REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

BY SIMON GREENLEAF,
Counsellor at Law.

VOL. VIII.

PORTLAND:
PUBLISHED BY WILLIAM HYDE FOR Z. HYDE.

A. Shirley.....Printer.

1834.

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

Attorney General, ERASTUS FOOTE, ESQUIRE.

ERRATA.

The Reporter having been unable, from the distance of his place of residence, to correct the press, some errors have unavoidably occurred; but none, it is hoped, materially affecting the sense. The reader is requested to correct the following:—

Page 10, line 25, after *ought*, insert *not*. Page 150, line 15, for 1831 read 1830.—Page 167, line 12, from bottom, dele *six*. Page 363, line 12, for *defendants*, read *demandants*. In a few copies, the *year* in the running title on pages 187, 189, 195, 199, 201, 203, 211, and 213, is erroneously inserted, and should be 1832.

A TABLE

OF THE CASES REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF KENNEBEC, MAY TERM, 1831.

MORTON *vs.* CHANDLER.

A recognizance having been taken in too large a sum, by the fraud of the conusee, and satisfaction had by extent on the land of the debtor, the latter applied to the creditor to refund the excess, who replied that *if there was any mistake he would rectify it, but he knew of none.* In an action of *assumpsit* brought to recover this excess, to which the general issue and the statute of limitations were pleaded, it was held that this language of the creditor, the fraud being proved, was sufficient to take the case out of the statute.

It was also held, that notwithstanding a writ of entry for the same land had been brought by the conusee against the conusor, and successfully prosecuted to final judgment, yet the conusor might now show the fraud of the conusee, and recover the amount of the excess, in an action for money had and received.

THIS case, which was *assumpsit* for money had and received, [see 7 *Greenl.* 44.] came again before the court; and was tried before *Weston J.* upon the general issue, and a plea of the statute of limitations. The plaintiff, on the 31st day of *March*, 1819, had given to the defendant a recognizance of debt before a magistrate; and it now appeared that by the fraud of the latter it was taken in too large a sum. To recover back this excess, was the object of the present action. The execution which was issued on the recognizance

had been satisfied by extent on real estate; for which the defendant had afterwards brought a writ of entry against the plaintiff, which the latter defended, without success. [See 6 *Greenl.* 149.] The counsel for the defendant now contended that the plaintiff ought not to be let in to the evidence of fraud, as it afforded ground of defence against the writ of entry. But the Judge overruled the objection.

To remove the bar arising from the statute of limitations, *R. Belcher*, Esq. formerly of counsel for the plaintiff, testified that in conversation respecting this demand, in the year 1825, the defendant told him that if there was any mistake in the recognizance he would rectify it, or was willing to rectify it; but that he knew of no mistake. This evidence, the Judge ruled, if believed by the jury, took the case out of the statute. And the verdict being for the plaintiff, the sufficiency of this testimony, and the admissibility of the evidence of fraud, were reserved for the consideration of the court.

Sprague and *A. Belcher*, for the defendant, contended that as land only had been received, and here was no express promise to pay money, this action would not lie. But if this objection were removed, the evidence of fraud was inadmissible. If it existed, the proper time to have offered it was in the trial of the writ of entry; when the whole matter was open to the plaintiff; and the fraud would have vitiated the whole extent. Having omitted or failed to show it then, he ought now to attack the recognizance collaterally, and in part. *Richardson v. Kilham*, 10 *Mass.* 239; *Scott v. Gilmore*, 3 *Taunt.* 226; *Bliss v. Negus*, 8 *Mass.* 46; *Thatcher v. Gammon*, 12 *Mass.* 268; *Loring v. Mansfield*, 17 *Mass.* 394; 1 *Stark. Ev.* 252.

If, however, the proof is admissible, it is only to show fraud and not a mistake. Now it is settled that the plaintiff is not to be permitted to go behind the recognizance to prove a mistake, in order to create a right of action to recover back the money; and *a fortiori* not to revive one. Proof of fraud is no answer to a plea of the statute of limitations. It should have been pleaded. *Clark v. Houghman*, 2 *Barnw. & Cresw.* 149. But if admitted, it does not

amount to an acknowledgment of indebtedness, and so does not avoid the statute. *Robbins v. Otis*, 3 *Pick.* 4; *Green v. Dana*, 13 *Mass.* 493; *Cutts v. King*, 1 *Greenl.* 158; *Homer v. Fish*, 1 *Pick.* 435; *Smith v. Lewis*, 3 *Johns.* 157; *Canfield v. Munger*, 12 *Johns.* 347; *Gardiner v. Tudor*, 8 *Pick.* 206; *Perley v. Little*, 3 *Greenl.* 97; *Bangs v. Hall*, 2 *Pick.* 368; *Deshon v. Eaton*, 4 *Greenl.* 413; *Fisk v. Needham*, 11 *Mass.* 452; *Porter v. Hill*, 4 *Greenl.* 41; *Wetsell v. Bussard*, 11 *Wheat.* 309; *Bell v. Morrison*, 1 *Pet.* 368; *Reed v. Wilkinson*, 2 *Wash. C. C. Rep.* 514; *Lonsdale v. Brown*, 3 *Wash. C. C. Rep.* 404.

Allen, for the plaintiff, cited *Albee v. Ward*, 8 *Mass.* 79; *Whitcomb v. Williams*, 4 *Pick.* 228; 15 *Johns.* 232; *Jones v. Scriven*, 8 *Johns.* 453; 12 *Mass.* 135; 16 *Mass.* 306; *Jones v. Robinson*, 2 *Munf.* 187; 1 *Salk.* 29; 1 *Ld. Raym.* 421; *Bush v. Barnard*, 8 *Johns.* 407; *Seaward v. Lord*, 1 *Greenl.* 163.

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

Mellen C. J. On a former occasion, when this cause was before us on a motion to set aside a former verdict, we granted a new trial on the ground that parol evidence had been improperly admitted to the jury to shew that a larger sum than was due to the defendant was inserted in the confession or recognizance by mistake; because it was not competent for the plaintiff, for such a purpose, to contradict the express language and stipulations of the recognizance, under his own hand and seal. And as the jury had found their verdict merely on the above mentioned principle, it was set aside, and an intimation given to the counsel, that if the plaintiff could prove that the excess was inserted in the recognizance without his consent or knowledge, and by the management and fraud of the defendant, parol evidence would be admissible in that manner to impeach the recognizance as well as any other deed. On the last trial such evidence was offered and ruled to be admissible; and upon the strength of it the jury returned their verdict for the plaintiff. But as the fraud complained of was committed more than six years before the commencement of the action, it was contended

that it was barred by the statute of limitations. The parol evidence offered in answer to this objection was, though opposed, admitted, and decided by the presiding Judge to be sufficient, if believed, to take the case out of the statute. So that the only question is whether his decision was correct.

It seems to be a well settled principle that when the original promise is proved by legal evidence, it may, after the expiration of six years, be revived or taken out of the statute by proof which would not have been sufficient to prove the original promise; for instance, no consideration need be proved. In the case of *Gibbons & al. v. McCasland*, 1 *Barnw. & Ald.* 690, it was decided that the defendant's testator, having entered into a guaranty in writing, and become liable more than six years before the commencement of the action, the case was taken out of the statute of limitations by a verbal promise, made within the six years, "that the matter should be arranged." In the case before us the promise of the defendant was that "if there was any mistake in the confession, he would rectify it, or it should be rectified." It is true, such a promise could not have been legally proved to support the original action, as we have already decided, any more than parol evidence could have been legally admitted to prove the guaranty in the case of *Gibbons & al. v. McCasland;* but the question is whether it may not be sufficient to relieve the case from the operation of the statute. The promise had reference to the subject matter of the dispute between the parties, namely, the excess in the confession; and though this, according to the finding of the jury, was a fraud in respect to the defendant, yet it was certainly nothing more than a mistake in respect to the plaintiff. Does not the language of the defendant amount to this? If there is any excess in the confession "arising from what *Morton* calls a fraud, but *I* call a mistake, justice shall be done to him and I will account to him for the amount of it." When the proof as to the new promise was offered, the question was before the jury whether there was an excess included in the recognizance by the management and fraud of the defendant. The character of the transaction was the essential point, before the jury, and not merely the transaction itself; not only the fact and amount of excess,

but whether it was included in the recognizance by the defendant's fraud. He promised, if there was any such excess, it should be accounted for; the jury have found that there was, and have also found it to have been the consequence of the fraudulent act of the defendant. His conditional promise has thus become absolute by the verdict of the jury. In accordance with the above principle is the case of *Bristow & al. v. Eastman, Peake's Ca.* 223. It was an action for money had and received to recover a sum which the defendant had embezzled and fraudulently appropriated to his own use. The defence was infancy, the sufficiency of which, in a case of fraud was not admitted by Lord *Kenyon*, but the point was not decided by him; because the plaintiff not only proved the fraud by the confession of the defendant, but also a promise of payment, after he came of age; and so the plaintiff obtained a verdict. Fraud was the gist of that action as it is of the present one; and for the same reason that a promise of payment destroyed the defence of infancy in that case, a new promise (which the jury have found) has taken this case out of the statute of limitations. In our opinion the ruling was correct in both instances; and the question whether correct or not, is the only one reserved. We therefore have no occasion to answer the argument, that the plaintiff has lost his remedy, by neglecting to defend the real action on the ground of the fraud.

Judgment on the verdict.

GREEN *vs.* YOUNG, *Administrator.*

The liability of the surety, in a bond conditioned for the official good conduct of a deputy sheriff during his continuance in office, extends as well to defaults committed after, as before, the death of the surety.

DEBT on bond. The defendant's intestate was surety in an office bond, given by one *Joseph Young* on his appointment as a deputy of the plaintiff, who was sheriff of the county of *Lincoln.* The breach happened nearly three years after the death of the surety; and the question was whether the liability of the surety extended to such breaches. *Weston J.* before whom the cause was tried, ruled that it did, and directed the jury to find for the plaintiff; reserving the point for the consideration of the court.

Sprague, for the defendant, argued that there was no debt due from the intestate at the time of his decease; nor any contingent claim, on account of which the estate could have been represented insolvent. Neither could the administrator have been justified in paying money for any liability then existing under the bond. Nor could he, by reason of any such liability, resist the claim of any creditor for payment of his debt. *Colman v. Hall*, 12 *Mass.* 570. And he contended that a rule establishing the liability of the estate would operate mischievously against co-sureties, who might lose all remedy for contribution.

He took a distinction between official bonds, for the good conduct of public officers, and those conditioned for the performance of a private duty; arguing that in the former case the liability terminated with the life of the surety. Public policy requires it; for otherwise it would be difficult, if not impossible, to obtain prudent and responsible sureties; as no such man would be willing to expose his children to poverty through the default of an officer after his own decease, against which it would be no longer in his power to take measures of protection. And this doctrine involves no hardship on the sheriff; who may always require a new bond of the deputy, upon peril of removal from office.

And he likened this to the case of a surety lulled into a fatal security by the neglect or misconduct of the obligee; and also to the case of an agent whose authority ceases at the death of the principal;—citing *Hunt v. Brigham*, 2 *Pick.* 581; *Paine v. Packard*, 13 *Johns.* 174; *King v. Baldwin*, 17 *Johns.* 384; *Kennebec Bank v. Tuckerman*, 5 *Greenl.* 130; *Cremer v. Higginson*, 1 *Mason*, 339; *Boston Hat Man. Co. v. Messenger*, 2 *Pick.* 223; *Baker v. Briggs*, 8 *Pick.* 122.

Allen and *W. W. Fuller*, for the plaintiff, cited *Crane v. Newell*, 2 *Pick.* 612; *Worcester Bank v. Reed*, 9 *Mass.* 267; *Dawes v. Edes*, 13 *Mass.* 177; *Toller's Ex.* 184, 281; 5 *D. & E.* 307, 381; *Plummer v. Marchant*, 3 *Burr.* 1383; 5 *Bac. Abr.* 156; *Howe v. Ward*, 4 *Greenl.* 199; *Justin. lib.* 3 *tit.* 16 *de Obligat.*; *People v. Jansen*, 7 *Johns.* 332; *Bachelder v. Fisher*, 17 *Mass.* 464; *Reed v. Cummings*, 2 *Greenl.* 82; *Stat.* 1821, *ch.* 52 *sec.* 25, 27, 28; *Royce v. Burrill*, 12 *Mass.* 398; *Howes v. Bigelow*, 13 *Mass.* 384; 4 *Dane's Abr.* 44.

WESTON J. delivered the opinion of the Court.

The action before us is debt on bond, conditioned that *Joseph Young*, appointed a deputy of the plaintiff, then sheriff of the county of Lincoln, should faithfully perform the duties of that office. The breach found by the jury, accrued since the decease of the intestate. The efficacy of contracts does not cease, upon the death of one of the contracting parties. His representatives are liable to an action for its non performance, and his estate is thereupon charged to respond what may be recovered. Whether a man undertakes for himself or others, in regard to future transactions, the contingency that death may remove him before the obligation can be fulfilled, must be in the contemplation of all parties, but it remains unaffected by that event. It may be more difficult to obtain satisfaction for a violation of what the contract enjoins; but the right of the party injured to a full indemnity is unimpaired.

The intestate undertook that the principal in the bond should discharge the duties of the office, to which he was appointed. For what period? So long as he continued in office, under that ap-

pointment. The breach found then is within the very letter of the condition. The counsel for the defendant sets up, as a limitation of the liability of the intestate, that it is confined to breaches accruing in his life time. This limitation is not to be found in the instrument; and if it is sustained, it must arise by construction of law from the nature of the undertaking. We have examined with care the cases cited for the defendant, but can find nothing to justify the limitation for which he contends. The plaintiff had a right to repose upon the solvency and sufficiency of the surety. If his security in regard to future breaches ceases upon the death of the surety, he might suffer, however vigilant. He might incur severe responsibilities, arising from subsequent breaches, before he could be advised of the death of the surety. If the defendant, representing the intestate, is not liable in this case, the death of a surety upon a sheriff's bond, and upon the bonds of the treasurer of the state, of a county or town, of cashiers of banks, and of many other officers, who are required to give bonds, would exonerate his estate from subsequent breaches, and throw the whole responsibility upon surviving sureties. No adjudication to this effect has been cited, or can, it is believed, be found. And yet, if warranted by the principles of law, cases must frequently have arisen, in which such a ground of defence might properly have been taken.

The efficacy of a power of attorney continues only during the life of the constituent, because the act authorized is to be his act, through the agency of another, and his power to act, even by an agent, is extinguished by his death. But in this case, a breach of the condition of the bond did not depend upon any act or omission of the intestate. Whether a breach should or should not happen, depended upon the fidelity of another. This hazard the intestate voluntarily assumed, and we entertain no doubt thereby bound his representatives and his estate for all breaches within the condition of the bond, and for which other surviving sureties might be held accountable. *Judgment on the verdict.*

Vid. Gordon v. Calvert, 2 *Simon's Ch. Rep.* 253; 4 *Russ.* 581, *S. P.*

Davenport *vs.* Woodbridge.

In order to protect the assignee of a chose in action from the effect of any subsequent payment by the debtor to the assignor, it is sufficient if he give the debtor *notice* of the assignment, without exhibiting the security, or offering him any other evidence of the fact.

This case was *assumpsit* on a note or due-bill made by the defendant, dated *February* 2, 1827, for the payment of twenty-nine dollars in wool skins and fur, to the plaintiff; and it came up by exceptions taken in the court below to the opinion of *Perham J.*

It was referred, in the court below, to Mr. *Boutelle*, who made a special report of facts; stating that the due-bill had been regularly assigned by the plaintiff to *John Otis*, Esq. who addressed to the defendant a letter informing him of the assignment; which letter the defendant received in *September*, 1827;—that before this time the defendant had made divers payments to the plaintiff, amounting to $13,41;—and that afterwards he paid other sums to the plaintiff, amounting to $35,66;—that if the defendant had sufficient and legal notice of the assignment, the plaintiff was entitled to recover the balance of $20,08, being the amount due on the note at that time;—but that if the notice was insufficient, because not accompanied by the note itself, or some evidence that it had been assigned, other than the declaration of the assignee, which latter was the referee's opinion, then the defendant was entitled to recover the excess of the plaintiff, for which he had filed his claim in offset.

And the court being of opinion that the notice given was sufficient to protect the assignee against the effect of subsequent payments to the assignor, accepted that part of the award which was in favor of the plaintiff, and entered judgment accordingly; to which the defendant excepted.

Allen, for the defendant, insisted that the assignee should have furnished the promissor with all the evidence in his power, and that mere notice was not enough, when he might have exhibited the security itself. And he urged, as strong analogy, the principle

regulating the liability of trustees in a foreign attachment; where mere notice of an assignment has no operation to discharge the trustee. *Foster v. Sinclair*, 4 *Mass.* 450; *ib.* 509; 3 *Mass.* 558.

Otis, for the plaintiff, cited 12 *Johns.* 343; 1 *Johns. Ca.* 51; *Goodwin v. Cunningham*, 12 *Mass.* 193; *Green v. Hatch*, *ib.* 195; 8 *Pick.* 470; *Dunn v. Snell*, 15 *Mass.* 485; *King v. Fowler*, 16 *Mass.* 397.

WESTON J. delivered the opinion of the Court.

The common law did not permit the assignment of a chose in action. The technical reasons upon which this was founded, have so far given way to the necessities and convenience of social life, that such an assignment is now held to pass an equitable interest which a court of law will protect and sustain. Care is taken however that in this transaction, the party indebted shall not be a sufferer. Thus, although upon the assignment, the original creditor ceases to be, for any beneficial purpose, the owner of the demand, and cannot receive it, or any part of it, to his own use; yet if the debtor, ignorant of such assignment, make payments to him, they are to be allowed in his favor. And this qualification of the right of the assignee is for the equitable protection of the debtor. But if the latter has notice of the assignment, what he afterwards pays to the original creditor, he pays in his own wrong. It has been said that such payments ought to be allowed, unless the debtor has been furnished with valid and satisfactory evidence of the assignment. He may require this before payment to the assignee; but the notice he receives is only a measure of precaution, and to put him upon inquiry. If he finds the original creditor still retaining the evidence of the demand, he may be well justified in paying it to him, but if he cannot produce it, he has the best reason to believe the notice has truly stated the fact of the assignment. After notice, the debtor acts at his peril, and the assignee, conducting fairly on his part, is not to be deprived of his equitable interest. In the present case, the defendant was put upon his guard, and before he made further payments to the original creditor, he ought to have required of him the production of the note, and his inability to do this should

have satisfied him that he was no longer entitled to receive payment.

The assignee, before he can claim to have his interest protected, must prove both the fact of the assignment, and notice to the debtor. In this case he has done both. And the trustee in a foreign attachment, will be held liable as the debtor of the original creditor, unless the fact of the assignment appears in his disclosure; for the decision of the question, whether he is trustee or not, will depend upon that fact. In that case, the rights of attaching creditors are not to be affected by mere suggestion; but they are entitled to proof. And the debtor, before payment to the assignee, or before he can be compelled to make payment to him, may require proof of the assignment; but after notice of such assignment, he must take care to pay to the party justly entitled to receive it.

The exceptions are overruled, and the judgment affirmed.

PATTEN *vs.* HUNNEWELL.

To sustain a motion for the rejection of an award, on the ground that improper testimony was admitted by the referees; it is not enough to show that such testimony was admitted, unless it also appear that it was objected to by the party.

Where a motion was made in the court below for the rejection of an award made under a rule of court, because the referee received the testimony of the adverse party in support of his own claim; and the Judge was of opinion that this, if proved, constituted no sufficient cause for rejecting the report; and thereupon the objector omitted to offer proof of the fact, but took exceptions to the opinion of the Judge, the report being accepted;—it was held that the party was not entitled to the relief sought by the exceptions, because of that omission.

Whether referees may lawfully examine the parties themselves before them,—*quære.*

THIS case, which was *assumpsit* on an account annexed to the writ, was referred in the court below, by a rule of court. On the coming in of the award, which was in favor of the plaintiff, the de-

fendant objected to its acceptance, "because the referee admitted the verbal statement of the plaintiff, not under oath, in proof of a material part of the claim or cause of action sued; and upon said statement, without any other evidence in support of it, allowed that part of said cause of action, and awarded that the plaintiff recover the same:—also, because the referee admitted the plaintiff to prove another part of his claim by his own oath, unsupported by any other evidence, and upon such proof awarded that the plaintiff recover this claim also. But no evidence was offered of the facts on which the motion was founded." *Ruggles J.* then presiding in the court below, was of opinion that the facts set forth in the motion, if proved, would not constitute a sufficient ground for setting aside the award; and therefore accepted it and entered judgment thereon. To which the defendant filed exceptions, pursuant to the statute.

W. W. Fuller, for the defendant, contended that the rules of evidence were the same in all courts; the same reasons equally applying in all cases; 17 *Mass.* 303, 326; and that referees appointed under a rule of court were officers of the court, and their conduct therefore subject to examination and revision.

Whatever is good cause for a new trial at law, or to arrest a judgment, is good cause to set aside an award. 1 *Dane's Abr. ch.* 13, *art.* 4, *sec.* 6, and *art.* 15, *sec.* 5; 4 *Johns. Ca.* 214; 1 *Dall.* 486; 4 *Dall.* 298. The policy of the law is in favor of settlements by arbitration. The statute is professedly so. Hence the importance of establishing settled rules of proceeding before referees, that parties may have confidence in resorting to that mode of decision. But if referees may call for the declarations of the parties, the parties themselves may offer them, as of right; contrary to uniform practice in this state, especially under rules of court. *North Yarmouth v. Cumberland*, 6 *Greenl.* 21; *Jones v. Boston Mill Corporation*, 6 *Pick.* 154.

He also cited 1 *Saund.* 327, *note c*; *Brown v. Bellows*, 4 *Pick.* 190; 10 *Mass.* 253; 2 *Pennington's Rep.* 932.

Leach, for the plaintiff.

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

The question presented in this case comes before us in a form somewhat unusual. An objection was made in the Court of Common Pleas to the acceptance of the report, for certain reasons said to exist, but of which no proof whatever was offered; and we have no means of knowing whether any proof of the facts alledged ever can be produced. The Judge expressed an opinion that, if proved, those facts would furnish no sufficient ground for setting aside the report; to this opinion the defendant excepted. Had he offered proof of the facts stated and the Judge had rejected it; or if he had admitted it, and placed his decision on its insufficiency, the intended question would have been properly before us on the exception; but such is not the case, and on this ground we think the defendant is not entitled to the relief he seeks. But without going into the general questions which have been argued, we think there is also another objection to the prevalence of the defendant's motion. It does not appear that there was any objection made to the mode of proceeding adopted by the referee; for aught which appears, the whole might have been done by consent of parties; such a course being often pursued in cases of this nature. Surely, if in a trial at law, an improper witness is admitted without any objection, such admission can be no legal ground for an exception; and why should it be here? We see no reason for sustaining the exception; and it is accordingly overruled. *Judgment for Plaintiff.*

EATON *& al. vs.* BROWN, *Administrator.*

The statute of 1821, *ch.* 51, *sec.* 28, which requires an administrator to *settle* his account of administration within six months after the commissioners on an insolvent estate have reported a list of claims, is satisfied if he *exhibits* his account within that time, and presents himself to verify and support it.

The penal consequences of that part of the statute do not attach, where an account, settled after six months, is composed of new items in favor of the estate, which have subsequently come to the knowledge of the administrator, without any want of diligence on his part, or which have arisen from the unexpected collection of a debt which had previously been deemed of no value.

THIS was an action of *assumpsit* on a promissory note made by the defendant's intestate. The defendant pleaded in bar, first, that an inventory of the estate was duly returned *January* 13, 1824; that in *December* following the estate was represented insolvent, and commissioners appointed, who returned a list of claims by them allowed, including the plaintiffs' demand, on the fourteenth day of *June*, 1825. To this the plaintiffs replied that the defendant neglected to exhibit and settle his account of administration within six months after the return of the list of claims, and that no further time for that purpose was allowed by the Judge of Probate, under his hand and seal. The defendant rejoined that he presented his first account of administration *April* 5, 1825, for allowance, which, after due notice, was allowed and settled at a Probate court held on the second Tuesday of *May*, 1825;—that his second account was presented on the first Tuesday of *December*, 1825, on which notice was ordered, returnable in *February* following; and which, after being continued by the Judge for sufficient causes, was allowed by him on the first Tuesday of *March*, 1826;—that his third account was presented *July* 3, 1827, and after notice and continuance as before, was settled and allowed by the Judge on the second Tuesday of *January*, 1828;—that his fourth account was presented *May* 6, 1828, and after due notice, was allowed *June* 17, 1828; on which last mentioned day a final distribution of the assets was decreed, amounting to twenty-one cents on the dollar. Hereupon the plaintiffs filed a general demurrer, which was joined.

The defendant pleaded secondly the statute limitation of four years, in bar of actions against administrators;—to which the plaintiffs replied the insolvency of the estate, and appointment of commissioners, as before pleaded by the defendant; and that they filed their claim with the commissioners, *Nov.* 10, 1824, which had been by them allowed. To this replication the defendant filed a general demurrer, which was joined.

In order to bring all the facts before the court, the parties exhibited copies of the inventory of the estate, and of the accounts of administration; from which it appeared that the real estate was appraised at $783,00, the personal estate at $322,14, and that the debts apparently due to the intestate, of which a schedule was annexed to the inventory, amounted to $956,96;—that in his first account the administrator had charged himself with all the personal estate, including all the securities on the schedule, and had been allowed divers expenses and payments;—that in his second account he was charged with the balance of the first, and with divers goods, rents and monies received, some of which were not inventoried, and was allowed divers sums, including $817,88 "on notes improperly inventoried;" leaving a balance of about sixteen dollars in favor of the administrator;—that in his third account he was charged with further sums of money and rents received, income of the homestead, and goods not inventoried; and with an error of $90, 60, made in the computation of his first account; and was allowed for divers monies paid and expended;—and that in his fourth account he was charged with the balance of his last account, and with other monies received, including the amount of sales of real estate; leaving, after all allowances, a balance of $287,90 to be distributed.

R. Williams and *Wells*, for the plaintiffs, to show that the second plea was clearly bad, in not stating how the administrator gave notice of his appointment; and that the allowance of the claim by the commissioners was equivalent to the judgment of a court of record; cited *Steward v. Valentine*, 6 *Pick.* 276; *White v. Swain*, 3 *Pick.* 365.

And they contended that the account, which the statute required the administrator to settle within six months after the return of the

list of claims allowed by the commissioners, was his final account of administration, on which a decree of distribution could be founded; for neglect of which he was liable to this action. *Stat.* 1821, *ch.* 51, *sec.* 28; *Hunt v. Whitney*, 4 *Mass.* 623; *Coney v. Williams*, 9 *Mass.* 114; *Ring v. Burton*, 5 *Greenl.* 49; *Foster v. Abbot*, 1 *Mass.* 233; *Pierce v. Whittemore*, 8 *Mass.* 282.

Allen and *Boutelle*, for the defendant, argued that the 28th section of the statute ought to be construed strictly, because of its penal character; and that to render the administrator liable in this suit, the acts proved against him should amount to waste. But here he appears to have done all in his own power; and therefore he ought not to be chargeable with the delay occasioned while the proceedings were pending in the Court of Probate.

As to the second plea, they insisted that it was good, because the statute contained no exception which embraced this case. It only provides that in certain events the insolvency of the estate shall not be pleaded in bar; but not that the bar created by the lapse of four years shall not, in all cases, be peremptory. The exception, which gives the creditor a right to sue at law, arises where his claim has been rejected by the commissioners; and not where it has been allowed.

Weston J. delivered the opinion of the Court.

The second plea in bar is founded upon the limitation of four years, provided by law in favor of executors and administrators, who have given public notice of their appointment in the manner directed; relieving them from being held to answer to suits, which shall not have been commenced against them within that period. *Stat* 1821, *ch.* 52, *sec.* 26. That section however provides that where an estate is represented insolvent, filing a claim with the commissioners shall be esteemed equivalent to originating a suit against an executor or administrator within the meaning of the act. And the replication, containing averments to this effect, answers and avoids the bar, which is therefore adjudged bad.

What account, an executor or administrator must, at his peril, exhibit and settle, where an estate is represented insolvent, within

six months after the commissioners have reported to the Judge a list of claims, or within such further time as he shall think proper under his hand and seal to allow, was settled in the case of *Butler v. Ricker*, 6 *Greenl.* 268. It was there held to extend to the goods and chattels, rights and credits of the deceased, which fall within the proper and ordinary power and duty of an executor or administrator. Or in other words, that it is limited to the personal estate. By the replication to the first plea in bar, it appears that at least two accounts were exhibited and settled by the defendant, after the lapse of more than six months from the time a list of claims was reported to the Judge by the commissioners; and it is not averred that the Judge had enlarged the time under his hand and seal. What the character of these accounts was, or what items they embraced, does not appear in the pleadings. In order however that we might apply to this case the principles settled in the case before cited, the parties have submitted to the inspection of the court copies of the accounts, four in number, referred to in the replication to the first plea, together with a copy of the inventory of the estate.

By the first account, which was exhibited and settled before the report of the commissioners, the defendant charged himself with the whole personal estate, and had an allowance for certain services, payments and disbursements. Had the inventory contained a true and full account of all the personal estate, and the administrator had been satisfied to have abided by that settlement, it must have been regarded as a seasonable fulfilment of the duty under consideration. The Judge thereupon, comparing the list of claims with the balance in the defendant's hands, might have ordered it to be divided among the creditors. But according to the usual course of proceedings, the charge, made by the administrator against himself of the whole personal estate, was subject to be revised and modified according to the true value of the goods and chattels appraised; and as the credits might or might not prove to be available. Accordingly in his second account, the defendant charged to the estate the greater part in number and value of the demands inventoried; either because they did not prove to be due, or were found of no value. There is an error in addition in this account; by which a balance appeared to be due to the defendant, when in fact there was a balance against him. This account however, as it stood, was allowed by

the Judge; and if it contained a true exhibit of the items for which the defendant was accountable, and was not out of season, there having been no appeal from its allowance, he could not be held liable to the penalty of the law, upon which the plaintiff claims to charge him, for an error in computation, which escaped the notice of the Judge, and was subsequently corrected.

That account was exhibited within the six months, but was continued from time to time, and was finally allowed by the Judge, three months after it was presented for allowance. The statute subjects the administrator to the penal consequences therein provided, unless he exhibits and settles his administration account within the six months. It is a very severe penalty imposed for the neglect of his duty; and ought not, upon a just construction, to attach to any omission or delay, not imputable to him. It ought to be deemed sufficient, if he seasonably exhibits his accounts, and presents himself to verify and support them. And if that account, together with the preceding, had contained the whole personal estate, we are not satisfied that the defendant could have been held liable in this action. It was his duty to cause the whole estate to be inventoried, and to administer and settle an account of all the personal estate, inventoried or not inventoried, which might come to his knowledge. That he neglected to do so, within the time limited, is apparent from his third account, which was not exhibited and settled, until more than two years had elapsed from the report of the commissioners, in which he charges himself with items of personal estate to a considerable amount, not before noticed. Upon these facts, the rejoinder to the replication to the second plea must be adjudged bad as it stands; unless permission should be given to amend the pleadings. If it could be made to appear that the new items in favor of the estate had not, within the time limited, come to the knowledge of the defendant, without any want of diligence on his part, or had arisen in part from the casual and unexpected collection of a demand, which in the preceding account had been deemed of no value, the defendant would not in our opinion be held liable under the statute. If the defendant can prove averments to this effect, he may amend his rejoinder on payment of costs; otherwise judgment must be rendered for the plaintiff.

CASES

IN THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF SOMERSET, JUNE TERM, 1831.

SAVAGE *vs.* BALCH.

The rule requiring that the party, offering a deposition taken out of the State and not under a commission, must prove the official character of the person who took it, was made to prevent management and imposition, and to afford reasonable satisfaction to the court that the transaction was correct and fair.

Therefore where such deposition was taken at *St. Stephens*, in New Brunswick, the adverse party living in the adjoining town of *Calais*, and attending the caption, without objection, the court presumed that he was acquainted with the person and official character of the magistrate, and admitted the deposition without other proof.

In an action against the sheriff for the misfeasance of his deputy in the service of an execution, the declarations of the deputy are admissible in evidence against him.

And where the deputy in such case had declared that the execution creditors had engaged to indemnify him, their testimony was for this cause held inadmissible.

THIS was an action of trover, against the late sheriff of the county of *Washington*, for a yoke of oxen which had been taken by *Ebenezer Reding*, of *Calais*, his deputy, and sold, under an execution in his hands against one *James Flanders*, in favor of *Hamilton* and *Edgely*. At the trial before *Weston J.* it appeared that the oxen once belonged to the plaintiff; and the principal question was

whether he had sold them to *Flanders*. To this point the testimony was multifarious; and certain declarations of the plaintiff offered by himself, but objected to, were admitted in evidence, as part of the *res gesta*. But this part of the case it is unnecessary to state, as the opinion of the court upon it, confirming the decision of the Judge, settles no doubtful point, and contains no new illustration or application of any settled principle of law.

In the course of the trial the plaintiff offered the deposition of one *Anderson*, which had been more than a year on the files of the court, and which appeared to have been taken before a magistrate at *St. Stephens*, in the British province of New Brunswick, *Reding*, the deputy sheriff, having been present at the caption. The defendant objected to its admissibility, for want of proof that the person before whom it was taken was a magistrate, duly qualified to take depositions. But the Judge overruled the objection.

The defendant offered the depositions of *Hamilton* and *Edgely*, the judgment creditors of *Flanders*, on whose execution the oxen had been sold; to the admission of which the plaintiff objected, on the ground of their interest in the suit; and to this point he proved that *Reding*, when he seized the oxen, being informed that the plaintiff claimed them, and that they probably were his, replied that he did not care about that, for he was indemnified by *Hamilton* and *Edgely*. Whereupon the Judge rejected their testimony.

A verdict being returned for the plaintiff, the questions of law were reserved for the opinion of the court.

Allen and *Boutelle*, for the plaintiff.

Sprague and *Preston*, for the defendant.

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

It is contended on the part of the defendant that the deposition of *Anderson* was improperly admitted, because, having been taken at *St. Stephens*, in the province of New Brunswick, not under a commission from court, there was no proof that the person before whom it was taken was a magistrate. Our rule requires such proof, where a deposition is taken out of the State, and not under a commission. But the question is whether the circumstances of this

case do not justify the admission of the deposition, according to the spirit of the rule, which was made to prevent management and imposition, and to furnish the court with reasonable satisfaction that the transaction was correct and fair. Now it appears that this deposition was taken near *Calais*, where *Reding* the deputy resides; and the fact is notorious that *St. Stephens* is opposite to *Calais*. Besides, *Reding* attended at the caption, and enjoyed the opportunity for cross examination. This circumstance, in connexion with the local situation of *Reding*, raises a violent presumption that he was acquainted with the person before whom the deposition was taken, and also with his official character. Other proof on that head seems unnecessary, as it does not appear that any objection was made by *Reding*, who is the real defendant in the present action.

As to the objection to the ruling of the Judge excluding the depositions of *Hamilton* and *Edgely*, the answer is obvious. It appeared to the court, from the declaration of *Reding*, that they had engaged to indemnify him against all damages by reason of his seizing and selling, on their execution against *Flanders*, the very oxen for the conversion of which the present action is brought. Of course they were directly interested to disprove the plaintiff's title, so as to protect themselves from liability to *Reding*, on their engagement to indemnify him.

Judgment on the verdict.

JEWETT *vs.* ADAMS.

In an action against the sheriff for the neglect of his deputy, the deputy himself, being properly released, is a competent witness for the defendant.

THIS was an action of the case against the late sheriff of this county, for the neglect of one *Goodrich* his deputy, in not attaching certain property which he was directed to attach on a writ in favor of the plaintiff. At the trial, before *Weston J.* the deputy, having a release from the defendant, was called by him as a witness; to whose admissibility the plaintiff objected, notwithstanding the release, on the ground that it was against public policy; but the Judge overruled the objection; and reserved the point for the consideration of the court, a verdict being returned for the defendant.

Tenney, for the plaintiff.

Allen, for the defendant.

PARRIS J. delivered the opinion of the Court at the ensuing *July* term in *Washington*.

The law will not receive the evidence of any person who has an interest in the proposed evidence; and, consequently, whose interest conflicts with his duty.

But it is only legal, certain and immediate interest in the result of the cause, or in the record as an instrument of evidence, that will disqualify; and whenever such interest is removed, however powerful and controling it may have been, the disqualification ceases. Affection, prejudice or bias may remain, and may have their influence upon the witness after all legal interest shall have been withdrawn; but it is the latter only which excludes him as incompetent; and when that is legally removed, whatever else may remain affects merely the credibility. In this case, *Goodrich*, before the release, was directly interested in the result of the cause. The action was brought for his neglect, and if the verdict had been for the plaintiff, the judgment rendered thereon would have been compe-

tent evidence in support of an action by the sheriff against *Goodrich*, on his official bond. From this liability, however, the release discharges him, and however he may have violated the condition of his bond in the particular transaction, which is the foundation of this suit, and whatever consequences may fall upon the sheriff, by reason of such violation, he has no remedy either against *Goodrich* or his bondsmen. The release is a perpetual bar under which he may always be protected. If *Jewett* recovers against the sheriff, a satisfaction of his judgment would be a bar to any suit which he, *Jewett*, might hereafter commence against the deputy, for the same neglect; while the release would also be a like security against a suit by the sheriff; so that if *Jewett* prevail, *Goodrich* is completely protected. If he has any interest in the result of this action, it is adverse to the sheriff, the party by whom he is called.

As the release, if it be a *bona fide* transaction, has extinguished all *Goodrich's* interest in this suit favorable to the defendant, we do not perceive any thing remaining in the case which renders him incompetent. If the release be collusive, having been executed merely to accomplish this particular purpose, and *Goodrich* is still to remain liable to the sheriff, either by written or verbal contract, or secret understanding between them, it might have been developed by interrogatories, and the iniquitous attempt would have proved unsuccessful.

It has been urged, that it is against the policy of the law to permit the deputy to testify under such circumstances. We must take the law as it is, and apply to these facts the same legal rule that is applicable to other similar cases, and which has been uniformly applied by this court and the courts of Massachusetts for a great number of years. It is not the province of this, but another branch of the Government to change the law. Nor can we find, in the cases cited by the plaintiff's counsel, any good ground for a change of practice. On the contrary, courts have latterly been more inclined to lean in favor of the competency of witnesses than formerly. The law considers it to be more safe to admit the evidence when there is a doubt, than to exclude it altogether; for the rejection is peremptory and absolute; but in case the witness be received, it is still

for the jury to consider what credit is due to his testimony, taking into consideration all the circumstances of the case, and the motives by which he may be influenced. Hence, says *Starkie*, it is the inclination of the courts that objections of this nature should go to the credit of the witness, rather than to his competency; and they will not wholly exclude a witness from giving evidence, unless he would be immediately and directly affected by a result contrary to the tendency of his testimony, or unless he has an immediate interest in the record.

We are all of opinion that the witness was properly admitted, and that there must be *Judgment on the verdict.*

Heald *vs.* Cooper *& al.*

Where mill-logs were sold for a price *per* thousand, according to the quantity of lumber they should afterwards be *estimated* to make; and there was a table or scale of estimation then in such general use that the parties were found by the jury to have referred to it as the rule for computing the quantity; it was held that they were bound by this scale, though proved to be in some respects erroneous.

And, where the deduction actually made in such case, to render all the lumber equal to merchantable, was found to be too small; yet it having been made by mutual assent of both parties, with equal means of information, and without fraud, it was held conclusive upon both.

This was an action of *assumpsit* to recover the value of a quantity of logs sold by the plaintiff to the defendants. It appeared that in *October*, 1825, the parties entered into a written contract, by which the plaintiff sold to the defendants all the pine and spruce mill-logs which he might cut and deposit on the *Kennebec* river, at or a little below the forks; and the defendants agreed to pay "three dollars for each and every thousand feet of merchantable boards that the above named logs may be estimated to make." On the 18th day of

March, 1826, the defendants indorsed on the contract an acknowledgement that they had received logs sufficient to make 180,740 feet of boards; and 10,000 feet more on the 23d of *March*. These receipts were dated at *Carratunk*. The plaintiff resided in *Madison*, and the defendants in *Pittston*. In *July* following, the logs were settled for, and a receipt in full given for the price.

But the plaintiff founded his claim on an alleged error in the mode of estimating the quantity of lumber the logs would make, and by which the computation was made at the time of settlement. It appeared that there were two tables or scales in use at that time; the one denominated "the *Learned* scale," which was in manuscript; the other "the *Brunswick* scale," which was printed. Both of these scales, when applied to logs of small size, such as some of these were proved to have been, would indicate a greater quantity of lumber than the logs would actually produce; but the latter scale was most correct when applied to logs producing 500 feet and upwards. The former scale was first used at *Clinton;* then at *Waterville*, and at *Gardiner;* and it gave results more favorable to the purchaser than the *Brunswick* scale; which being printed, accompanied with rules, and more convenient, had come into general use, superseding the other. The defendants estimated the logs by the *Learned* scale, the plaintiff complaining of it at the time, and doubting its correctness, and being assured by the defendants that it was correct. Upon this point *Weston J.* before whom the cause was tried, instructed the jury, that if at the time of making the contract, and subsequently, the *Brunswick* scale had been exclusively used and adopted at and above *Gardiner*, on the *Kennebec* river, in the sale and purchase of logs, the contract must be deemed to have been made in reference to that scale; and that if a different scale, less favorable to the plaintiff, and without his knowledge and assent, were applied by the defendants, the plaintiff was entitled to recover the difference between the scale which was and that which should have been applied.

It appeared that at the time of the settlement a deduction of six *per cent.* was made by mutual agreement, in order to make the amount equal to merchantable lumber. The defendants offered

evidence to prove that a greater allowance should have been made for this purpose; and that the amount of the error thus made against them was greater than the excess in their favor which resulted from the use of the *Learned* scale. And they insisted that if the settlement was revised for the correction of one error, there ought to be a correction of both. But it being in evidence that the logs were open to the view of both parties, and that the allowance of six *per cent.* was proposed by the defendants and acceded to by the plaintiff, the Judge instructed the jury that the defendants were bound by the agreement.

And the verdict, which was for the plaintiff, was taken subject to the opinion of the Court upon the correctness of those instructions.

Allen, for the defendants, argued that as the quantity of lumber in the logs was to be "estimated" by the parties, and they had exercised their joint judgment on the subject, with such aids as they chose to adopt, the estimation, being without fraud, was final and conclusive. And as either of the scales or tables in common use would give the plaintiff more than the actual amount sold, and he had received his full pay according to one of them, he was not entitled to recover; but if there has been an error one way in the estimate, there has been a mistake of equal magnitude the other way, in the amount deducted; one of which ought to be considered against the other.

Boutelle, for the plaintiff.

PARRIS J. delivered the opinion of the Court.

Every legal contract is to be carried into effect according to the intention of the parties thereto. In this case, the contract, on the part of the plaintiff, was to furnish a quantity of mill-logs, cut and hauled on the banks of *Kennebec* river near the forks;—on the part of the defendants, it was to pay three dollars for each and every thousand feet of merchantable boards, which said logs may be estimated to make. No mode is prescribed, in the written contract, by which this estimate is to be made; and it is understood that, from the nature of the article to be delivered, the exact contents could not be ascertained until after the logs had been taken down

the river and converted into boards.—But it is alleged, on the part of the plaintiff, that this contract was entered into in reference to a usage or custom prevailing among log dealers on the *Kennebec* river, to ascertain the quantity of boards which may be made from a log or lot of logs by a scale called the *Brunswick* scale;—and it was submitted to the jury to determine, whether, at the time of making the contract, that scale was in such general and exclusive use, as that the parties in making their contract, must be presumed to have had reference to it, and would expect to ascertain the number of feet of boards, which the logs would make by that scale, and they have found in the affirmative.

This usage explains the intent of the parties, and not being in opposition to established principles of law, or in contradiction to the express terms of the written instrument, is deemed to form a part of the contract, as much as though actually incorporated into it, or expressly referred to. *Williams v. Gilman*, 3 *Greenl.* 267; 2 *Stark. Ev.* 453. Every instrument is presumed in its general terms to refer to the known and established usage respecting the subject to which it relates, and should be construed accordingly. 2 *Ev. Poth.* 214. We are then to construe this contract as if it read "The said *Coopers*, on their part, agree to pay the said *Heald* three dollars for each and every thousand feet of merchantable boards that the above named logs may be estimated to make, such estimate to be made by the *Brunswick* scale." Considering that the jury have found the usage, and that the parties contracted in reference to such usage, they are bound by it, and the plaintiff is entitled to three dollars per thousand according to that scale, unless the defendants entered into the contract under such circumstances as will absolve them from the whole or any part of it. They contend that the estimate by the *Brunswick* scale is erroneous;—that its application to logs of the size of those delivered under this contract gives a larger quantity of boards than can be actually produced; and that the plaintiff is, therefore, not entitled to the benefit of that part of the contract growing out of the usage, but must be holden to the strict quantity, or at farthest, to the estimate made by the *Learned* scale, which is understood to be more exact in giving the quantity

of boards to be produced from logs of the size of these, than the *Brunswick* scale. In viewing this objection we must consider the situation of the parties at the time they made the contract, and the circumstances under which it was made. It was made between individuals residing on the *Kennebec* river, and engaged in the lumber business.—It specified the situation from which the logs were to be taken, and where to be deposited, with such exactness as to leave no room for doubt but the defendants knew, or with reasonable diligence might have known, the description and general size of the logs for which they contracted. The *Brunswick* scale had been in use for many years, was printed and extensively circulated, and, being more convenient, had come into very general use; and before and since the contract had entirely superseded the *Learned* scale.

The presumption is, from these facts, that the defendants knew the general size and quality of the logs they purchased, and also the character of the scale by which they were to be estimated; and if they did not, that it was in consequence of a want of such diligence as the law presumes every man, having a due regard to his own interest, would be likely to use.

It is said that the *Brunswick* scale is erroneous in favor of the vender, when applied to logs of a diameter insufficient to make five hundred feet, but that when applied to logs of a larger size, it is erroneous in favor of the purchaser.

It is evident that a scale founded on general principles cannot, in its application, be equally exact in all cases. If a given *per cent.* is to be deducted, as waste, from the contents of the log, it is apparent that if the deduction be correct in a large log, it cannot be so in a small one. But it is not found, and certainly it is not to be presumed, that the defendants, dealers in lumber as they are, could be ignorant of a fact so apparent and important to the interests of all persons engaged in the lumber business. If they knew the character of the *Brunswick* scale, and they are to be presumed to have known it; if they knew, or with reasonable diligence might have known, the size and description of the logs they purchased, and of this there can be no doubt; and if they agreed that the amount of these logs should be estimated by the *Brunswick* scale, which the

jury have found to be the fact, how can they escape from the fulfilment of their contract? If the defendants' engagement had been to pay three dollars for every thousand feet of merchantable boards that the logs would actually make, as the exact quantity could not be ascertained by either scale, but only by actual admeasurement after the logs had been sawed, perhaps the evidence of custom establishing the *Brunswick* scale would have been irrelevant, as the extent of the defendants' liability would depend upon the actual, not the estimated quantity. Such, however, is not the contract. The jury have settled the fact that the quantity was to be estimated by the application of the *Brunswick* scale. Whether that scale gave more or less, the parties are to be bound by their agreement.

But the defendants contend that the allowance made by the plaintiff to render the contents of the logs equal to merchantable was insufficient. It appears that sixty feet on a thousand was allowed for this purpose, and the defendants contend that the additional allowance, which they claim as necessary to make the lumber equal to merchantable, would be more than the difference between the *Brunswick* and *Learned* scales, and that this constitutes a defence to the action. How stands the case relative to the allowance? At the time that was made, the logs were open for examination, and were examined by both parties; and upon such examination, the defendants themselves proposed six *per cent.* as the proper allowance, which was acceded to by the plaintiff, and accordingly the allowance was made and accepted.

There is no pretence of any concealment of facts, or that the plaintiff had any greater or better means of ascertaining the quality of the logs than the defendant had. The parties stood on equal ground, and having settled that question themselves, it is not open for re-examination; certainly not in the absence of all suggestion of fraud or mistake. If there was any error in the estimate, it arose from defect of judgment, and as well might a party to any contract of exchange or purchase of property allege such a cause for annuling his contract as could the defendants in this case. But the mistake in estimating the quantity of lumber which the logs would make arose in a very different manner.

The case finds that the defendants used the *Learned* scale in making this estimate, when they should have used the *Brunswick* scale;—that the plaintiff complained of it, at the time, and repeatedly inquired of the defendants whether it was correct, to which they replied in the affirmative, and further stated that it was disputed up the river until it was compared with the *Brunswick* scale. The error arising from the application of the *Learned* instead of the *Brunswick* scale, in estimating the quantity of boards the logs would make, is, therefore, attributable wholly to the misrepresentation of the defendants, and if, in consequence thereof, the settlement made and receipt given were upon the payment of a sum less than was actually due upon an estimate according to the *Brunswick* scale, the defendants are bound in equity and in law to make up the deficiency, and this action will well lie to recover it.

We are of opinion that the ruling and instructions of the Judge were correct, and that there must be *Judgment on the verdict.*

Parsons *vs.* Webb.

Where one delivered his horse to a private agent, to be sold for the owner's benefit, and the agent sold him to his own creditor, in payment of his own debt;—it was held that the owner's property was not thereby devested, and that he might maintain replevin for the horse, even against a subsequent vendee.

This was an action of replevin of a horse; and was tried before *Weston J.* upon the issue of property in the plaintiff. It appeared that the plaintiff had delivered the horse to one *Read*, his son in law, to sell for him; and that *Read* had turned out the horse in payment of a debt he owed to one *Gilman*, who had sold him to the defendant.

The counsel for the defendant contended that whatever might be the finding of the jury upon the question of property, yet as the de-

fendant had bought the horse of a person who was the apparent owner and whom he had reason to believe to be the real owner, the plaintiff could not maintain this action without proof of a previous demand of the horse from the defendant. But this point the Judge overruled, and instructed the jury that if they were satisfied that *Read* had authority to treat the horse as his own, and to dispose of him at pleasure, the title of the plaintiff had been devested; but that if his authority was merely to sell the horse for the plaintiff, it would not justify him in turning him out for the payment of his own debt.

The verdict, which was for the plaintiff, was taken subject to the opinion of the Court upon the correctness of the Judge's instructions.

Boutelle, for the defendant, waived the point of demand, which had been taken at the trial. But he contended that though an agent with limited powers could not bind his principal beyond them, yet that where, as in the present case, a loss must fall on one of two innocent persons, by the fault of a third, it ought to fall on him who, by entrusting the third person, had enabled him to do the wrong. *Hearne v. Nichols*, 1 *Salk.* 289; *Parsons v. Armor & al.* 3 *Pet.* 428; *Schimmelpenninck v. Bayard & al.* 1 *Pet.* 290. And he likened it to the case of a factor, allowed to deal as owner of the goods, in which case, the buyer may set off against the owner, his private demand against the factor. *George v. Claggett & al.* 7 *D. & E.* 359; *Moor v. Clementson*, 2 *Campb.* 22; *Paley on Agency*, 253—257; *Baring v. Corrie*, 2 *B. & A.* 137; *Kelley v. Munson*, 7 *Mass.* 319.

Sprague, for the plaintiff, cited *Kinder v. Shaw*, 2 *Mass.* 398; *Odiorne & al. v. Maxcy*, 13 *Mass.* 178; *Jarvis v. Rogers, ib.* 105; *Banorgee v. Hovey*, 5 *Mass.* 11; *Kingman v. Pierce*, 17 *Mass.* 247; *Paley on Agency*, 250, 32, 33, 35; *Copeland v. Merchant's Ins. Co.* 6 *Pick.* 198; *Jones v. Farley*, 6 *Greenl.* 226.

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

Mellen C. J. Under the instructions given to the jury, they have, by their verdict in favor of the plaintiff, decided that *Read*

had not authority from him to dispose of the horse as he pleased and treat him as his own. The question then is whether the last instruction of the Judge was correct, namely, that if the authority given to *Read* was to sell the horse for the plaintiff, it would justify him in turning him out for the payment of his own debt. Most of the authorities cited by the defendant's counsel have reference to the effect of sales made by factors and brokers, under that general authority with which they are clothed.—"A factor, who has possession of goods, differs materially from a broker. The former is a person to whom goods are sent or consigned; and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them and a general lien upon them. But the case of a broker is different; the rule stated in the case in *Salkeld* must be taken with some qualifications; as for instance, if a factor, even with goods in his possession, acts beyond the scope of his authority, and pledges them, the principal is not bound; or if a broker, having goods delivered to him, is desired not to sell them, and sells them, but not in market overt, the principal may recover them back. The truth is that in all cases, excepting where goods are sold in market overt, the rule of *caveat emptor* applies." *Baring v. Corrie*, 2 *Barn. & Ald.* 148, 149. So in *Pickering v. Burk*, 15 *East.* 43, 44, Lord *Ellenborough* says, when speaking of the authority of a broker, "If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale: If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Where the commodity is sent in such a way, and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe." *Read* cannot be considered in the light of a commercial factor or as a broker. He was merely a private agent for a particular purpose; and the instruction to the jury was, that an authority from the plaintiff to sell the horse for him, did not authorize him to turn him out in payment of his own debts. If a broker cannot pledge the principal's goods for his own debt, not

being within the scope of his authority, can it be within the scope of a private agent's authority to pledge or give away the principal's horse, or pay one of his own debts with it?

