is such 25 per cent. allowed to the managers to be considered as a part of the sum authorized to be "raised" by lottery. *ib.*

MARRIAGE AND DIVORCE.
See EVIDENCE 6, 7, 8.

MASTER AND OWNERS.
See SHIPPING, 1, 2.

MASTER AND SERVANT.

1. Where a poor child is bound an apprentice by the overseers of the poor, to do any work in which his master may see fit to employ him; this is understood to mean any lawful work; and the indenture is valid within the statute. *Bowes v. Tibbetts.* 457

2. Where an apprentice is employed by a third person, without the knowledge or consent of his master; the master is entitled to recover the value of his earnings against the employer, even though the latter did not know that he was an apprentice. *ib.*

MILITIA.

1. Every citizen not within any class of persons specially exempted by statute from military duty, is presumed to be able bodied and liable to enrolment, until he show the contrary. *Hume v. Vance.* 158

2. Being near or short sighted, if the party is able to pursue the ordinary business of life without inconvenience, is not such a permanent disability as will exempt him from military enrolment. *ib.*

3. In cases of permanent disability, it is not necessary to obtain a surgeon's certificate, in order to be excused from military duty; the statute on this subject applying only to those which are temporary. *ib.*

4. The commanding officer of a regiment, for the time being, is the proper officer to sign a surgeon's warrant. *Tripp v. Garey.* 266

5. The only legal evidence of the appointment of a clerk of a company of militia, is the captain's certificate on the back of his sergeant's warrant, "that he does thereby appoint him to be clerk of the company." *ib.*

MILLS.

1. The remedy by complaint, provided by *Stat.* 1821, *ch.* 45, for the owner of lands flowed by the erection of a mill dam, does not lie for a town, against one who has flowed a town road, the fee still remaining in the original owner. For such injury, the remedy is by special action on the case. *Calais v. Dyer.* 155

2. But it seems that it does lie for one who has only a private easement in the land; and also for a tenant for years. *ib.*

MONUMENTS.

1. Where the plan and the monuments made by the original surveyor of a tract of land do not correspond, the monuments are to be resorted to, in order to ascertain the true location. *Esmond v. Turbox.* 61

2. And if the monuments were made by one surveyor, and the plan drawn by another, and the plan alone is referred to in a deed of conveyance, yet the monuments govern and control the plan. *ib.*

MORTGAGE.

1. In computing the three years after entry for condition broken, within which a mortgagor may redeem, the day of entry is to be excluded. *Wing v. Davis.* 31

2. Where a mortgage has been assigned, and the assignee has entered and is in possession, the tender, under *Stat.* 1821, *ch.* 39, is to be made to him, and not to the original mortgagee. *ib.*

3. Tender of money in a bag, made at the window of a house, to redeem a mortgage, the creditor being at the window, and not admitting the debtor within the house, is sufficient. *ib.*

4. But such tender, made after day light is gone, is too late. *ib.*

5. Where the purchaser of an equity of redemption afterwards took a deed of release and quitclaim from the mortgagee, this was held to be no extinguishment of the mortgage, but only an assignment of the title of the mortgagee. *Carll v. Butman.* 102

6. If the mortgagor has aliened the land to two persons, in separate parcels, a judgment obtained by the mortgagee against one of them for the whole tract, does not foreclose the other's right to redeem. *ib.*

It is not essential to the validity of a

mortgage of personal property, that it should contain a schedule or particular enumeration and valuation of the goods; if it be made without fraud, and sufficiently indicate the goods intended to be mortgaged. *Brinley v. Spring.* 241

8. If the first mortgagee afterwards acquires the right in equity of redemption, such purchase, and union of titles, will not affect the rights of an intervening second mortgagee; but he may still redeem the first mortgage, until foreclosure. *Thompson v. Chandler.* 377

9. If the purchaser of a right in equity to redeem a mortgage, takes an assignment of it, this shall not operate an extinguishment of the mortgage, if it is for the interest of the assignee to uphold it. *ib.*

See ASSIGNMENT 2.
CONVEYANCE 5.
DOWER 1, 2, 3, 4.
EXECUTION 5.