If a man should sell another's horse without any authority, the sale or act is merely void. If he is authorized to sell him to a particular person or at a limited price, can he sell him to another person for one half the limited sum? It is said the purchaser has been deceived; so has the plaintiff. It is said the plaintiff has reposed that confidence, which has been abused to the defendant's injury; true, and has not the defendant also reposed confidence unwisely? The mere possession of the horse gave *Read* no right to sell him; and therefore the defendant should have ascertained what authority had been given to *Read* by the plaintiff. To adopt the reasoning of the counsel for the defendant, would be to deprive a principal of the power over his own property, if entrusted to the hands of an agent for sale; and leave him at the mercy of those who are disposed to injure him. The grounds of public policy, as applicable to the commercial transactions to which we have alluded, cannot be considered as supporting the defendant's motion. In the case of *Fenn & al. v. Harrison & al.* 3 *D. & E.* 757, the distinction between a general and a special agent is clearly stated. *Ashurst J.* says: "If a person, keeping a livery stable, and having a horse to sell, directed his servant not to warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority; and the public cannot be supposed to be conusant of any private conversation between the master and the servant; but if the owner of the horse were to send a stranger to a fair, with express directions not to warrant the horse, and the latter acted contrary to the orders, the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment." *Buller* and *Grose* Justices, rely on the same distinction. See also *Ward v. Evans*, 2 *Salk.* 442; *East India Company v. Hensley*, 1 *Esp.* 112; *Hicks v. Hankin*, 4 *Esp.* 114; *Sugden*, 27; *Batty v. Carswell*, 2 *Johns.* 48; *Hooe v. Hancock*, 1 *Wash.* 23. Under the instructions which the jury received, they have found that *Read* was a mere agent, specially authorized to sell

the horse for the use and benefit of the plaintiff; instead of doing which, he has paid his own debt with it; thus clearly acting beyond the scope of his authority.—There must be

Judgment on the verdict.

ABEL WARE, *appellant from a decree of the Judge of Probate, vs.* JOHN WARE, *Executor, &c.*

It is the right and duty of the Judge before whom an issue of fact is tried, to determine which jury shall try the cause,—to discharge the jurors at his pleasure when they cannot agree,—to excuse jurors when he thinks proper,—and to call over a juror from one jury to serve on another, at his discretion.

Whether his decisions and orders in any of these particulars can be revised by a bill of exceptions,—*dubitatur*,—they being matters of judicial discretion, rather than matters of law.

Where, in an appeal from a decree of the Judge of Probate establishing a will, an issue is formed to the jury upon the sanity of the testator, the opening and closing of the cause belongs to the executor.

If, upon the cross examination of a witness, a question is put to him relating to the matter in issue, his answer may afterwards be contradicted by other proof, for the purpose of impeaching his credibility. But if the question relates to collateral matter, the answer of the witness is conclusive upon the party cross examining him. Nor is it necessary, in this State, first to ask the witness whether he has not, at other times, stated the facts in a different manner, in order to lay a foundation for contradicting him by proof that he has so stated them.

Where it is attempted to impeach a witness by proof of contradictory statements made by him out of court; he cannot be supported by the party calling him, by proof of other declarations out of court agreeing with his testimony on the stand.

Where, upon the probate of a will, the question is upon the sanity of the testator, the opinions of the opposing party upon that question, in favor of his sanity, expressed out of court, may be given in evidence by the executor, in support of the will.

The rule admitting evidence of the declarations of a third person, made in the presence of a party and affecting his interest, is not to be extended to include declarations made before such interest was acquired or known by the party to exist.

Thus, a conversation between other persons, affirming the sanity of a testator, had in the presence of the executor, without his dissent, the testator being still alive, and it not appearing that the executor then knew that he was appointed to that office, or that the will was made, are not admissible against the validity of the will when offered for probate by the executor.

Upon the trial of such issue, the opposing party offered to read in evidence the letters of a stranger who was proved to be insane, for the purpose of showing that insane persons might rationally write and converse on some subjects;—but such proof was held inadmissible.

Though none but the subscribing witnesses to a will are permitted to testify their opinions respecting the sanity of the testator; yet where others were called by the party opposing the will, to testify to facts showing his insanity, and their testimony was impeached by proof of their declarations at other times that in their opinion he was sane; it was held that these opinions might be considered by the jury, with the other evidence in chief, to prove his sanity.

It is not improper for a Judge to comment on the evidence, so far as he may deem it necessary fairly to present the cause to the minds of the jurors.

Where the probate of a will is opposed on the ground of insanity in the testator, this seems purely a question of fact; and, if submitted to a jury, it falls wholly within their province.

Upon an appeal from a decree of the Judge of Probate establishing the validity of a will, the allowance of costs to the appellee, where the decree is affirmed, is within the discretion of this Court; and will be refused, if there was reasonable ground for prosecuting the appeal.

THIS was an appeal from a decree of the Judge of Probate, establishing and approving the will of *John Ware* deceased; and an issue was formed to the country upon the question of the sanity of the testator at the time of executing the will. After the issue was joined, the appellant filed a motion in writing, admitting that the burden of proof was on him, to show that the testator was not of sane mind, and thereupon praying that he might have the opening and closing of the cause; which was overruled by *Weston J.* who sat in the trial.

When the cause came on to be tried, the Judge directed it to be put to the first jury, the second jury having had the trial of the preceding cause. The foreman of the first jury, on being called, requested to be excused from sitting in the cause, having formed and expressed an opinion upon the merits; and he was accordingly excused. There being a supernumerary juror, the clerk was directed to call him upon the jury; but the counsel for the appellee objected

to him, stating that he had been in a situation to hear much of the cause, and had probably formed an opinion. The juror, however, said that he had not; but he being still strongly objected to, and the whole of the second jury being in attendance, the Judge, wishing to have an unobjectionable jury impannelled, directed the clerk to call over the first juror on the second panel, who was the foreman, and who accordingly sat as a juror in this cause. To this the counsel for the appellant objected, insisting that the supernumerary ought to have been impannelled. Afterwards a juror was called to whom the counsel for the appellant objected. Upon inquiry, no legal cause of challenge appeared; but the counsel expressing a strong desire that another juror should be substituted, it was done, his place being supplied by the next man on the second panel. The jury, thus formed, tried the cause.

Dr. *Greene*, the attending physician of the testator in his last sickness, being called by the appellant, testified to certain acts and declarations of the testator, tending to show the unsoundness of his mind. Upon the cross examination he was asked whether he had stated to any one that the testator had his senses as well as ever; and whether he had uniformly so stated. He replied that he had stated to some persons, that when his mind was fixed on business he appeared regular and correct; but that to others, in whom he had confidence, and who would not report it to the testator, he had stated his real opinion, that the testator was not of sound mind; and he referred to Messrs. *Fargo*, *Pike*, *Heath*, and *Hamlet*. The counsel for the appellee then asked the witness, if he had ever stated that the appellant could not break the will, because the testator was of sound mind; or that the testator was capable of making a will; or that his mind was bright and clear. To these several questions the witness answered, that he did not recollect that he had ever so said. To all these questions the counsel for the appellant objected as improper to be asked; but the Judge overruled the objections. He also permitted the appellee to ask the witness, whether he had said that it would make a thousand dollars difference to him whether the will was established or not; to which he replied in the negative, the appellant objecting to the question.

Dr. *James Bates*, another witness for the appellant, testified that he had visited the testator during his last sickness, and stated what he saw, and heard him say. On the cross examination he was asked, whether he had told any person that whenever he saw the testator he was of sound mind; which he answered in the negative; the appellant objecting to the question, and the Judge overruling the objection.

The appellee called divers witnesses, whom he asked severally whether Dr. *Greene* had stated to them at various times that the testator had his senses,—that the appellant could not break the will, because the testator was of sound mind,—that he was capable of making a will,—that his mind was bright and clear,—that he was not insane,—that he had himself the best means of knowing the condition of his mind, and that the will could not be broken. To all which questions the appellant objected, but the Judge overruled the objections. The questions were all answered affirmatively by some of the witnesses, in the course of the testimony.

The appellant offered to prove, by the persons to whom Dr. *Greene* referred, that he had repeatedly stated to them in confidence, during the last sickness of the testator, that in his opinion the testator was not of sound mind. But this testimony, being objected to, was rejected by the Judge.

The appellee was permitted to prove that the appellant, within two or three weeks previous to the death of the testator, said that he had his senses. He was also permitted to prove that Dr. *Bates* had declared that the testator's mind was sound when he saw him; though all this evidence was objected to as improper to be offered.

The counsel for the appellant offered to read to the jury portions of several books of established reputation as medical authorities, and others upon the subject of medical jurisprudence; particularly, Cooper's Medical Jurisprudence, Johnson on the Liver, Darwin's Zoonomia, Thomas's Practice, Rush on the Mind, Good, Gregory, and others, to guide and instruct the jury on the subject of insanity, the diseases of the mind and of the body, and the sympathy between the body and its organs and the mind, and the symptoms attendant upon insanity; all which books the Judge rejected, but permitted

medical gentlemen on the stand to state their opinions upon these subjects, whether derived from books or from their own experience.

The appellant, having proved that one *John Jones* was insane, offered to read certain letters written by him while in that condition; which the Judge did not admit, the other party objecting to them. Another witness for the appellant testified, that during the last sickness of the testator, Deacon *Spaulding*, one *Fletcher*, the executor, and the witness being together in the store of the executor, under the chamber where the testator was, *Spaulding* expressed a wish to go up and see him; but *Fletcher* said "it was of no use," assigning a reason; and the executor immediately responded "no, it is of no use." The appellant proposed to ask the witness what the reason was which *Fletcher* assigned; but this being opposed, was not permitted.

The Judge was requested, by the counsel for the appellant, to instruct the jury, that if an illusion was fixed upon the mind of the testator as a reality, for months before and up to the time of executing the will, and his conduct was at any time influenced by such illusion, he was not of sane mind:—That if the testator was under a continued delusion for months previous and to the time of the execution of the will, and during that time believed an illusion of the imagination to be a reality, he was not of sane mind:—And that if he really, for months before and up to the time of executing the will, believed that he was repeatedly visited by a superhuman being, whom he saw, felt, heard and conversed with, as some of the testimony tended to show, then he was not of sane mind. But the Judge instructed the jury that the law, upon the facts assumed by the counsel for the appellant, had laid down no certain rules, and prescribed no deductions necessarily to be made from them; but that these facts, if proved, together with the other testimony in the case, must be left to their sound discretion as a matter of evidence, from which to determine the issue before them.

In summing up the cause to the jury, after calling their attention to the other evidence on both sides, the Judge adverted to the testimony adduced to contradict what had been stated by Dr. *Greene;* remarking to them that this was not of an affirmative character;

but that if it had been, and if Dr. *Greene*, who, as the attending physician of the testator during his last sickness, had the best means of knowing the condition of his mind, had testified as a witness, if it had been competent for him so to do, that his mind was perfectly and uniformly sound, it would have been testimony of great importance in the cause, calculated to afford much light upon the question before them; and that his declarations to others to this effect, though short of this proof, and being introduced to impeach his testimony rather than to establish facts affirmatively, yet being in the case, should be considered by them in connexion with the other testimony.

The jury found that the testator, at the time of making the will, was of sound mind; and it was agreed that the verdict should be deemed conclusive upon that point, in favor of the executor, unless the court should be of opinion that by reason of any of the decisions or instructions of the Judge at the trial, the verdict ought to be set aside.

Sprague, for the appellant, argued in support of the following positions:

1st. The court had no power *ex arbitrio* to set aside a juror regularly called. The supernumerary juror was thus called; and though he wished to be excused, yet he showed no legal cause; and the appellant insisted on his sitting. But the Judge set him aside, and ordered another to be called. For this he had no power at common law; which sets no juror aside but upon regular challenge. *Tidd's Pr.* 779, 781; 3 *Bl. Comm.* 359, 363; 1 *Salk.* 152, 338. Nor is such power given by the statute regulating the trial by jury. *Stat.* 1821, *ch.* 84, prescribes the mode of constituting juries; excludes none but persons convicted of infamous crimes, or incompetent; directs the mode of trying the competency of any juror objected to; requires that the twelve first on the list shall constitute the first jury, and that on excusing a juror for legal cause, a supernumerary shall be called in his stead. To admit, therefore, the power of a Judge, *ex mero motu*, at the request of a party, and without cause, to exclude a juror, is virtually to repeal the law, and leads to the packing of juries.

2d. The only question at issue being the sanity of the testator, and the presumption of law on this point being in favor of his sanity; the burden of proof was on the appellant, to show affirmatively that he was insane. And therefore, on the common rule of proceeding, the appellant should have opened and closed the cause, though some authorities may seem otherwise. *Phelps v. Hartwell*, 1 *Mass.* 71; *Brooks v. Barrett*, 7 *Pick.* 94.

3d. The cross examination of Dr. *Greene* and Dr. *Bates* was improper. None but a subscribing witness is to be asked his opinion of the sanity of the testator. Others are merely to state facts. But to ask another witness whether he has not stated his opinions elsewhere, is only another mode of foisting in those opinions as evidence in chief to the jury, by contradicting the answers. Thus, if a witness may not testify to the contents of a writing, and yet may be asked if he has not stated out of court what the writing contained, the rule is evaded. The appellee, having asked the questions, should not have been allowed to contradict the answers; or else the jury, instead of being permitted to consider the testimony as directly relating to the issue, should have been instructed to disregard it. *Poole v. Richardson*, 3 *Mass.* 330; 1 *Dane's Abr.* 451; *Needham v. Ide*, 5 *Pick.* 510; 1 *Stark. Ev.* 134, 144; *Spenceley v. Willock*, 7 *East.* 108; *The Queen's case*, 2 *Brod. & Bing.* 300; *Harris v Tippett*, 2 *Camp.* 638.

4th. The case of Dr. *Greene*, in reference to the opinions he had expressed was such as to entitle the appellant to the proof offered and rejected, by way of sustaining the perfect integrity of his testimony. *Bull N. P.* 294; 1 *Phil. Ev.* 230, 231; *Luttrell v. Raynell*, 1 *Mod.* 283; *Sir Joshua Friend's case*, 4 *State Tr.* 613.

5th. The evidence of the appellant's opinion of the sanity of the testator was illegally admitted. *Phelps v. Hartwell*, 1 *Mass.* 71; 3 *Dane's Abr.* 492, *sec.* 7.

6th. The authority of the medical books, especially those on medical jurisprudence, was as great as that of books of reports of other States; and entitled them to the same consideration. If the opinions of medical men may be given upon the stand, it is difficult to perceive why the books may not be read, from which those opinions have been formed. 1 *Salk.* 281.

7th. The letters of *Jones* were admissible, to show the jury how rationally a person really insane was capable of writing.

8th. If the opinions of the appellant were admissible, so were those of the appellee; and on this ground the testimony of what *Fletcher* said in his presence, and with his silent assent, ought not to have been rejected.

9th. If the declarations of Dr. *Greene* were admissible, it was only for the purpose of detracting from the weight of his testimony in chief, by showing that he had at other times expressed different opinions. But the Judge treated his declarations out of court, that the testator was sane, as positive evidence, tending to establish that fact; which was erroneous, at least unless all his opinions out of court should be taken together. 1 *Stark. Ev.* 50.

10th. The Judge ought to have instructed the jury as requested by the appellant, on the subject of mental illusions. An illusion fixed on the mind, constitutes insanity. It exists wherever the reason and judgment have no longer the control over the passions or imagination. And the facts being found or proved, the question whether they did or did not prove insanity was to have been decided by the court as a matter of law. 1 *Beck's Medical Jurisprudence*, 369, 374; *Hatfield's case*, 1 *Erskine's Speeches*, 495; *Miller v. Lancaster*, 4 *Greenl.* 159.

Allen and *Boutelle* argued for the appellee, citing the following authorities. To the second point,—1 *Co.* 71; *Brooks v. Barrett*, 7 *Pick.* 94; *Blaney v. Sargent*, 1 *Co.* 335; *Buckminster v. Perry*, 4 *Co.* 593.—To the correctness of the ruling of the Judge in relation to the testimony and opinions of Dr. *Greene*,—4 *Pick.* 439; *ib.* 179; 1 *Stark. Ev.* 134, 135, 148; 3 *Stark. Ev.* 1755; *Dickerson v. Barber*, 9 *Mass.* 227; *Stewart v. Sherman*, 5 *Conn.* 244; *Sears v. Dillingham*, 12 *Mass.* 360; *Hill v. Buckminster*, 5 *Pick.* 391; 1 *Stark.* 39, 40, 41; *De Sailly v. Morgan*, 2 *Esp. Rep.* 691; 2 *Camp.* 638, *note;* 1 *Phil. Ev.* 230, 231.—To the admissibility of the appellant's declarations,—*Phelps v. Hartwell*, 1 *Mass.* 71; 11 *East.* 578; *Atkins v. Sayer*, 1 *Pick.* 192.—To the testimony of what *Fletcher* said,—2 *Stark. Ev.* 37; *Jones v. Thomas*, 2 *Campb.* 647; *Doe v. Foster*, 13 *East.* 405.—And to the cor-

rectness of the Judge's instructions on the subject of mental illusions, —*Hambleton v. Russell*, 1 *Cranch*, 309; 3 *Stark. Ev.* 1702, *note m; ib.* 1707, *note u; Hathorn v. King*, 8 *Mass.* 371; *Stone v. Damon*, 12 *Mass.* 488; *Locke on Hum. Und. vol.* 1, *p.* 150; *book* 2, *ch.* 11, *sec.* 13.

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

In this case, after a long and laborious trial, the jury, by their verdict, have pronounced that the testator at the time of making his will, was of a sound and disposing mind. The issue having been thus found against the appellant, his counsel have reserved for the consideration and decision of the court, numerous questions arising out of the proceedings at the trial and the rulings and instructions of the presiding Judge; all of which we propose to consider in the order in which they have been presented in the argument by the respective counsel.

The first objection is founded in the proceedings on the part of the Judge in empannelling the jury. It appears that according to the course of business in court, the cause was in order properly to be tried by the first jury; the foreman of which having been excused on account of his having formed and expressed an opinion, there being but one supernumerary juror, he was called on to supply the place of the excused juror; and being objected to by the appellee, and inquired of, though not on oath, he stated that he had formed no opinion. But as strong objections were still urged against him by the appellee, he was set aside by the Judge, who expressed a desire to have the cause decided by an unobjectionable jury; and thereupon one of the second jury was called to sit in the trial of the cause; the appellant at the same time insisting that the supernumerary ought to have formed one of the panel. It appears also that one of the jurors, when called, was objected to by the appellant, and he was also set aside; no objection thereto having been made. Is the order of the Judge, setting aside the supernumerary in the circumstances above mentioned, a legal ground for setting aside the verdict? The 9th section of the act of 1821, *ch.* 84, re-

specting jurors, provides that the court on motion of either party, shall cause a juror to be examined on oath, as to his relationship to either of the parties, or whether he feels any prejudice or has expressed or formed any opinion; and if on such examination it shall appear that he does not stand indifferent in the cause, "another juror shall be called or returned, and placed for the trial of that cause in his stead." If the above provision would have in any manner availed the appellant, or imposed it as a duty on the court to have retained the supernumerary, as a juror on the trial, neither party moved that he should answer on oath; and so the Judge's order was not founded on, nor contrary to, any statute requirement or provision. Besides, if the juror had been sworn and answered all the statute questions in the negative, and the Judge had then, for satisfactory reasons, set him aside, no legal principle would have been violated; for the section before mentioned, makes it the duty of the court to set him aside when "it shall appear to the court that such juror does not stand indifferent in the cause;" but in the case at bar, had the juror, on oath, answered that he had formed no opinion; still there might have been various reasons which would have justified the court in setting such juror aside. Suppose the case that after a juror has answered that he is disinterested and has formed no opinion, he should request to be excused on account of deafness or indisposition, or to avoid giving offence to one or the other of the contending parties, and incurring his displeasure, both parties being his friends and neighbors; shall it be said that in such cases a judge cannot excuse and set aside such juror, whether the parties consent or not? Such a doctrine would certainly be a novel one, and opposed to a uniform course of practice ever since the statute was enacted. The Judge was influenced by commendable motives in the proceeding under consideration. In a cause of such magnitude and expectation,—a cause which in a fruitless trial at a preceding term, had consumed nearly a week,—a cause in which so much feeling had been excited and was then existing, the object was to have the trial conducted on principles and decided by a jury as impartial and unobjectionable as possible.

But the counsel for the appellant has urged that the language of the 11th section of the statute is imperative, and he has cited the following proviso, viz.: "Provided, and in case of the court's excusing for cause, any person of either of said juries, and there being any supernumeraries, the vacancy shall be supplied and the panels be filled and completed on the above mentioned principles, in the same manner as if the person excused had not been named on the jury list." In reply to this it is enough for us to observe that this section has no connexion with or reference to the arrangement of the jury for the trial of any particular cause, but relates exclusively to the mode of empannelling juries at the commencement of a term, or at the first appearance of jurors to be qualified. It is the right and duty of a Judge to superintend and direct as to the course of proceedings,—to decide which jury shall decide a particular cause, or discharge them at his pleasure when they cannot agree, —to make all requisite arrangements according to his sound discretion,—to excuse jurors when he thinks proper, or call a juror from one jury to another. It belongs to him in his discretion to do all these things; and we are by no means certain that such an order and proceeding as form the ground of this objection, are proper subjects of exception and open to revision and correction by the whole court. At least, they seem to be rather matters of judicial discretion than matters of law.

The second objection is that the order of the Judge was incorrect, by which the counsel for the appellant were permitted to open and close the cause. The counsel admits that the authorities are against him. They certainly are so; and we are satisfied the course of proceeding under the direction of the Judge was perfectly correct and proper in principle, as well as in accordance with the cases cited by the counsel for the appellee.

The third objection is that the ruling of the Judge was incorrect in permitting the questions to be answered, which were proposed to Doctor *Greene* and Doctor *Bates*; inasmuch as the answers only imported the expression of their opinions as to the capacity of the testator to make a will; and also in admitting testimony on the part of the appellee, contradicting those answers.—*Starkie*, in his learn-

ed treatise on the law of Evidence, vol. 3, page 1753, lays down the law as settled in England, that "whenever the credit of a witness is to be impeached by proof of any thing he has said or done in relation to the cause, he is first be asked, upon his cross examination, whether he has said, declared, or done that which is intended to be proved." *Queen's case*, 2 *B. & B.* 300. This principle has not been admitted in Massachusetts; *Tucker v. Welsh*, 17 *Mass.* 160; nor has it in practice in this State. Before proceeding to the examination of these grounds of objection, it may be proper to observe that Doctor *Greene* had been the attending physician of the testator, during his last sickness, and of course possessed the most accurate knowledge as to the situation of his mind and memory and his legal power to dispose of his property. He had been examined in chief as to the acts and declarations of the testator for the purpose of proving him to have been incapable of making a legal disposition of his estate; and the cross examination was intended to draw forth answers from him, for the purpose of disproving their truth by other witnesses, and of thus impeaching his credit and weakening the force of his testimony. The motive was the same in the cross examination of Doctor *Bates*.—It is contended that this course of proceeding was contrary to the established principles and rules of evidence. We apprehend that the correctness of this position, according to the most approved authorities on the subject, will depend on the nature of the proposed questions upon the cross examination; and that the true line of distinction is that which has been established between those questions which are merely collateral, and have no immediate connexion with the cause, and those which intimately relate to the subject of inquiry. The law on the point before us is laid down in very clear language by *Starkie*, vol. 1, page 134, and many authorities are there collected by him. He says, "It is here to be observed that a witness is not to be cross examined as to any distinct, collateral fact for the purpose of afterwards impeaching his testimony by contradicting him;" and he cites the case of *Spencely v. Willot*, 7 *East.* 108, as an illustration of the principle. It was a penal action for usury, in which "the defendant's counsel were not permitted to cross examine as

to other contracts made on the same day with other persons, in order to show that the contracts in question were of the same nature and not usurious, if the witness answered one way, or to contradict him if he answered the other way; and should such a question be answered, evidence cannot afterwards be adduced for the purpose of contradiction;" and he cites *Harris v. Tippet*, 2 *Camp.* 638, and *Rex v. Watson*, 2 *Stark. Ca.* 149. He observes, "The same rule obtains if a question as to a collateral fact be put to a witness for the purpose of discrediting his testimony, his answer must be taken as conclusive, and no evidence can afterwards be admitted to contradict it." He cites the two last cases and *Rex. v. Teale*, in support of the position, and then adds, "This rule does not exclude the contradiction of the witness as to any facts immediately connected with the subject of inquiry." As an illustration of this rule, he observes, "a witness may be asked whether, in consequence of his having been charged with robbery of the prisoner, he has not said that he would be revenged upon him; and in case of denial he may contradict him. *Yervin's case*, 2 *Camp.* 638. In such a case the inquiry is not collateral, but most important in order to show the motives and temper of the witness in the particular transaction." The same doctrine is laid down in pages 145, 146; and after repeating the rule, that "no evidence can be given of particular, collateral facts, for the purpose of contradicting" the witness, he assigns the reason of it; "for this would cause the inquiry, which ought to be simple and confined to the matter in issue, to branch out into an indefinite number of issues; besides this, no man could come prepared to defend himself against charges which might thus be brought against him, without previous notice." Numerous cases are cited in support of the reasons thus assigned.

We have thus presented a summary of the law on the particular subject under consideration, and it now remains for us to inquire how far the facts on which the objection is founded bring it within the range and influence of the rule above stated. In the course of the trial all evidence of mere opinion as to the sanity of the testator was excluded, except that of the subscribing witnesses; and therefore, it has been contended that as Doctor *Greene* and Doctor *Bates*

could not have been permitted to testify their opinions, as physicians, to establish the insanity of the testator, their answers on the cross examination that they had expressed their opinions of his sanity, and the questions proposed for the purpose of drawing out these answers, were all improperly admitted. But if those questions were not collateral, but intimately related to the subject of the inquiry, they were proper, and the answers thereto; according to the authorities before cited, as laying the foundation for impeaching their testimony by contradicting them, or for the purpose of discrediting them by their answers; although their opinions could not have been offered in evidence by the appellant to establish the fact of insanity. So that we are conducted directly to the point whether the questions proposed to Doctor *Greene* and Doctor *Bates* were in their nature collateral to the cause and related to distinct and collateral facts, or whether they were intimately connected with the immediate subject of inquiry, and so were proper on the cross examination. On this question it would seem that two minds could not seriously entertain more than one opinion. The sanity of the testator was the only fact in issue; and to prove and disprove it was the whole effort and labor of the parties; and in this view of the subject we are all satisfied that the cross examination of those witnesses was conducted on proper principles; and such being our opinion on this point, it follows, as a legitimate consequence, that the witnesses offered to disprove the truth of their answers and thereby impeach their testimony, were on legal principles clearly admissible for that purpose.

The fourth objection seems to be placed on an unstable foundation. The authorities cited clearly establish the principle that an impeached or contradicted witness cannot be supported by the party who called him, by proof of his declarations made at other times and to other persons, coinciding with his testimony. Such being the case, we do not in the present instance, see any reasons for considering it as removed from the influence of the general principle. Indeed it would seem objectionable on another ground, namely, that such declarations were mere expressions of the opinions of those witnesses as medical men; all which kind of evidence was exclu-

ded on the trial when offered to prove insanity, excepting the opinions of the subscribing witnesses to the will as before mentioned.

The fifth objection is that the declarations of the appellant should not have been admitted. They were made two or three weeks before the testator's death, and were distinctly expressive of his opinion of the testator's sanity at that time; and, admitting that a witness cannot be allowed to testify his opinion upon a question of sanity, as contended, does it follow that a person may not express such an opinion in conversation and afterwards, when such person has become a party on record and a party in interest, his opinion, as before expressed, may not be proved against him? And though his rights in a case like this, are not to be impaired or affected by the opinion of others, does it follow that those rights may not be impaired or affected by his own opinion? By law the confessions of a party may always be given in evidence against him and his interest, though not thereby to defeat or impair the rights of others claiming under him. In the case before us, there are no such rights. The case of *Phelps v. Hartwell* is relied on. The facts of that case are very uncertain as to the declarations offered to be proved. It does not appear when they were made, or on what they were founded. They might have been made months before, or months after the death of the testator. Indeed the facts are so loosely reported that the case cannot be relied on. Besides, the court were divided in opinion, and that opinion was given in the hurry of a jury trial, without examination or time for any. On the whole we cannot sustain this objection.

The sixth objection is that certain books on medical subjects, mentioned in the report, and alleged to be of high reputation, when offered as evidence, were improperly excluded. It was admitted in argument that there seemed to be no authorities having any direct bearing on the point. The books mentioned in some of the authorities, as admissible in evidence, are of a totally different character; and they are only exceptions from the general rule which is unquestioned. In the first place, those medical books contain only opinions or facts, stated by their respective authors. They do not come into court, as all other evidence must, either by consent or

under the sanction of an oath. Without such consent or sanction, their contents are mere declarations and hearsay. But it is urged as being more safe to read the opinions of distinguished physicians, as they have published them to the world, and thus learn the nature, tendency and effect of bodily disease, or the illusions of the imagination, upon the powers and operations of the mind, than to receive the opinions and facts from the mouths of witnesses on the stand, who have acquired all their knowledge on those subjects, perhaps, from those very books;—that such a course as the latter is founded on the idea that a copy is more perfect than an original. In answer to this it may be observed that the benefit of cross examination would be lost by allowing books of such a character to be evidence; and such cross examination is justly deemed a matter of great importance in the search after truth. The absence of all authority of adjudged cases on the point, is a strong argument against the admission of such evidence. The practice, if by law allowed, would lead to endless inquiries and contradictory theories and speculations. In a word, if one book is evidence, so is another; and if all are admitted, it is to be feared that truth would be lost in the learned contest of discordant opinions.

The seventh objection is that *John Jones's* letters were improperly excluded. This has been but little relied upon, and we do not perceive how they could have had any influence in deciding the question as to the testator's sanity. They contained the mere declarations of a crazy man.

The eighth objection is that the answer or declaration of *Fletcher* to *Spaulding*, while the appellee was with them in his store, ought to have been admitted. Had the declaration in question been made by the appellee himself, it would have been admissible for the same reason which we have given in our answer to the fifth objection; and it is contended that upon well known principles it should have been admitted, because spoken in the appellee's presence. On this point there is some uncertainty in the facts reported. The appellee was present in the store; but whether he heard the excluded declaration is not certainly known to us. It is evident that he heard a part of *Fletcher's* reply to *Spaulding*, because he echoed the

words, "it is of no use"; and it is said we must infer that he heard the whole, the reason assigned as well as the answer given. How far we are at liberty to draw this conclusion, not knowing how near the parties were to each other; how the appellee was then employed, and in how loud a voice *Fletcher* spoke, deserves consideration, and is not readily to be answered. It would have been an easy matter for *Fletcher* to state whether the appellee was attending to the conversation, and in a situation to hear it all; and yet on this point not a word has been testified. But in relation to this objection there is another answer which has not been noticed by any of the counsel. The reason why declarations made by a third person in the presence and hearing of a party are admissible, is, that his silence is construed to be an assent to the truth of those declarations; for every man is presumed to guard his own interest, and never yield his claims by a tacit acknowledgement of any thing which has a tendency to impair them. Now in the present case, when the declarations were made, the appellee was no party to this suit; he had no interest in the property to which the suit relates; the testator was then living; it does not appear that the appellee knew that he had been appointed executor, or even that any will had been made. The appellee in legal contemplation was then a stranger and had no interest in the conversation; nor was he in a situation to be committed by his silence under the then existing circumstances, though he might have been, had he then been a party in interest. In a dispute about a piece of property conveyed by a father to his son, can a plaintiff in an action against the son for the recovery of that property, give in evidence declarations made by a third person in the presence of the son, before he became owner of the property, going directly to defeat his title? We apprehend the principle has never been carried to such an extent. We think this objection also must be overruled.

The ninth objection relates to the instruction of the Judge to the jury, so far as it had reference to the testimony of Doctor *Greene*. On examination of this, it appears that the only instruction given them was, that "being in the case it would be taken into consideration by them, in connexion with the other testimony." Surely

there is nothing incorrect in this. It is true that the Judge prefaced this plain and obvious instruction with some remarks on the different degrees of knowledge which different persons probably possessed as to the capacity of the testator at the time of making his will, and the different degrees of influence which such knowledge, if legally conveyed to the minds of a jury, would probably have upon their decision of the question of sanity or capacity; and after noticing the difference between affirmative proof, and that which is merely of an impeaching character, and making an application of these remarks to the case then in trial, by way of illustration, he concluded by the instruction before mentioned. It has never been deemed a subject of legal exception, for a Judge to make his observations on the evidence, the different kinds of it, and its bearings on the points in issue, and to illustrate his meaning and enforce his observations in such manner as he may think proper;—taking care, in so doing, not to encroach upon the province of the jury in the decision of the facts, as they may think proper in view of the evidence, which they are to weigh. A Judge in the faithful discharge of his duty may and ought to state, arrange, compare and comment upon the evidence, so far as he may deem it necessary fairly to present the cause to their minds in as plain and clear a manner, as may be in his power. This proceeding on his part is often a most laborious duty, and he is to be governed, in the discharge of it, by a sound discretion; and the manner in which he performs this duty is not a subject of revision, by virtue of our statute, as a dry question of law. If any specific instructions are desired, counsel may always request a Judge to give them, and should he improperly decline to give them, his refusal is a proper subject of legal exception and revision by the whole court.

The tenth and last objection urged, is that the Judge erred in not giving to the jury the explicit instructions which were requested by the appellant's counsel. The general answer to this objection reposes on the principle that the question of sanity is of such a character as to render it highly proper for the consideration and decision of that tribunal; and such was the opinion of the appellant before the commencement of the trial. By our statute on this subject, the

question may be decided by the court, without the intervention of a jury, or it may be tried by a jury. As in this instance it was the desire of the appellant that it should be so tried, the court were not disposed to deny his request; and now that a verdict has been returned against him, there seems no reason for listening to the objection with any particular indulgence. The question of sanity often depends on a multitude of circumstances, various and minute, peculiar and contradictory, and where lights and shades are sometimes almost lost in each other. Besides, it is perhaps almost impossible for a Judge to draw any certain divisional line, and present it beforehand for the regulation of the jury. The line of separation between the powers and provinces of court and jury, in the decision of such cases, we apprehend it is also equally difficult to draw; and in those cases, cited by the counsel for the appellant, from the celebrated speeches of *Erskine*, to shew the various manners in which insanity displays itself and operates on the powers of the mind, it appears that the subjects of investigation were then before the jury for decision. In addition to these remarks, we would observe that the authorities sanction, in clear language, the course pursued on the trial of this cause. *Starkie*, vol. 3, page 1707, says, "The question of sanity is so peculiarly a question of fact for the decision of a jury, that a will of real estate cannot be set aside in equity, without being first tried at law on an issue of *devisavit vel non*." On the whole, after a careful examination of this cause, the authorities cited and the able arguments of the respective counsel, we are all of the opinion that the motion for a new trial cannot be sustained. Our opinion, we are sensible, has been extended to an unusual length; but it is the consequence of a desire on our part to assign reasons for our judgment, and, as far as in our power, give satisfaction to the parties, by a careful consideration of every objection urged at the argument, in a cause involving the decision of property to so large an amount.

From the proceedings which we have witnessed since the cause was removed into this court for final decision, we are satisfied that there was a reasonable ground for prosecuting the appeal; and, in view of all the circumstances of the case, we do not allow costs to the appellee.

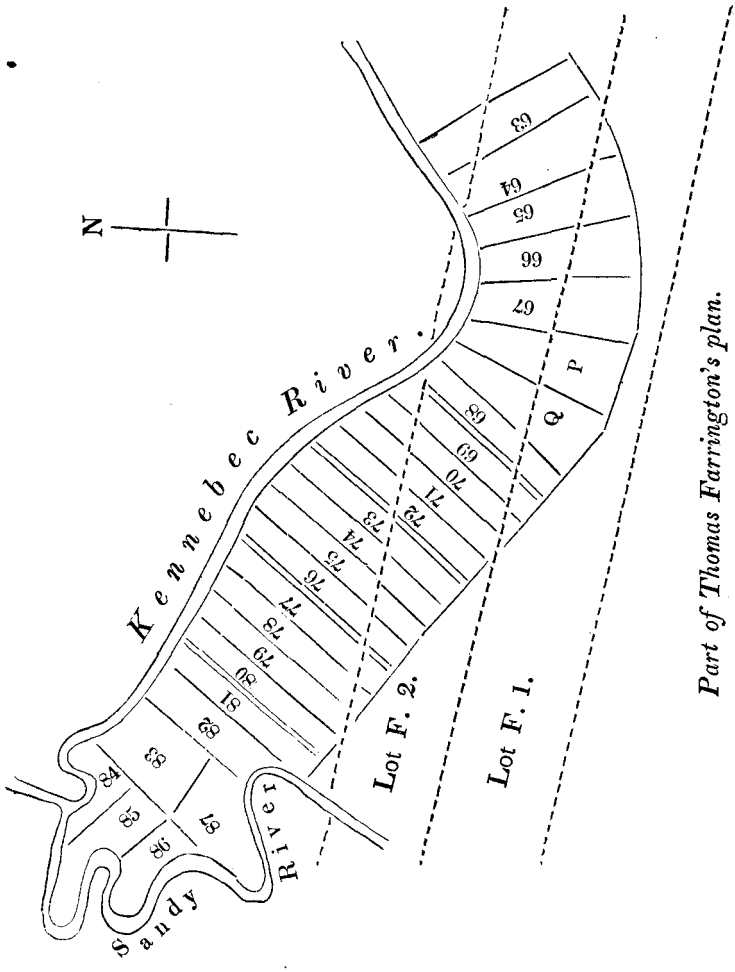
Loring *vs.* Norton.

When the boundaries of land described in a deed cannot be established by reference to known monuments; and the courses and distances cannot be reconciled, there is no universal rule which requires that one of these should yield to the other; but either may be preferred, as shall best comport with the manifest intent of parties, and with the circumstances of the case.

A lot of land, being one of several fronting on a river, was sold by reference to a plan, without other description; and it appeared that the surveyor, in laying out a large number of river lots, measured the front lines and marked the corners on the river, but never surveyed the sides nor the rear lines; nor did he correctly lay down the course of the river, but represented the place in question as a regular curve, and laid down the rear lines of the lots from corner to corner, as part of a larger concentric circle, when in fact the course of the river at that place was irregularly serpentine.—It was held that the lots were to be located by laying off the side lines by the courses and distances from the river, according to the plan, and then drawing the rear lines from one corner to another, thus making them conform to the true course of the river, as originally designed, though not so delineated, by the surveyor.

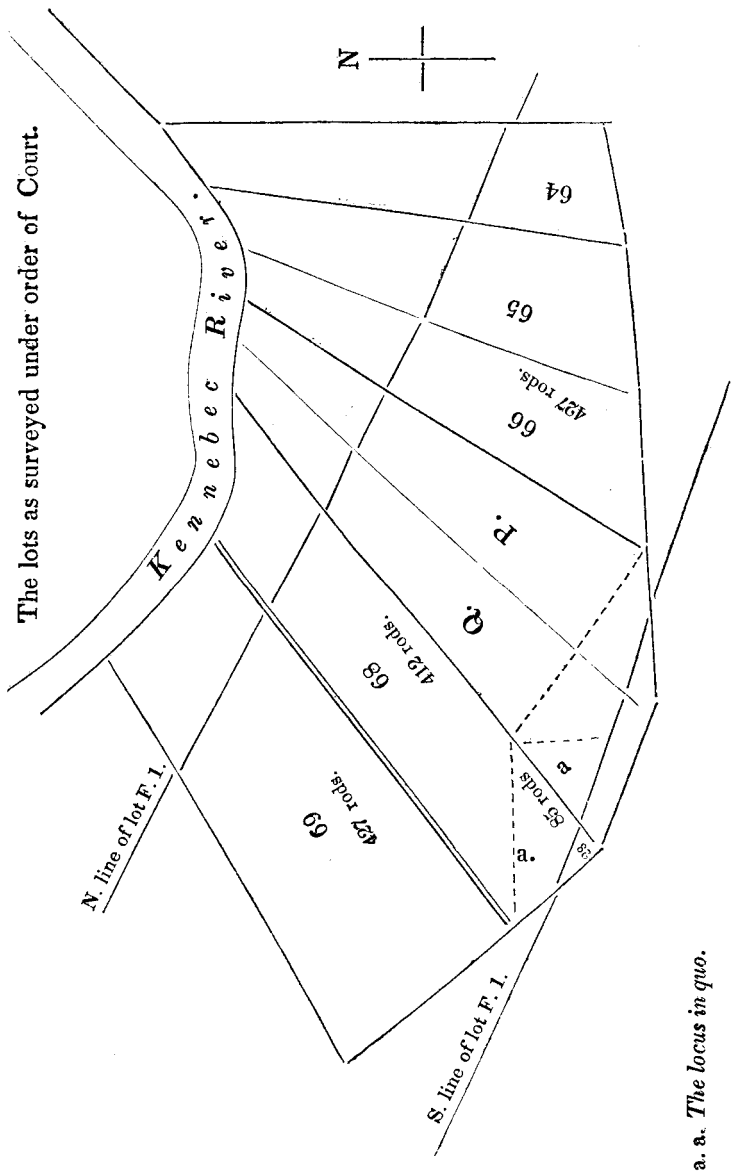
This was an action of trespass *quare clausum fregit*, for cutting trees upon the plaintiff's, being the southeasterly half of lot No. 68, and the southwesterly half of lot marked *Q*, in *Norridgewock*. The title of the plaintiff was derived under a grant from the proprietors of the *Kennebec* purchase, in which the lots were described as "lots 68 and *Q*, according to a plan made by *Thomas Farrington* in 1774," without further description. A copy of this plan, which was certified by the surveyor to have been made by a scale of one mile to an inch, and of the survey made in this case by order of court previous to the trial, are appended to the present report. It appeared that *Farrington* fronted the lots on the river; but that he never ran any rear nor side lines; and it was proved that the actual distance from *Kennebec* to *Sandy* river was about two miles, at the place where the distance appeared on the plan to be about the length of one of the side lines of the plaintiff's lot. By applying the scale by which the plan was protracted, to the plan itself, the line between 68 and *Q* was 412 rods; and the line between 68 and 69 was 427 rods.

The defendant claimed title to the *locus in quo* as part of the "great lot *F.* 1.," from the original grant of which the small river lots were excepted, the north line of which lot appears on *Farrington's* plan to be nearly a mile from the river; but by actual survey it was discovered that this north line was within about thirty rods of the river, and that by laying the lot down thus on *Farrington's*



plan, the side lines of the plaintiff's lots would intersect the south line of the great lot *F.* 1.

It also appeared that while Col. *Palmer*, who formerly owned



a. a. *The locus in quo.*

this great lot, was employed in surveying it into smaller lots, he and the plaintiff agreed that the plaintiff's lots should be extended as far south as the south line of *F.* 1. It was also proved that of some lots across the river, which had been located by *Farrington* by monuments in front and rear, and which were laid down on the plan as of the same length with the plaintiff's lots, none in fact measured less than 427 rods in length, some exceeding that length from four to twenty rods.

Hereupon the plaintiff contended that the side lines of the river lots ought to be extended so far as to preserve on the rear the unvarying curved character exhibited on *Farrington's* plan; or else that the actual length of the lot lines extending from *Kennebec* to *Sandy* river, these being known monuments, should be taken as the rule by which to apportion the others delineated on the same plan: —and, at least, that as by a correct location of the great lot *F.* 1, on *Farrington's* plan, its south line would be crossed by the side lines of the plaintiff's lots, the latter ought to be so extended on the earth. He also contended that the agreement of Col. *Palmer* was conclusive upon this point, and binding on the defendant.

All these points *Weston J.* who sat in the trial, ruled against the plaintiff; and instructed the jury that the extent of the plaintiff's lots was to be limited by the length of the side lines given on the plan, to be ascertained by the scale certified thereon; and that this construction excluding the *locus in quo*, they ought to find for the defendant; which they did; and the verdict was taken subject to the opinion of the court upon the correctness of the Judge's ruling and instructions.

Allen for the plaintiff, maintained the points taken at the trial, and cited *Ripley v Berry*, 5. *Greenl.* 24.

R. Williams, for the defendant, cited the case of *Bowman v White*, *S. J. C. Kennebec*, 1801, *M. S. S.* in which the same rule was laid down which the Judge adopted at the trial; and *Ken. propr's v Tiffany*, 1 *Greenl.* 219.

PARRIS J. delivered the opinion of the Court at the ensuing *June* term in *Washington*.

The only description of lots 68 and Q. in the conveyance under which the plaintiff claims, is a reference to *Farrington's* plan. The deed contains neither courses, distances or monuments.

We must, therefore, have recourse to the plan to ascertain the boundaries of these lots, and whatever of description may be found there will have the same effect, in the decision of this action, as if actually inserted in the body of the original deed.

Farrington having run no rear or side lines, their exact position on the earth could not have been known when he drew his plan; and although the plan purports to represent the situation of the land, yet it refers to no boundaries by which its extent can be determined. How then are we to ascertain it; for if the description be so uncertain that it cannot be known what estate was intended to be conveyed, the conveyance will be void, and if there be nothing, either in the deed or on the plan, by which it can be ascertained with reasonable certainty where 68 and Q are, and whether the alleged trespass was committed on these lots, the plaintiff's suit cannot be maintained.

There is, however, no controversy concerning the corners at the northerly end of the lots, on the river. These are either to be found, as originally established by *Farrington*, or admitted by the parties. It is the length of the side lines extending back from these corners which is involved in doubt. Upon this point the deed is silent, and the plan itself is silent as to the length of any particular line, but it gives the scale by which the whole is protracted. Applying this to the side lines between 68 and Q. as extended on the plan, and it gives the length of four hundred and twelve rods. If the length of each line had been particularly entered on the plan, all doubt would have been removed, as the description would have been as perfect as if entered at length in the deed, and the actual length of a particular line, as delineated on the plan, might have been controlled by the particular entry of the length of that line, rather than by the general scale by which the whole was protracted. But we find no such particular entries here, by which the general scale can be controlled. It is from that, alone, that the extent of any line on this plan can be determined, except such as run from

river to river, there being no other monuments, either natural or artificial. And why should we not apply the general scale to determine this question? The plaintiff replies, because other lots, particularly 81, and 82, represented on this plan, the former to be of the same extent as 68, and Q, and the latter to be less, but both extending to *Sandy* river, do actually extend much further than four hundred and twelve rods, and from this it is to be inferred that the surveyor intended they all should. It is to be remembered that this plan was not protracted upon actual survey; and that to *Farrington* it must have been a matter of entire conjecture whether *Sandy* river did or did not approach within four hundred and twelve rods of the *Kennebec*, at the point where he has represented lots 81 and 82 to be situated. Lot 81 is represented as being four hundred and twelve rods in length, according to the scale by which *Farrington* drew his plan, and to extend from river to river; but by admeasurement it is found that the actual distance from one river to the other, at this point, is over two miles. The only way of accounting for this discrepancy is, that *Farrington*, having no actual knowledge of the course of *Sandy* river, but supposing it approached much nearer the *Kennebec* than it actually did, delineated it erroneously on his plan, by bringing it within four hundred and twelve rods of the latter river at the point where he lotted lots 81 and 82, and that it was not his intention to represent these lots, or either of them, as actually extending in length, upwards of two miles. This solution, if it be the true one, takes from the plaintiff the foundation of his argument, for it is not pretended that there are any lots on *Farrington's* plan on the South side of the *Kennebec*, other than those bounded on *Sandy* river, that can be extended beyond what they are represented on the plan, as explained by the general scale, unless they are to be so extended in consequence of the actual length of the *Sandy* river lots being greater than their length as represented on the plan.

Because *Farrington* made a mistake in the distance between the two rivers, in consequence of which lots 81 and 82 are actually much longer than he intended, it surely cannot follow that the length of other lots must be increased in proportion. We are of opinion

that the length of the *Sandy* river lots gives no rule by which the length of the other lots is to be determined.

Again, the plaintiff contends that the rear line of 68 and Q, is to be curved, conforming to the general representation on the original plan. On examining that plan, it is manifest that *Farrington*, having laid down the river opposite the front of 68 and Q, as forming a regular curve, drew the rear lines conformable thereto; that is, the two side lines of each lot being extended to nearly an equal distance from the river, a straight line was drawn direct from one side line to the other to form the line in the rear. By this mode the rear line of each lot is in fact a straight line, although the general course of the rear line of the whole tract from lot 63 to 72 inclusive is an irregular curve. The position contended for by the plaintiff would undoubtedly be sound, if the actual course of the river corresponded with the representation on the plan. In such case, the side lines being extended in conformity to the plan, the rear line of each lot would also conform to it; and although each lot line would be straight from corner to corner, the general figure of the rear line of the whole tract would be a curve.

But here again another difficulty is presented, growing out of the incorrectness of the plan. From actual survey it is ascertained that the river opposite lots 68 and Q, instead of being a regular curve to the south, as represented on *Farrington's* plan, is indented or somewhat curving to the north; so that if the rear line of 68 should be established on the same course as the rear line of 69 and 70, as it is represented on the plan, it would give to the western side line of 68 an extent of 525 rods; an extent which could never have been contemplated, and for which the plaintiff does not even contend. We do not, however, perceive any middle course, which can be taken, without leaving every thing having even the appearance of certainty, and resorting entirely to conjecture. We must either extend the rear line of 69 and 70, to 68, and make the rear line of that lot conform to the course on the plan, which is evidently an error, arising from the erroneous delineation of the course of the river, or we must make the course of the rear line of 68 conform to the distance of the side lines, as protracted on the plan, and thereby

give to the plan such a construction as *Farrington* undoubtedly intended; that is, that the rear lines of the lots should conform to the course of the river. This construction will produce no injustice.—Each lot will contain the quantity originally intended, and precisely what it would have contained if the river had been correctly laid down on the plan. Either the side lines must be extended beyond their extent on the plan, so as to conform to the course of the rear line, or the course of the rear line must be altered so as to conform to the length of the side lines. As both cannot stand as represented on the plan, being inconsistent with each other, we must decide which shall yield. The defendant's counsel contends that courses must always yield to distances, where they cannot be reconciled, and refers generally to the *New York* reports, as establishing his position. We have found no decisions which go farther than that where distance is rendered certain by established monuments, courses will be thereby controlled.

The general principle is, that what is most material and most certain shall control what is less material and less certain, as that both course and distance shall yield to natural and ascertained objects. But when established monuments are wanting, and the courses and distances cannot be reconciled, there is no universal rule that requires that the one should be preferred to the other. Cases may exist in which the one or the other may be preferred, as shall best comport with the manifest intentions of the parties to the transaction, and correspond with all the other circumstances of the case.

Again, it is said that a number of lots represented on the plan of the same length as 68, and which were located by *Farrington* by monuments in front and rear, have been measured, and none are found to be less than four hundred and twenty-seven rods in length; and from this fact an argument is raised that 68 should have that length. The answer given to that argument, by the defendant, is, that *Farrington* located no lots by monuments on the south side of the river, where 68 is situated, and that such location on the north side has no applicability to the case. But there is another answer to that argument, which is not to be

overlooked. As before observed, it is an established principle that when the boundaries of land described in a deed of conveyance, are fixed, known and unquestionable monuments, although neither courses, nor distances, nor the computed contents correspond with such boundaries, the monuments must govern. For with respect to courses, from defects in surveying instruments, variation of the needle, and other causes, different surveyors often disagree; and as to distances, errors often arise from the inaccuracies of measure, or of the party measuring, and computations are often erroneous, but fixed monuments remain, and about them there can be no dispute or uncertainty. But if the monuments cannot be ascertained, the length of the lines must govern.

Some or all of these errors may have attended the survey of the lots whose boundaries are established by known monuments, and such a supposition would not be rendered at all improbable from any thing which has arisen in the examination of this plan. But if the location and actual admeasurement had been made with usual exactness, we do not perceive how it can affect lines that were never run on the earth, and whose length is to be ascertained entirely from the length of a line protracted on the plan, especially when, as in this case, the located and unlocated tracts lie on different sides of the river, and the lines of the one have no relation to the lines of the other. It is known that at the period when *Farrington* made his plan, surveyors were far from being exact in their measure; that a liberal allowance was made for unevenness of surface, and that, usually, exact measure now will give a quantity much less than was or would have been given by ancient surveyors. One of the side lines of 68 is found on the plan to be four hundred and twelve rods in length, according to the scale by which it was protracted; and it is said that lots on the other side of the river, of the same apparent length on the plan, and which were actually surveyed by *Farrington*, and bounded by monuments, are four hundred and twenty-seven rods in length. This fact seems to us not materially to contradict the plan. It would rather be a matter of surprise if a lot line run as four hundred and twelve rods in length in 1774, should not now be found considerably to exceed

that distance; and whether the excess would probably be equal to the difference between four hundred and twelve and four hundred and twenty-seven rods, would depend upon the liberal or strict measure which the surveyor was in the habit of making.

It is also contended that the plaintiff ought now to be allowed the same liberal measure as *Farrington* allowed in other cases. If the plaintiff's lot had been actually surveyed at the time, he undoubtedly would have had that allowance, for the actual survey would have governed the length of line. But we are not aware of any authority by which courts of law would be authorised to adopt such a principle in cases where no actual survey had been made. We can only look to the deed or grant, and to the plan as referred to for description, and of course making part of the deed, and unless that is controlled by actual survey, it must be binding upon all who claim under it.

The other facts in the case relating to great lot *F.* 1, and the assent of *Palmer* that the plaintiff's lot should extend to the south line of *F.* 1, seem not to have been much relied upon in the argument. There can be no pretence that they were conclusive against the defendant, and the Judge so instructed the jury, but also instructed them, that these facts were circumstances to be weighed in the cause.

On the whole, we can perceive no reason for setting aside this verdict. It is not improbable that the plaintiff will be more restricted in his measure than he would if there had been an actual survey in 1774, in consequence of the liberal measure that was usually allowed at that period; but with that exception, we perceive no reason to doubt but he will hold all that *Farrington* ever intended to include within lots 68 and *Q*. Were we to adopt any other principles in regard to the plan, it would be doing violence to adjudged cases of a somewhat similar character, which have arisen, at different periods, on this river, and particularly to *Bowman v. White*, decided in 1801, and *the Proprietors of the Kennebec purchase v. Tiffany*, 1 *Greenl.* 219.

Judgment on the Verdict.

The case of Knowles *& al.*

In issuing a warrant under *Stat.* 1821, *ch.* 122, *sec.* 18, for the removal of a pauper out of the State, who has no settlement therein, the magistrate performs only a ministerial act, no adjudication upon the question of settlement being required.

Therefore such warrant may lawfully be issued by a magistrate who is an inhabitant of the town in which the pauper resides, and which is to be thereby discharged from the expense of relieving him.

This was an indictment against *Thomas Brown*, Esq. *John Knowles* and others, for an assault and battery upon one *Leighton*. The defendants justified under a warrant issued by *Brown*, as a magistrate, and executed by the other defendants as the constable and aids, for the removal of *Leighton* as a pauper, to the place of his settlement. It appeared that all the parties were inhabitants of *Corinna;* that the pauper, who was at the house of his father in *Corinna*, had his settlement in *Tuftonborough*, in the State of *New Hampshire;* that the overseers of *Corinna* made a complaint, but not under oath, to the defendant *Brown*, setting forth the fact of the pauper's having been relieved, and being still in need of further aid, and of his settlement in *Tuftonborough*, and praying for a warrant for his removal, under the eighteenth section of the act for the settlement and support of the poor; and that the magistrate thereupon, without notice to the pauper, adjudged his settlement to be as alleged in the complaint, and issued the warrant prayed for, which was executed by the other defendants. And it appeared that the pauper had in fact been chargeable to *Corinna*, as the overseers alleged; and that his father still claimed to be paid for his support, when the warrant was issued.

At the trial before *Weston J.* the Attorney General moved the court to instruct the jury that the magistrate, being a citizen of the town of *Corinna*, and therefore interested, had no jurisdiction of the subject matter of the complaint; and that this fact being known to the other defendants, the warrant afforded them no justification. And for the purpose of bringing this question before the court, the Judge did so instruct them. The jury acquitted the magistrate, and

found the others guilty; and being interrogated by the Judge, they said that they were satisfied that the pauper could be conveniently removed; and that no unnecessary force was used in attempting to execute the warrant. The verdict was taken subject to the opinion of the court upon the question whether the jury were properly instructed.

H. Warren, for the defendants, argued that the interest of the magistrate was too minute to affect his jurisdiction; *Commonwealth v. Ryan*, 5 *Mass.* 90; and if not, yet by the language of *stat.* 1821, *ch.* 122, *sec.* 18, on which the process was founded, he was fully authorised to issue it. But if the magistrate was liable, yet the warrant was a sufficient justification to the officer and his aids. 1 *Chitty's Crim. law* 69, 70; *Sanford v. Nichols*, 13 *Mass.* 288; *Pierce v. Harwood*, *ib.* 342. The magistrate, however, was not indictable unless he acted corruptly; his act was purely ministerial; and if he is excusable, so are the others. 1 *Bl. Comm.* 354; 1 *D. & E.* 653; *Rex v. Fielding*, 2 *Burr*, 719; 3 *Burr*, 1318, 1716; 1 *Chitty's Crim. law*, 877; *Haskell v. Haven*, 3 *Pick.* 404.

The *Attorney General*, *e contra*, contended that the proceedings were wholly void, affording neither justification nor excuse to the parties; because, 1st, the complaint, was not under oath, which was essential in every case affecting, as this did, the right of suffrage and the personal liberty of the citizen. *Const. Maine*, *Art.* 1, *sec.* 5; *East's P. C.* 310, 325; *Foster's Crown law*, 312; 1 *Chitty's Cr. law*, 360; *Beaufort v. Beaufort*, 3 *Cranch*, 448.— 2dly, The magistrate was an inhabitant of the same town, and directly interested to grant the warrant prayed for. 3dly. The pauper was not cited before the magistrate, to be heard upon the question of his settlement, and need of support. He was disfranchised and transported out of the State, without an opportunity to be heard; in violation of the first principles of natural justice. The statute, in the fifteenth section, requires that he should be so summoned and heard, before he is removed to another town within the State; and *a fortiori* he ought to be, before he is carried out of it. *Shirley v. Lunenburg*. 11 *Mass.* 379. Any other construction would render the eighteenth section unconstitutional.

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

By the report it appears that the pauper was in such a situation as to be conveniently removed, at the time of the issuing of the warrant by *Brown*, one of the defendants, who was acquitted on trial, and under whom the other defendants have justified; and that in attempting the execution of the warrant no unnecessary force was employed. The question, therefore, and the only one reserved, is, whether *Brown*, being an inhabitant of the town of *Corinna*, had a legal authority, as a justice of the peace for the county of *Somerset*, to issue the warrant for the purposes mentioned in the complaint of the overseers of the poor of that town; the pauper having become chargeable therein. The justice was requested to grant a warrant for the removal of the pauper to *Tuftonborough*, in New Hampshire, the place of his alleged settlement. It may be useful to examine some of the provisions in the fifteenth, sixteenth, seventeenth and eighteenth sections of the act of March 21, 1821, *ch.* 122, in relation to the support or removal of paupers or persons standing in need of relief, or the mode of settling questions of habitancy. In the order of proceeding the 17th section comes first. This provides that overseers, before instituting any kind of process, may notify the overseers of the town where the person actually chargeable is supposed to belong, requesting his removal, &c.

The fifteenth section provides for cases where the person chargable has a settlement in this State, and declares that in order to effect the removal of such person and recover the expense incurred for his relief, the overseers of the town seeking relief may apply by complaint to any justice of the peace in their county, not an inhabitant of their town, for the purposes abovementioned. The section authorises the justice, after notice and a due course of proceedings had, to decide the question of settlement and amount of damages, and cause the removal of the person chargeable by his warrant, which may be served by any constable of the town, subject to the right of appeal to the Court of Common Pleas. Under this section the justice acts judicially.

The sixteenth section authorises the overseers to make the application for the above purposes originally to the Court of Common

Pleas, who have power to decide thereon, whose doings may in certain cases, be revised by this court.

The eighteenth section is the one under which *Brown* acted, and the defendants justify their proceedings; and it has reference to poor persons having no lawful settlement within this State. It requires the overseers to relieve and support all poor persons residing in their towns; and upon complaint of such overseers any justice of the peace in his county, may by warrant directed to, and which may be executed by, any constable of their town, or any particular person by name, cause such pauper to be conveyed to any other State, or any place beyond sea, where he belongs, if the justice thinks proper. This provision does not contemplate any hearing or adjudication by the justice, but merely authorises him to perform a ministerial act, similar to that of issuing an execution. As the town supposed to be the place of the pauper's settlement is not within the State, it cannot be made amenable to the process of any court or magistrate within its limits; of course an adjudication by the justice must have been deemed a useless and unavailing form. In the case before us, the justice was requested merely to issue his warrant for, and cause the removal of the pauper to the town of *Tuftonborough*. The words in this section are, "any justice of the peace in his county." In the fifteenth section there are added these words of limitation, "not an inhabitant of their town." There is reason for the limitation in the latter case as the justice acts judicially; and, if an inhabitant, would have a direct, pecuniary interest. In the former case, he does not act judicially, and the provision has no relation to pecuniary interest or any question of damages. For these reasons we are of opinion that the justice who issued the warrant in the present case, was not disqualified so to do, by reason of his being an inhabitant of *Corinna*; and his justification being thus established, the other defendants were justified in acting as they did under his directions and authority. It has been urged that the authority given by the eighteenth section cannot be sanctioned as constitutional; that it professes to authorise a course of proceedings on the part of a magistrate totally incompatable with all correct ideas as to civil liberty and person-

al security; but as this question is not presented by the report, we forbear the discussion of it, or the reasons on which the legislature probably proceeded in the enactment of the law; or how far policy and humanity might require the exercise of the powers complained of, as necessary to effect the commendable objects in view.

Verdict set aside.

WEDGWOOD'S *case.*

In an indictment for adultery, a copy of the record of the marriage, though admissible in evidence, is not sufficient to establish the fact of the marriage, without proof of identity of the person.

THE defendant being on trial, upon an indictment for adultery, the Attorney General offered in evidence, in proof of the marriage, a copy from the town records of *Lewiston* of the following tenor; "Mr. *Isaac Wedgwood* and Miss *Judith Kelly*, both of *Lewiston*, were joined in marriage *July* 15, 1821. *Dan Reed*, Justice of the peace." To the admission of the copy the counsel for the defendant objected, but it was admitted by *Weston J.* subject to the opinion of the court, the defendant being convicted.

Sprague, for the defendant, now sustained the objection, on the ground that the certificate afforded no proof of identity of the person; *Commonwealth v. Briggs*, 5 *Pick.* 429; and was, at most, only the copy of a copy.

The *Attorney General* relied on the usage under which such testimony had long been received without objection; and contended that it was correct in principle, being the record of an official return made pursuant to law.

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

The certificate of marriage offered and admitted in evidence is in due form, and properly authenticated, so that the question is

whether any proof of the marriage of the defendant was admissible, except the oath of the magistrate who is stated to have solemnized it; or of some other person present at the ceremony. In cases of divorce, it is the constant practice to prove the marriage of the parties on the record, by a regular certificate of the record. But in *Ellis v. Ellis*, 11 *Mass.* 92, after the marriage between them had been duly proved, the libellant offered the certificate of Rev. Dr. *Lothrop* to prove a second marriage of the respondent with one *Mary Sawyer*, for the purpose of thus proving the adultery alleged. This certificate was considered insufficient, and Doct. *Lothrop* was called as a witness. In *Commonwealth v. Norcross*, 9 *Mass.* 492, who was indicted for adultery, the marriage of the defendant was proved by a person who was present at its solemnization; and the question reserved was, whether the record of the marriage should not have been duly certified, as the higher and better evidence. The court decided that the witness was properly admitted, and they observed that "a copy of such record is not so satisfactory evidence as the testimony of witnesses. These last, indeed, are necessary to prove the identity of the parties." The certificate in the case before us is only proof of a marriage between "*Isaac Wedgwood* and *Judith Kelly*, both of *Lewiston*," in *July* 1821; but it does not prove that the defendant is the same person named in the certificate. The case of *Commonwealth v. Briggs*, 5 *Pick.* 429, cited by the defendant's counsel supports the same principle. This is the first cause in which the court have been called upon to decide as to the necessity of proof of identity in such a prosecution; and an objection on account of the want of it not having been made, it has not been before required or produced. In the present case, however, as the objection was formally urged by the counsel, the question was left to the jury upon the evidence arising from the circumstance of the mere identity of names and the fact that the defendant once called the person with whom he was living by the name of *Judith*. On the whole we do not consider such proof sufficient or satisfactory. And as we now establish the rule that proof of identity must be produced in such cases,

it must be proof of identity of person, and not of name merely. It may serve as a guard against fraud and deception. For these reasons the verdict is set aside and a new trial granted.

HACKETT *vs.* MARTIN.

After the assignment of a *chose in action*, no subsequent act or declaration of the assignor can modify or control it.

Nor can the assignor in such case be admitted a witness for the debtor, in an action brought against him in the name of the assignor, for the benefit of the assignee.

But the relations of the debtor are not changed till he has notice of the assignment.

THIS was *assumpsit* on a promissory note given by the defendant to *Hackett;* which the latter, as it appeared, had sold and delivered, without indorsement, to one *Pratt*, who in like manner sold it to one *Lord*, for whose benefit this action was brought.

The defendant offered in evidence a release made to him by *Hackett* after the assignment of the note, and notice thereof, to the defendant, which was on that account held to be of no effect, by *Smith J.* who sat in the trial in the court below. He then offered to prove the admissions of *Hackett*, made subsequent to the assignment, and notice thereof, stating that the note had previously been paid; which the Judge rejected. The defendant then proposed to call *Hackett* as a witness to testify to the same fact; but the Judge ruled that he was not admissible. He then offered evidence in support of an account filed by him in offset; and the Judge permitted him to prove any charges made before he received notice of the assignment; which the jury allowed accordingly, and returned a verdict for the plaintiff, for the balance. The defendant there-

upon brought up the cause by filing exceptions to the decisions of the Judge at the trial.

The cause was submitted without argument by *D. Williams* for the plaintiff, and *H. Warren* for the defendant; and the opinion of the Court was delivered at the ensuing *June* term in *Washington*, by

PARRIS J. The defendant relies upon a release from *Hackett* executed subsequent to the commencement of this suit, in which he admitted that the note had been paid, and thereby discharged the action. To rebut this, the plaintiff relies upon the fact that the note, before it became due, was assigned for a valuable consideration to one *Pratt*, by delivery only, not having been endorsed by *Hackett*, and that it passed in the same manner into the hands of *Lord*, for whose benefit this suit is prosecuted, and that the defendant had notice of the assignment before the execution of the release.

Although, as a general principle, a *chose in action* or a right in one to sue another to recover money or property in a court of law is not assignable, so as to enable the assignee to sue in his own name, yet it has long been settled by repeated decisions, not now to be doubted, that the law will protect the equitable interest of an assignee for a valuable consideration, and that the promissor shall not be permitted to avail himself of any payments made to the promissee subsequent to his having notice of the assignment, and that any release made to him by the promissee, after such notice, would be a fraud upon the assignee, and would not defeat an action brought for his benefit in the name of the assignor. *Jones v. Whitter*, 13 *Mass.* 304; *Eastman v. Wright*, 6 *Pick.* 322; *Andrews v. Beecker*, 1 *Johns. Cas.* 411; *Raymond v. Squire*, 11 *Johns.* 47.

The assignee is to be recognized as the owner, and all acts of the assignor subsequent to the assignment, and affecting the validity of the contract are fraudulent. He has no more power over it, than a stranger; but until the promissor has notice of the assignment all payments made by him, and all acts of the promissee in respect to him are good. *Thayer v. Havener*, 6 *Greenl.* 212.

From the exceptions it appears, that the defendant knew that the note was in the hands of *Pratt*, more than eight months before it became due. Up to this time he might well presume *Hackett* to be the owner of the note, and whatever payments he made, if not endorsed, would be a legal offset, and so the court below decided; for the jury were instructed to allow so much of the defendant's account, filed in offset, as accrued previous to the assignment. But whatever payments were made after the defendant had knowledge of the transfer of the note were properly rejected. He knew it was in *Pratt's* possession, and from that circumstance it was to be presumed that it had become his property. *Anderson v. Van Allen*, 12 *Johns.* 343. If the defendant continued his payments to *Hackett*, he did it upon *Hackett's* responsibility, and not in prejudice to the rights of the assignee. The law upon this point is well settled, and it comports with honesty and fair dealing.

Neither can there be any doubt of the correctness of the ruling in excluding the admissions of *Hackett* made after the assignment, and when he had no interest in the note. It is a general principle that the admissions of a party in interest are competent evidence. But *Hackett* had no interest in the note, or legal control over it, at the time when it is said he admitted the payment. He had parted with the debt and the evidence of it. It had become the property of *Pratt;* and as well might *Hackett's* admissions be introduced in any other suit as in this. *Packer v. Consalus*, 1 *Serg. & Rawle*, 526. *Crayton v. Collins*, 2 *McCord*, 457. So also as to the admissibility of *Hackett* as a witness. He had indeed no interest in the event of the suit, except that he might be liable for the costs in the first instance, and that interest was adverse to the defendant by whom he was offered. But the objection to a party in the suit being sworn as a witness is not placed on the ground of interest; it arises from considerations of policy. The common law rule is that a party to the record cannot be a witness, unless in actions of *tort*. In no other case can a party to the record give evidence to go to the jury on the merits of the cause. *Schermerhorn v. Schermerhorn*, 1 *Wend.* 119; *Supervisors of Chenango v. Birdsall*, 4 *Wend.* 453; *Cantey v. Sumter*, 3 *McCord*, 71 *note; Vineyard v. Brown*, 4 *McCord*, 24.

As to the admissions of *Hackett* and his admissibility as a witness, the case of *Frear v. Evartson*, 20 *Johns.* 142, is direct authority. At the trial of that case, the plaintiff proved his demand against the defendant for goods sold and delivered. The defendant then offered to set off his demand against the plaintiff, and called a witness to prove that the plaintiff, since the commencement of the present suit, had admitted and confessed that the items of the account, offered as a set off by the defendant, were due to him from the plaintiff as stated in the bill of particulars. The counsel for the plaintiff objected to the evidence, and to the admission of any confession from the plaintiff, on the ground that he had previously assigned his demand against the defendant; and on proof of the assignment and notice to the defendant, the admission of the plaintiff was rejected. The defendant then offered to call the plaintiff to prove the account of the defendant, and that the same was due before the assignment was made, and before the suit was commenced; but the witness was rejected. A verdict having been returned for the plaintiff, a motion was made, and argued, to set it aside. In giving their opinion, the court say, "The questions in this case are 1st, whether the admissions of the plaintiff after he had assigned his interest to another, could be given in evidence for the defendant who had notice of the assignment. 2d. Whether the plaintiff could be a witness for the defendant when objected to by the plaintiff's counsel, after proving the assignment and notice. The Judge, at the trial, excluded the evidence and rejected the witness, and we see no ground to doubt the correctness of his decision. Having assigned his interest in the *chose in action*, the plaintiff could not impair that interest by any confessions made by him to the prejudice of his assignee. As to his being a witness, that he was a party to the record was enough to exclude him unless by consent of the real parties in interest. The case of *Bauerman v. Radenius*, 7 *D. & E.* 663, is clearly distinguishable from the present case." See also *Mandeville v. Welch*, 1 *Wheat.* 235; 5 *Wheat.* 277.

The general doctrine relating to *choses in action* is this, that after the assignment and notice to the debtor, the debt and the

evidence of its being the property of the assignee, no act or declaration of the assignor can discharge or modify it; neither can he control a suit prosecuted to enforce its payment;—that the promissor remains unaffected by the assignment until he has notice of it, and any payments which he may make before notice, are as available in his defence, as if no assignment had been made. But upon notice, his relations are changed. He becomes the debtor of the assignee, and any subsequent payment to the assignor, or receiving a discharge from him, would be attempting a fraud upon the assignee, which the law will not sanction.

The exceptions are overruled.

EAMES *vs.* PATTERSON.

Under the *Stat.* 1821, *ch.* 44, *sec.* 3, regulating fences, it is necessary that the portion of fence belonging to a delinquent owner should first be adjudged by the fence viewers insufficient or defective, and that the owner should have written notice from them of that fact, and be requested in writing to repair or rebuild it within six days, in order to entitle the adjoining owner to charge him with the expenses of rebuilding or repairing it himself.

The main object of the third section of this statute is to divide the fence made or to be erected, and assign to each party his share; after which the rights and duties of the parties are to be regulated by the other parts of the statute.

The remedy given by this statute is cumulative, and does not affect the common law remedy which an aggrieved party may have for damages sustained by neglect of the owner of fences to keep them in such repair as the statute requires.

THIS was a special action of the case, brought upon the statute regulating fences and common fields, to recover double the appraised value of a certain fence, alleged by the plaintiff to have been built on the line dividing his land from that of the defendant, in pursuance of the assignment of two fence viewers of the town of *Madison*, where the land was situated. It came into this court by

summary exceptions filed by the defendant to the decisions of *Perham J.* in the court below, upon numerous questions raised in the progress of the trial before him. But the only facts which ultimately proved to be material were these;—that the fence between the lands of the parties being decayed, and in some parts wholly gone, the plaintiff called on the fence viewers to assign to each owner his portion to maintain; which they did, in writing; to the sufficiency of which, however, the defendant objected, although he was present at the assignment. Afterwards, the defendant not having rebuilt the portion of fence assigned to him, the plaintiff built it, and caused the value to be appraised by the fence viewers, in writing; at which the defendant was not notified to be present. And it seemed from the exceptions, that the defendant was verbally requested, at the time of the assignment, to build his part of the fence. But the fence viewers never made any adjudication that the defendant's part of the fence was not in sufficient repair; nor had the plaintiff served him with written notice to rebuild or repair it; but after the lapse of a few days from the time of the assignment, the plaintiff proceeded to build the defendant's part, conforming to what the parties had verbally agreed was the true line, which in some places was about a rod distant from the old fence. It was contended at the trial that no such adjudication nor notice were necessary, by the third section of the statute, under which the plaintiff claimed to maintain this action; and of this opinion was *Perham J.* to which the defendant excepted, a verdict being returned for the plaintiff.

Allen and *Boutelle*, for the plaintiff.

W. W. Fuller and *Bronson*, for the defendant.

Weston J. delivered the opinion of the Court, at the ensuing *June* term, in *Washington*.

Several objections are taken by the counsel for the defendant, to the right of the plaintiff to recover in this action. The plaintiff claims to maintain it, upon the third section of the act for regulating fences, and general and common fields. That section provides,

that when any dispute shall arise about the respective occupants' right in partition fences, and his or their obligation to maintain the same, application shall be made to two or more fence viewers, who shall assign to each party his share in writing. And in case any of the parties shall refuse or neglect to erect, keep up and maintain the part to such party assigned, the same may be done by the aggrieved party, in the manner before provided in the act, and for which he shall be entitled to double the value, to be ascertained and recovered in the like manner.

It becomes important therefore to examine in what manner, it was before provided in the act, that it should be done, ascertained, and recovered. This is to be determined by a recurrence to the second section. It is there enacted, that in case either party shall neglect or refuse to repair or rebuild the fence, which of right he ought to maintain, the aggrieved party may forthwith apply to two or more fence viewers to survey the same, and upon their determination that the fence is insufficient, they shall signify the same in writing to the occupant of the land, and direct him to repair or rebuild the same within six days. If not done, the aggrieved party may do it, and the same being adjudged sufficient by two or more fence viewers, and the value thereof by them ascertained, he may recover of the delinquent party double such value, together with the fees of the fence viewers, and if not paid within one calender month after demand, penal interest, by a special action on the case.

The third section then adopting the mode pointed out in the second, and referring to that, the preliminary measures therein prescribed must first be pursued in order to entitle the plaintiff to recover, viz. that the part assigned to the delinquent party should be adjudged by the fence viewers insufficient or defective, and that such party should have written notice from them of this fact, and a written requisition to repair or rebuild the same within six days. There were no such proceedings in the case before us, on the part of the fence viewers. It has been contended that these provisions are inapplicable to the case provided for in the third section, which contemplated a new erection altogether, where-

as the second section refers to a fence once built but out of repair. To this it may be replied, first, that there had been before a partition fence between the parties, part of which had been suffered to go to decay, and another part not exactly upon the line finally settled between the parties. And this would seem to present the case referred to in the second section. And, secondly, that without adopting in the third section, in this particular, the provisions of the second, there is no time limited fixing the delinquency of the one party, or vesting in the other the right to build or rebuild, and recover therefor penal damages. The main object of the third section is, to divide the fence made or to be made, and to assign to each party his share. This being done, the statute imposes generally upon each party the duty of maintaining the part of the fence thus assigned to him.

The statute having created the duty, if not performed within a reasonable time, the common law would afford a remedy to the aggrieved party for any injury he might sustain by reason of such neglect. But the statute also gives him the power of hastening the other party, by taking the steps prescribed in the second section, and if such party does not do his duty, within the short period of six days, after notice from the fence viewers, the aggrieved party may do it for him, and hold him to pay double the expense. He has thus distinct notice of what is required of him, and of the time within which he is to perform it, at his peril. As these provisions are equitable, and as the third section expressly adopts the mode and manner provided in the second, we entertain no doubt that the preliminary steps required by the latter, should have been pursued, in order to charge the defendant. This not having been done, the exceptions are sustained, and there must be a new trial at the bar of this court.

CASES

IN THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF PENOBSCOT, JUNE TERM, 1831.

LAPISH *vs.* THE PRESIDENT &c. OF THE BANGOR BANK.

The colonial ordinance of 1641, extending the title of riparian proprietors to low water mark, though originally limited to the *Plymouth* colony, is part of the common law of *Maine;* and is applicable wherever the tide ebbs and flows, though it be fresh water, thrown back by the influx of the sea.

Where the grantee is bounded by "high water mark," he is not a riparian proprietor, and therefore not entitled to the benefit of the ordinance. *Aliter* where he is bounded by "the stream."

The settlers in *Bangor*, who, by the resolve of *March* 5, 1801, were to be quieted in their possessions of a hundred acres each, and whose lands adjoined the river, are entitled to the flats lying in front of their respective lots, notwithstanding the full complement of a hundred acres each was laid out to them upon the upland.

THIS was a writ of entry to recover an undivided portion of an acre of land at *Budge's* point in *Bangor*, adjoining *Penobscot* river, and extending to low water mark; in which the demandant counted on his own seisin, and a disseisin by one *William M'Glathry*. The only question at the trial, which was had before the Chief Justice, was upon the demandant's title to the flats; which he claimed under a deed from the Commonwealth of Massachusetts to *Stetson*, *French* and *Lapish*, as assignees of *James Budge*

an original settler; and which the tenants claimed under a prior deed from *Budge* to *M'Glathry*. The description in each of the deeds is recited hereafter in the opinion of the Court. The tenants offered to prove that the tide at this place ordinarily rises sixteen or eighteen feet; that the water is so fresh as to be generally used by mariners as any other fresh water; that the flats are about eight rods wide; that the bank is elevated from three to five feet above the ordinary high water mark; and is of solid earth; that at high water, vessels, boats and rafts have constantly passed over these flats; and that no person has ever been forbidden to take fish there. All which the demandant conceded. The tenant offered in evidence the *Waldo* patent, the Massachusetts charter granted by *William* and *Mary*, and the act incorporating the town of *Bangor*. He also offered the deed of the Commonwealth conveying to *Henry Knox* the township of *Bangor*, except a hundred acres reserved to each settler; for the purpose of disproving both the title and seisin of the demandant. But as the tenant claimed nothing under this deed, the Chief Justice rejected it; and upon the whole evidence he instructed the jury to find for the demandant, for whom they found accordingly; but he reserved the law of the case for the consideration of the Court. It was agreed that all the deeds and documents mentioned in the cases of *Lapish v. Wells*, 6 *Greenl.* 175, and *Dunlap & al. v. Stetson*, 4 *Mason* 349, might be considered in the decision of this cause. The other facts will be found in the opinion of the court.

W. D. Williamson argued for the tenants, that as the demandant was bounded by the bank, in his title deed, his claim to the flats must arise under the colonial ordinance of 1641. But this ordinance could extend no farther than the limits of the colony which passed it, and therefore never had any operation eastward of *Merrimack* river. These flats, then, belonged to the sovereign. *Commonwealth v. Charlestown*, 1 *Pick.* 182; *Commonwealth v. Chapin*, 5 *Pick.* 201; *Charter Jac.* 1. *Nov.* 3, 1620; 1 *Haz. Coll.* 103; *Ancient Char.* 34, 35; 2 *Dane's Abr.* 691.

But as the colony afterwards surrendered its charter to the king, it could not, on any principle, apply to grants made after the sur-

render. And if it could, it would avail nothing to the demandant, as it extends, by its terms, only to the shores and arms of the sea, and to "salt water rivers;" whereas the *Penobscot* at *Bangor* is merely a fresh water river, though its waters are raised and driven back by the influx of the sea.

Allen, on the same side, to the admissibility of the deed to *Knox*, cited *Walcott v. Knight*, 6 *Mass.* 413. And he argued that as *M'Glathry* was *cestui que trust* of the acre, he, and not the demandant, was entitled to the flats in front of it, by the ordinance of 1641. He also contended that the case showed a sufficient title to the flats in the tenants, by disseisin. *Pray v. Pierce*, 7 *Mass.* 382; *Kennebec Proprietors v. Laboree*, 2 *Greenl.* 295; *Lansing v. Smith*, 4 *Wend.* 9.

Greenleaf and *Sprague*, for the demandant, cited *Adams v. Frothingham*, 3 *Mass.* 352, as reported by Mr. *Dane*, 2 *Dane's Abr.* 697; *Storer v. Freeman*, 6 *Mass.* 435; *Hatch v. Dwight*, 17 *Mass.* 289; *Dunlap v. Stetson*, 4 *Mason*, 365; *Handly's lessee v. Anthony*, 5 *Wheat.* 374; *Morrison v. Kean*, 3 *Greenl.* 474; *Lunt v. Holland*, 14 *Mass.* 149; *King v. King*, 7 *Mass.* 496; *Howard v. Chadbourne*, 5 *Greenl.* 15; *Knox v. Pickering*, 7 *Greenl.* 106; 7 *Pick.* 521; *Rex v. Smith & al. Doug.* 441; 2 *Dane's Abr.* 693, *sec.* 14.

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

By the report of the Judge who presided at the trial, in connection with the resolves and documents therein referred to, the following facts appear.

The premises demanded are situate in *Bangor*, consisting of upland and flats. The demandant having entered a *nolle prose qui* as to so much of the premises defended as lies above high water mark, with the privileges of water and landing in front of the same, the title to the flats is the only subject in dispute. The acre of land, of which two eighth parts are demanded, commonly called the *McGlathry* acre, is a part of a one hundred acre lot of land,

commonly called the *Budge* lot, on which *James Budge* formerly lived, and occupied the same as a settler prior to *January* 1, 1784. The flats in question are claimed by both parties, as belonging to and composing a part of the *Budge* lot; but whether they belong to, and compose a part of the *McGlathry* acre, is one of the controverted points. The tenants claim to hold them as a part of the acre in virtue of the deed from *Budge* to *McGlathry*, bearing date *April* 19th, 1798: the description of the land conveyed by that deed will be particularly examined in its proper place. The demandant contends that the flats were never conveyed by that deed to *McGlathry*, and of course that they were conveyed to *Lapish*, *French* and *Stetson*, as the assignees of *Budge*, in virtue of the deed to them from the committee of the Commonwealth, bearing date *March* 2, 1802. Whatever estate or property passed by *Budge's* deed to *McGlathry*, has, by regular conveyances, become vested in the tenants. We now proceed to the examination of the titles relied on by the parties, and the statement of the principles and facts, more particularly, on which they are alleged to be legally founded.

The resolve of *March* 5, 1801, declares "That all the settlers in the town of *Bangor*, or their legal representatives, who actually settled before the first of *January* 1784, be entitled to a deed of their respective lots of one hundred acres each, by paying into the treasury of this Commonwealth, eight dollars and forty-five cents." The resolve further provides that the committee for the sale of eastern lands should cause the several lots in the town of *Bangor* to be surveyed and run out by metes and bounds to each of the settlers in said town by some faithful surveyor. Those preliminary measures were adopted in regard to the lot on which *James Budge* had settled as before mentioned, and they are recognized in the deed of *March* 2, 1802, to *Lapish*, *French* and *Stetson*. They are the legal representatives of the said *Budge*, as to all the lot, excepting what he had before that time conveyed to *McGlathry*. In the case of *Knox & al. v. Pickering*, 7 *Greenl.* 106, we have decided that the flats in front of, and adjoining to the settlers lots in

Bangor, belong to and compose a part of those lots respectively. See also *Bussey v. Luce*, 2 *Greenl.* 367.

In the view we have taken of this cause, we consider the *Waldo* Patent, the Charter of the Massachusetts bay and the act incorporating the town of *Bangor* as unimportant. They can have no influence on our decision. The same remark is also applicable as to all those facts relating to the height of the tide, the width of the flats, the quality of the water, the height of the bank and the nature of the fishery, which the tenants offered to prove and the demandant admitted.

The above examination of the facts shows, that the principal question in the cause is, whether, by the terms and description employed in the deed from *Budge* to *McGlathry*, the flats were conveyed, or only the upland. The language of the deed is this:— "a certain lot of land, lying and being in *Bangor*, on *Condeskeig* point, so called, bounded and described as follows, to wit: beginning at a stake, on the west bank of *Penobscot* river, near a thorn bush, marked on four sides, running north eleven rods to a stake and stones; thence southerly to a stake and stones, a corner; thence south nine rods to a stake and stones on the same bank of the same river; thence running on the western bank of said river to high water mark, sixteen rods to the first mentioned bounds, with all the privileges of water and landing to the same belonging." The tenants have no claim to the flats in question, unless under the colonial ordinance of 1641, and the principle of our common law which was introduced by it: and to this ordinance and this principle his counsel has appealed, in his construction of the deed from *Budge* to *McGlathry* of the acre, in support of the title of the tenants; and has contended, that by the language of that deed the flats in question passed. Every course and every monument mentioned in the foregoing description is on the upland or bank; and from the language of the deed in describing the last course, it appears that the stake begun at, was at high water mark. In *Storer v. Freeman*, 6 *Mass.* 435, *Parsons C. J.* in delivering the opinion of the court says,—"The sea shore must be understood to be the

margin of the sea, in its usual and ordinary state. Thus when the tide is out, low water mark is the margin of the sea, and when the sea is full, the margin is high water mark. The sea shore is, therefore, all the ground between ordinary high water mark and low water mark." In that case the land conveyed was bounded by the shore, and the court decided that the flats did not pass by the deed. Now, as high water mark is one side of the sea shore or flats, and low water mark is the other, and as a deed bounding land on one side by the shore, does not convey the flats, it is perfectly clear that a deed bounding a piece of land by high water mark, which is one side of the shore, cannot be construed as conveying the flats. The case of *Storer v. Freeman* is decisive of the question in the present case. If the intention had been to convey the flats, there was no necessity for adding the words "with all the privileges of water and landing to the same belonging." These privileges would have passed without the special clause; but upon the construction we have given, the clause is important as granting an easement to *McGlathry*, though not extending the limits of the acre conveyed. *Hasty v. Johnson*, 3 *Greenl.* 282. As to the construction of the descriptive language relating to boundaries we also refer to *Hatch v. Dwight*, 17 *Mass.* 289, and *Morrison v. Kean*, 3 *Greenl.* 474. In addition to these authorities there is the case of *Dunlap & al. v. Stetson*, 4 *Mason*, 349, in which Mr. Justice *Story*, with his accustomed learning and accuracy, has examined the language of the deed now under our consideration and distinctly decided that upon the settled principles of construction, the flats, now in controversy, did not pass.

But it is, in the second place, contended that if the flats in front of the acre did not pass by *Budge's* deed to *McGlathry*, still the demandant is not entitled to recover; for he must recover, if at all, on the strength of his own title, and not on account of the weakness of the tenants, as the court recently decided in the case of *Knox & al. v. Pickering*; and it is urged that the deed of *March* 2, 1802, from the Commonwealth to *Stetson*, *French* and the demandant, did not include and convey the flats to them. In de-

fending against the demandant's title, the counsel has contended against the ordinance as having never been in force in this State, nor applicable to it, or to such a river as the *Penobscot* at *Bangor*. It is certainly as applicable in the construction of the demandant's title as the tenant's. It is enough to say that this part of the defence is in every view of it wholly unsubstantial. If the descriptive language of this deed does not by law pass and convey the flats, then there is no proof of the seisin of *Lapish* on which he has counted, and the cause is with the tenant. This leads us to the examination of the deed. It was made under the authority of the resolve of *March* 5, 1801, directing the committee for the sale of eastern lands to cause the several lots in *Bangor* to be surveyed and run out by metes and bounds. This was done by *Park Holland*, and a return thereof was made by him to the committee, that he had laid out by metes and bounds, conformably to the resolve, to *Lapish* and others, assignees of *James Budge*, one hundred acres, and in the return stated the boundaries. The object of the resolve was to quiet the settlers in their respective lots and prescribe the mode in which it should be done; and the object of the commissioners, in the conveyance, was to vest in *Lapish* and others all *Budge's* equitable right, title and interest, as a settler on said lot; the legal title being in the Commonwealth. As has been before stated, this court have decided, that, according to the true construction of the resolve, each settler became entitled to the flats adjoining his upland; and that such flats belong to and compose a part of his lot. According to the principles of the ordinance, flats pass by a conveyance of upland as appurtenant thereto, without being included by the descriptive language of the instrument of conveyance; still, according to such descriptive language, the question is to be decided whether, in a particular case, such flats do pass: hence the numerous decisions, touching the construction of deeds of land adjoining tide waters, and rivers. The descriptive language of the deed in question is a copy of the return, and is as follows; "Beginning at a stump with stones about it, standing on the bank of the river; being the southwest corner of lot number 12, and

from thence north seven degrees west sixty rods to a pine stump marked; thence north two hundred and thirty one rods to a stake marked; thence west fifty seven rods to a fir tree marked; thence south about two hundred and twenty seven rods, to a stake standing in the county road, one rod east of an oak stump in said road; thence west four rods to the stream; thence on said stream on the bank thereof, and on the bank of the *Penobscot* river to the first bounds, containing one hundred acres, agreeably to the certificate of said *Holland.*" As in the above description the words "stream" and "*Penobscot* river" are used, it is evident that the *Kenduskeag* stream is intended. The line from the abovementioned stump runs to the stream or *Kenduskeag* river; and thence on (which must mean by or adjoining) said stream and the bank thereof. Here the words "stream" and "bank" seem to be used as synonimous terms; and there is the same reason for supposing that the word "bank" was used in the same sense when connected with the words "*Penobscot* river;" that is, that in both instances the meaning was to bound the land conveyed by the *Kenduskeag* stream and *Penobscot* river. This construction is supported by the circumstance that no course is given in the deed from the place where the north-end line of the lot strikes the stream, to the first mentioned bounds or stump begun at; and the only natural inference is that the circuitous line of the stream and river was intended as the boundary, thus constituting the grantees riparian proprietors, entitled by operation of the principle of the ordinance of 1641, to the adjacent flats, as *Budge* was considered to have been equitably entitled in virtue of the resolve of 1801. Being thus bounded by the stream and river, they own to the margin of both at all hours of the tide in its ebbing and flowing; or, in other words, as far as low water mark. Thus we perceive the difference between the rights of these grantees under the deed in question, and those of *McGlathry* under his deed of the acre; for that acre was bounded expressly by high water mark; by which the flats were necessarily excluded, as we have already decided. In the abovementioned case of *Dunlap & al. v. Stetson*, Mr. Justice *Story*, speaking of the commissioners'

deed of 1802, says, "It is most manifest that the deed conveyed to the grantees the whole lot, supposing them to be assignees of *Budge* of the whole one hundred acres." He states, in another place, that the deed conveyed "all the right, title and interest of the Commonwealth in and to the same lot;" and such right, title and interest was that which was reserved and preserved for the settler on the lot, in and by the abovementioned resolve, including the adjoining flats. It has been contended by the counsel in the defence, as before observed, that for several reasons the colonial ordinance of 1641 does not apply in the present case, either by enactment, construction or adoption. The history of it is given in *Storer v. Freeman*, 6 *Mass.* 435, by *Parsons C. J.*, and he observes, "This ordinance was annulled with the charter, by the authority of which it was made; but from that time to the present, an usage has prevailed, which has now the force of our common law." Ever since that decision, as well as long before, the law on this point has been considered as perfectly at rest; and we do not feel ourselves at liberty to discuss it as an open question. We deem the usage in question or the principle of law above stated as applicable to the flats demanded as in any other case, concerning this species of property. The upland adjoins tide waters, and though at *Bangor* the river is fresh water, that circumstance has not been considered as changing the legal principle. The idea was not suggested in *Dunlap & al. v. Stetson*, though the cause underwent a long and learned examination. But it cannot be necessary for us to proceed further, than merely to say that there is not a particle of proof on which to ground the observation of the counsel that the demandant has been disseised by the tenants or any other persons.

We are all of opinion that the defence does not rest on any legal foundation.

Judgment on the Verdict.

HEWES *vs.* WISWELL.

An entry under a deed not recorded, followed by continual visible occupancy, is only implied notice of a change of property; but is not equivalent to the registry of the deed.

Therefore where *A.* conveyed to *B.* who entered into possession, but did not cause his deed to be recorded; and being in possession conveyed to *C*, who recorded his deed, but suffered the land to lie vacant;—and afterwards *S*, fraudulently induced *B.* to surrender his deed to *A*, who gave a new deed of the same land to *S*, which was recorded; and *S.* entered and occupied till his death; and his administrator conveyed to *W*, who had no knowledge either of the fraud of *S*, or of the previous deed from *A.* to *B*:—it was held, in an action by *C.* against *W*, that the possession of *B.* was nothing more than implied notice of his title; and that *W*, having no knowledge of it, was entitled to hold the land against *C.*

The demandant in a real action, having produced an office-copy of his title-deed, and proved that the original once existed, and was genuine, and that the subscribing witnesses were out of the jurisdiction; and having made affidavit of the loss of the original; was permitted to read the copy in evidence.

THIS was a writ of entry in the *per*, for possession of certain lands in *Brewer*, in which the demandant counted on his own seisin, and a disseisin by one *Samuel Stone*, whose administrator conveyed to the tenant. It was tried before *Parris J.* upon the general issue.

At the trial, the demandant offered an office copy of a deed from one *John Curry*, dated *Oct.* 16, 1813, and recorded *Sept.* 1, 1814, conveying to him the demanded premises, with warranty; to the admission of which the tenant objected. The demandant then proved by the Register of deeds that when he made the record, he must have had before him what appeared to be the original deed, or he should not have recorded it as such. He also proved that the persons named as subscribing witnesses, resided in *Brewer*, where he also resided, and near his dwelling, in *October* 1813; and that they had since removed to the State of New York, or to parts unknown. He further proved by two witnesses that within twelve, or at most eighteen months after the date of the deed, they saw and examined what they believed to be the original; that one of them knew *Curry's* handwriting, and had no doubt of the gen-

uineness of his signature to the deed, which conveyed the same land described in the copy ; that the witness went on the land in company with the demandant, with a view to buying it, and therefore examined the deed more particularly ; but neither of them recollected the names of the witnesses to the deed. The demandant also made affidavit that after diligent search, he could not find the deed, and believed it to be lost, having never seen it since he left it in the registry to be recorded. Hereupon the Judge admitted the copy to be read to the jury.

The tenant then produced an office copy of a deed dated *July* 4, 1811, acknowledged *June* 26, 1815, and recorded *June* 30, 1815, by which *Francis Carr* conveyed the same premises to *Samuel Stone* in fee with general warranty ; and a deed from *John Wilkins*, administrator on *Stone's* estate, dated *May* 8, 1827, conveying the same to the tenant. And it was admitted that *Wilkins* was duly licensed to convey, and had observed the directions of law therein ; and that *Stone* had entered into the exclusive possession of the premises under his deed, in 1815, and so continued till 1825, when he died.

The demandant then offered testimony to prove that previous to the execution of the deed from *Carr* to *Stone*, and previous to *Oct.* 16, 1813, the demanded premises had been conveyed by *Carr* to *Curry*, by deed duly executed, but not recorded ;—that *Curry* entered under his deed, and was in possession at the time of his conveyance to the demandant ;—that *Stone*, with full knowledge of these conveyances, and for the purpose of overreaching the demandant's title, procured the deed from *Carr* to *Curry*, to be surrendered to *Carr*, and a new deed to be executed from *Carr* to *Stone ;* which, though dated *July* 4, 1811, was proved to have been executed *June* 26, 1815.

For the purpose of proving some of these facts, the demandant offered evidence of the declarations of *Stone*, in his transactions with *Carr* and *Curry* relative to the demanded premises, and the title thereto ; to the admission of which the tenant objected ; but the objection was overruled. The Judge instructed the jury that if they should find that *Stone* knew of the conveyance from *Carr*

to *Curry*, of the possession of the latter under his deed, and of his conveyance to the demandant, previous to the execution of the deed to *Stone*; and that with knowledge of these facts *Stone* procured the deed from *Carr* to *Curry* to be given up, and the deed from *Carr* to himself to be executed, for the purpose of overreaching and defeating the title of the demandant; then their verdict ought to be for the demandant. But if they should not be satisfied of these facts, they ought to find for the tenant. And they found for the demandant.

It was contended on the part of the tenant, that as there was no evidence that he had any knowledge of the conduct of *Stone*, nor of any defect in his title, he ought not to be affected by any proof of fraud in *Stone*. But the Judge, for the purpose of bringing this question before the whole Court, ruled otherwise. And the verdict was taken subject to their opinion upon the correctness of his ruling and instructions.

Sprague and *Godfrey*, for the tenant, contended strongly against the admissibility of the copy of the deed; insisting that here was no sufficient proof of the existence of the original, much less that the paper offered was a true copy of it. And they argued that sufficient diligence had not been shown to procure the testimony of the subscribing witnesses. 1 *Stark. Ev.* 327, 330, 337; *Bull. N. P.* 256; *Kimball v. Morrell*, 4. *Greenl.* 368. To the other point they cited *Connecticut v. Bradish*, 14 *Mass.* 296; *Trull v. Bigelow*, 16 *Mass.* 406.

W. D. Williamson, for the demandant, argued that by the deed of *Carr* to *Curry* the grantor parted with his seisin, and had nothing to convey to *Stone*, who therefore derived no title by the fraud he practised, and of course could convey none to the tenant.

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

We are all satisfied that the preliminary proof introduced by the demandant, respecting the existence and loss of the original deed from *John Curry* to him, was sufficient to authorise the admission of the copy, as decided by the Judge who presided at the trial.

The remaining question as to the effect of the deed from the administrator of *Stone* to the tenant, viewed in connexion with some peculiar circumstances, has occasioned some hesitation; but upon a careful examination of facts and principles, we are all fully agreed in the opinion to be delivered.

The first section of *ch.* 36 of the revised statutes, contains this clause: "And no bargain, sale, mortgage or other conveyance, in fee simple, fee-tail or for term of life, or any lease for more than seven years from the making thereof, of any lands, tenements or hereditaments within this State, shall be good and effectual to hold such lands, tenements, or hereditaments, against any other person or persons, but the grantor or grantors and their heirs only; unless such deed or deeds thereof be acknowledged and recorded in manner aforesaid"—that is—recorded at full length in the registry of deeds in the county where such real estate may be situate. The foregoing is a copy of a provision in the act of 1783, on the same subject, now in force in the Commonwealth of Massachusetts. The provincial statute of the 9th of *William* 3d. *ch.* 7, contains a similar provision, with some little variation in its phraseology, but not in principle.

The registry of a deed is the only statute mode of giving notice of the change of property by means of the conveyance: and it is also the only statute mode of giving effect and operation to it, as to any person or persons, except against the grantor and his heirs. The reason why the grantor was excepted, undoubtedly must have been, that he necessarily must have had knowledge of the existence and nature of the conveyance from the very fact of his having made it; and his heirs were excepted, because, as claiming under him, they are bound by his acts and his knowledge. This exception shows what was the general object in the view of successive legislatures, in requiring the registry of deeds in the manner before mentioned. It was to give public notice that the grantor had conveyed to the grantee the estate described in the deed of conveyance, so as to secure after purchasers of the same property from the same grantor or his heirs, from being deceived and defrauded. But still it has for a long series of years been the uniform construction of the

statute, and the settled law of the land, that if B. purchases a piece of land of A. but neglects to place his deed on record, and C, knowing of the purchase of B, procures a deed of the same land from A, and causes it to be registered ; still he shall not hold the land against B, for C's purchase was a fraud on B. This principle and this construction of the statute do not, in any degree militate against its design and spirit. On this point there is no difference of opinion in the community. But if C. had no knowledge of B's purchase, he, by causing his deed to be registered, would hold the land against B, by the express language of the statute. So if C, the fraudulent purchaser from A, sells the land to D, for a valuable consideration, he not having any knowledge of the existence of the unrecorded deed from A, to B, D shall hold the land, though C, his grantor, could not. In the case stated, D perfects his title by the record of his deed ; and B, not having placed his deed on record, cannot, by the express terms of the statute, in such case, hold against any one but his grantor and his heirs ; nor, by the established construction of it, against any one else but him who had notice of his purchase from A.

Though a deed is not recorded, still other persons besides the grantor and grantee, may have notice of its existence and its contents. This knowledge may be either express or implied. He who relies upon proving express knowledge of the fact, must prove it by clear and unequivocal evidence, and not by floating rumors or loose conversation And implied notice must be proved by those circumstances from which the inference of knowledge may be clearly made, and at least appear natural and necessary. The learned Judge *Trowbridge*, 3 *Mass.* 575, lays down the principle that an entry under a deed "being followed by a visible improvement of the land and taking of the profits thereof is such an evidence of an alteration of the property as will amount to implied notice." This is true, but in many cases there may be no evidence that the entry was made under a deed ; though the improvement and possession may be distinct and exclusive. A person may be in possession under a lease ; or the fee may be conveyed by the lessor to the lessee in possession, and thus no change of possession follows. In

such circumstances, a continuance of the open possession would seem to give little or no notice to strangers of the existence of the conveyance : at least the facts could only furnish evidence from which a jury might or might not infer notice, according to the particular nature of those facts.

An entry and open and exclusive possession and perception of profits under an unregistered deed, has often been considered and pronounced as equivalent to the registry of the deed. This cannot be correct ; the language is too strong, and is, on that very account, deceptive. In the above cited passage from the reading of Judge *Trowbridge*, such improvement and perception of profits is only pronounced to be implied notice ; and it never amounts to any thing beyond that. If it were equivalent to the registry of a deed, then it would follow, as a legal consequence, that a fraudulent purchaser, with notice of a prior unregistered deed, and his innocent grantee without such notice, who had paid a full consideration and placed his deed on record, would both stand on the same ground, and neither of them could hold the land against the first purchaser, who entered under his deed and openly possessed and received the profits without recording it. But such a consequence is utterly inadmissible ; for it is unquestioned law, that in such case the innocent purchaser could hold the title against every one, as has been before stated in this opinion. Such entry, exclusive possession and taking of the profits, we repeat, is only implied notice of a change of property and transfer of it from the former owner to the person openly possessing it ; from which notice, fraud in a second purchaser is presumed, and by which it may be proved against him, so as to defeat the title of him who has been guilty of it ; but beyond this, neither the words, nor the long established construction of the statute have ever been extended. An unrecorded deed is good against a second purchaser with notice of it, though his deed is recorded ; because, in consistency with the soundest principles of morality, the negligence of the first purchaser in omitting the registry of his deed, may and ought to be overlooked, rather than that the fraud of the second purchaser should prove successful. And an innocent grantee of a fraudulent purchaser shall hold against the first

purchaser; for though neither of them has been guilty of any immoral conduct, yet one of them must suffer a loss; and it is more proper and just that he who has been regardless of his own interest, so far as not to place his deed on record, should sustain the loss, than the innocent purchaser who has not been thus negligent. In such a case justice requires the application of this principle of the common law; though, without its application, the provision of the statute itself is a sufficient protection of his title. It is believed that the foregoing principles and reasoning are sustained by the following authorities. Judge *Trowbridge's Reading*, 3 *Mass.* 573; *Marshall v. Fisk*, 6 *Mass.* 24; *Davis v. Blunt*, *Ib.* 68; *Farnsworth v. Child*, 4 *Mass.* 637; *Prescott v. Heard*, 10 *Mass.* 60; *Norcross v. Widgery*, 2 *Mass.* 506; *Connecticut v. Braddish*, 14 *Mass.* 296; *Bigelow v. Trull*, 16 *Mass.* 406; *Priest v. Rice*, 1 *Pick.* 164; *McMechan v. Griffith*, 3 *Pick.* 149; *Cushman v. Hurd*, 4 *Pick.* 253; *Jackson v. Burgot*, 10 *Johns.* 457; *Jackson v. Given*, 8 *Johns.* 107.

We will now attend to some of the facts, having an important influence in the decision. The deed from *Carr* to *Curry* was never registered; and though *Curry* went into possession under it and was in possession at the time of his conveyance to the demandant in *October* 1813, yet it does not appear that any one occupied the land from that time, until *Stone* entered under his deed in 1815; and it was admitted at the argument, that during that interval, the land was wholly unoccupied and unprotected; though the demandant's deed from *Curry* was recorded in *September* 1814. It does not appear, nor is it pretended, that the tenant at the time of his purchase from the administrator, had any knowledge of the conduct of *Stone* in procuring his deed from *Carr* or the defect in *Stone's* title, or of the deed to, or possession of the land by *Curry* while he was the owner of it. Upon these facts the Judge instructed the jury that if they believed that *Stone* had knowledge of the above mentioned particulars, when he obtained his deed from *Carr*, the demandant was entitled to a verdict. By this instruction, a *scienter* on the part of the tenant, was deemed of no importance. But, for the reasons and on the principles above stated, inasmuch as the

tenant was a fair purchaser for a valuable consideration, wholly innocent and unaffected by notice of the fraudulent proceedings and defective title of *Stone*, he is entitled to hold the land against the demandant, though *Stone* himself could not have held it. We are all of opinion that the instructions of the Judge cannot be sanctioned.

Verdict set aside and new trial granted.

Barker & al. *vs.* Roberts.