NEW TRIAL.
See EVIDENCE 12.

NOTICE.
See ATTACHMENT 2, 3.
BILLS OF EXCHANGE, &c. 2.
CONVEYANCE 6.
GUARANTY 1, 2, 3.
TOWNS 1.

OUSTER.

1. In a writ of entry, the question being upon the fact of ouster by the defendant, and it appearing that he held a deed of the land, as security for a debt, given to him by a third person, who continued in possession, but under no certain agreement as to time or amount of rent; the defendant intending to take the land into his possession whenever he should think proper;—this was held to be no sufficient evidence of an ouster. *Jordan v. Sylvester.* 335

See ACTIONS REAL 3.

PARISH.

1. The *Stat.* 1821, *ch.* 135, did not dissolve territorial parishes, but left them as they stood before it was enacted. *Osgood v. Bradley.* 411

2. Therefore the sons of the members of such parishes, on coming of age and continuing to reside within the limits of the parish, become *ipso facto* members of the same. *ib.*

3. So also persons who come to reside within the limits of a territorial parish, and do not belong to any other religious society, do thereby become members of the parish within which they come to reside. *ib.*

4. It is no longer necessary, in order to entitle a man to vote in parish affairs, that he should have been assessed in the last parish tax; that part of *Stat.* 1786, *ch.* 10, being virtually repealed by *Stat.* 1821, *ch.* 135, *sec.* 3. But the other provisions of *Stat.* 1786, *ch.* 10, so far as they are not inconsistent with our statutes of 1821, *ch.* 114, and 135, are still in force in this State. *ib.*

5. The legality of a town or parish meeting for the choice of officers is sufficiently proved by showing that it was notified and warned in due form, by those claiming to act as the legally qualified officers of the preceding year. *Tuttle v. Cary.* 426

6. The return of the constable or collector on the back of the warrant for calling a town or parish meeting, is the only proper evidence that the meeting was legally warned. *ib.*

7. And such return must show the manner in which the meeting was warned, or it will be bad. Nor can a defect in this particular be supplied by parol evidence. *ib.*

8. But if the constable's return is thus defective, it does not follow that the proceedings of the inhabitants at the town or parish meeting are necessarily void, to all intents; since in some cases the objection may be lost, on the ground of of waiver or estoppel. *ib.*

9. Yet in an action against the moderator of a parish meeting, for refusing the plaintiff's vote, the constable's return not showing how the meeting was warned, this defect was held to be incurable, and fatal to the action. *ib.*

See ACTION 3.

PATENT.
See CONTRACT 1, 2.

PLANTATIONS.
See POOR 1, 2.

PLEADING.

1. After verdict, the court will support the declaration by every legal intendment, if there is nothing material on record to prevent it. *Warren v. Litchfield.* 63

2. Therefore where the plaintiff declared against a town, that a certain bridge in it was out of repair, by reason whereof *his* horse, of the value of seventy five dollars, harnessed in *a* chaise, was drowned, and the harness injured to the value of fifteen dollars; and the jury found for the plaintiff, with damages to the amount of seventy two dollars and fifty cents;—the declaration, after verdict, was held well enough, the

damages being taken to refer to the horse which the plaintiff alleged to be his, and not to the harness, to which he did not set forth any title. *ib.*

3. Where a private statute created a corporation for the purpose of opening a canal, without directing when it should be done; under which statute the defendants, as corporators, justified certain acts complained of; and the plaintiff replied that they had never opened the canal in manner and form as prescribed by the statute, without alleging that reasonable time for that purpose had elapsed; the replication was for this cause held bad on general demurrer. *Spring v. Russell.* 273

4. In debt on an administrator's bond, the defendant pleaded in bar that he had paid to the heirs and creditors of the intestate divers sums which had been allowed by the Judge of Probate, amounting to more than the penalty of the bond. The plaintiff replied that the defendant was indebted to the intestate in certain promissory notes, of which he had never rendered any account; but without any averment that he had been cited for that purpose. And on demurrer it was held that the replication was bad, for the omission of such averment; that the plea would have been bad if demurred to; that the defect of the plea was cured by the fault of the replication; and that a citation to account being an essential prerequisite to the right to maintain the action, and it judicially appearing that the defendant had never been cited, though several issues of fact had been found against him, he was entitled to judgment *non obstante veredicto. Potter v. Titcomb.* 302

5. Where *S* sold a vessel to *A* who promised, in consideration thereof, to pay *B* a debt due from *S* to him; upon which promise *B* brought his action against *A*; it was held sufficient for the plaintiff to set forth so much of the promise as enured to his own benefit; and that proof of other and further particulars of the contract did not affect the action. *Brown v. Attwood.* 356

6. It was also held that such promise was good, though not in writing; for it was a promise to pay *A*'s own debt, though it enures to the benefit of *B*. *ib.*

7. It was also held that *S* was a competent witness for the plaintiff, his interest being equally balanced. *ib.*

8. Where certain of the heirs at law of an intestate, entitled to different proportions of the personal property, joined with the administrator in a submission of their claims to an arbitrator, who awarded a gross sum against the administrator, which he further proceeded to apportion among the heirs; it was held that they all might well join in an action on the award. *Stetson v. Healey.* 452

See PRACTICE 2.

POOR.

1. The provisions of the pauper laws, requiring towns to relieve and support the poor, do not extend to plantations. *Blakesburg v. Jefferson.* 125

2. Though plantations may raise money for the support of the poor, they are not obliged so to do. Nor have their assessors any general authority to bind the plantation by their contract for the support of the poor, beyond the amount of the money raised. *Means v. Blakesburg.* 132

See CONTRACT 14, 15.

PRACTICE.

1. Whether the merits of a motion in arrest of judgment made in the court below for defects apparent on the face of the declaration, can be brought before this court by summary exceptions, under *Stat.* 1821, *ch.* 93, *sec.* 5,—*dubitatur*. *Warren v. Litchfield.* 63

2. Leave to replead may be granted after argument upon demurrer. *Potter v. Titcomb.* 302

PRESUMPTION.

See EVIDENCE 15, 16.
SETTLEMENT 2.

PROMISSORY NOTES.

See BILLS OF EXCHANGE &c. 1.

PROPRIETORS OF LANDS, &c.

1. The provincial statute of 1738, [11 *Geo.* 2.] authorising the sale of delinquent proprietors' lands after thirty days notice, was not, by any necessary or fair implication, repealed by that of 1753, [21 *Geo.* 2 *An. Char. p* 598,] which required a delay of six and twelve months and a subsequent notice of forty days, they not being in *pari materia*. *Farrar v. Perley.* 404

2. An article to raise money for certain purposes, inserted in the warrant for a meeting of the proprietors of lands, is not exhausted of its efficacy by a single vote raising a certain sum; but further sums may from time to time be lawfully raised at subsequent adjournments of the same meeting, till the objects of the proprietors are accomplished. *ib.*

REFEREES.

See EXCEPTIONS 1.

SALE.

1. The delivery of the deed of transfer of a ship at sea, passes the title to the vendee, subject only to be defeated by his negligence in not taking possession of her within a reasonable time after her return to port. *Brinley v. Spring.* 241

2. The negligence in that case must be such as to afford ground for the presumption of fraud. *ib.*

3. Should such vessel arrive at another port, notice of the sale, forwarded by the purchaser to the captain, would seem to be equivalent to taking possession. *ib.*

4. It is only where the damages recovered include the value of the article for the taking of which the action was brought, that the chattel is transferred by operation of law, and the property therein vested in the trespasser. *Loomis v. Green.* 386

5. Therefore where, in an action of trespass for breaking and entering the plaintiff's close, and cutting down and carrying away divers timber trees, the plaintiff attached the timber, and took it into his own possession as reclaimed by himself; the defendant confessed the trespass; and the plaintiff entered a formal abandonment of so much of the action as related to the carrying away of the timber, and proceeded for damages for breaking and entering his close and prostrating his trees; for which he had judgment for nominal damages only;—it was held that by this judgment the title to the timber was not changed. *ib.*

See ATTACHMENT 1.