Where *A.* agreed to take the logs of *B.* at a certain place, and at an agreed method of computing the quantity,—to saw them into boards, and transport and deliver the boards to *B.*—and the latter agreed to sell the boards, free of charge for commissions, and to allow *A.* all they should sell for, beyond a stipulated price per thousand,—the property to be and remain all this time at the risk of *A.* :—it was held that this was not a sale of the logs to *A.*, but was merely a *locatio operis faciendi.*

This was an action of *assumpsit*, brought to recover the proceeds of certain logs which the plaintiffs alleged to be their own property, and which the defendant had converted into boards and sold for cash; he claiming them as his own, by purchase from *Cowan & Oaks.*

It appeared at the trial before *Weston J.* that the plaintiffs, being the original owners of the logs, entered into a written agreement with *Cowan & Oaks*, of the following tenor :—"Memorandum," &c. "That the said *Cowan & Oaks* on their part agree to take, at the *Sunkhaze* boom, a certain lot of logs, at the scale known by the name of the *Babcock* logs, and scaled by *Daniel Davis*, to saw and run to *Bangor* all the boards said logs make, free of any expense to the other party, as soon and as fast as one saw can saw them; and *Barker & Crosby* agree to dispose of said boards free of any commission, either to sell or ship to *Boston*, as they the said

Barker & Crosby may see fit; and allow to the said *Cowan & Oaks* all they shall nett over seven dollars per thousand. It is understood that the said *Cowan & Oaks* risk the logs after they are scaled, and risk the boards after the logs are sawed, until they are marketed." *Cowan & Oaks*, instead of sawing the logs, sold them to the defendant; who contended that the contract imported a sale of the logs to his vendors, and not a bailment for manufacture. But the Judge, for the purpose of settling other facts, overruled this position, and reserved it for the consideration of the whole court, a verdict being returned for the plaintiffs.

Sprague and *Kent* argued for the defendant, that the contract was sufficient proof of a sale of the logs, as it contained all the elements of a sale. Here was a fixed price, which is always received as evidence of an intent to sell;—*Marsh v. Wickham*; 14 *Johns.* 168;—and the goods were ever afterwards at the risk of the vendee;—who agreed "to take" the logs; which, in connection with a price named, means "to buy;" 2 *Kent's Com.* 367; *Buffum v. Merry*, 3 *Mass.* 478; *Hussey v. Thornton*, 4 *Mass.* 405; 6 *Mass.* 422. But if, as between the original parties, the plaintiffs might claim the lumber; yet the terms of the contract are such as to authorise *Cowan & Oaks* to convey a good title to a stranger.

Allen and *Starrett*, for the plaintiff, cited *Babcock v. Gill*, 10 *Johns.* 287; *Seymour v. Brown*, 19 *Johns.* 44; 3 *Dane's Abr.* 190; *Collins v. Forbes*, 3 *D. & E.* 316; *Barrett v. Pritchard*, 2 *Pick.* 512; *Patten v. Clark*, 5 *Pick.* 5; 7 *Johns.* 257; 8 *Johns.* 445.

Weston J. delivered the opinion of the Court, at the ensuing *June* term in *Washington*.

The contract between the plaintiffs and *Cowan & Oaks*, though sufficiently definite, if each had fulfiled the stipulations by them respectively entered into, is somewhat obscure as to the question now raised by a third person, there having been a breach of the contract on the part of *Cowan & Oaks*, viz. whether there was a sale to them by the plaintiffs of the logs, from which the boards in contro-

versy were made; but upon consideration, we are all of opinion that there was no sale. In common parlance, to take at a settled and agreed price, is a sale. But it is a term which applies at least as appropriately and as aptly to bailments. The agisting farmer takes cattle, to depasture. The tailor, cloth, to make into garments, and various artists and manufacturers, raw materials to manufacture for the owners. And we are satisfied the contract between the plaintiffs and *Cowan & Oaks*, was of this description.

The price to be paid for the logs, is not stated in that part of the written instrument, where it is said that *Cowan & Oaks* are to take them, and if it had been a sale, it would naturally and properly have been stipulated for in this connection. It is no where stated what the price of the logs was to be, but it is matter of deduction from the contract, that they were considered by the parties, as of the value of seven dollars, for so many as would make a thousand feet of boards. The object of the parties manifestly was, that *Cowan & Oaks* should receive the logs at *Sunkhaze*, that they should saw them into boards, that they should run the boards to *Bangor*, and there deliver them to the plaintiffs. Their compensation was to depend upon the marketable value of the boards at *Bangor*, or upon what they might produce upon a shipment to *Boston*. Whatever sum, beyond seven dollars, might be obtained for the boards, was to be paid to them by the plaintiffs. In this arrangement, the logs were doubtless considered worth seven dollars a thousand, and the increased value, arising from the services of *Cowan & Oaks*, was regarded as rightfully belonging to them. It is not stated that the plaintiffs were to retain the seven dollars as the price of the logs. There was no occasion for such a provision, if no sale was made, but the affirmative stipulation was, that the plaintiffs should pay to *Cowan & Oaks* a sum of money, to be ascertained upon certain principles prescribed.

In the survey of logs, their quantity is not ascertained by the exact number of feet of boards they may make, when manufactured, but by the judgment of appraisers, or by a scale, which in some places is of such general and uniform application, as to be consid-

ered adopted in all contracts in relation to logs, when no other mode of admeasurement is agreed upon. In this case, the logs were to be scaled by *Daniel Davis*, and this was necessary, not to determine what *Cowan & Oaks* should pay, for they engaged to pay nothing, but how much they should receive upon a final sale of the lumber. Much stress has been laid upon the express stipulation, that the logs and the boards should be at the risk of *Cowan & Oaks*, and this it is urged is an essential and decisive criterion of the right of property. And doubtless it is, where the risk is a deduction of law, for it is then, except in the case of common carriers, and perhaps in a few other special cases, an effect and consequence of the right of property. The former results from the latter. But it is otherwise, where the risk arises from the express agreement of the parties. It is expressed, because it would not be implied. Nothing is more common than for one to take the risk of another's property. With certain qualifications, the law imposes it upon common carriers. What led to this provision, in the contract under consideration, does not appear, but it does not afford evidence of a change or transfer of the logs from the plaintiffs. It was matter of convention, as was the engagement on the part of the plaintiffs, that they would charge no commissions for their services. And this last stipulation is urged as an evidence of the transfer of the logs; because it is insisted that there could be no pretence that the plaintiffs would be entitled to a commission for the sale of their own property, but had it not been for this provision, it might have been claimed by them as a fair deduction from what *Cowan & Oaks* were to receive; as it was a service of which they were to have at least part of the benefit.

Hussey & al. v. Thornton & al. was a case of conditional sale; the question raised here is, whether there was any sale whatever.

Judgment on the Verdict.

The States of Maine and Massachusetts *vs.* Webster & al.

In actions brought jointly by the States of Maine and Massachusetts for injuries to their common lands in Maine, no judgment can be rendered for costs, in favor of the defendant.

The two States of Maine and Massachusetts having brought a joint action of trespass *quare clausum fregit*, for cutting timber on their common lands, in which a verdict was returned for the defendants; the latter moved for judgment for their costs.

Sprague, for the defendants, supported the motion on the ground that a judgment for costs resulted from the general provisions of *Stat.* 1821, *ch.* 59, *sec.* 17, giving costs in all cases to the party prevailing. The legislature having made no exception, none ought to be made. The difficulty of framing a writ of execution to collect them, is no valid objection to the judgment itself. If the defendants cannot collect their costs of Maine, this is no good reason why Massachusetts should not pay them. *Mills v. Durgee*, 7 *Cranch.* 481; *United States v. La Vengeance*, 3 *Dall.* 297; *The Antelope*, 12 *Wheat.* 546; *Sargeant's Const. law*, 88; *Cohens v. Virginia*, 6 *Wheat.* 264; *Stat.* 1821, *ch.* 58, *sec.* 1, 4.

The *Attorney General*, for the plaintiffs, cited 6 *Dane's Abr.* 582, *sec.* 7; *Rex v. Plunkett*, 3 *Burr.* 1329; *United States v. Hooe*, 3 *Cranch.* 73; 1 *Cranch.* 259; 3 *Dall.* 301; 1 *Com. Dig.* 316; 1 *Chitty's Crim. law*, 283.

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

This is an action of trespass *quare clausum fregit* and a verdict having been returned in favor of the defendants they move for judgment for their costs. The motion is a novel one; and if we should grant it, we could not, by any of our process, carry it into execution, and give to the defendants the fruits of the judgment. They

could be obtained only on petition to the legislatures of the respective States; and that can be done as well without as with such a judgment. The counsel has cited some expressions of the Supreme Court of the United States, that perhaps a judgment for costs might be entered against the United States; but it does not appear ever to have been done. It is said that though a State is not sueable, yet if such State sues an individual in a civil action, they then both stand on the same level, and judgment for costs ought to be entered against such State. Justice seems to require that the State in such a case should pay costs; but we are not aware that we can rightfully enter the judgment moved for. In the case of inquests of office, which are usually prosecuted for the benefit of individuals, there is a special statute provision for the payment of costs from the State Treasury; and this seems to be a legislative declaration that without such a provision, costs could not be demanded. It may be a very proper subject for the consideration of the legislature; and it is for them to adopt such measures as they may deem consistent with justice and sound policy.

Motion denied.

WILLIAMS & AL. *vs.* VEAZIE.

In an action of the case for digging a trench and diverting water from the plaintiff's mill, full costs are to be taxed for the plaintiff prevailing, though the damages awarded to him are less than twenty dollars.

THIS was an action of the case, for digging a trench on the defendant's land, and thereby diverting the water from the plaintiff's mill, and throwing off waste slabs, and otherwise injuring and impeding the operations of the mill. Judgment having been rendered for the plaintiffs for less than twenty dollars damages, *Allen* and

Starrett moved for full costs, and cited *Stat.* 1821, *ch.* 59, *sec.* 30; *Bickford v. Page*, 2 *Mass.* 462; *Crocker v. Black*, 16 *Mass.* 448; *Bean v. Mayo*, 5 *Greenl.* 94.

Sprague and *Kent*, for the defendant, resisted the motion; contending that the title to real estate was not necessarily and directly involved in the suit, and that it therefore was not within the exception in the statute. The plaintiffs might have had a right to the water, without any title to the soil.

THE COURT, however, considered the case as nearly similar in principle to that of *Crocker v. Black*, cited for the plaintiffs; and observed that here the plaintiffs must necessarily have shown a title to the real estate, as the foundation of their right to recover. And they granted the motion.

BROWN *vs.* GILMORE.

In order to constitute a good tender, it is essential that the offer be unconditional; and that the money or other thing to be paid be actually produced; unless the creditor dispense with its production, either by express declaration, or other equivalent act.

Thus where one gave his promissory note for sixty dollars, payable in neat stock at a certain day and place; and meeting the creditor on the day of payment at another place, told him that the stock was ready for him on a neighboring farm, provided he would take forty eight dollars worth in full for the note, denying that any more was due; which the creditor refused, asking "why he did not bring on the cattle if he had any";—it was held that this was not a good tender.

THE facts in this case, which came up by exceptions from the Court below, are sufficiently apparent in the following opinion of this Court.

Rogers, for the defendant, contended, *first*, that here was a good tender, the actual production of cumbrous articles not being essen-

tial in such cases. The property in such goods passes by any constructive delivery, as in the case of goods sold by sample, or by marks and numbers in a warehouse. And in the present case, as the title of the plaintiff would have been complete by his assent to the tender, without any further act done by the defendant, the tender was sufficient. *Barrett v. Goddard*, 3 *Mason*, 107; *Bholen v. Cleaveland*, 5 *Mass.* 174.—*Secondly*, that if the tender was defective in form, this was cured by the language and conduct of the plaintiff, who refused to accept the cattle, if produced. *Black v. Smith*, *Peake's Ca.* 88; *Cole v. Blake*, *ib.* 179; *Coit v. Houston*, 3 *Johns. Ca.* 243; *Wright v. Reed*, 3 *D. & E.* 554; 3 *Stark. Ev.* 1391; *Lincoln & Kennebec Bank v. Hammatt*, 9 *Mass.* 159; *Slingerland v. Morse*, 8 *Johns.* 370; *Frasher v. Cushman*, 12 *Mass.* 277; *Barstow v. Gray*, 4 *Greenl.* 409; *Nourse v. Snow*, 6 *Greenl.* 208; *Fleming v. Gilbert*, 3 *Johns.* 531.

McGaw & Hatch, for the plaintiff, cited *Thomas v. Evans*, 10 *East.* 101; 3 *Stark. Ev.* 1393; *Thayer v. Brackett*, 12 *Mass.* 450; *Breed v. Hurd*, 6 *Pick.* 356; 5 *Bac. Abr.* 9; *Tender D.* 5 *Dane's Abr. ch.* 170, *art.* 2; *Luce v. Robbins*, 4 *Mass.* 474; *Barrett v. Goddard*, 3 *Mason*, 107; 8 *Johns.* 474; 5 *East.* 198; *Aldrich v. Albee*, 1 *Greenl.* 120; *Brady v. Jones*, 16, *Sarg. & Lowb.* 272; *Simmons v. Wilmot*, 3 *Esp.* 91.

Weston J. delivered the opinion of the Court at the ensuing *June* term in *Washington*.

This was an action of *assumpsit* on a promissory note for sixty dollars, in neat stock, at the market price, to be delivered at the six mile falls in *Bangor*, in nine months from date. The defendant pleaded, as to twelve dollars, *non assumpsit*, and a tender as to the residue. As to the twelve dollars, the jury found for the defendant, and as to the tender, for the plaintiff; and the question presented is, the sufficiency of the tender, attempted to be proved. On the day of payment, the defendant had, at the farm of one *Kendric*, about a mile beyond the six mile falls, a yoke of oxen, which

he had conveyed to the defendant, to secure a debt he owed him, which in the opinion of *Kendric*, who testified as a witness for the defendant, was worth about fifty dollars. The witness had other stock on his farm, and agreed with the defendant to let him have enough to pay the note, if the oxen should be appraised at a less sum. On the day of payment, the defendant and the witness went to the six mile falls, where they found the plaintiff, who was informed that the defendant had come for the purpose of making a tender of neat stock in payment of the note. The defendant then offered to pay neat stock to the amount of forty-eight dollars, on the note, but the plaintiff refused to receive the stock, unless the defendant would pay the whole sixty dollars. There was no stock present, nor any objection made by the plaintiff, on account of its non production. The defendant offered to bring the stock, if the plaintiff would receive forty-eight dollars, but he refused to receive any thing short of the face of the note. After considerable conversation, in which the witness endeavored to effect a settlement, the plaintiff said to the defendant, " if you have got any cattle, why dont you bring them on ?" to which the defendant replied, if you will take forty-eight dollars in full for the note, I will bring the stock forward, but the plaintiff said I will take nothing less than the whole note. The stock was not brought, or any offer of it actually made, other than what has been before stated.

At the trial, the jury were satisfied that twelve dollars of the note had been paid. When, does not appear. For any thing which the case finds, this payment might have been made after the conversation before recited, in which case the tender would be clearly bad. But we do not place the decision of the cause upon this ground. There are two other objections to the tender set up, either of which is fatal. In the first place, the actual production and offer of the money or other thing to be paid is essential, unless the creditor dispense with it, either by an express declaration, or other equivalent act. Thus where the debtor on leaving home left £10. with his clerk for the plaintiff, and the plaintiff was informed of this when he called, and demanded a larger sum, and he would not receive any thing less than his whole demand, and the clerk

did not offer the £10, it was held to be no tender. *Thomas v. Evans*, 10 *East.* 101; *Dickinson v. Shea*, 4 *Esp.* 68, was a case equally strong, and to the same effect. Now in this case the plaintiff was so far from expressly excusing the defendant from making an offer of the stock, that he told him, if he had any cattle, to bring them on. Secondly, a tender in order to be availing, must be unconditional. Thus if the party demand a receipt in full, or that the money or other thing tendered, shall be received in full discharge of the plaintiff's balance or claim, the tender is not good. 3 *Stark. Ev.* 1393, and the cases there cited. In this case, the face of the note was more, and the plaintiff claimed more, and whether more might eventually appear to be due or not, the plaintiff had a right to have the tender so made, that he might receive it, without prejudice to his further claim. Here the defendant's offer to bring the stock forward was clogged with the condition, that the plaintiff should receive forty-eight dollars in full for the note.

The exceptions are overruled, and the judgment affirmed.

Benson *vs.* The Inhabitants of Carmel.

Where it was the usage of a town to liquidate its debts by an order drawn by the selectmen on its treasurer, in favor of each creditor; and such an order was drawn and tendered to a creditor of the town, who well knew the usage at the time of contracting, but who refused to receive the order because it did not cover certain disputed items of his account;—it was held, that this was not a sufficient tender to bar the creditor from pursuing his remedy on the original demand.

This was an action of *assumpsit* upon implied promises to pay the amount of the plaintiff's account annexed to his writ. While the action was pending in the court below, the parties agreed to a statement of facts, therein admitting that the principal item of

$25,48 for the support of a town pauper was justly due to the plaintiff; and that the other items were not legally chargeable to the defendants. It was further agreed, that it was a general usage and custom with this and other towns, in transacting their business, to liquidate their debts by an order drawn by their selectmen, on the treasurer, in favor of each creditor;—that the plaintiff knew of this custom and usage at the time the pauper was placed with him at board;—that he presented his account to the selectmen, who drew their order on the treasurer for the amount of the board, he then having sufficient funds in his hands; but the plaintiff refused to receive it because it did not include all the items of his account. The order was not negotiable. Upon these facts the plaintiff's right to recover in this action was submitted to the decision of the Court.

The question was briefly spoken to by *Jewett*, for the plaintiff, and *Kent* and *Rogers* for the defendants; and the opinion of the Court was delivered at the ensuing *June* term in *Washington*, by

Mellen C. J. In this action the plaintiff declares on an account annexed to the writ, containing several charges, on which he claimed a right to recover; but afterwards, when the agreed statement of facts was signed, the plaintiff acknowledged that none of the charges could be sustained, but the first for $25,48; and the correctness of this was then admitted by the defendants; and as to this sum the only question is whether the proceedings, stated by the parties respecting the drawing and offer of the order to the plaintiff, and his refusal to receive it, taken in connexion with the knowledge of the plaintiff as to the usual mode of transacting such business, by the selectmen and treasurer of the town, with the creditors of the town, is equivalent to a tender of the money for which the order was drawn. No case has been cited which in all respects resembles this. In the case of *Varner v. Nobleborough*, 2 *Greenl.* 121, the plaintiff had accepted the town order in payment; and the court decided, that according to the well known usage, it was his duty to present it for payment to the treasurer, before he could sustain an action upon the order; but in the pres-

ent case the order was not accepted by the plaintiff, he at that time claiming that a larger sum was due than the amount of the order which he refused to receive; and such a claim was the reason of his refusal. We apprehend that the knowledge of the usage in such cases does not lay a creditor under any obligation to a compliance with it, except in those cases where he voluntarily receives an order for an undisputed amount. In such a case he must present it to the treasurer, and not sue the town upon it before so doing. But when he refuses the order, he thereby puts the town on its guard, and those who have the management of its prudential concerns, may then protect themselves from damages occasioned by a suit, by a legal tender of the amount due. In *Varner v. Nobleborough*, the order was negotiable, and, like a negotiable promissory note, amounted to payment of the account, and an extinguishment of the implied promise; and the order not having been presented, the plaintiff failed in his suit. But in the action of *Slemmons v. Westbrook*, cited and commented upon in *Varner v. Nobleborough*, the order was not a negotiable one, and it is understood that the Court permitted the plaintiff to recover on the account annexed to his writ, that is, upon the unextinguished implied promise. In the case before us, the order is not negotiable and the action is founded on the implied promise, and this seems governed by the same principles which dictated that decision. The defendants should have tendered as much as they confessed to be due, and not have relied on the offer of an order for that amount only, while a contested claim for a larger sum was insisted on by the plaintiff at the time. The effect of the proceedings adopted should be considered according to the then existing facts, and not the facts subsequently ascertained. The defendants must be defaulted.

BUTMAN'S *case.*

Where one statute creates an offence and inflicts the penalty, and a subsequent statute imposes another and further penalty; an indictment for the offence may well conclude *contra formam statuti.*

An indictment was for selling "wine, beer, ale, cider, brandy and rum, and other strong liquors" by retail, *diversis diebus* from a certain day to another day expressed, without license; and the defendant was found guilty of the whole matter; whereas the selling of beer, ale and cider by retail, during a portion of the time alleged, was not unlawful; yet the conviction was held well.

THE defendant in this case was indicted for that on the first day of *July* 1830, and on divers days and times between that day and the time of finding the indictment, which was at the *October* term following, he presumed to be a common seller of wine, beer, ale, cider, brandy and rum, and other strong liquors, by retail, without being duly licensed, &c. contrary to the form of the *statute* in such case made and provided;—and being found guilty upon the whole indictment, he moved in arrest of judgment, because by the latest statute on this subject, the selling of beer, ale and cider was not unlawful after the day next preceding the second Monday in *September* of the same year;—because it did not appear with sufficient certainty that any offence had been committed;—and because the offence was not laid against the form of the *statutes*, there being two relating to the matter.

Gilman and *Greenleaf*, in support of the motion, cited *Stat.* 1821, *ch.* 133, *sec.* 1; *Stat.* 1824, *ch.* 278, *sec.* 2; *Stat.* 1830, *ch.* 482, *sec.* 4; 4 *Com. Dig.* 384, *Indictment G.* 6; 2 *Hawk. P. C.* 252; 3 *Bac. Abr.* 114, *Indictment H.* 5.

The Attorney General and *Godfrey*, for the State, cited 1 *Chitty's Crim. law*, 239; *Broughton v. Moor*, *Cro. Jac.* 142; *Dingley v. Moor*, *Cro. El.* 750.

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

MELLEN C. J. This indictment is founded on the first section of *ch.* 123 of the revised statutes, and the offence is described in the

words of the statute. The penalty or forfeiture for the commission of the offence is the sum of fifty dollars. An act, additional to the former, was passed *Feb* 25, 1824, making some further regulations on the subject, in the first, second and third sections, not having any particular bearing on this case; and in the fourth section it is enacted "that if any retailer, innholder or common victualler shall violate any of the provisions of the act to which this is additional, and shall be thereof convicted before any court of competent jurisdiction, such retailer, innholder or common victualler shall not have his license renewed for the term of two years." By the act of *March* 18, 1830, *ch.* 482, so much of the act of 1821, *ch.* 123, as prohibits the sale by retail of beer, ale and cider was repealed, from and after the day next preceding the second Monday of *September* then next. During a part of the time mentioned in the indictment it was no offence to sell, by retail, beer, ale, or cider. The verdict against the defendant is general. In the motion in arrest of judgment filed, the first reason assigned is, that he may have been found guilty of selling by retail only beer, ale and cider, after it had ceased to be an offence so to do. We are of opinion that this objection is wholly unsubstantial. He is also found guilty of selling brandy and wine, and that surely was then and is now an offence. The third reason assigned is of more importance, according to many of the authorities in relation to the point. As there are several statutes on the same subject of innholders, retailers and common victuallers, containing numerous provisions and prohibitions and penalties, the question is whether the indictment is not bad, inasmuch as it concludes against the form of "the statute," instead of "the statutes" in such case made and provided. It is stated in 2 *Hawkins*, title *Indictment*, *sect.* 117, that "where a new statute adds a new penalty to an offence prohibited by a former statute—it seems it may with reason be argued, that if the indictment conclude *contra formam statuti*, it will be insufficient; because it may seem that the offence is not punishable by any one statute only—yet considering that the precedents in these cases generally conclude *contra formam statuti*, and the prosecution in truth depends on the addition made by the later statute, which seems

of itself alone sufficient to support it, it may be reasonably argued that such a conclusion may be allowed in these cases also." *Chitty*, in his treatise on criminal law, *vol.* 1, 292, observes, " a distinction formerly was taken between the case where an offence is prohibited by two statutes, and where the indictment cannot be supported upon one singly. But according to the later opinions, even in this case, a conclusion in the singular will be valid." From a view of the whole of the 117th section in *Hawkins*, it is evident he is of the same opinion.—In the cases above put, the new penalty is a substitute for the former ; as the statute of 13th *Eliz.* increases the penalty to £20 for a month's absence from church ; but such is not the fact in the present case. The penalty of $50 remains ; and the only effect of the provision in the 4th section of the act of 1824, is to create a disqualification for receiving a license for the term of two years ; but it is not declared that this shall be any part of the sentence of the court, over which they could have no control. The first section of *ch.* 123 of the revised statutes, is the only one which creates or describes the offence for which the defendant was indicted, and of which he has been found guilty. The offence charged was committed against the form of that statute only ; so that the indictment against the defendant seems not to fall within the influence of the old principle, which is stated by the books on criminal law, as being of so doubtful and questionable a character at the present day. The objection is merely technical and formal, but still we should feel bound to sustain it, if the authorities required it ; but upon a careful examination of them, we are satisfied they do not. Accordingly the motion in arrest of judgment is overruled.

Goodhue *vs.* Butman.

When a sale is made without warranty and without fraud, and the reasonable and just expectations of the purchaser as to the quality are disappointed; if, nevertheless, he receives the article without objection, he is liable for the price agreed.

This case, which was *assumpsit* for the price of a quantity of bricks, came up by exceptions taken by the defendant to the opinion of *Ruggles J.* before whom it was tried in the Court below. It appeared that the plaintiff had a quantity of bricks for sale, then made in his yard, and ready to be burnt; and upon application being made to him for some of them, by the defendant, who already knew the general quality of the bricks made at that yard, he offered them to the defendant for five dollars a thousand. The latter offered him a less sum for twelve thousands, but being told that he could not have them for less than five dollars, he said he would take several thousands, perhaps enough for his chimnies, at that price. He subsequently, by his agent, sent from time to time and took the quantity charged in the plaintiff's account. The defendant was present on the first day, when some of the bricks were brought, and made no objection to their quality. He then went to *Boston*, leaving the business in the hands of his agent. The agent, after some portion of the bricks had been received, notified the plaintiff that they would not answer the purpose; and directed his teamster to return without any, unless the plaintiff sent better bricks. The agent however testified that the plaintiff did send three other loads that were no better. Afterwards he sent one load of good weather bricks. Then the agent went with the plaintiff to the house the defendant was building, and showed him the defects in the bricks; but, at his request, and upon his assurance that they should be of a better quality, consented to receive the residue, being two or two and a half thousands: and no complaint was afterwards made. There was much conflicting testimony as

to the quality of the bricks ; but they were nearly all used in building the chimnies in the defendant's new house.

Upon the whole testimony, of which the foregoing is the substance, the Judge instructed the jury that, in the absence of proof of an express stipulation as to the quality, they might supply the want of such proof by inference, or presumption, from the purpose for which they were purchased, and the evidence of the defendants' having seen the bricks at the time of contracting, and before they were burnt, together with his previous knowledge of the kind and quality of bricks usually made of the material at that yard ; and that if the bricks received by the defendant were suitable for the purpose for which they were purchased, and of as good a quality as were usually made at that yard, and as the defendant had reason to expect to receive there, when the contract was made, he was bound to pay the stipulated price.

They were further instructed, that if the bricks were of a quality somewhat poorer than the defendant expected to receive, at the time of contracting ; yet if he took them from the plaintiff's yard without objection, and used them without notice to the plaintiff that he should not hold himself accountable for them as for the bricks contracted for, or that he should not pay for them at the agreed price :—or, if the defendant's agent, in consenting to receive the residue of two or two and a half thousands, they being of a better quality, intended thereby to waive objections to the quality of those previously received, and it was understood by the parties that the average quality would be thus restored to that which was contracted for, and the residue were in fact of such better quality ;—in either of these cases the plaintiff would be entitled to recover the price contracted for. The Judge further instructed them, that if they should find from the evidence, that the bricks were received as for the bricks contracted for, the burden of proof was on the defendant to show that they were of an inferior quality. But that if the contract was not performed on the part of the plaintiff, so far as it respected the quality of the bricks, and the defendant did not waive his objections, yet the bricks having been used by him, he was liable to pay the plaintiff what they were reasonably worth ;

and if this sum amounted to more than had been tendered by the defendant, their verdict must be for the plaintiff, for the surplus. And they found for the plaintiff.

The exceptions were briefly spoken to by *Brown* and *T. McGaw* for the plaintiff, and *Rogers* for the defendant; and the opinion of the Court was delivered at the ensuing *June* term in *Washington*, by

WESTON J. who, after stating the facts as above, proceeded as follows.

We do not perceive any objection to the instructions of the Judge to the jury. Upon the first view suggested, which the testimony rendered suitable and appropriate, the defendant received precisely what he purchased and what he expected; and if so, was unquestionably bound to pay the stipulated price. The second instruction is well supported by authority. When a sale is made without warranty and without fraud, and the reasonable and just expectations of the purchasers as to the quality are disappointed, if nevertheless he receives the article without objection he is liable for the price agreed. In this case notice was given and complaint made, whether well or ill founded, and it was submitted to the jury to determine whether, if some of the bricks were not so good as they ought to have been, others were not better, and whether upon the whole the defendant or his agent had not waived all objection to the quality, and received them under the contract; and they found that he had. If the defendant did so, he was chargeable for the price he had agreed to pay; and we are of opinion the Judge was warranted in presenting the case under this aspect to the jury.

The exceptions are overruled, and the judgment affirmed.

SMITH *vs.* THORNDIKE & AL.

Where two parties submitted a question of betterments, popularly so termed, to referees, who were to "determine as referees" whether the tenant was "by law entitled" to claim betterments, and if so, to what amount; and then agreed to a written statement of facts, upon which the referees decided that the tenant was "legally entitled" to betterments, to a certain amount;—it was held, in an action upon this award, that the question of law was definitively submitted to the referees; and that any mistake of law, on their part, was not open to further examination.

THE parties in this case entered into an agreement, of the following tenor:—"Whereas *Benjamin Smith* claims betterments on lot No. 224 in *Frankfort*, the soil of which is owned by *Israel Thorndike, jr. David Sears*, and *William Prescott:* Now it is hereby agreed between said *Smith*, and said *Thorndike, Sears* and *Prescott*, that *Martin Kinsley, Phineas Ashmun* and *Jeremiah Simpson*, shall determine as referees, the decision of the majority to be binding on both parties, whether said *Smith* is by law entitled to betterments in said premises; and if so entitled, what amount said *Smith* shall receive as in full of said betterments; and said *Thorndike, Sears* and *Prescott* agree to pay said *Smith* the amount estimated by said referees as the value of said betterments; and the said *Smith* agrees to accept the sum so awarded him as aforesaid, and to relinquish to said *Thorndike, Sears* and *Prescott*, all his right to said premises. It being understood by both parties that if said referees should award that said *Smith* is not legally entitled to betterments in said premises, said *Smith* is to relinquish to said *Thorndike, Sears* and *Prescott* all right to said premises." The facts in the case were contained in a written statement agreed and signed by both parties; upon which the referees decided that *Smith* was legally entitled to betterments, the value of which they assessed. The present action was *assumpsit* upon this award with the common money counts; which the defendants resisted; and a case was made for the opinion of the court upon these three

questions;—1st, Whether the referees were bound to determine according to law the matter submitted to them;—2d, Whether they had so determined;—3d, If they had not, then whether the defendants might avail themselves of that objection in this action.

Brown argued for the plaintiff, that the whole subject, both law and fact, was exclusively submitted to the referees.

Abbot, Greenleaf and *Kelly*, for the defendants, contended that the referees were bound to decide according to the rules of law, and had undertaken so to decide, as appeared by the award itself; and that the mistake of law was examinable in this form of action. To the point that the referees had mistaken the law, upon the facts agreed, they cited *Knox v. Hook*, 12 *Mass.* 329; *Runey v. Edmands*, 15 *Mass.* 291; *Shaw v. Bradstreet*, 13 *Mass.* 241; *Kennebec Proprietors v. Kavanagh*, 1 *Greenl.* 348. And to the last point they cited *Kent v. Elstob*, 3 *East.* 18; *Jones v. Boston Mill Corporation*, 6 *Pick.* 148; *Kyd on Awards*, 351; *North Yarmouth v. Cumberland*, 6 *Greenl.* 21; *Greenough v. Rolfe & al.* 4 *New Hamp.* 357; *Ames v. Milward*, 8 *Taunt.* 637; *Kleine v. Catara*, 2 *Gal.* 61.

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

In the view we have taken of this cause, the three questions submitted for our decision, may all be resolved into one, and one answer will be sufficient for all. The submission bears date *April* 30, 1830, and the referees were authorised "to determine as referees—whether the said *Smith* is by law entitled to betterments in said premises, and, if so, what amount said *Smith* shall receive as in full of said betterments." On the 15th of *May* following the parties made and signed a "statement of facts, to be submitted to said referees." This statement contains the history of the claims of *Smith* for betterments and the facts on which his claims were founded; and also the facts on which the defendants relied to disprove his claim. On the 19th of *July* following the referees made their report, in which they say that they had taken into con-

sideration "the agreement and the statement of facts," and then go on to pronounce their "opinion, final award and determination," that *Smith* is legally entitled to betterments.

In the case of *Jones v. Boston Mill Corporation*, 6 *Pick.* 148, the Chief Justice, in delivering the opinion of the court, says, "we take one principle to be very clear, which is, that where it manifestly appears by the submission, that the parties intended to leave the whole matter, law and fact, to the decision of the referees or arbitrators, the award is conclusive, unless the award itself refers such question to the consideration of the court;" which is not done in the present case; they declare their award to be final. See also *Kleine v. Catara*, 2 *Gall.* 61. The parties in this case certainly intended to refer some question to the decision of the referees; what was that question? Not one of fact; for all the facts were agreed upon and stated in writing. Then it could only be a question of law. This was a matter in which the parties were not agreed. How were the referees to decide it? The agreement of submission answers, they were to decide it "as referees," judging for themselves upon the legality of the claim submitted. If the court were intended ultimately to decide it, by controlling the determination of the referees, then they had no power; and the submission and all the proceedings were mere idle form and useless expense. Surely in this instance "it manifestly appears that the parties intended to refer the law" to a court of their own creation, and for the purpose of a decision in a quiet and friendly manner. In this respect it differs essentially from the case of *Greenough v. Relf.* The mere justice and fairness of the award is not disputed; and we are all of opinion that no legal principle prevents us from enforcing its performance by a judgment for the sum awarded and interest from the commencement of the action. A default must be entered.

Fisher *vs.* Bartlett & al.

Where property was attached by an officer, and delivered to a third person for safe keeping, to be forth coming upon demand; it is competent for the bailee, in an action against him upon his promise to redeliver the goods, to show that they were not the property of the debtor from whom they were taken, and that they have been restored to the true owner.

If the attachment was merely nominal, *quære* whether any consideration existed for the undertaking of the supposed bailee.

This was an action of *assumpsit* on a contract in writing, in which the defendants, reciting that the plaintiff, as a deputy sheriff, had attached a thousand pine mill logs of the value of two thousand dollars, on a writ in favor of *Henshaw & al. v. Davis & al.* which they had received of the plaintiff, promised to redeliver them to him on demand, or pay him two thousand dollars, at his election. At the trial, before *Weston J.* it appeared that judgment was recovered by *Henshaw & al.* for upwards of twelve hundred dollars; that their execution was placed in the hands of *Fisher* for collection, by virtue of which, within thirty days after judgment, he demanded the logs of the defendants; and that not being able to obtain them, he gave the defendants notice of his election to receive the money. It further appeared that no logs were in fact delivered to the defendants, at the time of signing the contract. The defendants offered to prove, by way of bar to the action, that the logs were not the property of *Davis & al.* but of *Fisk & Bridge.* But the Judge ruled that such evidence was inadmissible; the defendants being concluded from setting up this defence, by the tenor of their contract. And thereupon a default was entered, subject to the opinion of the court upon the question whether such testimony was admissible, and constituted a good defence to the action.

J. McGaw, for the defendants, at the opening of the argument, produced the deposition of Mr. *Fisk*, who testified that he and *Bridge* were owners of the logs when they were attached; and

that the greater part had been appropriated by them to their own use. And he cited *Fuller v. Holden*, 4 *Mass.* 498; *Tyler v. Ulmer*, 12 *Mass.* 163; *Brown v. Hurd*, 10 *Mass.* 427; *Boutelle v. Cowdin*, 9 *Mass.* 254.

Sprague and *Starrett*, for the plaintiff, argued that this was not a bailment of logs; but was wholly a collateral stipulation, that in consideration of the plaintiff's return of an attachment, the defendants would deliver to him a certain number of logs, or pay a certain sum of money, at his election. The attachment was merely nominal; but the engagement of the defendants was substituted as a real security for the debt. *Bridge v. Wyman*, 14 *Mass.* 190; *Jewett v. Torrey*, 11 *Mass.* 219; *Lyman v. Lyman*, *ib.* 317; *Cabot v. Hoskins*, 3 *Pick.* 93; *Webster v. Coffin*, 14 *Mass.* 196.

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

The counsel for the defendants has contended that the contract declared on is not founded on any legal consideration; and, if it is, that damages to a small amount only if any, should have been given. A benefit to a promissor, or an injury or inconvenience to a promissee constitutes a legal consideration. The plaintiff by his return on the writ of *Henshaw & al. v. Davis & al.* had made himself responsible for the logs attached or for their value, until legally accounted for to the owner; for in an action against him for the property, he would not be permitted to falsify his return and prove that he did not attach them. When, therefore, he, by his contract with the defendants, placed the property under their control, that very fact constituted a valid consideration. We have no doubt on this point.

When an officer attaches personal property, he stands responsible for it. If the plaintiff should recover judgment in the action, the officer will be accountable to him for thirty days after judgment; and, in certain cases, mentioned in the act of 1821, establishing this court, section 8, for a longer time. If the defendant should obtain judgment; then the officer will be accountable to him. In either event he will have a right to call the property out of the

possession of the receiptor; and even if at the time of the attachment, the property did not belong to the debtor, but to a third person, that circumstance alone will not constitute a defence in an action by the officer against the receiptor; for the officer must obtain possession of the property, in order that he may restore it to such third person, he being the true owner. But if such third person has obtained possession of the property or has appropriated it to his own use and benefit, there seems to be no sound reason why the receiptor, in such case should not be permitted to defend himself by proving these facts. Why should the officer recover? He cannot be answerable to any one in damages. Should the attaching creditor, having recovered judgment, sue the officer for neglect in not satisfying the execution out of the property attached, he might effectually defend himself by proving that it did not belong to the debtor. This has been distinctly settled in *Fuller v. Holden*, 4 *Mass.* 498; and *Tyler v. Ulmer*, 12 *Mass.* 163. If the defendant, having obtained judgment, should sue the officer for the non-return of the property, the same facts would constitute a good defence for him in such action. And if the true owner should call on him for it, he might defend himself, by proving that such true owner had already the property in his possession, or had availed himself of its proceeds or in some way appropriated it to his own use and benefit. Now, in the present state of the attached property, as the officer would not be answerable to any one for it, as it belongs to *Fisk & Bridge*, and they have received the proceeds of the greater part of it, why should this same officer recover of the defendants any more than the value of that portion of the property which has never been appropriated by *Fisk & Bridge*? What use is he to make of the amount, should a verdict for the full value be returned, and judgment be rendered thereon, and the money be paid to him? Is he to retain it for his own use? Such a proceeding, if sanctioned, might lead to gross injustice, and be managed, by a dishonest officer, so as to become shameful oppression. The case of *Learned v. Bryant & al.* 13 *Mass.* 224, is a decisive authority against a judgment for the plaintiff in this case; and if *Fisk & Bridge* had appropriated all the attached property, the two cases

could not be distinguished in principle. But the counsel for the plaintiff has contended, that this case differs from *Learned v. Bryant*, as the attachment by the plaintiff was merely nominal. We have already expressed our opinion on that point. We cannot perceive the force of this reasoning. Shall the officer be bound by a nominal attachment and the receiptor also, as much as by a real one, and yet neither of them be permitted to defend himself by proof of those facts which would constitute a good, valid and complete defence in case of a real attachment? A denial of this proposition would seem to be giving more importance to a shadow than a substance,—to a fiction than a reality. But on the fact and principle assumed by the plaintiff's counsel, how is the present action maintainable, considered independently of the defence? If the attachment was merely nominal, subjecting the plaintiff to no liabilities, what consideration exists to render the promise of the defendants to him obligatory? If the attachment is nominal, what legal interest has the plaintiff in the defendant's promise more than any other person, and on what ground can he claim damages? The transaction must be considered real or nominal throughout. Like other contracts in writing, it speaks for itself; and there is nothing equivocal in its language. It is not to be contradicted and controlled, where no fraud exists to impeach it. This instrument, though called merely a receipt, is by no means of that character. It is a contract imposing obligations, not a receipt discharging them. The argument of the counsel, therefore, is based not only on an assumed fact; but on one which, if it existed, he would not be permitted to prove by parol evidence. Whatever may be the damages which may be recovered on another trial, we know not; but we are all of opinion, for the reasons we have given, that the present default cannot stand.

CASES

IN THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF WASHINGTON, JUNE TERM, 1831.

STROUT *vs.* GOOCH & AL.

Where the officer and the execution debtor being together, the debtor said he had surrendered; and the officer thereupon remarked that he had appointed a third person to be his keeper; this was held to be sufficient evidence of an arrest.

THIS was an action of debt brought by a constable of the town of *Alexander*, on a penal bond dated *Dec.* 18, 1827; reciting that the plaintiff had on that day arrested *Ebenezer Gooch*, the principal defendant, upon an execution against him; that on his complaint a justice of the peace had assigned the 17th day of *March*, 1828, for him to appear at a certain place and take the poor debtor's oath; pursuant to the act of *Feb.* 9, 1822; and conditioned that he should so appear and take the oath, if admitted; and if not, that he should surrender himself within ten days thereafter, to the same officer, or to the prison keeper, to be dealt with as if no such proceedings had been had. Upon oyer of the bond and condition, the defendants pleaded that within the ten days, the oath not having been allowed, *Gooch*, the debtor, did surrender himself to the officer agreeably to the condition of the bond. And upon this point issue was taken.

At the trial, before *Parris J.* it appeared that the parties, and several others, having met on the 24th of *March*, 1828, *Gooch*, in the hearing of the plaintiff, said to a witness that he had surrendered. The plaintiff did not deny this, but observed that he had "appointed *Joel Gooch* as his keeper;" upon which *Joel* said, "if you have appointed me keeper, here he is." The residue of the testimony related to disputes about a new bond, and some personal conflicts between the officer and the debtor, during about five hours in which they were together, which resulted in the departure of the officer without the prisoner. Upon the facts developed at the trial, and reported by the Judge, the parties agreed to refer the case to the decision of the court.

Porter for the plaintiff, and *Vance* for the defendants, having submitted the cause without argument, the opinion of the court was delivered by

MELLEN C. J. The only question is whether the testimony furnishes proof of a surrender of *Ebenezer Gooch* to *Strout*, the plaintiff, within ten days next after the 17th day of *March*, 1828. The parties were together on the 24th of *March*, and the defendant, *Ebenezer Gooch*, in the hearing of the plaintiff, said he had surrendered; meaning, undoubtedly, that he had surrendered himself to the plaintiff, in compliance with the condition of his bond. This statement the plaintiff did not deny; but in addition to this implied assent to the truth of the statement made by *Gooch*, he observed that he had appointed *Joel Gooch*, (the brother of the defendant,) his keeper. He had no right to do this, unless there had been a surrender; and according to the dates of the above transaction, such surrender must have been after the 17th of *March*, and before the expiration of ten days next following that day. On these facts, the plea of the defendants is maintained. We have nothing to do with any other facts in the report, or the controversy about the bond—a non-suit must be entered.

MERRITT *vs.* LUMBERT.

Upon the death of the defendant in replevin, the suit abates, the administrator not being authorised to come in and defend.

In such case it seems that the remedy for the legal representatives of the defendant is by an action of replevin or trover against the plaintiff, after demand and refusal.

IN an action of replevin, it appearing that the defendant had deceased since the last continuance, a question was made at the bar, whether his administrator could come in and defend; and the cases of *Pitts v. Hale*, 3 *Mass.* 321; *Mellen v. Baldwin*, 4 *Mass.* 480; and *Badlam v. Tucker*, 1 *Pick.* 284, were cited. The counsel of record for the defendant, to save the rights of all concerned, suggested his title to the possession of the goods replevied, at the time of service of the writ, and at the time of his decease, and prayed judgment for a return. Whereupon *Parris J.* before whom the question was raised at the sittings after the last term, reserved it for the decision of the Court; whose opinion was delivered by

MELLEN C. J. This is an action of replevin; and the defendant having deceased, the counsel who appeared for him in his life time has moved that a judgment for a return of the property replevied from the possession of the defendant may now be entered. It is clear from the case of *Pitts v. Hale*, 3 *Mass.* 321, and *Mellen & al. v. Baldwin*, 4 *Mass.* 480, as well as from *Badlam v. Tucker*, 1 *Pick.* 284, that an action of replevin does not survive against the executor or administrator of the defendant; but his death immediately abates the suit: though in case of the death of a plaintiff, the case is otherwise; for his executor or administrator may come in and prosecute the action. By our statute an executor or administrator cannot be compelled or admitted to defend an action, except in those cases where it survives against such executor or administrator. In the present case therefore there is no person in whose

favor a judgment for a return can be rendered. The suit being abated, no further proceedings can be had, where it is abated by the death of the defendant; in other cases of abatement, a motion for judgment for a return is proper, as mentioned by the court in *Badlam v. Tucker*. It was supposed by the counsel that a similar motion might be sustained here; but the language used on that occasion evidently shews that it was not intended to be applied to a case where the defendant in replevin had died; for the court say that such defendant may move for the judgment for a return. The case of *Badlam v. Tucker* was an action of debt on the replevin bond, and it was decided that it could not be maintained; the condition of the bond not having been violated; because the plaintiff had prosecuted the suit as far as was in his power, and until judgment was entered that the suit abate, which was a final judgment. For the same reason it seems that the executor or administrator cannot maintain such an action against the present plaintiff; but we do not perceive why an action of replevin or trover, after demand and refusal, might not furnish a good remedy for the recovery of the property or damages for its conversion, should it on trial be found not to belong to the plaintiff. On this point, however, we do not mean to be understood as giving any decisive opinion. The judgment must be that the suit is abated by the death of the defendant.

Bradbury *vs.* Taylor & al.

A deputy sheriff, having attached personal property on mesne process, delivered it to third persons, who stipulated to keep it safely, and to see it forthcoming within thirty days after judgment in the suit in which it was attached. Upon the rendition of judgment, the term of office of the sheriff, and therefore of his deputy, having expired, the execution was placed in the hands of the new sheriff for collection, who, within the thirty days, demanded the property of the deputy who had attached it. It was held that the deputy, being thus made liable to the attaching creditor, might maintain an action for the property, against the bailees; and that the new sheriff was a competent witness for the plaintiff in the action.

The plaintiff in this case, while a deputy of Mr. *Balch*, late sheriff of this county, attached three oxen by virtue of a writ in his hands in favor of one *Sawyer*, against the defendant *Taylor* and one *Tuttle;* which he placed in the hands of *Taylor*, *Reding* and *Crosby*, the present defendants, for safe keeping; taking their receipt for the same; in which they promised to re-deliver the property to the officer, or his order, or to his successor in office on demand; and further agreed that a demand on one of them should be considered as binding on all, and that if no demand should be made they would re-deliver the oxen within thirty days after judgment in the suit in which they were attached, so that they might be taken in execution. When the execution was issued, Mr. *Balch*, and *Bradbury* his deputy, being no longer in office, it was delivered to Mr. *Bucknam*, the present sheriff of the county, for the purpose of demanding and receiving the property from *Bradbury*. To prove this demand, at the trial before the Chief Justice, the plaintiff's counsel offered sheriff *Bucknam* as a witness; who was objected to by the defendants, but the objection was overruled; and the witness testified that he demanded the property of the plaintiff, within thirty days after the judgment. There was no proof that the defendants knew in whose hands the execution had been placed for collection, nor that the receipt had ever been shown to the defendants after it was signed. It also appeared that *Sawyer* the creditor

had sued the late sheriff *Balch* for the neglect of *Bradbury* in not safely keeping the property by him attached; after which the present action was commenced.

Upon the developement of these facts, a default was entered against the defendants, subject to the opinion of the court upon the question whether the witness was admissible; and whether the action was maintainable with or without his testimony.

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

Weston J. By the terms of the contract, the defendants were to re-deliver to the plaintiff the property entrusted to them, within thirty days after the rendition of judgment. One of the defendants was a party to that judgment, and must therefore have had notice of the time when it was rendered; and notice to one of the defendants of this fact, would establish their liability, if there were no other objection.

But the principal question submitted to the court is, whether the plaintiff has sustained any real damage, on account of the failure of the defendants to fulfil their contract. And this depends upon his liability to the attaching creditor; and he is liable to him, if the property attached was demanded of him within thirty days after judgment. This fact is proved, if the present sheriff was a competent witness at the trial. He was objected to on the ground of interest. The attaching creditor has a remedy upon the former sheriff, upon the plaintiff, his deputy, or upon the present sheriff; and it is insisted that the latter is interested to sustain this action, that he may relieve himself from liability. If this were an action by the creditor against the former sheriff, or against the plaintiff, the witness would be interested; for the creditor after realizing the amount of his judgment from either, could have no further claim. But let this cause terminate as it may, the creditor is at full liberty to bring his action against the witness; and he could derive no protection whatever from this judgment; nor could he avail himself of any fact established by it in his defence. He has nothing to gain by a judgment direct-

ly in favor of the plaintiff. If thereupon the plaintiff pays and satisfies the creditor, it will enure to the benefit of the witness; but this is a consequence which may or may not follow from this judgment. If the creditor should choose to call upon the witness, he will still be bound to show that he has discharged his duty in relation to the execution. It does not appear to us therefore that he has any direct interest rendering him incompetent.

The court being of opinion that the testimony was competent and the action maintainable, the default is to stand, and judgment to be rendered thereon.

VANCE *vs.* VANCE.

In a libel for divorce, for adultery, where there is no appearance of collusion between the parties to procure a divorce, but the contrary; evidence of the confession of the guilty party may be received in proof of the offence charged in the libel.

THIS was a libel by the husband, for divorce *a vinculo matrimonii*, for adultery of the wife, who appeared and made a vigorous resistance to the suit. The libellant offered evidence of her confession of the fact charged in the libel; which was opposed as inadmissible, it being against public policy to put the dissolution of the contract in the power of the parties.

But THE COURT said that where the suit was evidently adversary in its character, and seriously resisted, as this, from all the evidence, appeared to be, all suspicion of collusion being out of the question, there seemed to be no good reason why the confession of the party should not be admitted, as in other cases. And it was accordingly admitted, and a divorce decreed.

Bulfinch *vs.* Balch.

In order to charge the sheriff, under *Stat.* 1821, *ch.* 92, *sec* 3, with thirty *per cent.* interest on monies collected by him and not paid over upon demand, it is necessary that the demand be made by a person having authority to receive the money and execute a legal and valid discharge. And whether such discharge should not also be made out and offered to the sheriff,—*quære.*

Therefore where the creditor's attorney of record wrote to a third person, requesting him to make a formal demand of the money, and to take a minute of the officer's answer, without more saying; this was holden insufficient.

The facts in this case are stated in the opinion of the Court, which was delivered as follows, by

Mellen C. J. This is an action on the case, charging a neglect on the part of *Simeon Bradbury*, late deputy of the defendant, who, at the time of the default alleged, was sheriff of the county of *Washington;* and the plaintiff demands certain sums of money collected by *Bradbury* on two executions, and interest thereon at the rate of thirty per cent since the alleged demand of the money—pursuant to the provision of the third section of *Stat.* 1821, *ch.* 92. On the two executions *Bradbury* had collected and received $794,51, belonging to the plaintiff. The judgments on which the executions issued were both rendered at *Sept.* term 1829. In each of the abovenamed actions the defendant has been defaulted; and the only question reserved is whether a legal and sufficient demand of the monies collected, was proved at the trial. The defendant makes no objection to the payment of six per cent. whether the demand was sufficient or not; but he refused to pay thirty per cent. contending that no demand has been made on *Bradbury*, entitling the plaintiff to recover it. With respect to the demand the facts are these. Mr. *Hobbs*, the attorney who commenced the original actions, after *Bradbury* had collected the money, addressed and sent a letter from *Eastport* to Mr. *Pike* of *Calais*, requesting him, (after describing the executions) to make a formal demand of the money of *Bradbury* on the executions, or get Mr. *Cooper* to

make such demand, and take a minute of *Bradbury's* answer. Such a demand was accordingly made by Mr. *Cooper*, and Mr. *Hobb's* letter was read to *Bradbury*, more than a month before the present actions were commenced. It was decided in the case of *Freeman v. Boynton*, 7 *Mass.* 483, that a demand on the maker of a note, living at *Wiscasset*, by a person residing there, who had been requested to make it by the indorsee of the note, living in *Boston*, was not sufficient to charge the indorsor, because the person making the demand was not in possession of the note, but only a copy, and so could not discharge the maker, had he been ready to pay the amount due; in other words, such refusal to pay was no dishonor of the note, and so the demand was not sufficient. It is well settled that a sheriff is not bound to deposit the money in court on return of the execution, nor to carry it to the creditor, but he must pay it on legal demand, or he is liable to an action for its recovery. *Wakefield v. Lithgow*, 3 *Mass.* 249. When a sheriff has indorsed on the execution the amount he has collected, he charges himself with it; and the record is decisive proof against him. When he is called on for the money, he ought to be furnished with proof of the payment, that will, of itself, protect him against any future claim on the part of the creditor. Payment to the attorney of the plaintiff on record, is always safe; because the record will always show his authority; but when paid to any other person than the plaintiff or his attorney of record, the demand of payment should be accompanied by a written power or order, which, being receipted by the payee, will be a good security against danger; or else a receipt for the money demanded, should be placed in the hands of the person making the demand to be shown and delivered to the sheriff on payment. Though in the present case, a payment to Mr. *Pike* or Mr. *Cooper*, would have been attended with no danger, yet one rule and one principle must be applied in all cases. A demand may, in other cases be made by a person, destitute of property or principle; or the person receiving the money may die, and leave the officer destitute of all proof of payment or authority. In the case before us, the letter was addressed to Mr. *Pike*, and it was never intended for *Bradbury* or offered to him; and we do

not see why he should be pronounced in fault, in declining to pay over the money in his hands, when no order was drawn on him, nor any provisional discharge sent to the person appointed to make the demand. From the language of Mr. *Hobb's* letter, it is by no means clear that it was intended that Mr. *Pike* or Mr. *Cooper* should receive the amount of the executions. On the whole, we think that in this case the plaintiff has not entitled himself to the penalty of thirty per cent interest. Accordingly, on the default entered, the plaintiff must have judgment for $794,51 and simple interest thereon from the time of the request, viz. *February* 4, 1830, according to the agreement of the parties; the calculation to be made by the clerk.

The STATE, *in certiorari, vs. The Inhabitants of* BARING.

Where a warrant for the location of public lots under *Stat.* 1821, *ch.* 41, directed the committee to give notice to all persons concerned, who were known and living within the State, instead of requiring them to publish and post up general notifications to all persons, in the terms of that statute: and they returned that they had given the notice required by their warrant; the location was held bad; and the proceedings quashed.

THE facts in this case appear in the opinion of the Court, which was delivered by

WESTON J. From the record now before us, it appears that the proceedings in question were had under the statute to provide for the location of certain land, *Stat.* 1821, *ch.* 41; the object of the petitioners and of the court being to designate the lots, reserved for public uses in the town of *Baring*. Several objections are taken to the proceedings; one of which we are satisfied is fatal. The statute expressly requires that the committee appointed to locate the lots, "shall give notice of their appointment, and of the time

and place of their meeting to execute their warrant, by causing the same to be published in one or more newspapers printed in the State, and by posting up written notifications, in two or more public places within the town, where the land lies, at least thirty days prior to their making the location." By their warrant, in the case under consideration, the committee were required "to give previous notice to all persons concerned, that are known and living within the State." And in their return, the committee state that they "gave previous notice, as named in their commission."

The judgment of the court is, for partition and location, as prayed for in the petition. This probably led to the adoption of some of the forms and proceedings, required in petitions for partition. In the act for the partition of lands and other real estate, *Stat.* 1821, *ch.* 37, the committee appointed to make partition are required to give due notice to all concerned, that are known and within the State. But in the act, under the authority of which the location of the public lots in *Baring* was attempted to be made, the term "partition" is not once used. It provides for the location of the reserved lots, and the designation of their several uses. The notice required is special as to time and manner, and being entirely disregarded in the case before us, we are all clearly of opinion that the proceedings must be quashed.

Ex-parte BARING.

In the establishment of a new public highway, the allowance of a reasonable time to the town through which it leads, to make it passable, pursuant to *Stat.* 1821, *ch.* 118, *sec.* 12, is indispensable; without which any ulterior proceedings by the sessions, under *sec.* 24, of the same statute, will be erroneous and void.

Nor can such ulterior proceedings legally be had, without previous notice to the town.

THE Court of Sessions for this county, at *September* term 1829, accepted and established a new public highway laid out through the town of *Baring*, but did not fix and allow a time, within which the inhabitants might open and make the road, agreeably to *Stat.* 1821, *ch.* 118, *sec.* 12.

Afterwards, at *September* term, 1830, upon a representation that it was not yet opened, the Conrt, without notice to the town, appointed a committee to open and make the road at the expense of the inhabitants.

Whereupon the inhabitants prayed this Court to cause the record to be brought up by *certiorari*, that it might be quashed; because, 1st. a reasonable time had not been allowed to the town, to make the road passable and convenient;—and 2dly, the ulterior and compulsory measures had been taken, without notice to the town.

And THE COURT was of opinion that both objections were well taken; and said that if no time were fixed and allowed, there seemed to be no foundation for any subsequent proceedings by the Sessions.

But it appearing that nearly half the road was already made, under the order of the Sessions; and no suggestion being offered that the town had made any preparation for opening the road, or that such a way was not of public convenience and necessity, the Court, in its discretion, refused to grant the writ.

Simpson & al. *vs.* Seavey & als.

If one of two tenants in common of a mill use it to the nuisance of a stranger; the other owner, not actually participating in the wrong, is not liable.

Thus where four owned a saw-mill, in the body of which three of them erected a lath-mill for their separate use, the rubbish thrown from which obstructed the mills below, it was held, in an action of the case against all the owners of the saw-mill for this injury, that the fourth owner, having no interest in the lath-mill, was not liable.

If two persons own separate saws in the same mill, under each of which they severally erect separate lath-mills, for their several use, the rubbish thrown from which becomes a nuisance to the mills below;—whether they can be jointly sued for this nuisance, *dubitatur*.

But if they be sued jointly, and one die before plea pleaded, it seems the action may be pursued against the survivor, for his separate acts.

If, in an ancient mill, a new and different machine is erected, of another description, the operation of which is a nuisance to the mills below; the antiquity of the mill itself affords no protection to the new machine erected within it, but the latter is to be regarded as an original and independent mill.

In order to constitute a mill a nuisance, as erected upon tide waters, it should appear to stand within the flow of common and ordinary tides.

In an action of the case for diverting water from the plaintiff's mill, it is no defence that the mill stands within the limits of tide waters, and is therefore a public nuisance.

In an action of the case for obstructing a water course, full costs are taxable, upon a sound construction of *Stat.* 1821, *ch.* 59, *sec.* 30, though less than twenty dollars are recovered.

This was an action of the case, in which the plaintiffs alleged that they were owners of a saw-mill on the *East Machias* river, below a saw-mill of the defendants; and that the latter, having erected two lath-mills within their own saw-mill, threw their lath-edgings into the river, which being carried by the current into the plaintiff's flume, choked and obstructed his gate-way, and diverted the water from his mill, &c.

The defendants, in addition to their several pleas of the general issue, pleaded in bar that the flume, dam and water works of the plaintiff's, mentioned in their writ, stand partly on the tide waters of

the river, and across the same, both above and below low water mark, where the tide regularly ebbs and flows ; and the residue thereof without the natural bed and banks of the river, upon a channel artificially created, and into which the waters of the river have unlawfully been caused to run by the plaintiffs. To which the plaintiffs replied that no part of their flume and water works was below low water mark. The cause was then submitted to the decision of the Court upon facts and damages to be found by commissioners agreed upon for that purpose ; who reported the following.

The defendants, during the time alleged in the writ, were owners of the double saw-mill called the Unity, situated on *East Machias* river, above the mill of the plaintiffs, and standing on an ancient mill site which had been used for that purpose upwards of sixty years. In the year 1826, two lath-mills were, for the first time, made and put in operation within the frame of the Unity mill ; one of which was owned, built and exclusively occupied by *Pope*, *Talbot* and *Seavey*, three of the defendants ; and the other by *Hovey*, another of the defendants, who died in 1827, pending the suit. *Dickenson*, the other defendant, owned and occupied, in his turn, two thirds of one sixteenth of the board saw, under which *Pope*, *Talbot* and *Seavey* erected their lath-mill ; but in the profits of the latter he had no interest, nor did he interfere in its management. The quantity of lath-edgings thrown into the river from the two machines was nearly equal. Prior to the erection of the plaintiffs' mill, which was built in the year 1808, the highest tides flowed up the river about six rods above the site of the plaintiffs' dam, now standing across the bed of the river ; but common tides do not now flow up so far as the dam, by four or five rods. The water is conducted to the plaintiffs' mill by a canal formed by a side dam, extending downwards, on the stream side, from the main dam to the flume ; and by a dyke on the shore side ; about eight rods of which canal were formed by cutting through or along the bank of the river.

They assessed the plaintiffs' damages, occasioned by both lath-mills, at sixteen dollars and sixty six cents.

Allen and *R. K. Porter*, for the plaintiffs, maintained their general right to damages on the ground of prior occupancy of the river, so far as related to the lath-mills; contending that these could not be treated as part of the defendants' ancient saw-mill; but were, to all practical effects, a new and different erection, subsequent to the building of the plaintiffs' mill; the obstruction of which was therefore illegal. *Hatch v. Dwight*, 17 *Mass.* 289; *Merritt v. Brinkerhoff*, 17 *Johns.* 306.

They claimed the right to charge the defendant *Dickenson*, because owning and improving a turn in the saw-mill under which one of the lath-mills was situated, it was in his power to have prevented the mischief, at least during his term; and by voluntarily permitting, he adopted the injury as his own. *Bush v. Steinman*, 1 *Bos. & Pul.* 404.

They further argued that the tide waters formed no bar to the action; because none but the highest tides ever flowed above the dam; and the rights of the public were limited to the flow of ordinary tides only. But if otherwise, the objection was not open in this form to the defendants, they not being specially injured. The remedy is for the public alone; and by indictment or information.

If *Dickenson* is not liable, yet the action, being in tort, is good against the others. *Govett v. Radnidge*, 3 *East.* 62; 2 *Chitty's Pl.* 271, 281; 2 *Dane's Abr.* 485, *sec.* 15; *Kennebec Proprs. v. Boulton*, 4 *Mass.* 420. And the plaintiffs are entitled to full costs, in a case of this sort, however small may be the amount of damages. *Crocker v. Black*, 16 *Mass.* 448; *Bean v. Mayo*, 5 *Greenl.* 94; *Hathorne v. Cate*, *ib.* 74.

Greenleaf and *Dickenson*, for the defendants. The defendants being tenants in common of the whole saw-mill, are equally entitled to use the building and privilege, for every lawful purpose. No one can prevent or impede another. So long, therefore, as *Dickenson* had the undisturbed use of his turn in the saw mill, and sought nothing more, the use of other parts of the building, by other owners, and for other purposes, was nothing to him. They were neither subject to his orders, nor liable to his control, nor at work for his

benefit, nor about his business. And upon one or another of these facts turns the whole doctrine of one's liability for the acts of another as his servant or agent. 2 *Dane's Abr.* 493, 498, *sec.* 8, 9, 10. In the case of *Bush v. Steinman*, the wrong doers were actually in the employ and about the business of the defendant. Yet the authority of the case itself has been doubted. *Hammond on parties*, 66, 92.

But the action itself cannot be supported, because it seeks to charge jointly the owners of separate mills, for distinct offences. The injury complained of results from the lath-mills alone; which are the several property of some only, of the defendants. If they are jointly chargeable in this action, they would so be if one of the mills were of a different kind, standing in another place on the same river, and the disparity were ever so great in the amount of damages they occasioned. The joint liability contended for does not depend on the accidental equality in the amount of damages occasioned by the two mills. The rule of joint liability, in actions *ex delicto*, is founded either in joint agreement in the concoction of the offence, or in joint participation in its advantages. *Hammond on parties*, 85.

If, however, the defendants are properly joined, yet the law is with them, upon the facts found. Theirs is an ancient mill; while the plaintiffs' is one of recent erection. The *gravamen* here arises merely from a more extended operation of the defendants' mill, the character of which is not changed, as it now only works up a greater proportion of the timber than before. For it is of common notoriety that lath-mills, like these, are supplied with nothing but the slabs and waste timber of the saw-mill. This mode of increasing their business was as lawful as the erection of additional saws, and quadrupling the quantity of boards made, and of course the quantity of rubbish necessarily escaping from the mill into the stream below, equally to the annoyance of the plaintiffs. But if the complaint arose from an entire change in the use of the mill, it would make no difference, since that would not change an ancient into a modern mill, nor abridge the rights of the owner. *Luttrel's case*, 4 *Co.* 84, 89; 3 *Dane's Abr.* 5, *sec.* 11. The owner of the mill below has

no remedy against the owner of the mill above, for any damage he may have sustained in consequence of any reasonable use of the water by the latter, for his own benefit, if it be not diverted. Every participator in the advantage of the stream, takes it *cum onere*. He takes the flood with the annoyances of its drift wood, as well as the benefit of its deposit. And the defendants insist that to avail themselves of the water for the purpose of floating away the useless rubbish of the work done in their mill, is not an unreasonable use of it; but on the contrary has had the sanction of universal custom, since the first settlement of the country. The right to such use is recognized in *Palmer v. Mulligan*, 3 *Caines*, 307.

Yet if they have not this right, the plaintiffs may not complain; because their own mill was erected on tide-waters, and so was wrongfully there. 2 *Dane's Abr.* 695, *art.* 4 *sec.* 1. So that the question will be, how much damage the nuisance of the defendants has done to the nuisance of the plaintiffs; a question which it is supposed no court will feel itself bound to determine. 3 *Caines*, 312. For the controversy here is not upon the right of the defendants to abate the nuisance; but it is whether the plaintiffs are in a situation to sue, by having suffered an injury in their *private rights*.

In any event, the plaintiffs can have but quarter costs. For the *Stat.* 1821, *ch.* 59, *sec.* 30, is different in this respect from all former laws. It has made no provision for cases where the title to real estate may be concerned, as the old law did; but its language is peremptory, extending to every personal action, at least, in which less than twenty dollars is recovered But if it is to receive a construction as broad as the language of the former law, still the present is not a case for full costs. The case of *Crocker v. Black*, cited on the other side, was an action for obstructing a private way, in which the title to real estate was actually pleaded. But in an action like the present the title to real estate no more comes in question than it does where an assault and battery is justified in defence of one's freehold; in which case the costs are never held to be affected by the nature of the defence.

The cause having been thus argued in writing, in vacation, the opinion of the Court was delivered at this term, by

MELLEN C. J. Since the commencement of the action, *Hovey*, one of the defendants, has deceased ; as to him, therefore, the writ is abated. Whether his death has any effect upon the action in respect to the other defendants, will be noticed presently. By inspection of the writ it appears that whatever injury the plaintiffs have sustained, has been occasioned by the two lath-mills, which have been made within the frame of the saw-mill *Unity*, and by the throwing of lath-edgings from them into the river, which floated down and obstructed the plaintiffs' saw-mill. By the reported statement of facts it appears that *Dickenson* was a part owner of the saw-mill *Unity*, during the time mentioned in the will; yet there is no proof that he owned any part of either of the lath-mills above mentioned ; but it does appear that, during the said period, *Dickenson* occupied no part of said lath-mills ; but one was wholly owned and occupied and improved by *Pope*, *Talbot* and *Seavey*, three of the defendants ; and the other was built and owned by the deceased *Hovey*. On these facts, we see no privity, in respect to the lath-mill, between *Dickenson* and the other three surviving defendants, which can implicate him in the transactions complained of by the plaintiffs, and subject him to damages ; of course he is considered by the court as not guilty, and judgment is to be entered in his favor for his legal costs.

It is contended on the part of the defendants that the present action is not maintainable ; because it was brought jointly against all the defendants, and that it appears, as before mentioned, that one lath-mill was owned in severalty by *Hovey ;* and the other in common by *Pope*, *Talbot* and *Sevey ;* and that it follows that the lath-edgings were not owned jointly or in common by all the defendants ; nor was the act of throwing them from the respective lath-mills into the river a joint act of *Pope*, *Talbot*, *Seavey* and *Hovey*. It is denied by the defendants' counsel that several trespassers, or persons who severally do an injury to a man's property directly or indirectly, can be sued jointly. The case of *Proprietors of Kennebec Purchase v. Boulton* is said by the plaintiff's counsel to be in point. That was an action of trespass *quare clausum fregit* against several persons who severally pleaded not guilty. They all were

on the plaintiff's, close at the same time ; but they cut down trees in different places ; one defendant worked alone ; several others worked together. The cause was tried before *Parsons C. J.* but no objection was made because the trespassers were not proved jointly guilty, as alleged ; the only question on which any doubt seemed to arise was as to the mode of assessing damages. They were assessed severally according to the amount of each trespass, and the whole court approved of the instruction. That case is not exactly like this, and it may not be a safe guide on this occasion. In 1 *Chitty's Pl.* 74, it is laid down that " if several persons be made defendants jointly, where the tort could not in point of law be joint, they may demur ; and if a verdict be taken against all, the judgment may be arrested or reversed on a writ of error ; but the objection may be aided by the plaintiff's taking a verdict against one only ; or if several damages be assessed against each, by entering a *nolle prosequi* as to one after verdict and before judgment." He cites 2 *Saund.* 117, *b. n.* 2, and cases there found ; one of which is this : " In an action against husband and wife for that they spoke of the plaintiff certain scandalous words, the jury found the husband guilty and the wife not guilty ; and the plaintiff had judgment ; for though the action ought not to have been brought against both, yet the verdict hath cured this error." We see no sound reason why the death of *Hovey* should not have the same effect on the action, as though he had been living and found not guilty, inasmuch as there can be no judgment against him ; and on this principle it has become unnecessary to pursue the enquiry as to the correctness of the manner in which the action was commenced.

The plaintiffs' mill is more ancient than the defendants' lath-mill ; though as to all the purposes of a saw-mill the defendants have the prior title to the extent, and on the principles recognized in the case of *Hatch v. Dwight & al.* cited by plaintiffs' counsel. But the lath-mill is a distinct concern ; and the damages sustained by the plaintiffs are of a kind which the saw-mill could not occasion ; and there is no proof or pretence that such damage existed before the lath-mill was put into operation.

It is said that the plaintiffs' mill is a nuisance, because it is maintained by a dam extending across the river where it is navigable in the strict legal sense of the term ; that is, where the tide ebbs and flows. This objection does not appear to be fairly sustained by the report ; it is there stated that before the dam was built the highest tides used to flow about six rods above where the dam now stands, but that common tides do not flow up within four or five rods of the dam. The report gives no particulars as to the size of the river, but from an inspection of the plan which accompanies it, we must suppose it a small stream, inasmuch as the plans of two saw-mills, one on each side of the river, occupy very nearly one half the width of it; besides the existence of mills and dams, is itself proof of rocks and falls there. As ordinary tides do not flow within several rods of the dam, we think that because the highest used to rise so as to flow back above where the dam now stands, that such a circumstance cannot alter the principle. A small stream is suddenly raised by a heavy rain; and may also, from the nature of its banks, be filled by the tide to an unusual height, in consequence of a storm, or severe gales from the sea. But if the plaintiff's dam, is a public nuisance for the reason above stated, does it follow that this action cannot be maintained? In the case of *Palmer v. Mulligan*, cited by defendant's counsel, *Spencer J.* says that it is questionable whether the plaintiff can maintain his action if his own dam is a nuisance, but *Thompson J.* says "how far the allegation" (that the plaintiff's dam is a nuisance) "is founded in fact, is not now a subject of enquiry ; this is a question between the public and the plaintiff, and cannot be tried in this collateral way" : and *Kent C. J.* says, " To obstruct this and other public uses of the river, by dams &c. would be a nuisance ; but of this question we have nothing to do in the present case." We do not think this objection is sustained by the facts, and doubt whether if it was, it would be good in point of law.

The last question relates to costs, and, as the damages reported are under $20, the defendant's counsel contends that costs, equal to one quarter part of the damages, should be taxed, and no more, and he relies on the 30th section of *Stat.* 1821, *ch.* 59, *sec.* 30.

But the generality of the words "any action" must be restrained; otherwise they would include an action of *trespass quare clausum*, actions of covenant broken, &c. which we have decided do not fall within the fair and consistent construction of them. So where the plaintiff's damages are reduced below $20 by means of defendant's offset :—all these points have been settled as appears by the cases cited in the argument. In addition, it may be observed, that the plaintiffs have disclosed their title in their writ, and the question as to priority of rights is expressly presented by the report, and legally discussed by the counsel as a question of law, which seems wholly unsuitable for the jurisdiction of a justice of the peace. As the damage was occasioned by the throwing of lath-edgings from *Hovey's* lath-mill, and that of *Pope*, *Talbot* and *Seavy* in about equal proportions, and as *Hovey* is dead, damages against the surviving defendants, who are adjudged guilty, and such only can be the basis of judgment in the action.—We therefore order judgment to be entered against *Pope*, *Talbot* and *Seavy* for the sum of $8, 33, and full costs.

Ex-parte HINCKLEY.

A petitioner for the location of a county road, is ineligible as one of the locating committee ; and his appointment vitiates the subsequent proceedings.

THE petitioner prayed for a writ of *certiorari* to the court of Sessions, to bring up the record of the location of a county road through a township of which he was the proprietor ; alleging among other things, that one *Pond*, who was one of the petitioners for the road, had been appointed and acted as one of the locating committee.

It was answered that though he had an interest, as a petitioner, in the matter pending, yet that the office of the locating com-

mittee was purely ministerial, and incapable of being affected by any interest of the members, in the actual location of the road.

But THE COURT were of opinion that as he had some discretionary powers as to the place in which the road was to be located, and was not disinterested, he was not qualified to act as one of the locating committee. And the writ being granted, the record was afterwards quashed, for this cause.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF HANCOCK, JUNE TERM, 1831.

SARGENT *vs.* SIMPSON.

The General Court of Massachusetts having appointed a Commissioner to survey the town of *Sullivan*, and report the number of proprietors and settlers of certain classes, their heirs and assigns, and the quantity of land which ought to be confirmed to them; he reported a list of different descriptions of persons, with the number of acres against their names, and among others, "to the heirs of *J. S.* 200 acres"; which report was accepted by the Resolve of *March* 8, 1804, and the several tracts therein mentioned were thereby "confirmed and granted" to the proprietors and settlers, and their heirs and assigns respectively; and the selectmen of *Sullivan* were authorized, upon the payment of a certain small sum by each person entitled, to release to such person, "and to his or their heirs and assigns," the title and interest of the Commonwealth in the land.—*J. S.* had previously deceased, having devised his farm, consisting of the tract above designated, to his wife for life, with remainder to two of his sons. The selectmen made a deed of release to "the heirs of *J. S.*" without other description.

Hereupon it was held,—

That the title of the Commonwealth passed to the proprietors and settlers, by the Resolve, without deed, upon the condition subsequent of payment of the money:—

Sargent *v.* Simpson.

That the resolve enured to the benefit of the assignees and devisees of the proprietors and settlers therein named, who were entitled to deeds from the selectmen; the word "and" being construed "or," to effectuate the intent of the grant:—

That *J. S.* had an interest in the land, capable of being devised; and that his devisees were entitled to hold the land, against his heirs at law.

THIS was an action of trespass *quare clausum fregit*, for entering the plaintiff's field in *Sullivan*, and cutting and carrying away his hay, and treading down his potatoes, on the 31st day of *July* 1827; and it was tried upon the general issue.

The plaintiff read in evidence the will of *Josiah Simpson*, which was proved *Sept.* 29, 1802; in which he devised his homestead to his wife during her life or widowhood; and afterwards the easterly half, which included the *locus in quo*, to his son *Josiah*, and the other half to his son *James* the defendant, and another son in fee. The whole farm was inventoried as the "homestead farm" of the testator. The easterly half was set off *July* 9, 1814, on an execution against *Josiah Simpson*, the devisee, in favor of certain creditors, who conveyed in *March* 1816, by deed to the plaintiff. It further appeared that the plaintiff occupied the *locus in quo* under a lease from the widow, till her death, which was in *Sept.* 1821; after which he continued to hold it under his deed.

The defence set up was that *Josiah Simpson* the testator had no title to the land, but was merely an original settler in *Sullivan;* and that since his decease the defendant and others, his children and heirs, had acquired the title from the Commonwealth.

To prove this the defendant read in evidence a Resolve of Massachusetts, passed *March* 8, 1804, founded on a report of Gen. *Cobb*, who was appointed to survey the town of *Sullivan*, ascertain the settlers in that town, and run out their lots; by which report it appeared that *Josiah Simpson*, the testator, was one of those settlers, to whose heirs, as "the heirs of *Josiah Simpson*, deceased, 200 acres" were allotted. The resolve adopted the report, and granted and confirmed the several parcels of land to the persons therein mentioned; and authorized and directed the selectmen of *Sullivan* to give deeds accordingly. A deed was thereupon made by them, *Sept.* 14, 1804, conveying two hundred acres, including

the homestead farm of the testator, "to the heirs of *Josiah Simpson*," without any other designation.

The plaintiff then read a petition preferred by the defendant to the Judge of Probate for this county, *Nov.* 17, 1824, setting forth that he was seized with others, as an heir, of the real estate, whereof the said testator died seized and possessed, and praying partition of the same; upon which notice was ordered only to "the heirs of *Josiah Simpson*"; under which partition was subsequently made of the homestead, as the estate of the testator, among his children; the *locus in quo* being assigned to the defendant.

Upon this evidence a nonsuit was ordered, by consent, subject to the opinion of the Court upon the right of the plaintiff to maintain this action.

Greenleaf for the plaintiff, and *Deane* for the defendant, argued this question at the *June* term, 1831.

MELLEN C. J. delivered the opinion of the Court, at the last term in *Washington*.

By the report of the Judge it appears that soon after the death of *Josiah Simpson*, the testator, which must have been before *Sept.* 29, 1802, the plaintiff entered into possession of the *locus in quo*, and has ever since been in the exclusive occupancy of it. The alleged trespass was committed in the summer of 1827. From his first entry up to the year 1821, he was the tenant of the widow of the testator, who had in his will devised a life estate to her; and upon her death in that year, he commenced holding the possession in his own right, having in *March* 1816, purchased the land of the creditors of *Josiah Simpson*, one of the sons of the testator, who had extended their execution upon it in *July* 1814, as the property of said *Josiah*, the son; the same having been devised to him by his father, after the death of his mother. Thus it appears that at the time the defendant entered and committed the alleged trespass there had been for about twenty five years an uninterrupted claim and exclusive possession by the plaintiff and the widow of the testator, both claiming under the will, and adversely to all other persons. On this view of the subject, we are not aware of any legal principles on

which the defendant could justify his entry in 1825, even if he was the legal owner of the land at the time. On this ground the defence fails; and here we might close our opinion; but as it may be satisfactory and useful to the parties to have the decision of the Court upon the question of title, we shall proceed to the examination of it, as disclosed in the report, and the resolve of *March* 8, 1804, which is referred to in it.

It is a part of our history that before and during the war of our revolution, multitudes of persons settled upon the public lands in Maine, which then belonged to Massachusetts, and in various parts made extensive improvements; that they became the subjects of legislative consideration and care, and were by successive Legislatures treated as having a species of equitable title to the lands they had subdued and cultivated, whereby the value of the adjoining or surrounding property had been enhanced; and that at different times provision was made for quieting them in their respective settlements, and on easy terms, conveying to them or their assigns the legal title which was in the Commonwealth. The language of these resolves presupposes the transmission of this possessory and equitable title from one to another. The proceedings of the Legislature in relation to the lands in *Sullivan*, were a part of the general system, and were predicated on the same principles which had been generally adopted.

It appears by the before mentioned resolve that in virtue of a prior one, *David Cobb*, Esq. had been appointed a Commissioner "to repair to the said town of *Sullivan*, and cause a survey of said town to be made at the expense of the petitioners, and to report to the next General Court the number of settlers who are original proprietors, or their heirs or assigns; those who are not original proprietors and settled previous to the first of *January* 1784; and also those who have settled thereon since that period to the present time; and the quantity of land which, in his opinion, shall be confirmed to the several settlers respectively." By the report of the said *Cobb* it appears that *Josiah Simpson* was an original proprietor, and that he assigned to his heirs two hundred acres. The language of the Commissioner in his report relating to the assignment is this: "He

has assigned to each of the original proprietors or to their heirs who settled in the town, and those settlers, their heirs or assigns, who were on the lands prior to the year 1784, and to those who settled thereon since that period to the present time," &c. Here are three classes of persons mentioned. In speaking of the first class, the word "assigns" is not mentioned, though in his commission he was directed to report who were the original proprietors, their heirs or assigns. In speaking of the second class he uses the words, "heirs and assigns," and in speaking of the third class he uses neither of the words; and yet it appears that seven of the last class reported were at that time deceased. These facts show that exactness of description and accuracy in the use of technical language were not particularly considered or attended to by the Commissioner. By an inspection of the report it further appears that no less than ninety settlers are enumerated for whom provision was made, and most of whom were on the lands prior to the year 1784; and where they were deceased, the lands were invariably assigned to the heirs, as stated in the list of such settlers, and described in no other manner; probably no other description or certainty as to the persons beneficially and equitably interested was deemed necessary. But knowing, as we do, the humane intentions of the Legislature, with respect to settlers and their assigns, can it be supposed that it was ever their design or that of the Commissioner, that in all cases where settlers had sold and conveyed their possessory interest to others and received a valuable consideration for it from fair purchasers, or had in any other mode transferred such interest, that the assignments to the living settlers, who had so sold and transferred, or to the heirs of deceased proprietors or settlers, who had so conveyed or devised their title, should in all cases be considered as enuring to the use and benefit of such settlers, or such heirs, to the exclusion of the uncontested claims and rights of fair purchasers, or favored devisees? Is it not much more in harmony with the benevolent intentions of government, as distinctly manifested in other cases of a similar character, to consider the word "heirs" as inserted in the report, by way of defining the interested representatives of the settlers, whether heirs, grantees or devisees? Is not this the most rational con-

struction, when it appears that fifty nine of the ninety settlers had resided on their respective lands more than twenty years, and fifteen more of them nearly ten years before the commissioner executed his commission? Surely it must have been strange indeed, if, during the above periods, numerous changes had not taken place as to the ownership of the lots on which settlements had been made.

But the foregoing questions may be more satisfactorily answered by a particular examination of the resolve, passed on acceptance of the report. The language of it is more explicit than the report, and discovers more attention to the subject, and to the equitable interests of all concerned. It is in these words: "Resolved that the report of *David Cobb*, Esq. and the survey of the town of *Sullivan* by him caused to be made in pursuance of a resolution of this Commonwealth, passed the fourth day of *March* 1803"—(here follows a statement of the powers given to him by that resolution) "be accepted; and that the quantity of land assigned in said report and survey, to the original proprietors, to the heirs and assigns of original proprietors; to the settlers, and to the heirs and assigns of settlers, as respectively set against their several names therein, be and hereby is confirmed and granted accordingly." As we have before stated *Josiah Simpson*, the devisor, was an original proprietor, whose heirs or assigns the commissioner was directed to report, but which he did not do; but the resolve confirms the two hundred acres to the heirs and assigns of *Josiah Simpson*, and the same corrective language is applied to those who became settlers after *January* 1, 1784. The terms of the report, where inaccurate or defective, are corrected by the resolve, or a more enlarged and extended meaning is evidently given to them by it, in conformity to the usual course. In the construction of the resolve, the term "assigns" includes devisees as well as grantees. 4 *Dane*, 550, *sec.* 10. It must be considered as comprehending those who at the time owned and held the equitable title of the settler by any species of legal transfer.

It is true that the deed from the selectmen purports to convey the lands therein described to the heirs of *Josiah Simpson*, and those only; thus narrowing the language of the resolve, in that part of it which gives to them the authority to convey, which is, that they "are hereby authorized and empowered to acknowledge a receipt thereof" (that is, of the sum required to be paid) "and to release to such person or persons, so paying the same, and to his or their heirs and assigns all the right, title and interest of the Commonwealth in and to the land assigned to said person or persons by this resolve; which deed, duly recorded in the register's office, shall be good and valid in law to convey to and vest in such person or persons and their heirs and assigns the title of the Commonwealth forever in such lands." In the above quoted passage of the resolve, the word "and" must be construed "or," so as to give to it the intended operation; that is, if the deceased settler had neither conveyed nor devised his equitable estate to any one, then the grant operated, and a deed should have been given to the heirs; but if he had in either of the above modes, disposed of such equitable title, then the grant operated to and for the benefit of the grantee or devisee, as the assign of such settler, and the deed should have been given accordingly, so as to do justice to all concerned. Had the terms of the resolve, thus explained and construed, been observed, as to the form of the deed to be given by the selectmen, it would have conveyed the land in question to *Josiah Simpson*, the devisee, as assign of *Josiah Simpson* the testator, instead of the heirs. Such was the mode adopted in the case of the assign of *Asa Dyer*, another settler in *Sullivan*. In the case of *Hill v. Dyer*, 3 *Greenl.* 441, the deed was made by the selectmen to *Hill*, the assignee of said *Dyer;* they even conveyed it to him by name, not merely as the assignee of *Dyer*. In making all the deeds the selectmen acted under a delegated authority; and in such cases, the principle of law is well known and established, that the authority must be strictly pursued. If, as we think, nothing passed by the deed to the heirs of *Josiah Simpson*, then the defendant, had no right of entry in 1827, and was a trespasser as charged in the writ, even if the plaintiff's pos-

session had continued only from 1821, when he claimed and possessed in his own right. But though the defendant has no title to the *locus in quo* under the deed, we are inclined to the opinion that as the selectmen were only authorized, but not required to give a deed, no deed is necessary to perfect the title of those to whom the land, assigned to them, was confirmed and granted by the express terms of the resolve, provided the sum each settler was required to pay within two years, was paid within that time. The confirmation and grant were on a condition subsequent; besides, it appears that, in the present case, the condition was performed in about six months after the resolve was passed, by payment of the required sum, the receipt of which is acknowledged in the deed. We are disposed to adopt the above opinion on this point by reason of the following clause in the resolve which is in these words: "But if any of the persons aforesaid shall neglect to pay said sum respectively ordered by this resolution within the time prescribed, the quantity of land granted to such delinquent person or persons shall revert to the Commonwealth." This provision must be considered as predicated on the principle that the title had passed by the resolve confirming and granting the land. For the sake of obtaining a deed, each settler would feel it his interest to pay the sum required of him; and on this ground the provision might have been useful. This case in the above particular, is not unlike that of *Mayo & al. v. Libby*, 12 *Mass.* 339. In the view we have thus taken of the cause we do not perceive how the proceedings in the Probate Court can have any legal effect on the decision of it. The application to that Court for partition was in *November* 1824, about twenty two years after the adverse possession of the premises was commenced, (which we considered in the beginning of this opinion) and has ever since been continued and under a claim of title, originating under the will in 1802 and the resolve of *March* 1804, almost twenty one years before the application was presented. There being no right of entry, a petition for partition could not be maintained in a court of common law; and surely the same objection lies in the present case. Besides the plaintiff had no notice and he is not bound by the decree of the Probate

Court, on that account, even if it had jurisdiction of the subject matter.

On the whole, we are of opinion that the defence cannot be sustained; and according to the agreement of the parties the nonsuit must be set aside and a default entered.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF WALDO, JULY TERM, 1831.

JOHNSON *vs.* RICE.

Where land, being mortgaged, was afterwards sold by the mortgagor, the grantee agreeing to pay off the mortgage, and giving to the creditor his own notes with a surety, as collateral to the original debt, which still subsisted; and the surety in this new security was afterwards sued, and the demand settled by compromise for a much less sum, the party being poor and the debt doubtful; and the grantee of the mortgagor being present and not objecting;—it was held that the mortgagee was accountable for no more than he actually received; but that out of this sum the costs of suit should not be deducted.

If the mortgagee release to a stranger his title to part of the mortgaged premises, with the assent of the mortgagor, the residue of the land is still charged with the whole debt.

But if the mortgagor alien the land in severalty to divers purchasers, and the mortgagee release to one of these without the assent of the others, his lien is *pro tanto* extinguished.

THIS was a bill in equity to redeem a part of certain mortgaged premises; and was brought by the assignee of the mortgagor, against the mortgagee. The bill stated that one *Warren* mortgaged certain premises, being fifty acres of land, to the defendant, *July* 23,

1811, to secure the payment of four promissory notes, amounting to $231;—that *Warren* conveyed the same land *June* 23, 1812, to *Archelaus S. Hunt;* who conveyed twenty acres of the same tract *May* 1, 1822, to the plaintiff;—that all the mortgage money had been paid by *Warren;* and that the defendant had entered and still held the land, for condition broken.

The answer admitted the purchase by *Hunt*, to whom the defendant gave further time of payment of the mortgage money; and that divers small sums had been received of him, and indorsed on the notes. The defendant also stated that in 1820 he had judgment against *Hunt* and one *Fowler* for possession of the land, upon which no *habere facias* had been sued out, nor had the costs been paid;—that in *February* 1820, he gave further time to *Hunt*, upon receiving of him three promissory notes for the amount of $163,50, then due upon the mortgage, with *Ichabod Hunt* for surety; but without any agreement or intent to impair his lien by the mortgage;—that one of these notes had been sued, and judgment recovered thereon, but never satisfied;—that this judgment, and the other two notes were afterwards put in suit, against the administratrix of *Ichabod Hunt's* estate; but the estate being small, and the hardship great, the defendant accepted a new note of a hundred dollars in full of all his personal claims against the *Hunts*, without any agreement or intent to impair the mortgage. He claimed to be allowed the costs of all these suits, being $68,92; and was willing to allow all monies he had ever received from any of the parties.

The plaintiff, by amendment to the bill, further charged that one *St. Clair* had bought thirty acres, being the residue of the mortgaged premises, in 1820, taking a deed of quitclaim from the defendant, who therein acknowledged himself to have received one hundred dollars as the consideration therefor. But the defendant denied having received any thing from him except a yoke of oxen, for the value of which he had already expressed his readiness to account; alleging that the residue was doubtless paid to *Hunt*, from whom *St. Clair* purchased the land.

The residue of the facts will sufficiently appear in the opinion of the Court, which was read at the ensuing *November* term in *Cumberland*, as drawn up by

WESTON J. The plaintiff among other things charges and avers in his bill, that the defendant has received full payment of the sum secured to him by mortgage, on the premises in question. This the defendant denies in his answer; but admits certain payments, which he particularly points out. The general replication has been filed, and proof has been offered on both sides. There is no evidence tending to show that the defendant has actually received in payment a greater sum than he admits, except what arises from the deposition of *Bunker Carter;* who states that in 1823 or 1824, one *St. Clair* sent or delivered to the plaintiff about thirty bushels of corn, which he understood at the time was to be turned in as part payment of what was due to the defendant on this mortgage. The deponent does not state by, or from whom, he understood this fact. To rebut this proof, the defendant has produced the receipt of *St. Clair*, dated *April* 8, 1824, in which he acknowledges to have received of him twenty four dollars, in full for thirty one bushels of corn. We cannot therefore consider it as proved that the corn was paid or delivered on account of the mortgage.

The plaintiff further charges, that the defendant received the *Hunt* notes in payment of his demand upon *Warren*. This the defendant denies, but says that his agreement with *Hunt* was, that when these notes were paid, his claim upon the land would be discharged. There is no testimony opposed to the answer upon this point, but it is supported by the deposition of *Archelaus S. Hunt*. *Warren* had sold to *Hunt*, who took the land subject to the mortgage. And it is strongly insisted that even if the *Hunt* notes were received by the defendant as collateral to the mortgage, yet as the security was adequate, the defendant could not relinquish it, or receive by way of compromise a less sum, to the prejudice of the plaintiff. To this argument, two answers have been made. First, that the defendant acted discreetly, both for himself and others interested in the property, in making the compromise. Secondly, that it was made in the presence of the plaintiff, without objection on his part, and that he was the real defendant in the actions compromised, having agreed to indemnify *Hunt*. Mr. *Farnham*, who was of counsel for one of the parties, testifies that the compromise was in

his opinion the best that the defendant could do, the administrator of the solvent signer of the notes defending upon the ground of a want of consideration; and there being great uncertainty as to the result. But the principal in those notes was grantee of the land, and interested to relieve it from incumbrance, and the express promise of the defendant to account for what might be received on the notes in discharge of the mortgage constituted a sufficient consideration. So that upon the facts as they now appear, if the same could have been then shown, the defence could not have prevailed. But the plaintiff derives his title from *Hunt* the principal signer, and *Henry Farwell* testifies that the plaintiff agreed to indemnify *Hunt*, if called upon to pay these notes. It may be understood that he agreed to pay them, as the consideration, in whole or in part, of his purchase. If so, he lost nothing by the compromise, and had no right to complain of it, whether he consented to it or not. But considering his connexion with the business, as a party interested, his consent and acquiescence in the compromise may well be inferred from the fact, proved by Mr. *Farnham*, that he was present when it was entered into, and made no objection. And we are of opinion, upon the whole case, that the plaintiff cannot hold the defendant to account for more than he has actually received.

The defendant contends that the whole sum received by him ought not to be applied towards the mortgage, but that certain deductions ought to be made therefrom for costs necessarily incurred by him, in the prosecution of his legal remedies. First, twelve dollars and sixty nine cents, being the amount of costs recovered by him in *December*, 1820, in his suit on the mortgage against *Hunt* and one *Fowler*. We are not satisfied that this deduction ought to be made, as the notes given by *Hunt* with a surety, in the *February* following were understood to embrace the whole amount due to the defendant on the mortgage. He claims further to be allowed the costs of the several suits brought by him on the *Hunt* notes.—These costs, in pursuance of the arrangement finally made, the defendant was not to exact, but to pay himself. This it is said was an agreement made with the administrator of *Hunt* the surety, of which the plaintiff has no right to avail himself. But we have held him

bound by the compromise, because being a party in interest, he made no objection but acquiesced in it. We deem it therefore not unreasonable that he should have the benefit of the stipulations then made by the defendant, by which he waived his claim to these costs.

The counsel for the plaintiff urges that he, as the purchaser of part of the land mortgaged, viz. twenty acres, ought to be held liable only for a part of the sum due, the defendant having released to *St. Clair* his lien upon the thirty acres purchased by him. And in support of this ground he cites 1 *Johns. Ch. Reg.* 425. There the mortgagee released a portion of the land mortgaged to the prejudice, and without the consent, of a stranger, who had previously purchased the other portion. If the creditor has two chattels or two estates pledged as collateral security for his debt, and gives up one of them, what he retains still remains pledged for his whole debt. He has only waived part of his own rights, and impaired his own security, which it is competent for him to do. But if the debtor transfer his right to redeem the chattels or the estates in severalty to several purchasers, and the creditor has notice of such transfers, if he give up one of the chattels or release one of the estates to one, without receiving from him his proportion of the sum due, without the consent of the other, it would not be unjust that his lien should be restricted to the proportion which the other ought equitably to contribute. But the release made by the defendant to *St. Clair*, was in confirmation of *Hunt's* conveyance to him. *Hunt* therefore could not complain of it; and the plaintiff holds under *Hunt* by a subsequent conveyance. And we are of opinion that the land conveyed to him was, and is, liable to the whole mortgage.

For all sums actually paid to the defendant, the plaintiff is to be allowed without deduction. The defendant is to be allowed all interest justly accruing to the time of the decree, and is to be held accountable for the rents and profits of the mortgaged premises to the same period, from the time he took possession. And upon payment to him by the plaintiff of the sum justly found due to him upon

these principles, he is to release to the plaintiff all his right, title, and interest to the land in controversy between the parties.

W. Crosby and *Greenleaf*, for the plaintiff.

Allen, for the defendant.

Bishop *vs.* Williamson.

The fact, that some of the jury misapprehended the testimony, does not furnish good cause for a new trial.

The defendant, who was postmaster at *Belfast*, moved for a new trial, because some of the jurors misunderstood the testimony contained in the deposition of one *Gurley*, a witness adduced by the plaintiff; who deposed touching his general practice in the transmission of letters on business, but was understood by them to speak positively to the fact of having sent a certain letter to the plaintiff on a particular day, for the detention or loss of which letter, the present action was brought.

But the Court unanimously denied the motion; for they said the tendency of such a practice would be extremely mischievous. Besides, it was the duty of the jurors to have read the deposition, it being committed to them, with the other papers in the cause, for that purpose. A new trial, however, was afterwards granted on other grounds.

Sprague for the plaintiff.

Allen and *Greenleaf* for the defendant.

TILLSON, *petitioner*, *vs.* BOWLEY.

When a month is referred to, in legal proceedings, it will be understood to be of the current year, unless, from the connexion, it is apparent that another is intended.

Therefore where the complainant, in a bastardy process, alleged that the child of which she was then pregnant was begotten on or about a certain day in *April*, without saying in what year, this was held to refer to the *April*, next preceding.

Where the complainant, in such case, said, in the time of her travail, that the child was *P. T's.* or not any one's, this was held a sufficient accusation, within the meaning of *Stat.* 1821, *ch.* 72, *sec.* 1.

The complainant is not bound to answer the question whether she has had intercourse with another man who might have been the father of the child.

THE petitioner applied to this Court for a writ of *certiorari*, to quash a record of the Court of Common Pleas in a bastardy process, in which a judgment of filiation had been rendered against him. And a copy of the record being produced, it appeared that *Mary Bowley* had charged him before a magistrate with being the father of a child with which she was then pregnant, which, she said, was begotten "on or about the eleventh day of *April*," without saying in what year; the complaint bearing date *Nov.* 7, 1829. It further appeared that her mother, *Jane Bowley*, was offered as a witness at the trial; but was objected to, on the ground that her husband, being liable by law to support his daughter and her child, was interested in procuring a judgment against the putative father. This objection was overruled; and the mother testified that having asked her daughter, during the time of her travail, who was the father of the child, she replied that it was "*Perez Tilson's* or not any body's." The complainant herself being admitted as a witness, was asked by the respondent whether, about the time charged in the complaint, she had intercourse with any other man, by whom the child might have been begotten. To this question her counsel objected; and the presiding Judge ruled, that she was not bound to answer it, but might, if she would. And being instructed by her counsel, she did not answer the question.—To all which the respondent took exceptions.

W. Crosby, for the petitioner, to the point that the accusation did not amount to a positive charge, and was therefore insufficient, cited *Commonwealth v. Cole*, 5 *Mass.* 517. And to the propriety of the question propounded to the complainant, and her obligation to answer it, he cited 1 *Stark. Ev.* 147, *note* 1 ; *Commonwealth v. Moore*, 3 *Pick.* 194, *Swift's Ev.* 80.

Thayer, for the original complainant.

WESTON J. delivered the opinion of the Court.

Jane Bowley was a competent witness. Her husband had no interest in the event of the prosecution ; and this point is not pressed by the counsel for the respondent.

The examination of the complainant before the justice, was made in *November*. She was then pregnant. She stated that the child was begotten in *April*. It was impossible to mistake what *April* was intended. When a month is referred to, it will be understood to be of the current year, unless, from the connexion, it is apparent that another is intended. But in the present case, from the nature of the complaint, no other could possibly be understood.

The terms in which the complainant charged the respondent, in the time of her travail, were sufficiently positive. They clearly conveyed the idea not only that he was the father, but that no other person could be. That this declaration was made in the time of her travail, is well established from the testimony.

The complainant could not be held to answer a question admitting or accusing herself of an offence, which by our law may be criminally prosecuted.

Certiorari denied.

SMALL *vs.* CONNOR *& al.*

Where the parties entered into a submission to arbitration, pursuant to *Stat.* 1821, *ch.* 78, and the debtor also gave a bond to the creditor, conditioned to pay the sum awarded, in six months ; but the report of the referees, though notified to the parties, was not made to the Court holden next after the award, as the statute requires ; yet this omission is no bar to an action on the bond.

THE facts in this case, which came before the Court upon demurrer to the replication, will be found to be sufficiently stated by the Chief Justice.

W. Crosby, for the defendants, argued that the award which they were bound to perform was one which should be made pursuant to the statute, whose forms the parties had adopted as part of the contract ; and that it was never the debtor's intent to deprive himself of the legal mode of correcting any errors of the referees. 5 *Dane's Abr.* 126, *sec.* 5, 6 ; 1 *Com. Dig. tit. Arbitrament, S.* 4, 5. *T.* 6 ; 1 *Bac. Abr. tit. Arbitr. K.* 1, 2 ; *Worther v. Stevens*, 4 *Mass.* 448 ; 9 *Mass.* 198.

Abbot, for the plaintiff, cited 1 *Com. Dig. tit. Arbitrament, I.* 4; 3 *Lev.* 24 ; *Cutler v. Whittemore*, 10 *Mass.* 445 ; *Bean v. Farnham*, 6 *Pick.* 269.

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

The plaintiff *Small*, and *Connor*, one of the defendants, on the 3d of *September*, 1828, entered into an agreement to refer all demands subsisting between them, to certain persons therein named, pursuant to the provisions of " an Act for rendering the decision of civil causes as speedy and as little expensive as possible." *Stat.* 1821, *ch.* 78. Soon after this, *Connor* and *Whitmore*, the other defendant, executed the bond declared on, conditioned that *Connor* should " pay the said *Small* the amount awarded to him by said referees in cash, at the expiration of six months from the date" of the bond. The object in view in the execution of the bond un-

doubtedly was to secure to the plaintiff the payment of the sum which might be awarded to him, by means of the suretyship of *Whitmore*. Such being the object, we ought to give the plaintiff the benefit of this super-added security, unless some stern principle of law forbids it ; but it is contended, that as the report of the referees was not returned to the Court of Common Pleas next after they had agreed upon their award, according to the provisions of said act, the plaintiff has lost the benefit, not only of the bond, but of the decision of the referees. It is true that by the terms of the submission, no final judgment could have been legally entered on the report, unless the same had been returned to the Court of Common Pleas next after it was completed ; and it seems that the plaintiff did not rely on a judgment and execution to enforce the payment of the sum awarded ; but preferred the security of the bond. By the request of the parties, the referees made known to them the nature and import of their report ; and it is averred in the replication that the defendants did not within the time limited, pay to the plaintiff the sum awarded to him. By examining the condition of the bond, it does not appear that the acceptance of the report and judgment thereon at the proper term of the court, were made necessary to entitle the plaintiff to recover on the bond. *Connor* was, by the terms of the condition, to pay the plaintiff, within six months from the date of the bond, "the amount awarded to him by said referees." We cannot add to the condition of the bond, or require more or less of the defendants, than they have stipulated to perform. The sum awarded was notified to them, and during the six months they neglected, and still neglect to pay it.

In this view of the cause we are of opinion the defence has failed.

Replication adjudged sufficient.

Huse *vs.* Brown, *Ex'r.*

The question whether a physician's charges accrued for services rendered in the *last sickness* of the deceased, within the meaning of *Stat.* 1821, *ch.* 51, *sec.* 25, is to be decided by the jury.

And it seems that the sickness, however long its duration, which terminated in the death of the patient, is within the meaning of this statute ; though the same language employed in the *Stat.* 1821, *ch.* 38, *sec.* 3, respecting nuncupative wills may require a more restricted interpretation.

This action, which was for medicines and medical services, was brought within one year after the decease of the testator, on the ground that, being for the expenses of his last sickness, the demand was within the exception in the statute which exempts the executor or administrator from the costs of any suit commenced within a year from the date of his official bond. Within the year the defendant tendered the amount of the debt, without costs, under *Stat.* 1821, *ch.* 52, *sec.* 18 ; which being pleaded in bar, the plaintiff replied that the bill was for the expenses of the testator's last sickness ; on which fact issue was taken. The bill accrued between *Jan.* 19th, and *June* 28th, 1828, inclusive ; and the patient died *Dec.* 16th, in the same year, of a cancer in the nose ; which had existed about two years, and had been regarded as a fatal disease as early as in *April* preceding. He was six sixty years old ; and had bestowed some personal attention to the business of his farm during the summer of 1828, and was occasionally abroad in the autumn following.

Perham J. before whom the cause was tried in the court below, ruled that the words " last sickness," in the statute respecting nuncupative wills, being used for a different purpose from those in the statute relating to suits against the executor, had no bearing on the present question; and he instructed the jury that if they were satisfied that the testator died of the disease for which the plaintiff prescribed, and that it continued till his death,they ought to find for the plaintiff ; which they accordingly did. And the defendant filed exceptions.

C. R. Porter, for the defendant, argued that the terms " last sickness" were to be applied, in chronic and long protracted complaints, only to the last alarming and probably fatal changes in the character of the disease ; agreeably to the construction given in *New-York* to the law respecting nuncupative wills. And he contended that this rule was sufficiently liberal to secure to the patient the common offices of humanity, which was the sole object of the statute.

J. Thayer, for the plaintiff.

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

MELLEN C. J. Though the present action was commenced within one year next after the defendant assumed the trust of executor, and though he made a tender of the amount of the demand sued and brought the same into court for the plaintiff within said year, still by the terms of the *Stat.* 1821, *ch.* 52, *sec.* 18, the action was properly commenced and the tender and deposit of the money in court were no bar to the action, if the demand was such as would not be affected by the insolvency of the estate of the testator. Our enquiry then is, whether the demand is of that character.

In the *Stat*, 1821, *ch.* 51, *sec.* 25, it is provided " that when the estate of any person deceased shall be insolvent or insufficient to pay all just debts which the deceased owed, the same shall be distributed to, and among all the creditors in proportion to the sums to them respectively due and owing, saving that debts due for taxes and debts due to the State, and for the last sickness and necessary funeral expenses of the deceased are to be first paid." Viewing the facts of the case as presented on the exceptions, the enquiry is whether the verdict ought to be set aside on account of any alleged incorrectness in the instructions given by the Court of Common Pleas to the jury. As to the second instruction relating to the provision in our *Stat.* 1821, *ch.* 38, *sec.* 3, we consider it as perfectly correct. The words " last sickness," as there used, cannot be understood as explanatory of the same words as employed in the pas-

sage above quoted. We do not know that their construction has ever been settled by any judicial decision. The object which the legislature had in view, doubtless was, that a sick man, though possessed of but very little property, should be in no danger of suffering by reason of the want of medical advice and assistance, even where unfeeling physicians, if there are any such, would be tempted to refuse or withdraw their professional attentions, apprehending they might lose their reward.