SCHOOLS.

See CONTRACT 10.

SET-OFF.

1. Whether, where the creditor in one execution is joint debtor with others in another execution, the officer, having both in his hands, is bound by *Stat.* 1821, *ch.* 60, *sec.* 4, to set off one against the other, at the request of such creditor;—*dubitatur. Gould v. Parlin.* 82

2. If a party has once applied to the discretion of the court, by motion, to set off one judgment against another, which is refused, after a full hearing on the merits; he cannot afterwards maintain an action against the sheriff to whom both executions have been delivered, for refusing to set off the executions in the same manner *ib.*

3. *Aliter*, if the court declined interfering at all in the matter, in that summary mode. *ib.*

SETTLEMENT.

1. A legitimate child, being a minor, and having a settlement derived from its father at the time of his death, does not follow any new settlement afterwards acquired by the mother. *Fairfield v. Canaan.* 90

2. Where a husband had been absent at sea more than sixteen years prior to *March* 21, 1821, without having been heard from, except a rumor that he was impressed on board a British vessel of war; this was held to afford legal ground for the presumption that he was dead; so that the wife was capable of acquiring a new settlement for herself by dwelling on that day in another town, under *Stat.* 1821, *ch.* 122. *Biddeford v. Saco.* 270

3. Illegitimate children, under age, living with their mother on the 21st day of *March*, 1821, do not follow a new settlement acquired by her by residence on that day in some town in this State; but retain the settlement which she had at their birth. *ib.*

4. Being taxed in any town for five successive years, does not gain a settlement, if the party during that period has left the town with an intention of never returning; though such intention was changed, and he did in fact return, within the same year. *Westbrook v. Bowdoinham.* 363

5. The assessment of taxes for five successive years, on a person afterwards a pauper, does not estop the town, in a question of settlement, from showing that during part of that period his domicil was in another town. *ib.*

SETTLER.

See CONVEYANCE 3, 7.

SHERIFF.

1. The offices of justice of the peace, and of sheriff, deputy sheriff, or coroner are not compatible with each other *Bumford v. Melvin.* 14

2. The *Stat.* 1821, *ch.* 67, requiring the sheriff to notify the bail fifteen days before the return day of the execution, does not excuse the sheriff from making diligent search for the body and goods of the debtor, as before. *Kidder v. Parlin.* 80

3. Where one became bail at the request of a third person, who afterwards paid him the greatest part of the judgment, which the bail had been compelled to satisfy;—this was held to constitute no defence for the sheriff, in an action brought against him by the bail, for a false return on the execution. *ib.*

See AMENDMENT 1.
CONTRACT 7.
DAMAGES 2.
ESTOPPEL 2.

EVIDANCE 14.
EXECUTION 1, 4, 5.
SET OFF 1, 2, 3.

SHIPPING.

1. Where a fishing vessel was let on shares to the master, who was to victual and man her, the owner having nothing to do with the purchase of supplies, nor with the employment of the vessel;—it was held that the owner was not liable for supplies furnished to the master. *Winsor v. Cutts.* 261

2. Whether one holding the title to part of a fishing vessel, as security for the payment of the purchase-money, in trust for the master who had contracted for the purchase, and had taken the vessel for the fishing season on the usual shares, is liable for supplies furnished to the master;—*quære.* *ib.*

See SALE 1, 2, 3.

STATUTES CITED AND EXPOUNDED.

Constitution of Maine.

Art. 2, qualification of electors. 492
Art. 3, *sec.* 2, distribution of powers. 17
Art. 4, *sec.* 5, elections. 497

Statutes of Maine.

1821, *ch.* 39, *sec.* 1—mortgages. 31
—— — 45—mills. 155
—— — 50, *sec.* 2—forfeiture. 225
—— — 51, *sec.* 70—indorsement of writs. 311
—— — 51, *sec.* 23, 24—Probate jurisdiction. 467
—— — 60, *sec.* 4—cross executions. 82
—— — 60, *sec.* 17—sale of right in equity. 376
—— — 60, *sec.* 1—attachment. 232
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Private Statutes.