The nature of the disorder and its progress are particularly described in the exceptions, and the court instructed the jury that they would decide whether the testator died of the cancer under which he was laboring, when the plaintiff attended upon him; and whether it was a continuing complaint or disorder until his death; and if they should decide those questions in the affirmative, they might consider it his last sickness. And why might they not, whether any such instruction had been given to them or not? It would seem, to a plain understanding, to be an indisputable fact, that the sickness which is terminated by the death of a patient, is his last sickness.— All taxes and debts due the State are to be paid before other debts, however long a time they may have been due; no limitation is here imposed; nor is there any as to the length of time which the last sickness of a man may have continued prior to his death; and how can the court impose a limitation in the latter case with more reason than in either of the former? Sickness assumes so many forms and death approaches in so many different ways, that we know not how to lay down any legal principle in such cases, that can be applied by way of construction of the words "last sickness." What is to be considered a man's last sickness, seems to be a question properly determinable by the jury upon the facts in each case, which can seldom, if ever, be the same in two instances. There may probably be, in a multitude of cases, a strong resemblance. On a trial for homicide, it is always a question for the jury, whether the deceased died a natural death, or in consequence of the act of the person accused. So it may be a question whether the sickness, of which a person dies, is the same under which he labored, when confined and receiving medical aid one or two months before. In the case before

us, the question as to the cause of the testator's death, and the continuance of his sickness, have been settled by the jury, whose business it seems to have been to settle it, as much as to determine, in a case of lunacy, whether a certain act was done in a lucid interval, or under the influence of a continuing, mental disability.

We perceive no ground for sustaining the exceptions.

Judgment on the Verdict.

DOAK *vs.* SWANN *& al.*

Where four out of five tenants in common of a paper mill, for the more convenient management of their business, entered into an agreement that one of their number should be sole manager, foreman and book-keeper, another should perform general labor in the mill, another should be engineer, and the fourth should "collect stock and market the paper," at fixed compensations to each;—it was held that this constituted a partnership of those who signed it, in the business of making and vending paper; and that a promissory note, given for stock, in the name of the company, by the party appointed to the charge of that department, was binding on all the parties to the agreement.

THIS was an action of *assumpsit* against *John Swann*, *John Woodcock*, *Benjamin T. Pierce*, and *Daniel F. Harding*, on a promissory note given to the plaintiff, of the following tenor:—*Camden, Oct.* 29, 1829. For value received of *James Doak*, we, *Swann, Woodcock & Co.* promise to pay him or his order twenty seven dollars and thirty cents on demand with interest. *Swann, Woodcock & Co.*" This note was given by *Pierce* for stock which was used in the defendants' paper mill; and his authority to bind the others was argued from the agreement among them in these terms: "The subscribers, owners of the paper-mill, for the purpose of economy adopt the following arrangement, until they shall think it

best to adopt other arrangements. *John Woodcock* is to be sole manager and foreman, and keep the accounts, at one dollar and twenty five cents per day, and board himself. Mr. *Swann* is to have one dollar per day for his labor in the mill, and board himself. *E. T. Barrett* is to be engineer three months, at eighteen dollars per month, and board himself. Mr. *Pierce* is to collect stock and market the paper, at one dollar per day and expenses paid. *Camden, Aug.* 20, 1829." This was signed by all the present defendants, but not by *Barrett.*

At the trial in the Court below, *Perham J.* ruled that this was sufficient authority to *Pierce* to bind all the defendants, the stock having been used for the common benefit; to which they filed exceptions; a verdict being returned for the plaintiff.

W. Crosby, for the defendant, in support of the exceptions, cited *Emerson v. The Providence hat manufacturing company*, 12 *Mass.* 242; *Paley on Agency*, 160; 1 *H. Bl.* 155; 12 *Mass.* 189; 13 *Mass.* 178.

Abbot, for the plaintiff.

The opinion of the Court was read in the ensuing *November* term in *Cumberland*, as drawn up by

Weston J. If the defendants were partners in the business of making paper at their mills, or if *Pierce* was authorized by the written evidence in the case to sign the note in question in their behalf, the action is maintained. Their ownership of the mill would not make them partners; but if they voluntarily unite to carry on the manufactory of paper, either in their own mill, or in any other, on their joint account, or for their common benefit, they may be regarded as partners in this particular business, even as between themselves; much more where strangers are concerned. And we are of opinion that the written agreement is evidence that they did thus associate. They made certain arrangements professedly for the sake of economy; to enure to whose benefit? Doubtless to their general or joint benefit. They agree what sum shall be paid to two of their associates respectively, for their personal services.

Out of what fund they are to be paid is not expressly stipulated; but it must be intended out of their joint fund or credit. The whole, in their associated capacity, contract with a part of their number as individuals. It results from the nature of their connexion, that they must all share in the profits, and be responsible for losses, arising in the prosecution of the business. In what proportions, it is not necessary in this action to settle; but in the absence of any express agreement upon this point, it might be presumed that they would share profits and responsibilities, according to the share of each in the mill. It has been urged that as owners of the mill, they must be deemed to be tenants in common only; otherwise by the sale and transfer by one of his interest in the mill to a stranger, a partner might be imposed upon the others, without their consent, and even against their will. To this it may be replied that we do not hold them to be partners, because they are owners of the mill, but because they have united in the prosecution of a joint business, which is the basis of all partnerships.

But aside from the question of partnership, *Pierce* was expressly constituted the agent of the defendants, in the purchase of stock and in the sale of their paper. In the exercise of this authority, they have imposed no restriction. It does not appear that he was furnished with funds, wherewith to make immediate payment, for stock purchased. It may well therefore be considered as within the scope of his agency to purchase on credit; and if so it would result that he might give to a party of whom he purchased, a note or memorandum in writing as evidence of the debt thereby created. So long as it was limited, as it certainly must be, to the purchase of stock on account of his principals, the giving of a note would have no tendency to increase their liability; and it would be better for all concerned than to have the business for future adjustment, in the shape of open and unsettled accounts. In the case of *Emerson & al. v. the Providence hat company*, 12 *Mass.* 242, cited in the argument, it was held that the defendants were not liable for notes signed by a sub-agent, who had no authority directly from them. And this decision was very properly placed upon the ground that a

confidence exists between principal and agent, which is not communicated to sub-agents.

The exceptions are overruled, and the judgment affirmed.

Lewis *vs.* Staples *& al.*

A debtor resident in the county of *Waldo*, being committed to the gaol in the county of *Hancock* while it was the prison for *Waldo*, under *Stat.* 1827, *ch.* 354, establishing the latter county, gave bond in common form, for obtaining the debtor's liberties, and returned to his home. The prison in *Waldo* was subsequently completed, and accepted by the Court of Sessions, and the prison limits restricted to the county lines. After this, the debtor went out of the limits of *Waldo*, to the gaol in *Hancock*, for the purpose of taking the poor debtor's oath, which was there administered.

And it was held that he was not bound to take notice of the doings of the Court of Sessions in accepting the gaol, &c. no public notice thereof having been given;— and that the bond was not broken.

This was an action of debt on a goal-bond; and came before the Court upon a case stated, in substance as follows:

The debtor who dwelt in *Prospect*, in the county of *Waldo*, was committed *Nov.* 21, 1829, in execution, to the gaol in *Castine*, in the county of *Hancock*, it being constituted the prison for *Waldo*, by *Stat.* 1827, *ch.* 354, for five years, if required, until a gaol should be erected in the latter county; and for this enlargement he gave the bond declared on, which was in the usual form, and returned to his home in *Prospect*. On the 24th of the same *November* the gaol in *Waldo*, being finished, was accepted by the Court of Sessions, as the public prison for the county. And on the 16th day of *March* following, the debtor, having previously given notice of his intention to the creditor, in due form of law, went to *Castine*, in the county of *Hancock*, and there took the poor debtor's oath and re-

ceived his certificate in legal form. After the lapse of nine months and three days from the date of the bond, the debtor not having surrendered himself to prison, this action was commenced.

W. G. Crosby, for the plaintiff, submitted a written argument, in which he contended that the debtor was bound to conform himself to the prison limits as they existed for the time being, under such modifications as might from time to time be legally made. And upon this principle he was bound either to have remained within the limits of the county of *Hancock*, or to have continued within those of *Waldo*, taking the oath before Justices of the latter county. *Stat.* 1828, *ch.* 410, *sec.* 1; *Stat.* 1827, *ch.* 354; *Reed v. Fullum*, 2 *Pick.* 158. The gaol in *Waldo* was the only place to which he could properly have surrendered himself in discharge of his bond.

Johnson, for the defendant.

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

Mellen C. J. The decision of this cause depends upon the construction to be given to the act establishing the county of *Waldo*, passed *February* 7, 1827, and an additional act for the relief of poor debtors, passed *February* 26, 1828. The county of *Waldo* was formed out of certain portions of the counties of *Hancock*, *Lincoln* and *Kennebec*. The fourth section of the act first mentioned provides for the disposition of actions and processes pending in the courts in the three several counties of *Hancock*, *Lincoln* and *Kennebec*; designating such as should be tried in the respective counties where pending, and such as should be transferred from thence to the dockets of the respective courts in the county of *Waldo*. The tenth section declares "that all officers within and for the county of *Waldo*, having authority to commit any prisoner or debtor to goal, shall be authorized and required, for the term of five years from and after the passing of this act, if so long required by the county of *Waldo*, to commit such prisoner or debtor to the goal in the counties of *Hancock*, *Lincoln* or *Kennebec*, respectively, in the same manner as like officers in the respective counties last aforesaid, were by law

authorized and required to do before the passing of this act; and the keepers thereof are hereby authorized and required to receive and detain in their custody all such prisoners and debtors; and all persons so committed to goal in either of the counties of *Hancock*, *Lincoln* or *Kennebec*, from the county of *Waldo*, shall be entitled to the same rights and privileges as though they lived or had their homes in the county where committed as aforesaid; and it is hereby required and made the duty of all magistrates and civil officers of the counties of *Hancock*, *Lincoln* and *Kennebec*, respectively, to do and perform all acts and duties relating to such prisoners and debtors, as they are authorized and required by law to do and perform for other prisoners or debtors, arrested or committed within their respective counties." The first section of the last mentioned act is in these words: "That from and after the first day of *June* next, the limits of each respective county in this State, shall be, remain and become the boundaries of the gaol yard to each and every gaol within such county. Provided, that until a gaol be erected and ready to be occupied in the county of *Waldo*, the limits of the gaol yards in the several counties of *Hancock*, *Lincoln* and *Kennebec*, so far as regards debtors belonging to the county of *Waldo*, be extended so far as to include the territory within said county of *Waldo*." Thus, by the act of *February* 26, 1828, the limits of the gaol yard in the county of *Hancock* on the first day of *June* of that year included, and until the 24th of *November* 1829, continued to include all the territory in the county of *Waldo*. On the 21st day of *Nov.* 1829, *Staples*, the debtor, was committed to the gaol in *Hancock* county. This was a lawful commitment. On the same day he was liberated from prison by giving the bond on which the action is founded; in virtue of which bond he was immediately at liberty to go at large in any part of the counties of *Hancock* and *Waldo*, at least during that and the two following days. The question is, what were the rights and liabilities of the debtor, after the 24th of *November*, and the declaration of the Court of Sessions of the county of *Waldo* as to the erection of the gaol in that county, and its readiness to be occupied, according to the acts above quoted and the condition of the bond declared on. We must ascertain as well as we can the

meaning of the legislature as expressed in the foregoing provisions. When the debtor was committed to gaol, he was lawfully entitled to his liberty, within the limits of the gaol yard, as then established, including *Hancock* and *Waldo;* of course, the bond which he gave was a lawful one as to the terms of its condition; and it was a part of the condition that he should surrender himself to the gaol keeper and go into close confinement, as required by law; but, according to the 21st section of *ch.* 209, a debtor, having been admitted to the liberty of the gaol yard by giving bond as before mentioned, is not obliged to surrender himself to the gaol keeper, if within the nine months after being admitted to his liberty he has been discharged according to law. Within such nine months was he discharged according to law? It appears that within that period, viz. on the 16th of *March* 1830, he was admitted to take the poor debtor's oath at the prison in *Castine;* which oath must have been administered by justices of the peace in and for the county of *Hancock.* If he had not been admitted to his oath, to what gaol must he have been committed or to what gaol keeper should he have surrendered himself? The condition of his bond, lawful when given, required him to surrender himself to the keeper of the gaol in *Castine.* If he had so surrendered himself, would it not have been the duty of the keeper of that prison to receive and detain him? The 10th section of the act incorporating the county, expressly says that such keepers are "required to receive and detain in their custody all such prisoners and debtors"—that is, all persons belonging to the county of *Waldo.* There is no provision in the act for the removal of such prisoners from the gaol in *Hancock* to the gaol in *Waldo;* and it would seem that such a removal was never intended; for had it been, some mode would have been prescribed; and in case of surrender some provision would have been made to protect innocent debtors and their sureties from incurring a forfeiture of the penalty of their bonds. In addition to this, there appears to be an intelligible expression of legislative meaning in the language of that part of the 10th section, which requires and makes it the duty of all magistrates and civil officers in the county of *Hancock* to do and per-

form all acts and duties relating to debtors, belonging to *Waldo*, but committed to *Hancock* gaol, as they are required to do and perform for other debtors committed to the *Hancock* prison. According to this plain language, what authority could two justices of the peace in and for the county of *Waldo* have to administer the poor debtor's oath to *Staples* ? They surely could not go and administer it in the gaol at *Castine*, supposing *Staples* had never given bond ; they could do no official act out of their own county ; and *Staples*, being within the liberties of the prison, could not after *November* 24th, go into the county of *Waldo*, and, with knowledge that the gaol in that county had been declared by the Court of Sessions to be ready to be occupied, apply to two justices in that county to administer the oath to him, without violating the condition of his bond. Could the legislature have intended, that in order to avail himself of the privilege of gaining his liberty, he must either violate his bond and thus subject himself and his surety to a severe penalty, or the officiating magistrates must violate their duty and transcend their jurisdiction ? Looking at the several provisions of the act incorporating the county of *Waldo*, and especially the tenth section, we are all of opinion that the only reasonable and safe construction of it is, that all persons belonging to *Waldo*, who were committed to the gaol in *Hancock*, in virtue of the provision for that purpose, in that section, must be considered as having been to all intents and purposes as much the prisoners of the keeper in *Hancock*, while in close confinement ; and, while enjoying the liberties of the gaol yard in *Hancock* county, their duties, rights and liabilities were the same as though in both situations, they had been inhabitants of that county ; with the single exception, that from *June* 1, 1828, to *November* 24th, 1829, they enjoyed more extensive liberty, inasmuch as they might travel or reside in any part of the county of *Waldo*, as well as *Hancock*, without violating the condition of their bonds. This opinion, therefore, settles one, and the principal question of construction, arising merely on the face of the acts themselves, and unconnected with the particular facts, presented in the statement of the parties.

The only question remaining is, whether the residence of *Staples*, the debtor, at his home in *Prospect*, within the limits of the county of *Waldo*, after the 24th day of *November*, for a length of time, as the parties have expressed it, and prior to his discharge, in consequence of his having been permitted to take the poor debtor's oath, amounted to a breach of the condition of his bond. By virtue of a public law, which was in full force when the bond was given, he knew that his immediate return to his home and residence there, was lawful; and, if by a subsequent public law, of which all persons are bound to take notice, the limits of the gaol yard in the county of *Hancock* had been restricted, so as not to include any part of the county of *Waldo*, the residence of *Staples* in the town of *Prospect* would have amounted to a violation of the bond. Such was the case of *Reed v. Fullum*, cited from 2 *Pick.* 158. But, no man was bound to take notice of the acts or declarations of the Court of Sessions in relation to the readiness of the *Waldo* gaol for occupation. There is no evidence or intimation that the debtor had any notice of this declaration of the Court of Sessions, even when he took the poor debtor's oath. It is true, as a general principle of law, "that if a covenant be to do an act, upon the performance of an act by a stranger, there needs no notice; because it lies equally in the knowledge of the obligor and obligee, and the obligor takes upon himself to do it; as if a condition be to pay when A. marries; there needs no notice when A. marries." 3 *Com. Dig.* 106, 107, *L.* 9. But we apprehend this principle of law cannot properly be applicable in such a case as the present. *Staples* had no means of knowing when the gaol in *Waldo* would be accepted and declared to be in readiness, and the *Hancock* gaol yard limits, in consequence, restricted to *Hancock* county, unless public notice had been given by the Court of Sessions a reasonable time before hand, that on the 24th of *November*, 1829, the gaol would be completed and ready to be occupied; but nothing of that kind appears to have been done. While *Staples* was lawfully residing at his home in *Waldo* county on the day above mentioned, the Court of Sessions pronounced the gaol ready to receive prisoners; and, according to the principle on which the counsel for the plaintiff contends the action to be maintainable,

the debtor, before he was, or could be aware of it, had committed an escape, though he did not know his duty, till it was too late to comply with it, nor his danger, until it was too late for him to make his escape. Considering the novel and peculiar provisions, in both acts, so far as they relate to *Waldo* county debtors, committed to *Hancock* gaol, we are of opinion that *Staples* cannot be adjudged to have violated the condition of his bond, as he had no knowledge that the territory of *Waldo* county had ceased to be a part of the gaol yard of the county of *Hancock*, as it was established to be by the act of *February* 26th, 1828.

We cannot persuade ourselves that the legislature, actuated as they must have been by liberal and humane feelings towards unfortunate debtors, could ever have intended that the legal provisions which we have been considering, should by a strict construction, be converted into snares for entrapping the innocent and unsuspecting, and thus defeating the purposes of justice.

Plaintiff nonsuit.

The State *vs.* Berry *& al.*

A Justice of the peace has no authority to take the recognizance of a prisoner, while in custody of the officer under a *mittimus* issued by another Justice, for want of sureties for his appearance at Court, and before his commitment to prison.

Scire facias on a recognizance. The defendants were sureties for two *Crockets;* who were examined on a criminal charge, before a Justice of the peace, who ordered them to find sureties for their appearance at the next Court, and for want of sureties issued a *mittimus* against them. While they were on the way to prison, in custody of the officer, they went before *another* Justice, and entered into the recognizance on which the present writ was sued out.

Sprague, for the defendants, objected that the latter Justice had no jurisdiction of the matter, and that therefore the recognizance was void.

And THE COURT being of that opinion, the *Attorney General* entered a *nolle prosequi*.

CASES

IN THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF YORK, APRIL TERM, 1832.

STAPLES *vs.* BRADBURY *& al.*

A father conveyed his farm to his son, reserving a life estate to himself; and taking from the son a bond to pay all his father's debts, support him during his life, furnish him with a horse, oxen and farming tools to use at his pleasure; to deliver and account for to the father, on demand, certain enumerated neat cattle and sheep belonging to the father, or others as good as those. The son thenceforth had the chief management of the farm and property for about three years, when the father died; soon after which the son sold the stock as his own. Hereupon it was held;—

That if the son was attorney to the father, his authority was not coupled with an interest;—or, if it was, yet by its terms it was to be executed only in his lifetime;—and in either case it ceased at the death of the father:—

That placing the property thus under the apparent ownership of the son, did not estop the father or his representatives from showing the true nature of the authority:—

And that as no title passed to the son's vendee, the administrator of the father might lawfully take the stock into his own possession, to be administered with the other assets.

THIS was an action of trespass for taking and carrying away a yoke of oxen and three cows, the property of the plaintiff; who

claimed them under a bill of sale from *Joseph Bradbury* to himself, dated *April* 22, 1829. The defendants took the cattle from the plaintiff by order of the administrator on the estate of *Jabez Bradbury*, the father of *Joseph*. The question was whether the cattle belonged to the intestate's estate, or not. It appeared that the father, *June* 29, 1826, conveyed his farm to his son *Joseph*, reserving a life estate therein to himself; and that the son at the same time gave a bond to his father, conditioned to pay all the father's debts; to support him during life in a decent and comfortable manner, providing him with a horse and chaise, a yoke of oxen and farming tools to use at his pleasure; and to deliver and account for to the father, on demand, certain enumerated neat stock and sheep belonging to the father, or other stock as good. The son thenceforth managed the farm and stock, and, with the father's consent, exchanged some of the cattle, and conducted the business of the father as his agent, the latter declaring that after his death *Joseph* would have all that was on the farm. About two months after his father's death he sold to the plaintiff the property in question being part of the cattle enumerated in the bond.

The Chief Justice, before whom the action was tried, was requested by the counsel for the plaintiff to instruct the jury that the bond constituted a power of attorney to the son to sell any of the property for which he therein engaged to account; that this authority was coupled with an interest, and so was not terminated by the father's death; and that if the cattle were ostensibly the property of *Joseph*, and so much so as that the plaintiff might fairly presume them to be his, and this with the knowledge or by the act of the father, they ought to find for the plaintiff. These instructions the Chief Justice declined to give; and informed them that the authority of the son expired at the death of his father. Whereupon they returned a verdict for the defendants; which was taken subject to the opinion of the Court upon the question whether the desired instructions ought to have been given.

D. Goodenow and *Fairfield*, for the plaintiff, contended *first*, that *Joseph* had sufficient authority from the father, by the terms of the bond of *June* 1826, to dispose of the cattle. The only obligation

on his part in such case was to furnish " others as good." *Secondly*, that this authority was coupled with an interest, and so did not expire at the death of the father. The legal operation of the transaction was a gift of the property to the son, reserving to the donor the privilege of employing the cattle of the donee in his own service. *Hunt v. Rousmaniere*, 8 *Wheat.* 204 ; *Hunt v. Ennis*, 2 *Mason*, 250 ; *Bergen v. Bennett*, 1 *Caines's Cas.* 1.—*Thirdly*, that the father having suffered *Joseph* to treat the property as his own, and having enabled him to make a legal sale without employing any other name than his own as vendor, is now bound by his acts. *Buffinton v. Gerrish*, 15 *Mass.* 158 ; *Hussey v. Thornton*, 4 *Mass.* 407 ; *Thurston v. McKown*, 6 *Mass.* 428 ; *Dana v. Newhall*, 13 *Mass.* 498 ; *Schimmelpenninck v. Bayard*, 1 *Pet.* 290 ; *Pickering v. Busk*, 15 *East.* 42.

J. & E. Shepley, for the defendants.

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

On the trial of this cause, it appears by the report of the Judge, the principal, and indeed the only question was whether the cattle taken by the defendants were the property of *Jabez Bradbury* at the time of his death, or of his son *Joseph*, under whom the plaintiff claims title. This being a question of fact, all the evidence relating to the point was left to the jury, who by their verdict have decided that *Joseph* the son was not the owner of the cattle at the time of the sale, which was *April* 22, 1829. It appears by the bill of sale that he undertook to sell the cattle in his own right and as his own property. *Jabez Bradbury*, the father, died, one or two months before the bill of sale was given. There must be judgment on the verdict, if the Judge's instructions were correct, and the requested instructions were properly refused.

The first instruction was surely correct. If the son was the agent of the father and had power to make bargains on his account, and sell or exchange his cattle, still that authority was at an end as soon as the father died, which was prior to the sale to the plaintiff. We are of opinion that the requested instruction as to the legal im-

port of the bond from *Joseph* to *Jabez* was properly declined. There is not in any part of the condition an authority given by the father to the son, in terms, to sell and dispose of any of his property. The condition recites a conveyance of the father's farm to *Joseph*, and his agreement to maintain him ; speaks of the stock on the farm as the father's, and contains an agreement to deliver and account to him for it on demand, when he should need the same, or other oxen, cows and sheep as good as those then belonging to the father. The only expression contained in the bond, which is relied on as showing a power, coupled with an interest, is that by which the son was authorised to deliver other cattle and sheep as good as those on the farm. But if this gave a power to sell, and substitute other cattle or sheep in the room of those sold, the substitutes were to be delivered to the father ; of course, the power, if coupled with an interest, was, by the express terms of the condition, to be executed in the life time of the father ; but as this was not done, they were the property of the father when he died ; and, as well as his other property, were legally subjected to the control of the administratrix ; and on this ground the sale by *Joseph* to the plaintiff conveyed nothing.

The last instruction requested was, that if by the act or knowledge of the father, the cattle had been placed in such a situation as ostensibly to be the property of *Joseph*, and so that the plaintiff might fairly presume it to be his, the jury should find for the plaintiff. We also think this instruction was properly denied. Surely, because the owner of cattle or any other personal property, leases it to his neighbor, who goes into possession, that neighbor has no right to dispose of it ; we are not to allow property to be thus changed. The question is not did the cattle appear to be the property of *Joseph* when he gave the bill of sale, but were they then his property ? The jury have decided that they were not. A multitude of cases in Massachusetts and in this State have settled the law, that such possession by one, who is not the owner, may always be explained, to repel the charge of fraud or to vindicate and protect the rights of the true owner. There must be

Judgment on the Verdict.

LITTLEFIELD *vs.* LELAND.

The hostler at a stage-tavern, though in the service of the mail contractors and regularly employed in changing the post horses on the great daily route, and occasionally driving the mail stage, is not within the act exempting "stage-drivers" from military duty.

THIS was a writ of error to a Justice of the peace, to reverse a judgment rendered in favor of the defendant in error, who was clerk of a militia company, against the now plaintiff in error who was enrolled therein as a private soldier, but refused to do military duty. He was in the employ of the mail contractors at *Saco*, to attend and change the horses conveying the mail, which passed through that place four times a day; and he occasionally drove the mail stage, in the sickness or absence of the regular driver; and also drove the gigs and extra stages in which the mail was sometimes conveyed, when the travelling was bad, or extra assistance was required.— These services occupied all his time. He was not sworn as a stage driver. And the question was whether he was a "stage driver," within the meaning of the militia acts, and as such exempted from military duty.

J. and *E. Shepley*, for the plaintiff in error.

Leland, pro se.

PARRIS J. delivered the opinion of the Court.

The second section of the United States' militia law exempts from the performance of military duty "all post-officers and stage-drivers, who are employed in the care and conveyance of the mail of the post office of the United States." Does the plaintiff in error come within either description? It is not pretended that he was a post-officer, for he had no employment in the post office in any capacity. Could he be considered a stage-driver employed in the care and conveyance of the mail? He was engaged by the contractors to attend at the stable and prepare the horses. This was

the general business for which he was hired, and to which his attention was principally directed. Although his services as a hostler might be as necessary to facilitate the progress of the mail as those of the driver, still they were of a different kind and did not constitute him a driver, and without that character, although he might improperly have the sole care and custody of the mail, he comes not within the class of exempts. If the hostler is to be exempted by construction because his services are necessary in the superintendance and care of the horses and carriages, why not the mechanics by whom the horses are shod and the carriages repaired, and by extending the principle include all who furnish any of the means of subsistence so essentially necessary to the conveyance of the mail.

The language must have a reasonable interpretation. It could never have been intended that every one who handed a mail from a stage coach to the post office, or who might happen to relieve a driver when sickness or accident prevented the performance of his trip, should thereby become a "stage driver," and claim exemption from military duty. If the law could be satisfied with such slight services, the result would probably be a very considerable diminution of the company rolls.

To answer the phraseology and spirit of the law, the general or stated employment of the person claiming the exemption must be to convey the mail; in which case, although the person so employed may be occasionally called to other services, still he will retain his general character, and fall within the exemption. The counsel for the plaintiff in error puts the case of one who drives and rests on alternate days, and asks if he is to be considered a stage driver. Undoubtedly he is, and so is he who statedly conveys the mail on a route where, by the regulations of the post master general, it is carried but once a week, notwithstanding it may require but one day to perform the route. But the man who is generally employed for other services, and not statedly as a driver, neither loses the character of his general employment, nor gains that of stage driver, by being called occasionally from his usual duties, to relieve a regular driver, who by sickness or accident may be unable to perform his appointed service.

There is nothing in this case which shews that the plaintiff was hired as a driver, but on the contrary for a different service; and the fact that he has not taken the oath by law required to be taken by all persons employed in the conveyance of the mail, is a strong circumstance indicating that neither he, nor the contractors by whom he was employed, considered conveying the mail as any part of his duty.

The defendant in error contends that even if *Littlefield* had been employed as a regular driver of the mail stage, yet inasmuch as he neglected to take the oaths which the law requires "before he shall be entitled to receive any emolument," he cannot avail himself of the exemption from military duty. From the view already taken of the case, and the nature of *Littlefield's* employment, it becomes unnecessary to consider this point. It has, however, been expressly decided in a neighboring state, that the exemption cannot be claimed unless the oath has been previously taken. *Twombly v. Pinkham*, 3 *N. H. Rep.* 370.

We are of opinion that there is no error in the record and proceedings before us; and the judgment is affirmed with costs.

HOBBS *vs.* GETCHELL *& al.*

The privilege of freedom from arrest while going to or returning from the polls on the days of election, does not extend to an elector preparing to go, if he has not actually proceeded on the way.—*Const. Art.* 2, *Sec.* 2.

THIS was an action of debt on a bond given for the debtor's liberties. The defendants pleaded in bar that the principal debtor was arrested in execution on the day of the state elections, and while he was at his own house, preparing to attend the election in *Sanford*, and a reasonable time only previous thereto, he being a legal voter;

and that to effect his release, and by duress of imprisonment, the bond in question was executed. To this the plaintiff replied that the arrest was between the hours of nine and ten in the forenoon, and not during his attendance at, going to, or returning from said election; and that after giving the bond at the gaol in *Alfred*, he returned to *Sanford*, where the election was holden at one o'clock in the afternoon, and there exercised his elective franchise without molestation or hindrance. The defendants rejoined that the arrest was made while he was preparing to go to the election and only a reasonable time previous thereto, and alleging the duress as before. The plaintiff surrejoined that the arrest was made between the hours of nine and ten in the forenoon, and at an earlier hour than a reasonable time for the debtor to leave his home to attend the election at the time appointed; concluding to the country; which was joined. A second plea in bar was filed, in which the arrest was alleged to have been made while the debtor was going to the place of election; to which the plaintiff replied as before; and the defendants re-affirming the same fact in their rejoinder, and tendering an issue to the country, it was joined by the plaintiff.

At the trial of this cause before *Whitman C. J.* in the court below, the defendants called witnesses who testified that they went from their own home about eleven o'clock on election day, and stopped at *Getchell's*, at his request, till he should be ready to go with them to the town meeting, which was four miles off; that he was preparing to go, and was ready, except putting on his hat, when the officer arrested him, and took him away to *Alfred;* that they went directly to the meeting, and arrived just before it was organized, which was at one o'clock; and that *Getchell* arrived after them, and before the meeting was opened. On the other hand, the officer testified that the arrest was made between nine and ten o'clock; and the prison keeper at *Alfred* testified that the commitment was before the meeting in that town was organized, which was at twelve. The distance from *Getchell's* house to the prison was four miles; and thence to the place of election in *Sanford* was five miles. This evidence, the Judge instructed the jury, was insuf-

ficient to maintain either of the issues on the part of the defendants; and they therefore found for the plaintiff; to which the defendants filed exceptions.

W. B. Holmes, for the defendants, referred to the Constitution of Maine, *Art. 2, sec. 2*, exempting electors from arrest while going to, attending at, and returning from elections; and to similar exemptions to members of the legislature in those of the United States and of Massachusetts. The privilege here claimed is analogous to those of legislators, parties and witnesses. By the law and custom of Parliament, members of the House of Commons are privileged for a convenient time to enable them to come and go. 1 *Tidd's Pr.* 170. And this has been extended to forty days before and after each session; though the peers deemed twenty days sufficient.

Courts of Justice, in the case of parties and witnesses, have given the law of privilege a liberal exposition, allowing the party a reasonable time to prepare for his departure, and not judging with severity even his loiterings by the way. *Lightfoot v. Cameron*, 2 *H. Bl.* 1113; *Hatch v. Blissett, Gilb. Ca.* 308; *Smythe v. Banks*, 4 *Dal.* 329; *Bro. Abr. tit. Privilege*, 4; *Meekins v. Smith*, 1 *H. Bl.* 636; *Hunt's case*, 4 *Dal.* 387; 6 *Mass.* 245; 1 *Tidd's Pr.* 173; 1 *Maule & Selw.* 638; *Moor* 57, 340; *Jacob's Law. Dict. tit. Priv. and Parl.*; *Basset's case*, 7 *Bac. Abr.* 413; 1 *Dal.* 296.

The privilege of the elector is given by the constitution; and it should be expounded as liberally as the privilege of parties and witnesses. The one is protected for the sake of public liberty; the other for the sake of public justice. The whole day of election must have been intended; as in some cases the elector might dwell so far from the place of balloting as to render it necessary to leave his home on the preceding day. The act of preparation to go, shows the intent, and is done with reference to the election, not less than that of going to the polls. It necessarily includes the *eundo*, and ought as such to have been left to the jury. 1 *Bl. Com.* 167; 3 *Bl. Com.* 289.

E. Shepley, for the plaintiff, cited 6 *Com. Dig. Privilege A; Ex parte McNeil* 6 *Mass.* 264; *Meekins v. Smith*, 1 *H. Bl.* 636;

Spence v. Stuart, 3 *East.* 89 ; *Coffin v. Coffin*, 4 *Mass.* 29 ; *Cook v. Gibbs*, 3 *Mass.* 197 ; *Lewis v. Elmendorf*, 2 *Johns. Ca.* 222.

D. Goodenow argued in reply.

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

The defendants contend that *Getchell* was illegally arrested and committed to prison, and being under duress of imprisonment when the bond declared on was executed, the same is void. Whether the arrest and imprisonment were illegal was the question on trial. The defence of the action is placed on a provision in our constitution, *art.* 2, *sec.* 2, which is in these words, viz: "Electors shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest on the days of election, during their attendance at, going to, and returning therefrom." It appears that *Getchell* lived more than four miles from the place of the town meeting at *Sanford*, and four miles from the prison in *Alfred;* and that the distance from the prison to the place of the town meeting in *Sanford* is five miles. If the arrest was not illegal, the commitment was not. We are well satisfied that the latter part of the above cited section is restrictive of the generality of the preceding, and that the meaning is that Electors should be privileged from arrest during such part of the days as is occupied by them in their attendance at, going to and returning from the election. It is contended that *Getchell* was arrested as he was going to the town meeting, which was to be holden on that day at one of the clock in the afternoon. The witnesses produced by the defendants, testified that as *Getchell* was preparing to go, and ready, excepting putting on his hat, the arrest was made. According to this testimony, *Getchell* was not, when arrested, going to the election or ready to go—he was preparing to go. This does not bring the case within the language of the constitutional inhibition. Does the evidence bring it within its fair import and construction? The abovementioned witnesses say they left home about eleven of the clock, in order to go to the meeting, and on their way, called at *Getchell's.* On the other hand, the officer who made the arrest

testified that he did it between nine and ten o'clock; and the prison keeper testified that the commitment was before the meeting at *Alfred* was organized, which was to be held at 12 o'clock. On these facts was not the arrest made so early in the day as to be liable to no objection; or, in other words, were not two or three hours more than a reasonable time to be occupied in travelling four miles, or a little more, to attend the town meeting? But we again observe that the defendants' own witnesses proved that *Getchell* had not left home and was not going or ready to go to the meeting when the arrest was made. We have no authority to extend the language of the constitution to cases which it does not comprehend; and we must remember that the inhibition as it stands gives a right to debtors on the days of election, or at least, on a part of those days, which rights thus given, have to the same extent, abridged the rights of creditors. We feel it our duty to be governed by the plain language of the constitution as it stands. Questions of privilege in England depend on different principles or usages, and not on definite, constitutional provisions. Exception overruled.

Judgment on the Verdict.

The President &c. of the STRAFFORD BANK *vs.* CROSBY.

Where it was the usage of a bank to suffer the accommodation notes of its debtors to remain over-due, the interest being paid in advance at every return of the period of renewal, and one of its former directors, conusant of the usage, and acquiescing in it, became surety on a note to the bank, which was afterwards suffered thus to lie over for more than two years, until the principal became insolvent;—it was held that this was not such a giving of new credit to the principal as discharged the surety.

THIS was an action of *assumpsit* on a promissory note to the plaintiffs, which the defendant and one *Wyatt* had signed jointly and

severally with one *Varney*, and as his sureties, dated *March* 28, 1825, for six hundred dollars, payable in sixty days with interest. The defendant had been a director of the bank from its original institution in 1804, till the year 1821, excepting one year; during two of which years he was its President. It was the usage of the bank from the beginning, to discount accommodation notes at sixty days; and at the maturity of the note to receive checks and interest, and frequently the interest alone, for the next sixty days, endorsing the same; and so *toties quoties*, without any vote of the directors, till the note was required to be taken up. This was done without any renewal of the note, or consulting the sureties; it being tacitly understood that the note was to lie during the time in which interest was regularly paid; but that the principal or sureties were in the meantime at liberty to pay the whole debt, if they chose. In this usage the defendant acquiesced, up to the time of his leaving *Dover* in New-Hampshire, in which the bank was situated, and removing to the county of *Penobscot* in this State, which was in *April*, 1821.

A note signed by *Varney* as principal, and one *Mann* and one *Chandler* as sureties, on which $619,74 was due, was taken up *May* 25, 1821, and a new note for six hundred dollars, with the defendant and *Chandler* as sureties given in its stead; and this latter note was exchanged *May* 25, 1825, for the note now in controversy. The interest was paid by *Varney*, and regularly indorsed on the note, up to *Dec.* 31, 1827. He resided in *Dover*, and was in good business and possessed of sufficient attachable property to have paid the debt, till *April*, 1828, when he failed.

Upon this evidence the action was submitted to the decision of the Court.

J. & E. Shepley, for the plaintiffs, cited *Lock v. United States*, 3 *Mason*, 455; *Hunt v. Bridgham*, 2 *Pick.* 585; *Rees v. Barrington*, 2 *Ves.* 540; *Frye v. Barker*, 4 *Pick.* 384; *Bellows v. Lovell*, 5 *Pick.* 310; *Oxford bank v. Lewis*, 8 *Pick.* 458; *Varner v. Nobleborough*, 2 *Greenl.* 126; *Lincoln & Ken. bank v. Page*, 9 *Mass.* 157; *Loring v. Gurney*, 5 *Pick.* 16; *Renner v. Bank of Columbia*, 9 *Wheat.* 582; *Mills v. Bank, U. States*, 11 *Wheat.* 438.

N. Emery, for the defendant, cited 2 *Bl. Law. Tracts*, 19 ; *Nesbit v. Smith*, 2 *Brown's Ch. Rep.* 579 ; 10 *East.* 34 ; *The People v. Jansen*, 7 *Johns.* 232 ; *Williams v. Gilman*, 3 *Greenl.* 286 ; *Homer v. Dorr*, 10 *Mass.* 26 ; *Bank of Washington v. Triplet*, 1 *Pet.* 30 ; 12 *Wheat.* 554 ; *Kennebec bank v. Tuckerman*, 5 *Greenl.* 130.

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

The cases cited by the counsel for the plaintiff shew most clearly that persons transacting business at a bank are presumed to be acquainted with its usages, and assenting to them, and are consequently bound by them, even when those usages are deviations from the course established by legal principles. For this season such persons, when making contracts with a bank, are considered as doing it with reference to such usages ; indeed, they are, in legal contemplation, a part of the contract. On this ground it is contended that the present action is maintainable. The plaintiff does not rely on merely presumed knowledge, on the part of the defendant, of the nature of the usages of the bank ; it appears he had express knowledge, from his having been for several years a director, and for almost two years president, ending in *April*, 1821, about which time he removed to the county of *Penobscot*, in *Maine*. The usage in question is particularly stated by the cashier. According to this, the course of the bank was to extend credit to the principal debtor on his payment of interest in advance for the usual term, without a renewal of the note or consulting the sureties ; and it was understood that the note was to lie in the bank during the time for which interest was paid ; but the principal or sureties had liberty to take up the note in the mean time if they chose so to do. The note on which the present action is founded, it is true, was not given till 1825, about four years after the defendant removed from *Dover ;* but it was given in payment of another note for the same sum, taken up, and which had been given in *May*, 1821 ; which, of course, must have been in the bank in the interim, and the interest thereon must have been paid. In the note of 1821, *Crosby* and *Chandler*

were the sureties; in that of 1825, now in suit, *Crosby* and *Wyatt* are the sureties. Probably this new note was given on account of the change of one of the sureties. It appears further that the note of 1821, grew out of one given in 1819, for $619,74, which was taken up in 1821. The defendant, when he signed the note in question, must have known that he had not paid the interest which had become due upon it; and the fact is that it had been regularly paid by *Varney*, the principal. These circumstances are evidence of his recognition of the usage, (which has never been changed since the bank was incorporated,) as lately as in 1825, and of his continued liability in consequence. There is no proof that the defendant ever requested the bank to call on the principal and secure payment; and the cases cited to the point shew that mere delay to prosecute the principal does not discharge a surety, unless some fraud has been practised. The continued solvency of *Varney* until *April*, 1828, does not constitute a defence, in the circumstances of this case, and we are all of opinion that the action is well maintained; and according to the agreement of the parties a default must be entered.

SEWALL *vs.* SEWALL.

Upon the trial of a writ of right, the tenant gave in evidence a deed conveying the premises from the demandant to a third person, in order to disprove the demandant's right to recover; and evidence was also offered to show that previous to this conveyance the tenant had verbally admitted the demandant's title as tenant in common with him, though he had, after the conveyance, denied it, claiming to hold the whole. The latter declarations, made after the conveyance, the Judge instructed the jury to disregard. And for this cause a new trial was granted, the evidence being proper for them to consider, as tending to show the intent and evince the character of his previous occupancy.

THIS was a writ of right, brought by *Stephen Sewall* against *Joseph Sewall*, upon his own seisin within twenty years, for one forty

eighth part of certain lands. The title of the demandant was regularly deduced and proved, down to *July* 19, 1827, on which day, as it appeared from a deed offered by the tenant, he had conveyed all his right, title and interest in the premises to *David Wilcox*. To show that he was disseised at the time of this conveyance and that therefore nothing passed by the deed, the demandant read the record of a partition, in the Common Pleas at *February* term, 1823, upon the petition of *John Sewall* and others, the demandant not being a party thereto, and having had no notice of its pendency, from which it appeared that the whole tract had been divided among the petitioners and others, and their parts set off in severalty, one moiety having been assigned to *John Sewall*, as his share. This part he conveyed by deed of quitclaim, dated *July* 17, 1824, to the tenant, who afterwards entered into the same. The demandant contended that these proceedings, and the entry of the tenant under *John Sewall's* deed, amounted to a disseisin; and that not having entered at any time after the devise under which he claimed, he was ousted, and nothing passed by his deed to *Wilcox*. *Daniel Sewall*, Esq. testified that in eight or ten different conversations with the tenant, since the conveyance of *John Sewall* to him, he had admitted that the demandant had a right in common in some part of the demanded premises, which he wished to purchase; but that after the making of the deed from the demandant to *Wilcox*, the tenant denied any right in the demandant, and claimed to hold the whole. It also appeared that in *October* 1830, the tenant had aliened all his right to a part of the land he bought of *John Sewall*, describing it by metes and bounds.

The demandant's counsel requested the Chief Justice, before whom the action was tried, to instruct the jury that if they believed that the tenant, in his conversations with the witness, intended only to admit the right of the demandant to the land, and not the fact that he had entered or was in possession as a tenant in common with him, then the demandant was disseised at the time of making his deed to *Wilcox*, and therefore nothing passed by it, and the demandant was entitled to recover. The Chief Justice declined so to instruct them; but he did instruct them that if they believed, from

the testimony, that the tenant, after he purchased of *John Sewall*, admitted that the demandant had a common right in some part of the tract, which he was desirous of purchasing, and that from that time till the making of the deed to *Wilcox* he did not claim to hold adversely to or in defiance of the title of the demandant, but in consistency therewith, there was nothing to prevent the operation of the deed to *Wilcox*, to whom the demandant's title was thereby conveyed. He also instructed them to take no notice of that part of the testimony which related to the declarations made by the tenant after the date of the last mentioned deed.

To which instructions the counsel for the demandant filed exceptions.

D. Goodenow argued in support of the exceptions, and cited 3 *Bl. Com.* 179, 180.

E. Shepley, for the tenant, argued that his occupancy was in submission to some title in the demandant, and therefore did not defeat the operation of his deed. *Kennebec Proprietors v. Laboree*, 2 *Greenl.* 281; *Commonwealth v. Dudley*, 10 *Mass.* 406; *Wells v. Prince*, 4 *Mass.* 67; *Cook v. Allen*, 2 *Mass.* 470. The deed from *John Sewall* worked no disseisin, it being merely a conveyance of such interest as he might have in the property, and not an absolute conveyance of the fee. *Fox v. Widgery*, 4 *Greenl.* 214. Nor is the reception of the whole profits by the tenant a disseisin, he being only a tenant in common. *Barnard v. Pope*, 14 *Mass.* 438. And the seisin of a cotenant is sufficient for a devisee; *Brown v. Wood*, 17 *Mass.* 74; as well as for an heir. *Shumway v. Holbrook*, 1 *Pick.* 116.

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

Mellen C. J. By the exceptions it appears that the title of the demandant was proved to have been good on the 19th day of *July*, 1827; but the tenant contends that on that day he sold and conveyed all his right, title and interest in the demanded premises to *Wilcox*, by his deed of that date. Unless he was disseised when he

made the deed, the title passed to *Wilcox*, and the action fails. The jury under the directions given them, have found that he was not disseised. The only question is whether they were properly instructed. *John Sewall* was seised of the tract of land assigned to him, and his title and seisin were conveyed to *Joseph*, the tenant, by deed dated *July* 17, 1826; *Joseph* went into possession under his deed and has ever since remained in possession. We think that the first instruction given to the jury, though not in the language as requested, nor merely of the import of it, yet that it was more comprehensive, and included the requested instruction and was more explicit and intelligible; presenting to their minds the grounds and principles on which they were to decide the question whether the possession of *Joseph*, of the premises in question, at the time of the conveyance to *Wilcox*, amounted to and constituted a disseisin. We do not perceive any incorrectness in the foregoing instruction. The next inquiry is whether the second instruction was proper. To answer this question we must examine the testimony of *Daniel Sewall*. He stated that in eight or ten conversations with *Joseph Sewall*, since the conveyance of *John Sewall* to him, he admitted that the demandant had a right in common in some part of the demanded premises, and that he wished to purchase it; but that after the conveyance to *Wilcox*, *Joseph* denied all right of the demandant and claimed to hold the whole. The admission of *Stephen's* right in common was good evidence to qualify the seisin and possession of *Joseph*, and prove that they were not adverse to, but in submission to the common seisin of *Stephen;* and his denial had a tendency to prove, and, in fact, was proof that his possession was adverse to the title of *Stephen*, and so was a disseisin. The evidence of the above denial, however, the Judge instructed the jury to disregard, which, in effect, amounted to an exclusion of that part of Mr. *Sewall's* testimony. Now the difficulty is this. Mr. *Sewall* refers only to two dates; namely, the time of the conveyance from *John Sewall* to *Joseph;* and the conveyance from *Stephen* to *Wilcox;* between which events or dates there is an interval of a year. It does not appear how long before the deed to *Wilcox* was given, the above mentioned admissions of *Joseph* were made; or

when he began to consider himself as holding adversely to *Stephen* and openly denying his right; it might have been many months before the conveyance to *Wilcox;* and that the denial of the demandant's right had reference to his own possession and claim of the whole for months before the above conveyance was made. This, perhaps, may be an improbable fact; but being a matter of inference, it was proper for the consideration of the jury; and though a disseisin committed by *Joseph* after the deed was made, would be a fact of no importance in this cause, or in any manner affect the operation of the deed, still the excluded evidence might have been considered by the jury as explanatory of the intentions of *Joseph* before the conveyance was made and shewing him a desseisor at that time. On the whole, we are all of opinion that the last restrictive instruction was too limited and therefore incorrect.

Exceptions sustained; verdict set aside; and new trial granted.

Lord *vs.* Chadbourne *& al.*

At the time of the indorsement of a promissory note then payable, the indorser requested the indorsee "not to call on the maker at present," to which the indorsee agreed. No demand was made on the maker till more than six months afterwards, and no notice to the indorser till three months after demand; all the parties living in the same county. And it was held that this agreement did not excuse so long a delay, and that the indorser was discharged.

Assumpsit by the indorsee against the indorsers of a promissory note made by *Porter Sands, May* 1, 1830, and payable to the defendants or their order on demand, and indorsed in blank to the plaintiff. At the time of its indorsement, which was *July* 30, 1830, the defendants requested the plaintiff "not to call on *Sands* at present," and the plaintiff replied that he would not. *Sands,* being about to fail, was sued by the plaintiff, *Feb.* 14, 1831, but nothing

was realized from the attachment; and no notice was given to the defendants till *May* 17, 1831. The parties all lived in this county. Upon these facts the action was submitted to the decision of the Court.

D. Goodenow and *Hussey*, for the plaintiff, contended that the agreement amounted to a waiver of demand and notice; and that the plaintiff was thereby constituted sole arbiter of the time when he would call on either of the parties; or else it was made his duty to wait till the defendants requested him to move. *Mead v. Small*, 2 *Greenl.* 207; *Cobb v. Little*, *ib.* 261; *Hunt v. Adams*, 6 *Mass.* 519; *Oxford bank v. Haines*, 8 *Pick.* 423; *Storer v. Logan*, 9 *Mass.* 57; *Sumner v. Gay*, 4 *Pick.* 311; *Moyes v. Bird*, 9 *Mass.* 436; *White v. Howard*, 9 *Mass.* 314; *Parker v. Parker*, 6 *Pick.* 80; *Bond v. Farnham*, 5 *Mass.* 170; *Boyd v. Cleaveland*, 4 *Pick.* 525; 2 *Stark. Ev.* 274; *Fairbanks v. Richardson*, 5 *Pick.* 436; *Weld v. Gorham*, 10 *Mass.* 366; *Lincoln & Ken. bank v. Page*, 9 *Mass.* 155; *The same v. Hammatt*, *ib.* 159; *Blanchard v. Hilliard*, 11 *Mass.* 85; *Jones v. Fales*, 4 *Mass.* 251; *Berkshire bank v. Jones*, 6 *Mass*, 524; *Taunton bank v. Richardson*, 5 *Pick.* 436; *City bank v. Cutter*, 3 *Pick.* 414; *Barker v. Parker*, 6 *Pick.* 80; *Burrill v. Smith*, 7 *Pick.* 291; *Hale v. Burr*, 12 *Mass.* 86; *Bank of North America v. Barriere*, 1 *Yeates* 360; *Rugeley v. Davidson*, 2 *Conn.* 33; 2 *Stark. Ev.* 272, *note* 1.

J. & E. Shepley, for the defendants, cited *Bayley on bills*, 336; *Hopkins v. Liswell*, 12 *Mass.* 54; *Field v. Nickerson*, 13 *Mass.* 138; *Renner v. Bank of Columbia*, 9 *Wheat.* 587; *Free v. Hawkins*, 8 *Taunt.* 92; *Britton v. Webb*, 2 *Barnw. & Cres.* 483; *Moies v. Bird*, 9 *Mass.* 436; *Groton v. Dallheim*, 6 *Greenl.* 476; *Mead v. Small*, 2 *Greenl.* 207; *French v. Bank of Columbia*, 4 *Cranch* 163; *Hussey v. Freeman*, 10 *Mass.* 84; *Bank of Washington v. Triplett*, 1 *Pet.* 35.

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

The note in question had been due about three months when it was indorsed to the plaintiff, yet no demand was made on *Sands*

for more than six months; and no notice was given to the defendants for more than three months after such demand. Laying out of the case the agreement made between the parties that *Sands* should not be called on "for the present," and it is most manifest that no legal principles could be found to sustain the action. In the circumstances of this case we cannot believe that the above agreement could excuse so long a delay in making the demand; but we need not place our decision merely on this ground. The agreement had respect to the demand on *Sands* exclusively; and the obligation of the plaintiff to give notice to the defendants of the nonpayment by *Sands* remained wholly unaffected by the agreement. They had a right to require of him a strict compliance with legal principles as to the time of giving such notice; and his delay and omission to give such notice are a decisive bar to the action, according to settled law. The other facts in the report are of no importance. The plaintiff must be called.

The inhabitants of WELLS *vs. The inhabitants of* KENNEBUNK.

The wife of an insane pauper in *Kennebunk* left him in 1809, and returned to her father's house in *Newfield*, where she was soon after delivered of a son. She and her son were supported by her father, at his house, for about eight years, when she left that town and removed from this county, to which she never returned. Her husband died in 1820; and the boy continued to live with and be supported by his grandfather, till 1829. Hereupon it was held that the boy was emancipated by his mother; and therefore acquired a settlement by his domicil in *Newfield*, at the passage of *Stat.* 1821, *ch.* 122.

IN this action, which came before the court upon a case stated, the only question was upon the settlement of *Stephen D. Littlefield*,

a pauper, for whose support the action was brought. The facts appear in the opinion of the Court.

D. Goodenow, for the plaintiffs, argued that the clause in the Statute for the settlement and relief of the poor, which fixed all settlements in the place of the then existing domicil, was not intended to apply to minors having derivative settlements from their fathers; but only to those who were not otherwise provided for in the same statute. *Fairfield v Canaan*, 7 *Greenl.* 90.

Bourne, for the defendants, cited *North Yarmouth v. Lewiston*, 5 *Greenl.* 57; *Sidney v. Winthrop*, *ib.* 123; *Parsonsfield v. Kennebunkport*, 4 *Greenl.* 47; *Eastport v. Lubec*, 3 *Greenl.* 220; *St. George v. Deer Isle*, *ib.* 390; *Amherst v. Granby*, 7 *Mass.* 1.

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

Simon Littlefield, the father of the pauper, had a legal settlement in *Kennebunk*, and died in *October*, 1820, having been for many years prior to his death insane and a town pauper. His wife separated from him in *March*, 1809; and it does not appear that they ever lived together afterwards. In *May*, 1809, the pauper was born at *Newfield*, where his mother lived at that time at her father's house, and continued to live until the year 1817, when she removed to *Brighton*, in the county of *Somerset*, and from thence in 1825, to *Clinton*, in the county of *Kennebec*. The pauper continued to live at *Newfield*, with his grandfather, until the autumn of 1821; when the grandfather removed to *Brighton*, and the pauper with him, where they both continued to live till 1829, when the pauper left him and went to *Wells*. On these facts the question is whether the pauper has to this time retained his derivative settlement in *Kennebunk*, or gained a new one in his own right in *Newfield*, in virtue of the act of *March* 21, 1821, at which time he was about twelve years of age. A minor child residing with the parents and under their care and nurture does not gain a settlement by the incorporation of a town. *Hallowell v. Gardiner*, 1 *Greenl.* 93; *St. George v. Deer Isle*, 3 *Greenl.* 390. But a minor, if emancipated, might

so gain a settlement, or under the statute of 1821. See the last case. Emancipation is not to be presumed, though it may be implied from circumstances. In *Eastport v. Lubec*, the paupers were helpless orphans, without any home where they had a right to remain. The court adjudged them as settled in *Lubec* by the act of 1821, where they were then supported by a relative. In *St. George v. Deer Isle*, the pauper's mother was married to a second husband, in whose family she had no right to remain at his expense. She was considered as emancipated and capable of gaining a settlement in her own right. In *Parsonsfield v. Kennebunkport*, the pauper was considered as having her residence in the family of her father in law, to which she might always be welcome; and that her residence at another town in the country on the 21st of *March*, 1821, was merely a temporary one at service; so that there was no proof of emancipation. In *Pittston v. Wiscasset*, 4 *Greenl.* 293, the pauper was a minor, and prior to the act of 1821, had resided in different places, by direction or permission of his mother; she receiving a proportion of his wages, and, in some cases, making the contract for his services. This was considered as disproving emancipation, and of course the minor did not gain a new settlement under the statute of 1821. The case before us differs from the foregoing. After the death of *Simon Littlefield*, and indeed from the time of her desertion of him, his widow had no home except in her father's family, who, we are to understand, maintained her and the pauper, then a child. When the child was about eight years old, the mother left the town of *Newfield*, and has never returned to it; but did not carry the pauper with her; he lived in the grandfather's family, which was his home, till the year 1829, during all which period, it does not appear that she has contributed to his support, controlled any of his conduct or received any of his wages, if he ever earned any. She seems to have resigned him to the care, government and protection of the grandfather. The language of her conduct seems to be plain and not to be misunderstood. The conduct of the pauper seems to speak a similar language; he has not followed her, or sought her aid or submitted to her control. Considering all the circumstances of this case, we are led to the conclusion that the pau-

per must be considered as having been emancipated before 1821, and that by his residence and having his home in *Newfield* on the 21st of *March* of that year, he gained a settlement in that town by virtue of the statute before mentioned; accordingly a nonsuit must be entered.

The inhabitants of WATERBOROUGH *vs. The inhabitants of* NEWFIELD.

Where the wife left her husband, and returned, with her children and furniture, to her father's house in the same town; and the husband, not being suffered to follow her, and having no property, sought employment in a neighboring town, intending to return and dwell with his wife whenever she should be reconciled to him, which was afterwards effected;—it was held that his domicil remained in the town where his family had continued to reside.

THIS was an action of *assumpsit* for reimbursement of the charges of the support of one *Elijah Smith*. The material facts, which were developed at the trial, and then stated in a case made by the parties, will be found in the opinion of the Court.

Appleton, for the plaintiffs, contended that the pauper gained a settlement by having his domicil in *Newfield* at the time of the passage of *Stat.* 1821, *ch.* 122. *Putnam v. Johnson*, 10 *Mass.* 501. He had the *jus domi*, and freedom from arrest, in the house of Dr. *Ayer*. *Oyster v. Shead*, 13 *Mass.* 520. Any residence, however short, was sufficient. *The Venus*, 8 *Cranch*, 279. He had acquired the right to vote, and was eligible to office, and liable to do military duty, in *Newfield*; from which place, moreover, he had no present intention of removing. And he had no right to dwell in any other house. *Cambridge v. Charlestown*, 13 *Mass.* 501; *Abington v. Boston*, 4 *Mass.* 312; *Green v. Buckfield*, 3 *Greenl.* 136; *Dixmont v. Biddeford*, *ib.* 202; *Boothbay v. Wiscasset*, *ib.* 356. Had he

died, on or before the passage of the act of *March* 21, 1821, in the neighboring county of *Cumberland*, the Judge of Probate in that county would not have had jurisdiction to grant administration on his estate. *Cutts v. Haskins*, 9 *Mass.* 547; *Harvard College v. Gore*, 5 *Pick.* 370; *Holyoke v. Haskins*, *ib.* 20; *Hallowell v. Saco*, 5 *Greenl.* 143.

J. & E. Shepley, for the defendants, cited *Gorham v. Canton*, 5 *Greenl.* 266; *Turner v. Buckfield*, 3 *Greenl.* 229; *Knox v. Waldoborough*, *ib.* 455; *Hampden v. Fairfield*, *ib.* 436; *Richmond v. Vassalborough*, 5 *Greenl.* 396.

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

Smith, the pauper, resided in *Shapleigh* from about the year 1816 till the spring of 1820, in a hired house, with his family. At that time a misunderstanding took place between him and his wife. He absented himself several weeks from the house where he lived, and his wife and the children went to her father's house in that town, and caused the furniture to be removed to that place, though the person employed to remove it, was forbidden so to do by the husband. Soon after this the house they had occupied was removed to another place, and was never afterwards occupied by *Smith* or any of his family. The husband was forbidden by *Wood*, the wife's father, to come to his house; the wife was unwilling that he should come and he never did, for about two years, nor until after a reconciliation had taken place. After the separation, the husband lived some time at his father's in *Shapleigh*; afterwards, a short time, in *Waterborough*, and in *November*, 1820, he went to Dr. *Ayer's*, in *Newfield*, and resided with him till 4th of *April*, 1821, and worked for *Ayer* to pay a debt he was then owing him. He testified that he never intended to abandon his family, but always meant to return to them, when he should be permitted so to do. That he never furnished them any supplies, though he should have furnished them with necessaries, if he could have been permitted. And that he did not know that he should ever be permitted to go back and live with her at her father's; but that he had some hope of living

with her again. This is a compressed summary of the facts on which our decision must be founded. We may add that it does not appear that they ever had any fixed home in *Shapleigh* after the reconciliation; they lived a few weeks at her father's, and after his removal to *Waterborough* they remained several months in *Shapleigh* and then removed to *Limerick*. The question is, where was the pauper's domicil on the 21st of *March*, 1821. On that day he was in the employment of Dr. *Ayer* in *Newfield*, and his wife and children were residing in *Shapleigh*, at her father's house, and in possession of the furniture belonging to the husband, which had been removed from the house they had lately occupied. It is a well settled principle of law that if a man leaves his family and home for months or years, *animo revertendi*, his domicil is not changed by such absence so long as such intention continues; and this intention must be ascertained from a view and consideration of all circumstances. It is true that while he was residing at *Newfield*, he had no house in the town of *Shapleigh* which he then had a right to enter; but his wife and children were in that town; and he never intended to abandon them, but always meant to return to them as soon as he could; and the case finds that a reconciliation took place, and he carried his intention into execution as soon as he was able to do it. A man domiciled in a particular town, will continue to have his domicil there, though he may own no real estate, nor occupy any. He may live as a boarder; he and his family may live as boarders and still retain their domicil. The misunderstanding between the pauper and his wife, led to the separation, and poverty caused her removal to her father's; and his poverty rendered him unable to procure another dwelling where he could live with her, as he testified he was desirous to live. These facts seem to indicate no intention to change the domicil, more than was manifested by the pauper in the case of *Richmond v. Vassalborough*, cited and relied upon as decisive of the case at bar. We have particularly examined the facts of that case and find a strong resemblance between the two. In both, the paupers left their families in consequence of a misunderstanding with their wives; in both there was no absolute desertion of their families, but a conditional inten-

tion of returning to them and living with them again; in both a reconciliation took place, and a consequent reunion of the parties, though not until after the 21st of *March*, 1821. In *Richmond v. Vassalborough*, the court considered the reunion as a degree of evidence of the original intentions of the husband, proper for the consideration of the jury; and as the court in the present case, are by consent of parties, authorized to draw all inferences which a jury might properly draw, we may consider the subsequent reconciliation as evidence of the sincerity of the pauper's declarations as to his hope and intention of again living with his wife and children, who continued to reside in *Shapleigh* as before mentioned. In *Richmond v. Vassalborough*, the pauper during his absence, furnished some small supplies to his wife; and in the present case he was desirous of doing the same, had he been permitted so to do. In *Richmond v. Vassalborough*, the wife deserted the house in which she and her husband had lived together, and on her return from *China*, unlawfully broke into an empty house and there resided; so that in that case, as well as in the one before us, the former habitations of the husband and wives prior to their separation, had ceased to be their rightful homes, and indeed they had no new places of settled habitation until after their reunion. On the whole, we perceive no material distinction between the two cases, and the same legal principles must be applicable to both.

According to the agreement of the parties a nonsuit must be entered, with costs for the defendants.

ALLEN *& al. vs.* THE PORTLAND STAGE COMPANY.

If an execution be issued within "twenty four hours" after judgment, though it be on the following day, it is irregular under *Stat.* 1821, *ch.* 60, *sec.* 3, and may for that cause be set aside.

Parol evidence may be received to show the hour of the day at which an execution was issued, for the purpose of showing that it was within twenty four hours after judgment, and therefore irregular.

But such irregularity can only be shown by parties or privies; and it cannot affect the title of an innocent purchaser without notice.

Whether this objection can be taken collaterally, or only directly upon a motion to set aside the execution;—*quære.*

The extent of an execution on real estate cannot be considered as commenced till the appraisers are sworn.

Whether it can be said to be commenced before the land is shown to the appraisers;—*dubitatur.*

Therefore where an appraiser was chosen by the debtor's attorney, and the debtor died before either of the appraisers was sworn, the extent was for this cause held void.

Parol evidence is admissible to show the time of the debtor's death, for the purpose of avoiding the extent, as it does not contradict any fact stated in the officer's return.

THIS was a writ of entry, in which the demandants claimed title to a parcel of land as devisees under the will of *Elisha Allen.*

In a case stated by the parties it was agreed that the land was formerly the property of *Porter Sands;* that the testator caused it to be attached *Oct.* 22, 1830, in his suit against *Sands,* in which judgment was entered *April* 26, 1831; and that this entry was made as late as five o'clock in the afternoon. In the same evening, by consent of the attorney of *Sands,* the execution was made out, bearing date *April* 27th, and delivered to the creditor's attorney. *Sands* died on the 27th day of *April,* at one o'clock in the afternoon. On the morning of that day, *Sands* being insensible, his attorney, having general discretionary powers to act for him in this matter, notified the officer who had the execution that he had chos-

en *John Low*, Esq. as an appraiser, for the debtor. The other two appraisers were chosen in the forenoon of the same day. In the afternoon Mr. *Low*, being then notified of his appointment, declined acting, on account of the death of *Sands;* but after the funeral he was induced to waive the objection. The appraisers were sworn, and the extent completed *April* 30th; the debtor's attorney having previously notified the officer that his power was terminated by his client's decease, and that he did not wish Mr. *Low* to act as chosen by him. The officer's return was in the usual form, showing that the appraisers were chosen on the 27th, *Low* being chosen by the debtor's attorney, and the oath administered and the extent completed on the thirtieth. The other facts were agreed subject to objections as to their admissibility in evidence.

The tenants claimed under a mortgage made by *Sands* to them *Feb.* 14, 1831, and an entry for condition broken.

D. Goodenow, for the demandants. The execution being dated the day after the rendition of judgment, appears regularly issued; first, because the law does not regard fractions of a day; and secondly, because parol evidence is not admissible to show the contrary. The presumptions of law are in its favor; and if an interval of twenty four hours is necessary, the court ought to presume that the judgment was entered as early on the twenty sixth as it could lawfully have been entered, and that the execution was issued at the earliest legal hour on the following day, and previous to the death of *Sands.* If two judgments are entered on the same day neither has the priority, because parol proof is inadmissible. But if the law be otherwise, the debtor here consented to the issuing of the execution, and so the irregularity is cured. *Ruggles v. Ives*, 6 *Mass.* 494; *Bean v. Parker*, 17 *Mass.* 601; *Bott v. Burnell*, 9 *Mass.* 96; 11 *Mass.* 153; *Eastabrook v. Hapgood*, 10 *Mass.* 313. And if not, yet the execution cannot be avoided collaterally; but only upon direct application of parties or privies. *Butler v. Haines*, 3 *N. Hamp.* 21.

As to the extent, the sheriff's return is conclusive evidence of the choice of the appraisers. 6 *Com. Dig.* 242. The attorney's authority was sufficient for this purpose, both as he was attorney of

record, and as he had general discretionary powers. No deed was requisite. *Commonwealth v. Griffith*, 2 *Pick.* 11; *Smith v. Bowditch*, 7 *Pick.* 137. And the appointment thus made was irrevocable. The extent was commenced, and the rights of the creditor were thereby vested, before the death of *Sands*. But if the appointment was not good as made by the debtor, it may be taken as made by the sheriff, as though the debtor were absent or refused to choose. In either case, his death intervening could not prevent the completion of the extent. *Herring v. Polley*, 3 *Mass.* 121; *Grosvenor v. Gould*, 9 *Mass.* 209.

Dane and *J. Shepley*, for the tenants, as to fractions of a day, cited *Mostyn v. Fabrigas*, *Cowp.* 16; 5 *Dane's Abr.* 136; 4 *Co.* 70; *Doug.* 58; *Prescott v. Wright*, 6 *Mass.* 20; 9 *Dane's Abr.* 80; 1 *McCord*, 369;—as to the admissibility of parol evidence, *Leland v. Stone*, 10 *Mass.* 461; *McGregor v. Brown*, 5 *Pick.* 170; *Wynne v. Wynne*, 1 *Wils.* 42;—as to the irregularity of the execution, *Briggs v. Wardwell*, 10 *Mass.* 355; *Hildreth v. Thompson*, 16 *Mass.* 91;—and as to the extent, *Cushing v. Hurd*, 4 *Pick.* 253; 5 *Pick.* 170.

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

By the statute, directing the issuing, extending, and serving of executions, *Stat.* 1821, *ch.* 60, *sec.* 3, it is provided that the party, obtaining judgment in a civil action, shall be entitled to have his execution thereon, at any time after the expiration of twenty four hours, after judgment rendered. Now as in the course of judicial proceedings, the days only are noted, and not more minute divisions of time, unless other proof is admissible, the direction of the statute would be rendered ineffectual, whenever the execution bears date the day subsequent to the rendition of judgment. A defendant, against whom an execution issues, at an earlier period than the law permits, ought to have some mode of relief. Suppose he moves to set aside an execution, thus irregularly issued, if he is not allowed to prove the fact, he can take nothing by his motion. It would

seem therefore that such proof must be admissible, in order to give effect to the law. It does not contradict the record. The execution may bear date the day following the judgment, and yet have been issued within less than twenty four hours after its rendition. But it is said the counsel for the defendant in the action upon which the execution in question issued, waived his right to have it staid for that period. He argued that it might be post dated, and that the counsel for the plaintiff might receive it, on the day judgment was rendered; and it does not appear that more was intended by his assent. The practice of post dating, may be convenient for counsel, who are desirous of carrying with them their executions, on their return from court; but it is attended with hazard. If the clerk refused in all cases to let them go from his office, until the twenty four hours had elapsed, such a difficulty, as is now presented, could not arise. The legal presumption being, that every thing is correctly and legally done by official agents, an execution, bearing date the day following the judgment, will be presumed to have issued according to law, and would not be suffered to be impeached against persons, not parties or privies to any irregularity, such as is now under consideration. Purchasers should be secure in their titles, who buy without notice of such irregularity, where every thing appears by the record, to have been legally conducted. Whether this objection can be taken collaterally, or whether only directly, upon motion to set aside the execution, we do not decide, because we are of opinion, that there is a fatal defect in the levy, upon another ground.

The first act to be done by the officer, in extending an execution upon real estate, is, to cause three disinterested freeholders to be sworn as appraisers. The statute points out how they are to be designated, in which the creditor, the debtor and the officer have a part to perform; but the duty of causing them to be sworn is the first, which is specially and distinctly enjoined upon the officer. We are of opinion, that until this is done, the levy cannot be considered as commenced. Indeed it might not be going too far to hold, that the first step in extending an execution upon any particular real estate is, when it is shown to the appraisers; for there is no designa-

tion of the land to be appraised, in the oath administered. The authorities, cited by the counsel for the demandants, sufficiently show that the return of the officer, whether true or false, is conclusive as to what is done under the execution; and is the only evidence, which can be received. But it is not evidence of the time of the decease of the judgment debtor. That is a fact which may be proved *in pais*. In the present case it is agreed, that the judgment debtor deceased on the twenty seventh day of *April*, 1831. By the officer's return it appears, that the appraisers were not sworn, until the thirtieth of the same month. It results that the levy upon the land in question, not having been commenced until after the decease of the judgment debtor, was not effectual to transfer the title from him to the judgment creditor. The demandants making claim only as devisees under him, there must be

Judgment for the tenants.

ELDEN *petitioner vs.* COLE.

The *Stat.* 1821, *ch.* 67, regulating reviews, does not apply to a judgment rendered in the Court of Common Pleas, upon demurrer, from which an appeal was claimed, but by mistake was not entered, the remedy, if any, being by writ of error.

THIS was a writ of *scire facias* against the petitioner, as indorser of a writ, to which he demurred specially in the court below; and the demurrer being overruled, and judgment rendered for the plaintiff, he appealed to this Court, but by mistake his appeal was not entered; for remedy of which he now applied for a writ of review.

MELLEN C. J. delivered the opinion of the Court at the following *May* term in *Kennebec*.

On examination of the petition and of the judgment complained of, it appears to have been rendered upon a special demurrer to the declaration and joinder. The decision of the Court of Common Pleas, overruling the demurrer, is considered by the petitioner as erroneous; and as, by mistake, his intended appeal from the judgment below was not entered, he prays for a review of the cause that he may have justice done him by a revision and correction of the decision of the court as to the sufficiency of the declaration. On examining our Statute of 1821, *ch.* 67, we are satisfied it was never intended to embrace such a case as this. The object was to provide a mode for an examination or a re-examination of the facts on which causes depend. It provides that on the trial upon review, either party may offer any further evidence. It speaks of an increase or diminution of damages, &c. Indeed this question has been distinctly settled in the case of *Sturdivant v. Grecly & al.* 4 *Greenl.* 534. A writ of error is the proper remedy for obtaining a correction of the errors on the record, if there are any. It would be inexpedient in such a case as this to grant a review, even were it a proper course of proceeding; for after a trial on the review, a writ of error would lie, in the same manner as it will now.

Review not granted. No costs allowed to respondent.

FULLER *vs.* McDONALD, *adm'r.*

If the payee of a negotiable note indorses his name in blank on the back, he thereby assumes only the legal liability of an indorser, depending on written evidence, which cannot be varied by parol.

But parol evidence is admissible to show that the right to demand and notice was waived by the indorser.

It is not necessary that such waiver be positive. It may result by implication, from usage, or from any understanding between the parties which is of a character to satisfy the mind that a waiver was intended.

THIS was an action of *assumpsit* by the indorsee against the administrator of the late Gen. *John M'Donald* as indorser of a promissory note, of the following tenor:—"*Limerick*, *April* 8, 1820. For value received I promise to pay *John M'Donald* or his order three hundred and twenty-one dollars and forty-six cents on demand with interest. *Davenport Tucker.*" At the bottom of the note was the following memorandum;—"The indorser guarantees the eventual payment of the above note."—On the back were these indorsements;—"20 *April* 1820, *pr.* receipt—Received one hundred dollars, and a receipt given for the same. $100.—15 *September*, 1826. Received on this eleven dollars 94-100 being an error and interest on note given up. $11,94.—And underneath—"*John M'Donald.*"—The declaration contained a second count for money had and received.

At the trial, which was before the Chief Justice, the plaintiff offered the depositions of *James Means*, with the note annexed, and of *Robert M. Barnard;* and the depositions of *Earl Sturtivant*, with a memorandum annexed, and of *Eleazer Howard, Jr.*; to the admission of each of which the defendants objected, but the objections were overruled.

Means testified that in the latter part of the year 1827, *Tucker* being in *Boston*, he presented the note to him and requested payment; to which *Tucker* replied that he was then unable to pay it, but thought he should be in the spring. *Means* then requested

Sturtivant to take notice of what was said, and make a memorandum of it, which he did.

Barnard testified that in *October* 1825, he received the note of *M'Donald* in payment of a debt which the latter owed him; *M'Donald* at the same time saying that *Tucker* would pay the note the next time he came to *Boston*, which was expected to be the next spring; and if he did not, that he, *M'Donald*, would pay it the next time he came to the city;—that he told *M'Donald* that he would not take the note unless he would agree to those terms, to which he assented;—of which the witness directed his clerk, Mr. *Howard*, to make a memorandum;—that the next time he saw *Tucker* he requested payment of the note, and *Tucker* replied that he had the money of Gen. *M'Donald* under particular circumstances, that he could not pay it then, and should not until he could make it convenient. *Tucker* further stated that there was an error of $11,94 in the note. In *September* 1826, after the death of the indorser, the witness stated these facts to his administrator, who corrected the error by paying the amount in money, which was indorsed on the note, at the same time giving the memorandum annexed to *Sturtivant's* deposition. In the spring of 1827, *Barnard* failed, and the note was transferred, with other effects, to his assignees, of whom the plaintiff was one. In a second deposition *Barnard* testified that he had no interest in this suit; and annexed a copy of the assignment to his creditors, from which it appeared that they accepted the property assigned, in full of their respective demands, and discharged him from all further claims.

Sturtivant testified that the note was in the hands of the assignees on the twenty-eighth day of *December* 1827, at which time payment was demanded of *Tucker*, who promised to pay the note in two or three months; of which, at their request, the witness made a memorandum, on the back of an original paper signed by the present defendant, and annexed to his deposition, in these words: "*Boston, Sept.* 15, 1826. *Memorandum*, that I, as administrator of the goods and estate which were of *John M'Donald*, late of *Limerick*, in the county of *York*, and State of *Maine*, deceased, agree

to guarantee the eventual payment of a note which my father sold to *R. M. Barnard*, against *Davenport Tucker*, dated *Limerick*, *April* 8, 1820, which was the agreement of my father. *John McDonald*, administrator."

Howard testified that he was present at the indorsement of the note to *Barnard*, and recollected the facts as the latter had stated them in his deposition;—that he made the memorandum on the bottom of the note at *Barnard's* request;—and that he was also present in *Sept.* 1826, at the conversation testified to by *Barnard*, between him and the administrator, who thereupon, in his presence, made the memorandum annexed to *Sturtivant's* deposition.

It was admitted that Gen. *M'Donald* died *March* 16, 1826; and that in the summer of 1829 the plaintiff's attorney called on the defendant for payment of the note, who requested him to sue *Tucker*, which he did, and obtained judgment, but the execution was returned unsatisfied.

Whereupon a nonsuit was entered, for the purpose of referring to the court the question of the defendant's liability, he agreeing to be defaulted, if adjudged liable to pay the note.

Appleton and *M. Emery*, for the plaintiff, cited the following authorities to show that the action was rightly brought in the name of *Fuller*: *Bingham v. Marean*, 7 *Pick.* 40; *Cole v. Cushing*, 8 *Pick.* 48; *Bayley on bills*, 67; *Frye v. Baker*, 4 *Pick.* 382; 2 *Stark. Ev.* 247; *Blakely v. Grant*, 6 *Mass.* 386; *Upham v. Prince*, 12 *Mass.* 14; *Smith v. Clark*, 1 *Esp.* 180; *Lovell v. Evertson*, 11 *Johns.* 52; *Williams v. Matthews*, 3 *Cowen*, 252; *Thompson v. Robinson*, 4 *Johns.* 27; *Bank of Utica v. Smith*, 18 *Johns.* 230; *Dean v. Hewitt.* 4 *Wend.* 257; *Cobb v. Little*, 2 *Greenl.* 261; 3 *Greenl.* 84;—and that it was apparent that notice was waived by the indorser; or, if not, yet upon the whole evidence the plaintiff was entitled to recover on either count: *Taunton v. Richardson*, 5 *Pick.* 436; 2 *Stark. Ev.* 273, 275, *note*; *Burrill v. Smith*, 7 *Pick.* 291; *Hill v. Buckminster*, 5 *Pick.* 391; *Baxter v. Penniman*, 8 *Mass.* 134; *Brown v. Anderson*, 13 *Mass.* 203; *Emerson v. Thompson*, 16 *Mass.* 439; *Atkins v. Sawyer*, 1 *Pick.* 192; 1 *Phil. Ev.* 74; *Pierson v. Hooker*, 3 *Johns.* 68; *Durgee v. Den-*

nison, 5 *Johns.* 248; *Agan v. McMannus*, 11 *Johns.* 180; *Hall v. Freeman*, 2 *Nott & McCord*, 479; *Gibbon v. Cogan*, 2 *Campb.* 183; 6 *East.* 16; 7 *East.* 231; *Gunson v. Mott*, 8 *Serg. & Lowb.* 478; *Boyd v. Cleaveland*, 4 *Pick.* 525; *Barker v. Parker*, 6 *Pick.* 80; *Whitwell v. Johnson*, 17 *Mass.* 449; *Hopkins v. Liswell*, 12 *Mass.* 52; *Peacock v. Rhodes*, 2 *Doug.* 363; *Grant v. Vaughan*, 3 *Burr.* 1516; *Ellis v. Wheeler*, 3 *Pick.* 18; 2 *Phil. Ev.* 13, 14, 21; *Dunlop v. Shearer*, 1 *Cranch*, 418; *Bayley on bills*, 244—6; *State bank v. Hurd*, 12 *Mass.* 172; *Chitty on bills*, 170. That the want of privity was no valid objection against the plaintiff's recovering on the money count: *Wilde v. Bishop*, 4 *Pick.* 421; *Hill v. Ely*, 5 *Serg. & Rawle*, 363; *Davenport v. Mason*, 15 *Mass.* 85; *Barker v. Prentiss*, 6 *Mass.* 430; *Little v. Blunt*, 9 *Pick.* 488. And to the competency of the evidence objected to: 1 *Phil. Ev.* 226; *Ely v. Forward*, 7 *Mass.* 25; *Phillips v. Bridge*, 11 *Mass.* 242; *Bean. v. Bean*, 12 *Mass.* 20; *Locke v. N. Amer. Ins. Co.* 13 *Mass.* 61; *Cotchil v. Discon*, 4 *McCord*, 311; 5 *Wend.* 55; 2 *Stark. Ev.* 746; *Henry v. Morgan*, 2 *Bin.* 497.

J. & E. Shepley, for the defendants, argued that the evidence furnished nothing to take the case out of the ordinary rules applicable to indorsed notes; and that therefore the defendant was not liable, for want of seasonable demand and notice. *Groton v. Dalheim*, 6 *Greenl.* 476. If it is any thing else, it is a contract of guaranty; which was a promise to *Barnard* alone, and not assignable, so as to entitle this plaintiff to sue in his own name. *Scott v. Mc Lellan*, 2 *Greenl.* 203; *Chitty on bills*, 448. Whatever it was, the proof is in writing, by the indorsement of the party's name on the back of the note. Over this, the holder may write whatever the law implies by the act of transfer, but nothing more. To admit parol evidence to set up any other contract, as made at the same time, would be to charge the party in the double capacity of indorser and guarantor; and would violate the rule which does not admit parol evidence to contradict or add to a written contract. *Barry v. Morse*, 3 *N. Hamp.* 132; *Bayley on bills*, 336; *Hopkins v. Liswell*, 12 *Mass.* 54; *Field v. Nickerson*, 13 *Mass.* 138; *Renner v.*

Bank of Columbia, 9 *Wheat.* 587; *Free v. Hawkins*, 8 *Taunt.* 92; *Britton v. Webb*, 2 *Barnw. & Cresw.* 483; *Moies v. Bird*, 11 *Mass.* 440. But if the parol evidence is admitted, it establishes a contract altogether collateral, upon which here is no proper count to entitle the plaintiff to recover. *Dow v. Tuttle*, 4 *Mass.* 414. And being a conditional undertaking, the defendant is absolved by the laches of *Barnard*. *Oxford bank v. Haines*, 8 *Pick.* 426; *Cobb v. Little*, 2 *Greenl.* 261; *Lincoln & Kennebec bank v. Page*, 9 *Mass.* 157; *Berkshire bank v. Jones*, 6 *Mass.* 524; *Thornton v. Winn*, 12 *Wheat.* 183; *Garland v. Salem bank*, 9 *Mass.* 408; *Trimble v. Thorn*, 16 *Johns.* 152; *Griffin v. Goff*, 12 *Johns.* 423; *Miller v. Hackley*, 5 *Johns.* 375; *Tower v. Durell*, 9 *Mass.* 332; *Warder v. Tucker*, 7 *Mass.* 448.

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

WESTON J. The deposition of *James Means*, and the first deposition of *Robert M. Barnard*; also a memorandum signed by the defendant, and another by *Earl Sturtevant*, used at the trial, were objected to by the counsel for the defendant. The first deposition of *Barnard*, taken by itself might be liable to objection, as it justified the inference that he was interested in the suit, and ultimately to be benefited by it, if the plaintiff prevailed. But laying his deposition out of the case, the same facts are testified to by *Eleazer Howard*. Besides, in *Barnard's* second deposition, given after all interest on his part had ceased, he reaffirms the facts stated in the first; thus removing every objection to his testimony.

It has been urged, that the liability of the intestate and of the defendant, if liable at all, is upon a contract of guarantee. And that if the plaintiff from the evidence, if competent, could maintain an action upon such a contract, he has no count charging the defendant upon this ground. An indorser is conditionally liable; so is a guarantee; but the latter may be holden, where the former would not be. The liability of a guarantee, and the steps necessary to charge him, have been well set forth and illustrated in the case of

the *Oxford bank v. Haynes*, 8 *Pick.* 423. He is generally either the payer of a note not negotiable, or some person not named in the body of the note or other instrument, of which he becomes the guarantee. We are not aware of any case in which the payee of a negotiable note has been charged as a guarantee, who indorses his name upon the note. If however he distinctly and expressly engages as such, there does not appear to be any objection to his being so charged. But it is a contract of a specific character, governed by its own principles. And there is certainly great weight in the position, that upon such an engagement, he cannot be held as indorser, relying upon this contract as evidence of a waiver of demand and notice. It would be confounding principles well settled, which it is important to preserve. But if, as was the present case, the payee of a negotiable note indorses it in blank, he thereby assumes a legal liability as indorser, depending on written evidence. It would affect his liability, and materially vary his undertaking, if it could by parol evidence be converted into a contract of guarantee. If the depositions and memoranda objected to at the trial, were introduced and relied upon for this purpose, changing as they would the legal effect of a written contract, they are not warranted by the law of evidence, and are clearly inadmissible. And we are well satisfied that if the intestate was not liable as indorser, neither he, nor the defendant representing him, can be charged in this action. If he was, either count in the plaintiff's declaration is sufficient. Upon this point we entertain not the least doubt. The note was negotiable. The intestate was the payee; and he indorsed it in blank. Nothing was written over his name, at the time or since; nor does it appear that he requested or authorized the making of any memorandum on the note. That was made by *Howard*, under the direction of *Barnard*, as their sense of what the intestate had agreed. It constituted no part of his contract. By his name on the back in blank, he assumed the liability of an indorser of a negotiable note, made payable to himself. The memorandum is not in itself evidence; but may be used by the witnesses to refresh their memory. Unless demand and notice was waived by the indorser, there is no sufficient evidence of either to charge him. The case therefore

turns upon the question, whether it does appear by competent proof, that demand and notice was waived. This may be proved by parol. It does not change the character of the contract, or convert it into one of a different species. It only relinquishes a condition, to which the party would otherwise have been entitled. It does not appear that *Howard* in his memorandum on the note, used the language of the intestate. What he did agree, is stated by *Howard* and by *Barnard* in their depositions. They state from recollection, agree in their testimony, and neither appears to be at a loss as to what passed at the time of the indorsement. The intestate was indebted to *Barnard*. The note, payable on demand, had been then given over five years. It had been some time prior in the hands of *Barnard*. The intestate urged him to receive it in payment, and pass it to his credit. *Barnard* was reluctant. It had been long due; and it is evident from the testimony that he relied only upon the credit of the intestate. But upon the urgent solicitation of the latter, and upon his express assurance and engagement, that if the maker did not pay the note the next time he came to *Boston*, he, the intestate, would the next time he came; *Barnard* received the note, and passed it to his credit. We are of opinion that the inference reasonably and justly to be drawn from this testimony is, that the legal steps of demand and notice, otherwise necessary to charge an indorser, were waived by the intestate. To hold his estate discharged from this liability would, upon these facts, unjustly throw a loss upon *Barnard* or his assignee, without any fault or negligence on their part. *Barnard* did, in relation to the note, every thing the parties could have contemplated. *Howard* thinks he wrote to the maker, at the time of the indorsement. At any rate he is sure that he saw the note when he came to *Boston*, and that payment was demanded of him by *Barnard*. He did not pay. Then the intestate was to pay when he came to *Boston;* and we think the fair implication is, that he waived notice of the failure of the maker to pay, until he could be apprized of it on his arrival in *Boston*. *Boyd v. Cleaveland*, 4 *Pick.* 525, is a strong authority for the plaintiff; and it is a case decidedly in point. It is not distinguishable from the case before us. It did not convert a contract of guarantee into evidence of

a waiver of demand and notice. *Cleaveland* was an indorser; not a guarantee. He could not be made such by parol; but from what passed between him and *Boyd*, when the latter received the note, he was deemed, and we think properly, to have waived his right to demand and notice. It is not necessary that such waiver should be direct and positive. It may result by implication from usage, or from any understanding between the parties, which is of a character to satisfy the mind that a waiver was intended.

The nonsuit is taken off, and a default is to be entered.

Defendant defaulted.

NOWELL *appellant*, *&c. vs.* NOWELL.

The power vested in this Court to grant license to sell real estate for the payment of debts is discretionary, not imperative.

License to sell real estate for the payment of debts will not be granted where the claims appear to be barred by the statute of limitations.

Nor will license be granted to sell real estate to defray charges of administration, under *Stat.* 1821, *ch.* 51, *sec.* 68, after the lapse of four years from the grant of letters of administration, and a reasonable time thereafter to settle the administration account.

Whether license to sell to defray charges of administration only, can be granted where the testator died before the separation of *Maine* from *Massachusetts*, and the rights of heirs and creditors were vested under the laws of the latter State; —*quære.*

License under the foregoing circumstances having been granted by the Judge of Probate, from whose decree the heirs did not appeal, having had no knowledge of the pendency of the petition, nor of the passage of the decree, an appeal was granted on his application to this Court, under *Stat.* 1821, *ch.* 51, *sec.* 65, and the decree reversed, notwithstanding the land had in the mean time been sold under the license.

THE material facts in this case, except that the land was sold *Dec.* 24, 1829, under the license granted by the Judge of Probate, will be found in the opinion of the Court.

J. Shepley, for the appellants, cited *Ex parte Allen*, 15 *Mass.* 58; *Thompson v. Brown*, 16 *Mass.* 180; *Ex parte Richmond*, 2 *Pick.* 567; *Heath v. Wells*, 5 *Pick.* 140.

Appleton, for the appellee.

PARRIS J. delivered the opinion of the Court in *April* term 1833, the cause having stood over for advisement.

This case comes before us as the Supreme Court of Probate on appeal from a decree of the Judge of Probate for this county granting license to the petitioner, the present appellee, as administrator *de bonis non* on the estate of *John Nowell* deceased, to sell the real estate of said deceased for the payment of the charges of administration. The appeal was granted by this court upon the application of the appellant preferred under the 65th *sec.* of the "Act to regulate the jurisdiction and proceedings of the Courts of Probate;" it appearing that the appellant was not present when the decree was passed, and had no notice in fact of the pendency of the petitioner's application for license, and that she had not lost her appeal by her own neglect. The decree appealed from was rendered without any opposition by those adversely interested, and probably passed rather as a matter of course, it appearing that a balance was due the administrator, and that there remained no personal estate of the intestate with which to pay it. The material facts in the case are these: *John Nowell*, the intestate, deceased in 1810, or previous to that time. On the 16th of *July*, 1810, administration on his estate was committed to *James Nowell*. On the 13th of *June*, 1820, *John Nowell*, the petitioner, was appointed administrator *de bonis non*. On the 14th of *June*, 1825, he settled his first account of administration, the character of which will be considered hereafter. On the 5th of *September*, 1825, the real estate, by decree of the Judge of Probate, was divided among the heirs. In *September*, 1829, the petitioner settled his second account of administration; and in *November*, 1829, on his application, the decree appealed from was rendered, granting him license to sell so much of the real estate of the intestate as would be sufficient to satisfy the administration account.

By the 68th section of the act above referred to, (Statutes of Maine, *ch.* 51,) Judges of Probate of the respective counties "have the same authority which the courts of common law have, upon petition, to empower and license executors, administrators, &c. to sell the real estate of their testators, intestates, &c. respectively for the payment of just debts and legacies, with incidental charges, and charges of administration." We may, therefore, in examining this case consider it as if the application for license to sell was now originally before us, as a court of common law.

The power of the common law courts to authorize a sale of the real estate of a deceased person for the payment of his debts is contained in the second section of the "act respecting executors, administrators and guardians, and the conveyance of real estate in certain cases," (Maine Laws, *ch.* 52,) which provides that when the goods and chattels belonging to the estate of any person deceased shall not be sufficient to answer his just debts and legacies, upon representation thereof, and the same being made to appear to the Supreme Judicial Court in any county in this State, &c. the said court is authorized to empower and license the executor or administrator of such estate to sell all or such part of the houses, lands or tenements of the deceased as may be necessary to satisfy his just debts and legacies, with incidental charges, and charges of administration.

Is the real estate of *John Nowell* deceased, liable, or ought it to be now holden for the payment of the administrator's account? It is to be kept in view that the intestate deceased in 1810, or before that time, and his estate was then to be administered under the laws of Massachusetts.

Upon all his real estate his creditors had a lien for the payment of their debts, provided his personal estate was insufficient for that purpose. Subject only to this lien the estate passed to his heirs, and the administrator had no power or control over it. The expenses of administration were a charge upon the personal estate, and out of that only could the administrator be remunerated. They formed no lien upon the real estate. That passed to the heirs free from any claim that might arise for charges of administration.

If the personal estate was insufficient to pay the debts, after deducting the expenses of administration, so much of the real estate might be sold as would discharge the deficiency; but when the debts were paid, the lien upon the land, created by statute, was discharged, and the administrator had no power to receive it, by incurring further expenses in the administration. The language of the statute of Massachusetts providing for the sale of real estate by executors and administrators authorises license to sell "so far as shall be necessary to satisfy the just debts which the deceased owed at the time of his death with incidental charges," but not including charges of administration, as is the case in the statute of Maine above cited.

If the just debts of the intestate were paid by *James Nowell*, the first administrator, then clearly by the law of Massachusetts under which he administered, the real estate was discharged from all lien which the creditors or the administrator ever had upon it, and the lien could not be revived on the appointment of the administrator *de bonis non*. The real estate was, therefore, under the laws of Massachusetts, never assets in his hands, and he could have no authority to dispose of it. Whether the just debts were or were not paid by the first administrator does not distinctly appear in the case. He was appointed in 1810, and ten years intervened before the appointment of the administrator *de bonis non*, a time amply sufficient and far exceeding that contemplated by law for the entire settlement of the most complicated estate.

We find in the case a report of commissioners "appointed to receive and examine and audit the accounts of creditors to the estate of *John Nowell* deceased under the administration of *John Nowell* administrator *de bonis non*," dated *February* 18, 1822, and accepted at a Probate Court on the 18th of *March* following, in which the commissioners report as due to *Abigail Emerson* $333 84-100 for balance due on note dated *February* 25, 1806. To *Ebenezer Simpson* $126 31-100 for balance due on note dated *March* 8, 1805, and to *Mark McIntire* $33 13-100 for balance due on note dated *January* 9, 1809. From this report it might be inferred that there were debts remaining unpaid by the first administrator. But

if it were so, and they were payable at the time of the decease of the intestate, the statute of limitations in favor of executors and administrators was a complete protection to the administrator *de bonis non*, inasmuch as nearly twelve years had then elapsed since the appointment of the first administrator. Or if the debts were not payable when the intestate deceased, the administrator *de bonis non* could shield himself under the same statute, more than seven years having intervened between the report of the commissioners and the application for license to sell, he being administrator during all the time. But the application is not to sell to pay these debts. We hear no more of them, nor of a debt of $2808 reported by the same commissioners as due from the estate of the intestate on the accounts of *James Nowell*, the first administrator. The commissioners report them due in *February*, 1822. Their report is accepted in *March*, 1822, and from that time to this we hear no more of these claims, although *John Nowell* is all the while administrator, and in the mean time exhibits and settles two accounts at the Probate office. These claims, if ever due, are barred, and no court ought to grant license to sell real estate to pay them, even if the estate remained undivided and in the same situation in which the intestate left it.

In the accounts settled by the administrator *de bonis non*, and for the payment of which he now asks license to sell real estate, the estate is charged $371 commencing with his first appointment in *June*, 1820, and ending *September*, 1829. The whole account is charging the estate but giving no credit. In *August*, 1820, there is a charge of $9 paid appraisers, and three dollars for attending with appraisers, and five dollars for attending Probate court to hand in inventory; but no credit has ever been given for, or any account rendered of the disposition of what was appraised and inventoried. So as to the commissioners. There are charges amounting to $26 for the administrator's attendance with them, and also a charge for their services, but it does not appear by the administrator's account that he has ever paid a dollar of the sums reported by them to be due from the estate. The whole account is for his personal services in attending Probate courts, before commissioners and appraisers, for

monies paid for probate fees, attornies', officers', commissioners' and appraisers' fees, and for prosecuting and defending law suits. Not a dollar collected or credited, not an article of property accounted for, not a debt paid. This is such an account as most clearly would not be chargeable upon the real estate, under the statute of Massachusetts before referred to; and that statute was in force as law in Maine for nearly a year after the petitioner was appointed administrator. Whether the statute of Maine, which makes real estate liable for the charges of administration as well as the payment of debts, is applicable to a case where the administration was granted under the laws of Massachusetts, like the case before us, we do not feel called upon to decide.

The power of this court to grant or refuse a license to sell is discretionary, not imperative. The words of the statute imply such discretion. This court is authorised to grant license, not required, and the Probate court is invested with the same discretionary power. It is a power which is to be exercised cautiously and upon thorough examination, inasmuch as by its exercise the real estate, which otherwise would descend to the heirs, is placed at the disposal of the Administrator. The law of Maine *ch.* 52, *sec.* 1, has made all the real estate of which any person may die seized liable for the payment of his debts and charges of administration. But to the duration of this liability there certainly should be some limitation. It is unnecessary for the accomplishment of the object of the law, and it would be extremely inconvenient and embarrassing to heirs, that this lien, so extensive and paramount in its effect, should remain unlimited;—that after all the debts were paid, the administrator might still delay closing his administration until the real estate had been divided, and perhaps transferred, and then enforce his lien to the injury of innocent and unsuspecting purchasers. It is to prevent such mischief that the discretionary power of the court, is to be invoked to refuse license to sell; and if inconvenience and loss follow such refusal, they will fall where they ought, upon him who has been slothful, and not upon the heir or the unsuspecting assignee.

The law has fixed a period, by the expiration of which it seems to be contemplated that estates should be settled and heirs left in the quiet possession of their inheritance, undisturbed by either creditor or administrator. By statute no executor or administrator can be holden to answer to any suit that shall be commenced against him, in that capacity, unless the same shall be commenced within the term of four years from the time of his accepting that trust. This statute was intended for the benefit of heirs, that they might be quieted by a speedy settlement of estates in which they are interested, and the courts of Massachusetts whose statutes upon this subject are very similar to ours, have uniformly refused to grant license to sell real estate to pay debts after the expiration of the four years, unless extraordinary circumstances rendered it proper. As this is the period beyond which the administrator is no longer liable for the payment of debts, it is to be expected that his administration will speedily thereafter be brought to a close, unless some extraordinary circumstances render it necessary to keep it open a further time. If on seasonably closing his administration, either at the expiration of the four years, or within a reasonable time thereafter, it should be found that the personal assets remaining in his hands were insufficient to satisfy his administration account, the real estate, under our statute, might, at the discretion of the court, be holden for the deficiency.

We will now apply these principles to the facts in the case. The estate of the intestate, having been under previous administration for ten years, was, in *June* 1820, committed to the petitioner, as administrator *de bonis non*. After having been under his administration upwards of five years, a decree was passed in the probate court on the 5th of *September* 1825, dividing the real estate among the heirs. Of the proceedings preparatory to this division the petitioner had notice, as he has charged in his account in *June* 1825, five dollars for attending probate court about the division of the real estate;—and by another charge it appears that he was present at the probate court when the decree was made. And yet he raises no objection to the division, nor did he interpose any claim to

the real estate as liable for the payment of the charges of administration, although his first account had some months before been allowed by the probate court.

Thus, after the estate had been more than fifteen years under administration the heirs come into possession of their inheritance in severalty, as well they might. The administrator still lies by more than four years longer, permitting the heirs to remain in undisturbed possession, without any intimation of his claim, or any attempt to enforce his supposed lien upon the real estate, until *November* 1829, when he prefers to the probate court the application for license to sell, which is now the subject of consideration. At that time more than nineteen years had elapsed since the first administration was granted to *James Nowell*, and more than nine years since administration *de bonis non* was granted to the petitioner.

The real estate had long been discharged from all liability for the payment of the debts of the intestate. It was not by law liable for the charges of administration under the first administrator, nor for more than a year after the appointment of the petitioner; and if it became liable under the revised statute of Maine, which, situated as this estate was, is by no means clear, we think the course pursued by the petitioner has been such as to give him now no claim upon the real estate for the payment of his account; or, at least, to render it improper for the court, at this remote period, to exercise its discretionary power in his favor to the manifest injury of the heirs.

The decree of the probate court is, therefore, reversed.

Hacker *vs.* Storer *& al.*

The grantee in a deed of conveyance brought an action of covenant against a remote grantor, alleging a breach of the covenants of seisin in fee, and good right to convey, as well as of the covenant of warranty. To which the defendant pleaded, admitting that he had no right to convey, at the time of conveyance, and that his immediate grantee, under whom the plaintiff claimed, took nothing by the deed. The plaintiff replied that the defendant was seised in fact at the time of the conveyance, though not in fee and of right; and that such seisin passed by the deed to his immediate grantee; which was traversed, and issue taken thereon.

It was held that under this issue no evidence was admissible to prove a breach of the covenant of warranty; and that the plaintiff could not recover on the other covenants, in his own name, as assignee, against his own allegation that they were broken as soon as made.

This was an action of covenant, in which the plaintiff declared upon the covenants in two deeds of conveyance, with general warranty in the usual form, made *May* 11, 1825; by which the defendants conveyed certain real estates in *Kennebunk* to one *Jesse Varney*, from whom by certain mesne conveyances, title deeds had passed to the plaintiff, who claimed as assignee of the covenants declared on. The first tract was described as lying on the east side of *Mousum* river, bounded by the bank of the river, by the post road, and by the lands of divers persons therein named; and containing eighty eight acres and one hundred and seventeen rods, exclusive of "a town road which was originally granted from said post road and adjoining the original bank of said river, to the landing;" together with some other exceptions. The second tract was part of a mill lot with the grist mill thereon, standing on the east side of the same river, near the bridge, and adjoining the road.

In each of the two counts the plaintiff alleged a breach of the covenants of seisin in fee, freedom from incumbrances, and good right to sell and convey, in each of the deeds of the defendants, as committed at the time of making the deeds. In the first count he also alleged a subsequent breach of the warranty, in an eviction of

himself from half of the grist mill by one *George Lord*, under a writ of *habere facias possessionem;* and in the second he alleged a similar breach, by an ouster of himself from all the premises by certain persons named, under an elder and better title.

The defendants pleaded, first, *non est factum;* and secondly, a general performance of the covenants; on both which issues were joined to the country. Thirdly, that as the second tract, and so much of the first tract as lies eastwardly of the town road mentioned as running along the bank of the river, they were lawfully seised in fee thereof by a good and indefeasible title, at the time of making the deeds, by virtue of which the same seisin and title passed to *Varney*, their grantee; and that as to the residue, (meaning the parcel between the road and the thread of the river,) they had no right or title to the same at the time of making the deeds, and that *Varney* thereby took nothing. To this the plaintiff replied that as to this residue, at the time of making the deeds, the defendants were seised in fact, though not in fee and right; and that *Varney* entered under his deeds, and thereby acquired the same seisin. The defendants rejoined by a traverse of this alleged seisin in fact, tendering an issue to the country, which was joined.

At the trial, before the Chief Justice, it was admitted that the only question between the parties was whether the defendants were seised in fact of the whole grist mill and privileges, and of the eastern half of *Mousum* river, to the middle of the channel, at the time of the grant to *Varney*. The plaintiff proved that the eighty eight acre lot was never occupied home to the river the whole distance; that the road was always fenced and kept open a part of the way down to the landing; and that the residue was inclosed in common with the defendants' pasture, by an arrangement made between them and the selectmen of the town; that the defendants ran their fence to the river to prevent their cattle from escaping; that the opposite or western bank of the river was owned by one *Gilpatrick*, who kept a fence on the bank, through which the cattle of the defendants, crossing the river, broke and entered in the year 1824; whereupon the defendants directed their tenant, with the consent of *Gilpatrick*, to repair his fence, which was done. There was some

evidence offered to prove a seisin in fact of the whole grist mill lot; but it was only hearsay, and of the most shadowy character.

The plaintiff also offered in evidence a copy of the judgment recovered by *George Lord* against him for half of the grist mill; which the Chief Justice rejected as irrelevant to the issue. He also offered proof of his damages, which the Chief Justice also rejected; and directed a nonsuit; being of opinion that the evidence was insufficient to prove a seisin in fact as alleged in the replication; and that therefore no estate in the residue in question passed to *Varney* by the deeds. The nonsuit was entered subject to the opinion of the Court upon its propriety, and upon the ruling of the Chief Justice at the trial.

N. Emery and *Hussey*, for the plaintiff, cited *Wyman v. Ballard*, 12 *Mass.* 304; *Sprague v. Barker*, 17 *Mass.* 586; *Cutts v. Spring*, 15 *Mass.* 135; 7 *D. & E.* 537; *Brimmer v. The Prop'rs. of Long Wharf*, 5 *Pick.* 135; *Lunt v. Holland*, 14 *Mass.* 149; *Hatch v. Dwight*, 17 *Mass.* 289; *Kennebec Prop'rs. v. Springer*, 4 *Mass.* 416; *Boston Mill Corp. v. Bulfinch*, 6 *Mass.* 229; *Little v. Palister*, 3 *Greenl.* 6; *Hamilton v. Cutts*, 4 *Mass.* 349; *Hall v. Leonard*, 1 *Pick.* 27; *Wilkinson v. Scott*, 17 *Mass.* 249; *Fisher v. Dunning*, 1 *Hen. & Munf.* 563; *Backus v. McCoy*, 3 *Ohio Rep.* 218.

Dane and *E. Shepley*, for the defendants, cited *Peaceable v. Reed*, 1 *East.* 568; *Doe v. Prosser*, *Cowp.* 217; 3 *Dane* 478; 6 *Mass.* 229; 4 *Mass.* 416; *Commonwealth v. Dudley*, 10 *Mass.* 403; *Cushman v. Blanchard*, 2 *Greenl.* 266; *Langdon v. Potter*, 3 *Mass.* 219; *Codman v. Winslow*, 10 *Mass.* 251; *Newhall v. Wheeler*, 7 *Mass.* 199; *Pray v. Pierce*, 7 *Mass.* 381; *Tufts v. Adams*, 8 *Pick.* 549.

PARRIS J. delivered the opinion of the Court.

The first question presented by the report is as to the proof of the defendants' seisin of that portion of the premises described in their third plea.

Upon this point the only proof that was introduced came from the

plaintiff; by which it appeared that the defendants owned and occupied a lot bounded by a fence which separated it from a road running on the easterly bank of *Mousum* river. Who owned the fee in the land occupied as a road, does not appear. The case shows that the defendants did not claim it. They were bounded by the line of the road farthest from the river, and there was no proof of any occupancy or possession by them west of their line, excepting that a part of the road was for a time inclosed in common with the pasture, by arrangement between the defendants and the selectmen of the town. This and the repairing *Gilpatrick's* fence on the westerly bank of the river is far from proof of an appropriation or possession of the water privilege or any part of the river or the shore thereof. We see nothing in the evidence reported which looks like a seisin in fact by the defendants or any intention to occupy and improve the whole grist mill and privilege, and the eastern half of *Mousum* river to the channel at the time of making their deeds to *Varney*.

The next question is upon the admissibility of the rejected evidence. The plaintiff offered to prove an eviction by paramount title, to support the allegation of breach of the covenant of warranty, and also to prove the damages which he had sustained by reason of such breach. Such proof would have been relevant if he had succeeded in proving the defendants' seisin of the premises at the time of the execution of the deed; but failing to do this, the case left him nothing on which the covenant of warranty could operate. No land had passed by virtue of the deed, and consequently there was nothing to be defended.

Was the nonsuit properly ordered? Where the plaintiff does not set forth a good ground of action, the defendant is not bound to answer. So where the plaintiff wholly fails to prove his material allegations the defendant is not put to his proof but may call for a nonsuit. Where there is contradictory testimony it is the exclusive province of the jury to settle the facts. What was there to be settled by a jury in this case? As the issue was made up, it was incumbent on the plaintiff to prove that the defendants were seised in fact as he alleged. He did prove certain facts which were not de-

nied by the defendants. Whether those facts amounted to seisin was a question for the Court. The Judge ruled at the trial, and we think correctly, that they did not show a seisin in fact by the defendants, and of course they could not be required to defend further on the alleged breach of the covenant of warranty.