March 15, 1805, *Feb.* 29, 1812, *March* 21, 1829, } Androscoggin booms. 474
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1738, 11 *Geo.* 2—nonresidents. 404
1753, 26 *Geo.* 2—nonresidents. 404
1786, *ch.* 10—parishes. 411

STATUTE OF LIMITATIONS.

See LIMITATIONS.

STATUTE OF FRAUDS.

See FRAUDS.

SURETY.

1. In an action against the surety in an executor's bond, he is not precluded, by a previous judgment against the executor, in a suit by a legatee, from showing a deficiency of assets. *Hayes v. Seaver.* 237

See ACTION 2.

TENANT AT WILL.

1. The manure on a farm in the possession of a tenant at will is liable, during the continuance of his tenancy, to be seized in execution and sold for the payment of his debts. *Staples v. Emery.* 201

TENANT FOR YEARS.

See MILLS 2.

TENDER.

1. Where a town order, payable in corn and grain, was presented to the town treasurer, who offered to pay it in those articles, but said that if the payee would wait till a future day he would pay it in money; which was agreed;—it was held that this was a waiver of the tender; and that the treasurer had sufficient authority thus to bind the town. *Veazy v. Harmony.* 91

2. When specific articles, as corn or the like, being a part of a larger quantity, are tendered, it seems they should be separated and set apart from the mass in which they are contained, that the party may see what is offered, and is to be his own. *ib.*

See MORTGAGE 2, 3, 4.

TOLLS.

See BOOMS 1.

TOWNS.

1. In an action against a town for damages occasioned by a defect or obstruction in the highway, it is not necessary to prove that the surveyor or selectmen had notice of the existence of the nuisance, if it were seasonably known to other inhabitants of the town. *Springer v. Bowdoinham.* 442

2. Therefore, where a stick of timber was deposited in the highway, on the confines of a village, between one and

two hours before sunset, which was seen by several inhabitants of the town, though not known to the selectmen or the surveyor; and in the same evening the plaintiff's chaise wheel struck the timber, whereby he was thrown out and injured; it was held that the town was liable, under *Stat.* 1821, *ch.* 118, *sec.* 17. *ib.*

See MILLS 1.
PROPRIETORS OF LANDS 2.

TOWN OFFICERS.

1. Where a town officer is sworn into office by the moderator of the meeting at the time of his election, the proper evidence of the fact is the certificate of the moderator, filed in the office of the town clerk, and proved by an attested copy. *Abbot v. Hermon.* 118

2. Overseers of the poor are justifiable in advancing money, employing counsel, and rendering assistance in the prosecution of a bastardy process, the complainant being poor, and an inhabitant of their town. *Dennett v. Nevers.* 399

3. And where they had done so, and procured judgment of filiation, with costs, which were collected by the attorney of record for the complainant, and passed to the credit of the town, to which he had charged his fees; and the record was afterwards quashed on *certiorari;* it was held that neither the overseers, nor the town, nor the attorney, but the complainant alone was liable to refund the costs so paid. *ib.*

See EVIDENCE 4, 5.
PARISH 5, 6, 7, 8.
TENDER 1.

TRESPASS.

See SALE 4, 5.

USURY.

1. Where the title to real estate is absolutely vested by deed of bargain and sale, it shall not be disturbed by proof that all or part of the consideration was a usurious debt. *Hale v. Jewell.* 435

VERDICT.

1. If the judge has left certain questions to the jury, which it was his own province to decide; yet if the jury have come to a proper result, the verdict will not be disturbed. *Copeland v. Wadleigh.* 141

See JURY 2.
PLEADING 1, 4.

WAIVER.

See CONTRACT 5, 17, 18.
ESTATES UPON CONDITION 2.
EVIDENCE 13.

WAY.

1. Fresh water rivers, of public use in the transportation of goods, are of common right as public highways by water. *Spring v. Russell.* 273

See CONSTITUTIONAL LAW 2.

WRIT.

1. In an action on a Probate bond, it is sufficient if the writ be indorsed with the names of the persons for whose benefit it is brought, without mentioning the characters in which they claim. *Potter v. Titcomb.* 302