As to the covenants of seisin and good right to sell and convey, the plaintiff, as assignee had no such interest in them as could enable him to maintain an action in his own name for their breach. They were broken at the time of executing the deed to *Varney*, and the right to recover damages for their breach vested immediately in him, and could not be assigned so as to enable the assignee to maintain an action for their breach in his own name. This doctrine is supported by the uniform current of American authorities; and is too well settled here to be shaken by the recent decisions to the contrary in England.

The declaration and pleadings, in this case, present the litigating parties in somewhat of a novel situation. The plaintiff in alleging a breach of the covenant of seisin, and of good right to sell and convey, virtually alleges that the defendants were not seised in fact, for if so seised, whether by right or wrong, it would be sufficient to support these covenants. They are negatived in the declaration, that is, the declaration virtually alleges that the defendants were not seised in fact, and had not good right to sell and convey. The defendants, by their plea, admit that they had no such right. To this the plaintiff replies directly against the legal effect of his allegation in the declaration, that the defendants were seised in fact; and the defendants rejoin that they were not so seised. The result of these pleadings is such, that when the issue is formed, the plaintiff is in effect denying his own allegation, and the defendants admit it. The settled rule of pleading is that the replication must not depart from the allegations set out in the declaration, in any material matter, and the reason given for it is, that if parties were permitted to wander from fact to fact, and to supply a new cause of action as often as the defendant should interpose a legal bar to that which the plaintiff first set out, it would lead to endless prolixity.

If the covenants of seisin, and good right to sell and convey have been broken, as the plaintiff alleges in his declaration, they were broken at the time of the execution of the deed to *Varney*, and if so, no estate or interest passed to him or his assignees to which the covenant of warranty could be annexed. That covenant runs with the land conveyed, and descends to heirs, and vests in assignees with the land, whenever that passes. But when the covenant of seisin is broken, nothing passes by the deed, and, the *substratum* having failed, the covenant of warranty cannot descend to the heir, or vest in the assignee. It cannot run with the land, for none having been conveyed there is none for it to run with.

It is therefore manifest that if the defendants were not seised and had no right to sell and convey when they executed the deed, as the plaintiff alleges in his declaration, their covenant of warranty does not vest in the plaintiff as *Varney's* assignee. That being the case, the plaintiff, by his own showing, has no cause of action for breach of the covenant of warranty, for in the same count in which he alleges a breach of that covenant he also alleges a breach of the covenants of seisin and good right to convey, and the defendant admits it.

Motion to take off the nonsuit denied.

CASES

FOR THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF CUMBERLAND, MAY TERM, 1832.

BRADLEY *& al. vs.* CARY.

A trader in Maine being about to purchase goods in *Boston,* exhibited and delivered to the seller a letter from his friend in Maine, addressed to himself, containing among other things the following,—"For the amount of such goods as you wish to purchase on six months credit, not exceeding one thousand dollars, I will guaranty at two and a half *per cent;*"—upon the faith of which he obtained goods, giving therefor his promissory note payable in six months with grace.—It was held that this was not an authority to the purchaser to bind the writer at all events; nor was the purchaser thereby constituted his agent for the purpose of receiving notice of its acceptance; but that it was merely a case of collateral guaranty, in which seasonable notice of acceptance was necessary, in order to charge the guarantor.

Assumpsit on a letter of guaranty given by the defendant, under the following circumstances. *Alfred Randall* and *Calvin Gilson*, about the first of *January*, 1830, formed a secret partnership in retail trade, to be conducted in *Portland* in the name of *Randall* alone. They came together to *Boston*, with some letters of introduction, to obtain goods on credit; but not meeting with success, *Gilson* returned to *Portland* for the purpose of obtaining other let-

ters, and from thence forwarded to *Randall* the letter in question, which was in these words:—"*Portland, Jan.* 11, 1830. Mr. *Alfred Randall,* Sir, Having information from you by Mr. *C. Gilson,* who states that your introductions were not satisfactory to those you presented them to, and if the following should be of any service to you, you have the liberty to make use of the same. For the amount of such goods as you wish to purchase on six months' credit, not exceeding one thousand dollars, I will guaranty at two and a half per cent. Yours, &c. *Ezra Cary.*" Upon showing this letter to one of the plaintiffs to whom *Randall* had previously applied in vain for goods, he said he would put them up; and handed back the letter to *Randall*; but after the purchase was completed he asked for and received the letter, saying it might be as well for *Randall* to leave it, and inquiring who *Cary* was. The amount of the purchase was $964,52, for which *Randall* gave the plaintiffs his negotiable note payable in six months with grace. He told *Bradley* at that time that he must pay the two and a half per cent; to which *Bradley* replied that he would; or that it should be no expense to *Randall.*

Cary, in *Sept.* 1829, had sold out his stock of goods to *Gilson,* on credit; and *Randall* had been *Gilson's* clerk, till the new arrangement. There was a variety of evidence upon the point of notice to the defendant of the acceptance of the guaranty; resulting partly from declarations and conduct of *Cary,* and partly from admissions and conversations of *Bradley,* all which were left to the jury.

The counsel for the plaintiff contended, and requested *Weston J.* before whom the cause was tried, to instruct the jury,—1st, That by the terms of the letter of guaranty, and by the evidence in the case, *Randall* was the agent of *Cary* for all purposes touching the guaranty; that the guarantor is to look for notice only to the person to whom his letter was addressed, if it be addressed to any individual; and that in the present case notice to *Randall* was legal notice to the defendant.

2d. That by the terms of the guaranty, the premium of two and a half per cent. was to be paid by *Randall*; and that the agree-

ment of *Bradley* to exonerate him from the payment, gave *Cary* a right of action therefor against the plaintiffs.

3d. That if it was not to be paid by *Randall*, then it was payable by the plaintiffs, whose acceptance of the guaranty gave *Cary* a right of action against them for the amount.

4th. That if *Randall* was not *Cary's* agent, yet it was not necessary that notice to the latter should proceed from the plaintiffs; it being sufficient if, from any source, he had information that the guaranty was accepted.

But the Judge instructed the jury that if, from the evidence, they were satisfied that the guaranty was accepted, and that the defendant had notice of it, they should find for the plaintiffs; otherwise, for the defendant. And they returned a verdict for the defendant; which was taken subject to the opinion of the court upon the points made at the trial.

Greenleaf, *E. Shepley* and *Deblois* argued for the plaintiffs in support of the foregoing positions; insisting chiefly upon the first; that the letter was a general authority to *Randall*, to contract, in the defendant's behalf, with any seller of goods; that the defendant was bound, *ipso facto*, by the mere delivery of the goods upon the faith of the letter; which, as soon as it was acted upon, became, in effect, a direct and absolute promise to the plaintiffs; and that notice was necessary only where the undertaking was strictly a collateral guaranty, conditional in its nature, and addressed to the creditor; which was not the case at bar. *Grant v. Naylor*, 4 *Cranch.* 236; *Lanusse v. Barker*, 3 *Wheat.* 152 *note*; *Norton v. Eastman*, 4 *Greenl.* 521; *Seaver v. Bradley*, 6 *Greenl.* 60; *Reed v. Cutts*, 7 *Greenl.* 180; *Paley on Agency*, 199, 202; *Fitzherbert v. Mather*, 1 *D. & E.* 16; *Cowan v. Simpson*, 1 *Esp.* 290; *Erick v. Johnson*, 6 *Mass.* 193; *Train v. Gold*, 5 *Pick.* 380.

Longfellow and *Daveis* for the defendant.

Weston J. delivered the opinion of the Court at the next *May* term in *Kennebec*.

The counsel for the plaintiffs insists, that upon the transaction in question, no notice was necessary to charge the defendant. That

by the letter, *Randall* was made the agent of the defendant, with authority to bind him, and that if he made a contract for the defendant, his liability immediately attached; and that it should have been left to the jury, whether *Randall* did not so contract for the defendant, and as his agent.

Whatever contract *Randall* did make, he made on his own account. He purchased the goods, and gave his own note for the amount, in which no mention is made of *Cary*. There is no evidence that he made any contract in his behalf, or that he assumed so to do. It appears only that he showed the letter signed by *Cary* to the plaintiffs, and finally submitted it to their keeping. If then the letter authorised *Randall* to bind *Cary*, by a contract to be entered into as his agent, there is no evidence that such authority was executed.

But we are of opinion, that the only sensible construction, which can be given to the letter, upon which the defendant is sought to be charged, is, that it is a letter of guaranty. The introductory paragraph is addressed to *Randall*. What follows, he is authorised to use, if it might prove of any service to him, in aid of his credit. How was it to be used? By showing it to persons, who might be disposed to accept it. This *Cary* must have contemplated, and all who saw it, must have understood that he thereby pledged himself, that if *Randall* did not pay within the time stated, he would be answerable to the amount limited. And this, by the plain intendment of the letter, might be offered to any one, and be accepted by any one. "You," in the concluding paragraph, stands for *Alfred Randall*. The contract, according to its legal import, is proffered to any one, who was the vender of such goods, as *Randall* wished to purchase. And therein the defendant declares under his hand, that for the amount of such goods, as *Alfred Randall* may wish to purchase, on six months credit, not exceeding one thousand dollars, he will guaranty, at two and a half per cent. The operative word used, expresses the nature of the contract. It was a guaranty, collateral to the undertaking of *Randall*, who was to be accommodated with the credit. Such was the contract in form, in substance, and according to its legal effect; and reasonable notice

of its acceptance, should by law be given to the party to be charged. *Norton v. Eastman*, 4 *Greenl.* 521. *Seaver v. Bradley*, 6 *Greenl.* 60. This is not a case, in which we are called upon to determine what is reasonable notice. The jury have found that the defendant had no notice whatever. The law of the case requiring notice, would have been the same, if the defendant had not stipulated for a commission, as the condition of his undertaking. Generally the principal and the collateral contract depend on the same consideration; the credit given. But here the defendant claimed for himself a separate and distinct consideration. By whom was that to be paid? By the other contracting party, who claimed the benefit of the guaranty against the defendant. And if this was open to be explained by parol proof, *Randall* testified that the plaintiffs agreed, that the two and an half per cent. should be no expense to him. The commission required, is an additional reason, why reasonable notice of the acceptance should have been given.

It is urged that *Randall* was the agent of the defendant, and that notice to the former, was therefore notice to the latter. But *Randall* was no otherwise the agent of the defendant, than every bearer of a guaranty, given to sustain his credit, is the agent of the party entering into the collateral contract. We perceive nothing in this case to distinguish it from others, in which notice is required.

We are not dissatisfied with the verdict. There is no affirmative proof of notice; and little to justify the inference, that the defendant had been given to understand that the plaintiffs had accepted his guarantee. That the guarantee ever was accepted, is not free from doubt. It is true the plaintiffs declined to give *Randall* credit, until they were shown the defendant's letter. That was calculated to create a confidence that he was solvent, and would pay. They there saw, that the defendant did not regard the hazard as exceeding two and a half per cent. And they might thereupon think it not imprudent themselves to incur the hazard, and save the commission. Had *Randall* paid his note, the defendant might have met with difficulty in recovering it.

Judgment on the Verdict.

DENNETT *vs.* CROCKER *& als.*

The payment of taxes on land, as an act of ownership, may be proved by parol, without production of the assessments, or of the collector's tax-books.

Where land was claimed by actual possession and inclosure in fences, and was bounded on one side by a pond, and on the other sides by other lands, to which the claimant had good title; though his fences did in fact surround the land in question on all sides except that next the pond, yet it was properly left to the jury to determine whether they were erected for the purpose of inclosing the land in controversy, or merely for the protection of his own.

Land thus situated being about to be sold, the claimant declared to the intended purchaser that he held it by possession, warning him not to buy a quarrel; but it was held that these declarations, unaccompanied by any act of ownership, did not constitute a disseisin, nor change the character of the previous inclosure by fences.

THIS was an action of trespass, *quare clausum fregit*, for cutting and carrying away certain trees from the lot numbered seven in the eleventh range of lots in *Bridgton*, between *January* 1, 1829, and *April* 1, 1831, which was the date of the writ; and it was tried before *Parris J.* upon the general issue.

The plaintiff relied upon a title acquired by twenty years possession; and submitted sundry depositions and the testimony of several witnesses to the jury, in support of it; and for this purpose he offered also to prove by *Stephen Swett*, that more than ten years since, *Swett*, then holding a deed of the lot aforesaid, and being upon that part of it which lies east of *Crotched* pond, for the purpose of examining and exploring the lines of it, was informed that the residue of the lot, lying west of the pond, and which was the *locus in quo*, was held by possession; and supposing, from the information to this effect, which he received, that he could not hold it by his deed, he for this reason, neglected to go upon and examine it. But the Judge refused to admit so much of this evidence as was only hearsay, confining the witness to speak only of his own acts and knowledge.

The defendants justified under a deed from the heirs of the late *Thomas Robison* to them jointly. They also exhibited a deed from *Benjamin Kimball, Enoch Perley* and *James Stevens*, to *Thomas Robison*, under whom the defendants' grantors claimed as heirs at law, which deed, though objected to for want of authority in them to execute it, the Judge permitted to be read in evidence, to show the extent of *Robison's* claim.

To rebutt the title set up by the plaintiff, the defendants read sundry depositions and examined several witnesses, tending to prove that the plaintiff had, on various occasions, up to within five or six years of the date of the writ, in conversation, called the *locus in quo* by the name of the *Robison* land; and that he and his grantors have always admitted and respected the *Robison* title to the *locus in quo*.

To prove the continued possession of their grantors, the defendants introduced *John Perley* as a witness, and offered to prove by him, that, as agent for their grantors, he had the care of the lot, and had occasionally been upon it to see that no trespass was committed; and that he had given permission to take dead wood from the lot; and that the plaintiff had once, some years ago, but within twenty years, applied to him or his father, as agent for the *Robisons*, for leave to cut wood on the lot on the west side of the pond. In the course of the examination, the witness disclosed that he had a written power of attorney, which he could not produce, having left it at home. The plaintiff objected to his admission until the written power was produced. The Judge however permitted the defendants to examine him as to any acts done by him, as agent for defendants' grantors, which had been subsequently recognized and ratified by them. He also permitted him to testify to the payment of taxes upon the lot, for the defendants' grantors, though the plaintiff objected that the assessments to the defendants' grantors, and the collector's bills, should have been produced. And he testified that as agent for the heirs of *Thomas Robison* senior, without any written power, since the decease of his son *Thomas*, he had paid all taxes assessed on the lot numbered seven in the eleventh range, up to the time of the sale to the defendants; and had taken care of

said lot for them ; which services and payments he had charged from time to time in accounts, which have been paid and settled by *Lemuel Weeks*, as agent for the heirs, his wife being one. He also testified that between five and six years since, the plaintiff came to him and said there was a pine tree standing on the western side of the pond, near the line between his land and *Robison's*, which he rather thought was on his, and believed he should cut it. The witness told him he had no tree there ; that it was on *Robison's* land, and if he cut it, the witness would overhaul him for it ; to which the plaintiff made no reply. He said that he never heard of the plaintiff's claiming any title to the *locus in quo* until within one year preceding, and about the time of the sale to the defendants. He further testified that in the fall of 1823, he, as agent for the *Robisons*, ran the line between the plaintiff's farm and the *locus in quo*, in company with the plaintiff, who made no objection, except that he thought the corner was two or three rods farther east. As agent of the *Robison* heirs he notified the plaintiff to attend. No entry by the heirs of *Thomas Robison* after his decease, was proved by the defendants except the aforesaid acts of *Perley*.

The plaintiff proved that on the day of, and prior to the sale of the lot, he told *Davis*, one of the defendants, that he held it by possession, and that if he purchased it he would buy a quarrel. He also proved that the *locus in quo*, which was triangular in form, was bounded on two sides by land owned by him ; which land had for ten or twelve years been inclosed by substantial fence built by himself, most of which was stone wall ; and on the remaining side by a pond, which, from its depth and width, constituted a natural fence ; that there was no fence between the plaintiff's field and the *locus in quo* ; that his cattle, which were pastured in the close adjoining and on the *locus in quo*, ranged over the latter without obstruction ; that a small portion of it, along the line adjoining the plaintiff's pasture, was cleared and produced grass, which was eaten by the plaintiff's cattle ; and that he occasionally cut and took wood from the tract in controversy.

The plaintiff contended that even if he had not made out title by possession for twenty years, yet that at the time of the sale, the defendant's grantors were disseised, and so nothing passed to them by their deed; and that his declaration to *Davis*, supported by the possession he had, was *per se* conclusive evidence of a disseisin.

But the judge left it to the jury to determine whether the fence erected by the plaintiff was built for the purpose of inclosing the *locus in quo*, or other lands owned by him; and whether the plaintiff, for and during twenty years next before the time when the trespass is alleged to have been committed, or at the time of the execution of the deed from the heirs of *Thomas Robison* to the defendants, had open, notorious and exclusive possession of that part of lot number seven in the eleventh range, where the trespass is alleged to have been committed, claiming to hold it adversely, and manifesting his claim by such acts of ownership indicative of the exercise of right, in hostility to the former possessor, as comport with the ordinary management of similar estates in the possession and occupancy of those who have title thereto; stating that in ordinary cases, the inclosure by fence, especially such as that erected by the plaintiff, would be evidence of claim and possession, if erected immediately around the tract claimed, or in such position as to manifest an intention of occupancy; however it might fall short of such evidence, if erected in such position as to inclose other tracts, and apparently be for the only purpose of inclosing those tracts, although the tract claimed might be within those surrounded by the fence. And upon this part of the case, he instructed them, that if they found the *locus in quo* had been in the continual and exclusive possession and occupation of the plaintiff, or those under whom he claims, for twenty years next before the time when the trespass is alleged to have been committed, or was so in his possession at the time of the conveyance from the heirs of *Thomas Robison* to the defendants, then their verdict should be for the plaintiff; otherwise for the defendants.

The plaintiff requested the Judge to instruct the jury that his declaration to *Davis* at the time of the sale was, *per se*, conclusive evi-

dence of a disseisin, when taken in connexion with the other facts proved in the case; which instruction he declined to give; but he did instruct them that they would consider the plaintiff's declaration to *Davis* with all the other testimony bearing upon the question; and that if, in their opinion, upon the evidence, the heirs of *Robison* were disseised at the time of the execution of their deed to the defendants, nothing passed by it, and the plaintiff was entitled to a verdict.

In the course of the trial when the deed to the defendants from the heirs of *Thomas Robison* was offered, the plaintiff objected to its admission because the letter of guardianship to *Henry Frothingham*, and the power authorising him to execute the deed as attorney to *Mary Robison*, guardian to her children *Thomas W.* and *Mary Robison*, were not produced. But it having been proved that the deed was duly executed by the other heirs of *Thomas Robison*, the Judge permitted it to be read to the jury.

The verdict, which was for the defendants, was taken subject to the opinion of the Court upon the general question whether they were entitled to retain it.

Daveis and *R. A. L. Codman*, for the plaintiff, cited *Prop'rs. of Kennebec purchase v. Call*, 1 *Mass.* 403; *Commonwealth v. Kenniston*, 4 *Mass.* 646; *Waterman v. Robinson*, 5 *Mass.* 303; *Bassett v. Marshall*, 9 *Mass.* 312; *Andrews v. Hooper*, 13 *Mass.* 472; *Poignard v. Smith*, 6 *Pick.* 172; *Brinley v. Whiting*, 5 *Pick.* 348.

Greenleaf, *Fessenden & Deblois*, for the defendants, were stopped by the Court, whose opinion was delivered by

Weston J. If *Stephen Swett*, the witness, had received information from a tenant in possession, that he held adverse to his claim, the declarations of such tenant would be evidence of the fact; but it does not appear from whom the information came; and the witness knew not whether it was true or false. It was mere hearsay, and properly rejected as such. The objection, made at the trial,

to the admission of the deed to *Robison*, to show the extent of his claim, is waived by the counsel for the plaintiff.

It is insisted that the agency of *John Perley*, a witness for the defendants, was not proved by competent testimony; he having a written power from *Thomas Robison*, under whom the defendants' grantors held as heirs. That power however ceased by the death of *Robison*, after which the witness acted under a parol authority from his heirs. All the facts to which he testified, happened after his decease, except payment of part of the taxes; and as to this part of his testimony, it was not allowed by the ruling of the Judge, and must have come out without any special objection, made to this part alone. But proof of the payment of any taxes, by those who claimed the *Robison* title, it is contended was inadmissible, without the production of the assessments and the collector's bills. If the due assessment of these taxes had been material to the issue, which cannot be pretended, the production of the regular evidence of this fact might have been required. The payment itself was matter *in pais*, to which the witness was competent to testify; and there might have been no other evidence of the fact. The witness was not called to prove, nor did he testify, whether the taxes were rightfully claimed or not of those whom he represented.

The plaintiff, having failed to show any title whatever, cannot recover; whether the defendants' title, from all the heirs of *Thomas Robison*, is made out or not. If the land was his, and they have the interest of part of the heirs, they had a right to enter upon the premises, and exercise the acts of ownership, of which the plaintiff complains. The execution of the deed, under which the defendants claim, by part of the heirs, being proved or admitted, it was legally in evidence, and properly read to the jury.

The title of the plaintiff, and not that of the defendants, was the question in issue. Had they been plaintiffs, they would have been required to make out their title affirmatively, and then some of the objections to the operation and effect of the deed, under which they hold, might have been properly taken. But as they were involved also in the plaintiff's title, which depended on disseisin, these objections have been removed by the verdict of the jury. They have

found that the plaintiff had no seisin, by virtue of a possession and improvement. His fences were made to enclose his other land. This point the jury have settled. And while they existed, he repeatedly recognized the *Robison* title. The Judge was requested to instruct the jury, that what the plaintiff said to *Davis*, one of the defendants, about the time of the execution of the deed to them, was, in connexion with the other facts, conclusive evidence of a disseisin. But what their combined effect would be, would depend upon the character and quality of the other facts. Mere declarations do not make a disseisin; but they may show the nature and character of an actual possession. The declarations of the plaintiff were left to the jury. And we are of opinion that in giving the instructions he did, and in witholding such as were requested, the Judge was warranted by law. All adverse seisin being disproved and negatived, there was no necessity of an entry, on the part of *Robison's* heirs, to give actual seisin; and no impediment to the conveyance of their seisin, by their deed, to the defendants.

Judgment on the verdict.

FRENCH *vs.* STURDIVANT.

Whether, if the purchaser at a Sheriff's sale of a right in equity of redemption, refuse to receive the deed and complete the purchase, the bill in equity against him for specific performance may be brought by the judgment creditor alone ;—*quære.*

If it may be so brought, the officer is a competent witness for the plaintiff.

The *Stat.* 1830, *ch.* 462, giving to this Court chancery jurisdiction in cases of fraud, trust, accident and mistake, has not enlarged its jurisdiction over mortgages.

V conveyed to *O* certain lands, and at the same time took from *O* a written promise, not under seal, to reconvey the same land to *V* upon the payment of certain monies by a certain day. Hereupon it was held that the written promise did not constitute a mortgage ;—that the time of payment was material, and to be regarded as of the essence of the contract, even in equity ;—and that after the day had elapsed, without payment, *V* had not an attachable interest in the premises, under any law of this State.

THIS was a bill in equity, in which the plaintiff stated that being a judgment creditor of one *Vining*, he placed the execution in the hands of *David Wescott*, a deputy sheriff, to be served and satisfied upon a right in equity of redemption of certain land and buildings, which had been attached upon the original writ ; that the defendant attended the sheriff's sale and bid upon the property, which was stricken off to him as the highest bidder ; that a record of the sale was made on the spot and signed by the officer, and a deed to the defendant was also made and executed at the same time by the officer, and by him tendered on the same day to the defendant, who refused to receive it and complete the purchase. The plaintiff therefore prayed for a decree for specific performance of the contract, and for general relief.

The defendant demurred to the bill ; and pleaded in bar that its material allegations were false and that the plaintiff was not entitled to relief ; and also answered, in substance, that he was a mere by-bidder at the sale, employed by the plaintiff ; in whose behalf, and for whose benefit, and not his own, he bid for the land. He also

denied that *Vining* had any attachable right in equity, and prayed that the plaintiff might be holden to prove the same.

The plaintiff's testimony in proof of the bill and in direct contradiction to the answer, was derived chiefly from the deposition of *David Wescott*, the officer, whose competency was objected to; and of *William Willis*, Esq. his attorney, who directed the sale, and who stated that he was employed by the plaintiff to bid off the property for him, at a limited price; and that the only persons present at the sale were *Sturdivant*, *John Owen*, who bid a small sum, and himself, except that during a pause in the sale the plaintiff was sent for. It appeared from other proof that the plaintiff had employed the defendant to bid for him as high as fifty dollars and no more; that on the defendant's bidding fifty one dollars, the plaintiff was sent for; that as soon as he came and was informed of the state of the sale, and without any intercourse with the defendant, the plaintiff bid to the amount of his debt, and that the defendant immediately bid one dollar more, and it was stricken off to him.

The land was purchased by *Vining* of one *Ichabod Jordan*, *May* 26, 1827, and at the same time mortgaged back to him, to secure the purchase money. Afterwards, on the 19th day of *Feb.* 1828, *Vining* conveyed the premises by an absolute deed to *John Owen*, and took back a writing not under seal, signed by *Owen*, of the following tenor: "Whereas *Nathan Vining* of *Portland*, has this day made and executed to me a deed of his lot and buildings in said *Portland*, whereon said *Vining* now lives, and is the same he bought of *Ichabod Jordan* of *Saco*, *May* 26, 1827, and recorded book 108, page 381, for the consideration of one thousand dollars. Now, therefore, if the said *Vining* shall pay me or my heirs, &c. whatever sum or sums I shall properly and lawfully pay any person or persons for and on account of said real estate, and such sum also as said *Vining* now owes or may owe me at any time during the time that said contract shall run, that is, to the first day of *March*, *A. D.* 1829; and whenever said *Vining*, his heirs, &c. shall pay or cause to be paid as aforesaid, within the time aforesaid, I promise to redeed the same property to him, his heirs, &c. in as good and ample a manner as I have received the same of him, except war-

ranting the title generally. And I also promise said *Vining* that I will not buy up any demand against him to bring into this contract which does not lawfully belong thereto, touching said real estate." The mortgage money due to *Jordan* was not wholly paid at the time of the sheriff's sale; nor was *Owen* reimbursed for the monies which he had advanced under the contract.

Greenleaf, for the plaintiff, argued that the bill was properly brought in the name of *French*. The general rule in equity is, that all persons materially interested in the subject matter, and necessarily affected by the decree, should be made parties. *Wendell v. Van Rensselaer*, 1 *Johns. Chan.* 349; *Wiser v. Blachley*, *ib.* 437; *Hallett v. Hallett*, 2 *Paige*, 18. But *Wescott* is neither. No person's interests are involved in this suit, except those of the plaintiff and defendant on the record. If the officer was at all concerned, it was as trustee. But in a bill by *cestuy que trust*, the trustee is not necessarily a party; 1 *Mad. Chan.* 176; and is never to be made such, after the trust has been executed. *Swan v. Ligan*, 1 *Mc Cord*, 227; *Cleaves v. Foss*, 4 *Greenl.* 1. Any person, for whose benefit an agreement is made, though not in terms a party to the agreement, may have a bill in chancery for its specific performance. *Crocker v. Higgins*, 7 *Conn.* 342.

As to the mortgage, wherever it appears, from written evidence, that land is conveyed as a pledge to secure the payment of money, chancery will treat the conveyance as a mortgage, in whatever form the land is pledged. *Kelleran v. Brown*, 4 *Mass.* 443; *Hughes v. Edwards*, 9 *Wheat.* 489; *Thompson v. Daveport*, 1 *Wash.* 125; *James v. Johnson*, 6 *Johns. Chan.* 417. And this Court has now, by *Stat.* 1830, *ch.* 462, all the powers of a Court of chancery, in such cases. *Owen*, in the present case, admitted *Vining's* right to redeem, by bidding at the sale; by which he is now estopped. But if not, yet, at the time of the attachment, *Vining* had a remedy on the contract, against *Owen*, under *Stat.* 1821, *ch.* 50, which would be in effect the same as on mortgage, and would be treated as such in equity. *Stat.* 1829, *ch.* 431.

Davis, for the defendant, to the point that *Vining* had no equity of redemption in the property, cited *Newland on Contr.* 227, *ch.* 12; 1 *Mad. Chan.* 430, 435, 441; *Wilde v. Fort*, 4 *Taunt.* 334; 3 *Stark. Ev.* 1617; *Kelleran v. Brown*, 4 *Mass.* 443. And he argued that the sale was void because a puffer was employed by the plaintiff. *Dixwell v. Christie*, *Cowp.* 395; *Howard v. Castle*, 6 *D. & E.* 642; 1 *Mad. Chan.* 325; *Doolin v. Ward*, 6 *Johns.* 194; *Moncrief v. Goldsborough*, 4 *Har. & McKen.* 281.

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

The first objection, taken by the counsel for the defendant, is to the testimony of *David Wescott*, the officer, as incompetent on the ground of interest. This interest, if any exists, must arise from his liability to the plaintiff, by reason of failure of duty on his part. He does not appear to have been guilty of any official negligence, unless it was his duty to have brought this bill in equity, of which the plaintiff has certainly no right to complain, having elected to bring it himself, if otherwise he might have sustained an action against him. A second objection is, that the defendant, if liable at all, is liable to the officer, and not to the plaintiff, between whom and himself, there is no privity of contract, either at law or in equity. The answer to this is, that the officer is the trustee, acting for and in behalf of the plaintiff, the *cestui que trust:* and that the latter, as the party beneficially interested, may sue in equity; and in support of this position, respectable authorities have been cited. To this, it is replied, that the relation between trustee and *cestui que trust*, so well known in chancery, and which is the foundation of the rule relied upon by the plaintiff, does not result from official duties, such as the law imposes upon the officer. But as we determine the cause upon other grounds, it is not necessary to come to a decision upon this point.

It is further insisted, that chancery will not sustain a bill for specific performance, unless it relates to real estate; but as it is founded

upon the purchase and sale of real estate, this objection is not sufficient to defeat the plaintiff's suit.

A more important ground taken by the defendant is, that there was nothing in *Vining*, the judgment debtor of the plaintiff, which could by law be attached, or seised and sold on execution. First, because if the conveyance by *Vining* to *Owen* was a mortgage, the land being subject to a prior mortgage to *Jordan*, there remained only in *Vining* a right to redeem an equity, which it is contended is not liable to attachment, or to seisure on execution. It has been held that where an equity has been seised and sold on execution, the right which the debtor has to redeem such property, is not liable to further attachment. But if the debtor mortgage this right, it has been decided, that the equity still remaining in him is attachable. *Reed v. Bigelow*, 5 *Pick.* 281. There may seem to be great refinement in this distinction; but it results from the language of the statute. Whenever real estate is conveyed in mortgage, an equity of redemption remains in the debtor, which the statute has subjected to attachment; and however frequently this right is successively mortgaged, the remaining equity is by law made liable to be attached by creditors.

It is, secondly, urged, that the conveyance from *Vining* to *Owen* was absolute, and that the latter did not hold in mortgage. On the day that the deed was executed, *Owen* undertook by a written instrument, not under seal, to reconvey to *Vining*, upon the payment of certain sums, within a limited period. In England, according to the law and practice of the court of chancery, this constitutes a mortgage. But in this state and in Massachusetts, it has been held that to constitute a mortgage, the condition must be part of the deed, or that there must be a defeasance, which is an instrument of as high a nature, and executed at the same time. Upon such only has relief been afforded in equity, under our statute. This may well be regarded as a modification of the English law, as applied in chancery, if it ever obtained in this country. And no other equities, except such as may be enforced under our statute respecting mortgages and the right in equity of redemption, have heretofore been recognized by our law.

This view of the law was taken in *Kelleran v. Brown*, 4 *Mass.* 443. It is true Chief Justice *Parsons* in that case admits the chancery doctrine, but says that it cannot be applied here, by reason of the limited equity jurisdiction of the court. He intimates that it would be otherwise, if the court held all the equity powers of a court of chancery. What might result from the hypothesis assumed, was not the question before the court. If the legislature thought proper to invest this or any other court with the general powers of a court of chancery, such powers must be administered according to existing laws. To these the principles and practice of such courts, however extensively adopted, must be accommodated. And whenever equities and trusts, or other subjects of chancery jurisdiction, may have been modified by our laws, either directly or by necessary implication, chancery is restrained and limited by such modification. But giving the fullest effect to the *dictum* of the learned Chief Justice, we are not satisfied that the law of mortgage has been changed, or that what was before held not to be a mortgage, becomes such in the view of this court, by reason of the additional chancery powers, with which it has been invested, since the decision in *Kelleran v. Brown*. These powers, though much extended, are still not general, but limited. No further powers, in relation to equities of redemption, have been given. Those previously granted, were deemed adequate to the enforcement and protection of this species of property. As the public exigencies have, in the opinion of the legislature, called for other specified and enumerated powers, appertaining to this jurisdiction, they have been granted; and have been accordingly extended to cases, where a specific performance of contracts in writing is claimed; and to cases of fraud, trust, accident or mistake. It is not pretended that this is a case falling within either of the four latter sources of jurisdiction.

The plaintiff's rights, whatever they may be, depend upon a contract in writing. But giving effect to this contract, could not avail the plaintiff. Where time is not of the essence of the contract, it is sometimes disregarded by a court of equity. But here it was of the essence of the contract. It was the condition, upon which the engagement of *Owen* to reconvey, was distinctly made to depend.

Had this constituted a mortgage, according to our law, the mortgagor would have had three years more, after entry or holding for foreclosure, beyond the time limited; but this neither results from the contract, nor could it have been intended by the parties. As the instrument is not a mortgage, the parties to it, and such as come in under them, must be restricted to the time therein stipulated. If that period had not expired at the time of the seisure and sale, upon which the plaintiff founds his bill, it was an attachable interest under the additional act, respecting the attachment of property. *Stat.* 1829, *ch.* 431. But the time limited having expired at that time, there was nothing upon which the execution could operate.

The defendant relies upon other points, which it is unnecessary to notice. Being of opinion, from the facts disclosed in the bill, answer and proof, that no attachable interest of the judgment debtor was seised and sold to the defendant, upon the plaintiff's execution, the bill is dismissed; but under the circumstances of the case, we do not award costs to the defendant.

BLANCHARD *& al. plaintiffs in error, vs.* BAKER *& al. original plaintiffs.*

The right to use the water of a stream for domestic purposes, watering cattle, and irrigation, is to be so exercised as not essentially to diminish, or unreasonably to detain the water. And the right of using it for this latter purpose will not justify the taking of water for other purposes, to the injury of other proprietors.

Where the proprietors of a mill privilege and bank of a river obtained license from the owner of the opposite bank to extend their dam across the stream and join it to his own land, till he should want the privilege on his side the stream for his own use; it was held that the subsequent revocation of this license could not affect the right of the proprietors to the head of water thus raised and appropriated.

In an action of the case for diverting a water-course, if the unlawful diversion be proved, the plaintiff is entitled to recover, without proof of actual damage.

Whether aquatic rights are acquired by mere prior occupancy, not continued for twenty years;—*quære.*

The owner of an ancient mill may change the character and use of his mill, at pleasure, without impairing his right to the water; if he does not thereby injure his neighbor's mill, and returns the water again to its ancient channel.

One tenant in common may have an action of trespass on the case against his co-tenant, for diverting the water from their common mill, for separate purposes of his own.

THIS was a writ of error, brought to reverse a judgment rendered by *Whitman C. J.* in the court below. The action was trespass on the case, brought originally before a Justice of the peace, by *Jeremiah Baker* and *Samuel Baker*, against *Sylvanus Blanchard*, *Amasa Baker*, and *Benjamin Mitchell*, for diverting the water of *Royall's* river from their mill. The declaration was as follows:—"for that the plaintiffs, on the thirtieth day of *April*, *A. D.* 1830, were, and ever since have been, and now are seised of thirteen sixteenths of a certain ancient water-mill, called a corn or grist mill, with an ancient mill-dam and privilege appurtenant thereto, situate in *North Yarmouth*, commonly called and known by the name of *Baker's* mill, in their own demesne as of fee, as tenants

in common with the said *Sylvanus*, *Amasa* and *Benjamin*; and the plaintiffs and all those whose estate they now have in the said mill with the appurtenances, in common, or with the owners of the remaining three sixteenths, have ever had, and now ought to have the whole of a certain stream or water course, called and known by the name of *Royall's* river, running to the said mill, for the benefit thereof, as ancient rights and privileges appertaining to the said mill. But the said *Sylvanus*, *Amasa* and *Benjamin*, well knowing the premises, but intending to injure the plaintiffs, and deprive them of their part of the use and profits of said mill, did on the said thirtieth day of *April*, and on divers other days and times between that, and the day of the purchase of this writ, dig up and remove the banks of said river and water course, above said mill, and open a wide and deep channel from said river, and thereby divert a great part thereof so running as aforesaid from the said mill, so that the said mill, which before was able and was used to grind twenty three bushels of corn and grain in every hour, now and during the time aforesaid, by reason of the diversion aforesaid of the said water, is and has been able to grind only nine bushels of corn and grain in every hour; by reason of which the plaintiffs have been deprived of a great part of the profits of their share of said mill, and still continue to be deprived thereof.

Also, for that whereas the said *Sylvanus*, *Amasa* and *Benjamin*, at said *North Yarmouth*, on the first day of *June*, in the year of our Lord eighteen hundred and twenty eight, intending to injure the owners of said mill, and mill privilege, and those who should thereafter become owners thereof, and deprive them of the water running to and by the same, had on that day, and on divers other days between that and the fifth day of *August*, in the year last aforesaid, dug up and opened a channel above said mill privilege and thereby diverted a great part of the water running as aforesaid, from the said mill privilege; the said defendants thereafter, to wit, from the twenty seventh day of *April*, now last past, until the day of the purchase of this writ, continued the said channel open, and deepened the same, and thereby diverted a great part of the water from said mill and mill privilege and greatly injured the same.

The following is the substance of the bill of exceptions which was filed by the original defendants, in the case.

Samuel Baker, with his three sons, *Nathaniel*, *Amasa* and *Samuel*, in 1796, built a single grist-mill, which was the first mill, upon the premises in question, on the west side of *Royall's* river. It was built upon the privilege, of which said *Samuel* the father and his three sons commenced an occupation; and the father had before used the land adjoining for a pasture, but without any title to the same. *Samuel Baker* the father died seised of one quarter part of the premises in question on the west side of said river, in 1801. He left nine children, one of whom died, before any of the conveyances hereafter mentioned, were executed; and that without issue. The children, by bond, dated 17th *Nov.* 1801, agreed to settle their father's estate, "among themselves," without administration; "to make provision for their mother," to depute some person to pay all "debts due from said estate, and all the remainder to make partition of among themselves in the most just and equal manner that could be done."

The plaintiffs, to prove their title as set forth, produced the deed of *Nathaniel* and *Amasa Baker* to *Ammi R. Mitchell*, dated 25th *August*, 1807, and recorded on the following day; conveying "one half of a grist-mill standing on the falls in *Royall's* river in *North Yarmouth* aforesaid known by the name of *Baker's* falls, together with one half of all the privilege belonging to said mill, and one third of a card machine standing on the same falls, together with one third part of all the privilege belonging to said machine. Also, five eights of a nail mill or machine, together with a blacksmith's shop and tools, standing on the aforesaid falls, together with all the privilege belonging to said iron works or machines, together with a privilege of the road leading from the county road to said mills and privilege:"—A deed of the same premises from said *Ammi R. Mitchell* to *Joseph Sturdivant*, *Ephraim Sturdivant* and *Andrew Blanchard*, dated 3d *Sept.* 1808, and recorded 6th *Sept.* 1808:—and of the said *Sturdivants* and *Blanchard* to *Jeremiah Baker*, one of the plaintiffs, dated 28th *April* 1826, and recorded 4th *May* 1826.

They also produced the deed of *Samuel Baker*, son of *Samuel Baker*, deceased, and father of *Jeremiah*, dated 8th *April*, 1816, and recorded 10th *June*, 1818, conveying to *Jeremiah*, among other property therein recited, "one quarter of the grist mill; three undivided eighth parts of the nail mill and machine; three eighth parts of the blacksmith shop and tools; which I purchased of Hon. *Ammi R. Mitchell*, and two thirds of the carding machine; all standing on *Baker's* falls, together with the privileges belonging to the several parts of mills, shops and machines aforesaid:"—Also the deed of *Solomon Winslow* and wife to said *Jeremiah*, dated 8th *May*, 1826, and recorded 28th *Feb.* 1827, conveying to him "one eighth part of the real estate which was assigned to the said *Eleanor*," widow of *Samuel Baker* the ancestor, "as aforesaid, and which at her demise reverted to her heirs and the heirs of the said *Samuel Baker*, deceased." The plaintiffs further offered in evidence a deed of quit-claim from *Joseph M. Baker* to *Jeremiah Baker*, one of the plaintiffs, dated *Dec.* 10, 1827, conveying one thirty second part of *Baker's* mill and privilege: also a warranty deed from the plaintiff, *Jeremiah Baker*, to the plaintiff, *Samuel Baker*, dated *April* 27, 1830, conveying one fourth part of the same mill and privilege. It was proved that by an agreement among the heirs of said *Samuel* deceased, one fourth of the mill and privileges appurtenant, was assigned to the widow of said *Samuel* deceased, as, and for her dower in his estate. The defendants contended that upon the true construction of the deeds introduced by the plaintiffs, no title to the privileges therein mentioned, passed from the several grantors, farther than such title as they could claim as heirs of *Samuel Baker;* and that as there were eight heirs, the plaintiff had established title to no more of the privileges before mentioned, than the three eights and one thirty second, under the respective deeds of *Samuel Baker*, *Nathaniel* and *Amasa Baker*, and *Solomon Winslow* and wife.

But the Court ruled that the plaintiffs had proved their title to thirteen sixteenths of the mill, dam and appurtenances, and of the water-course, or stream, as set forth in their declaration.

In defence, the defendants offered in evidence the quitclaim deed of *Josiah Lovell* and wife, *Sarah Baker* and *Hannah Baker*, children and heirs of *Samuel Baker*, conveying to *Amasa Baker*, one of the defendants, all their right, title and interest in and to one "fourth part of a grist mill and mill privilege situate in said *North-Yarmouth*." "Also all other estate of said *Samuel Baker* deceased, of which he died seised and possessed, and which we, as his heirs, have not heretofore disposed of by deed or otherwise." This deed was dated 9th *January*, 1824, duly acknowledged, and recorded 14th *September*, 1827. Also the deed of quitclaim of *Nathaniel Baker*, *Solomon Winslow* and *Catharine* his wife, and *Josiah Lovell* and *Jane* his wife, children and heirs of said *Samuel Baker*, to said *Amasa Baker*, dated 19th *February*, 1827, duly acknowledged and recorded 14th *September*, 1827, conveying to said *Amasa*, all their right, title and interest in and to one fourth part of the grist-mill and privilege called *Baker's* mills." This, with the property mentioned, was described as "having been assigned to our late mother *Eleanor Baker*, as dower. Also, all other real estate of said *Samuel Baker*, deceased, which has not been divided among the heirs."

The defendants further offered in evidence the warranty deed of *Amasa Baker*, one of the defendants, to *Sylvanus Blanchard*, and *Benjamin Mitchell*, co-defendants, dated 6th *September*, 1827, conveying to them "one eighth part of the mill privilege in *Royalls'* river in said *North-Yarmouth*, known by the name of *Baker's* mill's," in common with the other seven eighths of said privilege—"together with a privilege of the aforesaid road" (meaning the mill road) "to pass and repass to said privilege;—also, one undivided half of another piece of land" on the south-east side of said road, and adjoining the mill privilege. "Also, one undivided half of another piece of land," on the north-west side of the road, and adjoining the mill privilege. Under the above recited deeds, the defendants, upon the construction above contended for, claimed title to four eighths of the premises in question, on the west side of the river. It was proved that *Samuel Baker* the elder, occupied and fenced the land adjacent to the river, adjoining the mill privilege, and that

no one but himself ever claimed the same during his life, except that his three sons claimed as before mentioned the three quarters of the mill and privileges appurtenant, and occupied the same.

The defendants also proved their title to the premises, on the east side of *Royalls'* river, upon which the diversion of the water is alleged to have been made, through the heirs of *David Jones*, who was shown by the witnesses, to have been in open possession of the same for upwards of thirty years before his death, which was in 1821, occupying and fencing the same to the river. In their deeds from *Jacob H. Jones*, son of *David*, the estate conveyed is bounded on a line running "to the river; thence down the river, as it treads, to a stake," &c. These deeds are from *Jacob H. Jones* to *Amasa Baker*, *Sylvanus Blanchard* and *Benjamin Mitchell*, the one dated *August* 17, 1827, duly acknowledged and recorded *October* 31, 1827—the other dated *November* 1, 1827, duly acknowledged and recorded *November* 6, 1827.

It was also proved that Dr. *Jones*, thirty years ago, told *Nathaniel Baker*, that the owners of the mill on the west side of the river might join their dam on the east side of the main stream, until such time as he should want the privilege there; and that before the plaintiffs had built their new dam, the defendants forbade such building or joining of it upon the land on the east side.

In relation to the channel or outlet, through which the defendants conduct water to drive their mill, it was proved that the water had passed through it in greater or less quantities for thirty-five or forty years, when the water was high;—that the plaintiffs' present dam is eight inches higher than the former dam was;—that the water did not run in the defendants' channel, before it was deepened, unless the water was several inches higher than the old dam; that the defendants have since lowered or deepened their channel two and an half feet; so that when the water runs over the plaintiffs' present dam, there will be a depth of water in defendants' channel of three and an half feet. The water always trickled through the rocks at the entrance of the channel. They also proved that after the defendants had deepened their channel, they were obliged to dam it

up while they were laying the foundation of their mill, owing to the flow of water, which was such as to prevent working without such dam; though at the time of building, the river was by no means full; and that the water ran through the channel, after the old dam, extending from the plaintiffs' mill across the river, was carried away, and when there was nothing over one half of the river, to prevent the escape of the main stream.

It was proved that the defendants' channel would injure the plaintiffs' mill if it were a single mill, in case of droughts, such as ordinarily occur in the summer season, although none such occurred during the summer of 1830;—that there would be five and an half feet head at the plaintiffs' mill, when none could run in the defendants' channel, which would drive the plaintiffs' mill very well; but not so well as when the head of water was greater, and especially when so as to run over the plaintiffs' dam; and that, by actual measurement, the bed of the stream, at the entrance of the channel aforesaid, is not so low as the bed of the main stream; nor has been made so low at any time by the defendants. The defendants deepened their channel in 1829, and erected their mill in the same year.

Upon this testimony the defendants contended that they had good and legal right to one half of the water in the main stream, and to take it through the channel aforesaid; as by so doing they were making but a reasonable use of the water; and that they had a right, as riparian proprietors, to open the channel, which they maintained was an ancient channel, and divert the water to their own use in the manner and to the degree which they did; and that the plaintiffs could not contend for more of the stream than was necessary to carry a single mill, which was all the right they could claim by virtue of their grants.

But the Court ruled, that the defendants had no such right to open the channel, or to take the water through the same for the use of their mill; nor such right to divert the water as contended for; that the plaintiffs had all the right in the stream which they had set forth; and so instructed the jury; and that if the defendants did cut or open the channel to the injury of the plaintiffs, they must find

a verdict for the plaintiffs, and assess damages, which they did accordingly, in the sum of one dollar.

The defendants also contended that against them this action could not be maintained, they being tenants in common with the plaintiffs, and, as such, declared against; but that if chargeable in any manner, they were chargeable under a different form of action.

But the Court ruled that the action was maintainable as it stood. To all which the defendants excepted.

Upon this record the following errors were assigned :—

1st. that the Court of Common Pleas ruled and determined that by the legal construction of the deeds produced by the original plaintiffs, they had proved a good title to thirteen sixteenths of the mill-dam, and appurtenances and of the water-course or stream, described in the declaration, when, by such legal construction they had proved title to only three eights and one thirty-second part of said premises.

2d. There is error in this; that it was ruled and decided by said court of Common Pleas that the defendants in such original suit, had no right to open the channel, and take the water through the same for the use of their mills, nor to divert the water from the main channel of the River, in the manner and to the extent they did; whereas in law they had that right.

3d. There is error in this; that it was ruled and decided by said court of Common Pleas that the defendants in said original suit, had no right to deepen any part of their channel, to make a reasonable use of the water through the same, or for the purpose of driving their mill; whereas in law they had that right.

4th. There is error in this; that it was ruled and decided by said court of Common Pleas, that the defendants in said original suit, had no right to take the water through their channel, from the main stream, for the purposes and to the extent they did, though their said channel was an ancient channel; whereas in law, they had such right.

5th. There is error in this; that said court of Common Pleas ruled and decided that the original plaintiffs had a right to extend

their dam across the whole river, and to join it to the bank on shore owned by the defendants; whereas in law, they had no such right.

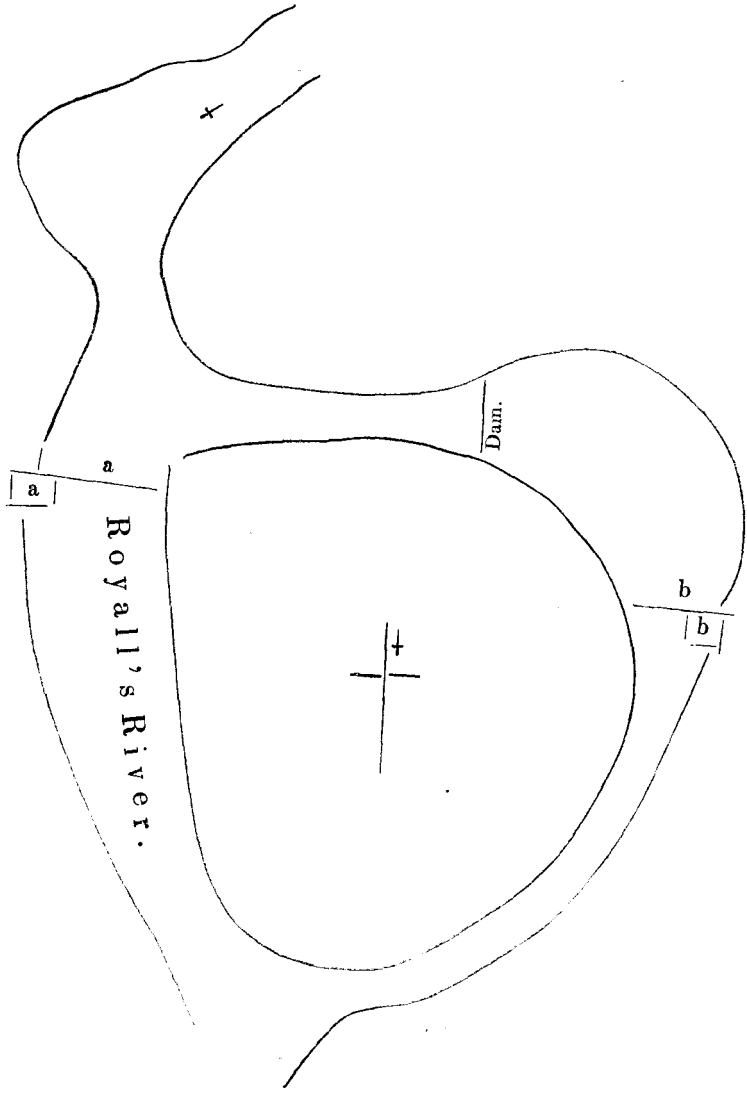
6th. There is error in this; that the said court of Common Pleas ruled and decided that the plaintiffs had a right to raise their new dam eight inches higher than their original dam was, and to maintain the same; whereas in law, they had no such right.

7th. There is error in this; that said court of Common Pleas ruled and decided that the defendants in the original suit, had not a right to one half the water in the main stream of said river, and to take and use it in and through the channel aforesaid, for the purpose of turning their mill; whereas they had that right.

8th. There is error in this; that said court of Common Pleas ruled and decided that the original plaintiffs had a right to erect and maintain the double grist-mill and other buildings and machinery described in the declaration; whereas they had a right to erect and maintain a single grist-mill only.

9th. There is error in this; that it was ruled and decided by said court of Common Pleas, that the original plaintiffs, being tenants in common with the defendants' had a legal right to maintain their said action against the defendants aforesaid, in the form aforesaid; whereas in law they had no such right.

The following diagram shows the relative positions of the places alluded to in the testimony.



a a Plaintiffs' mill and dam.
b b Defendants' mill and dam.

Longfellow and *Mellen* for the plaintiffs in error.

1. As to the quantum of interest; the grantors of the original plaintiffs having no greater interest than their portion as heirs, no more than that quantity of estate passed by their deeds. One cannot grant a thing which he has not. *Perk. Grant*, 65; 4 *Com. Dig. Grant, D.*

2. If the original defendants had no right to open the channel and take the water, it was because thereby they infringed some right of the plaintiffs. But the plaintiffs show no title to the water. Their claim is virtually that of an easement in another's land, which is against common right. 3 *Dane's Abr.* 4 *sec.* 7. The ground of the action is the diversion. But this must be to some extent, and of some consequence, or it is *damnum absque injuria*, and no action lies. The plaintiffs alleged that less water came to their mill, by reason of the defendants' using it as they did. Yet the same consequences would follow from extensive irrigation, and absorption of the water, though the surplus be returned to the natural channel before it passes the mill. Now for such an act the owner of the mill has no remedy. It is the consequence of the legal use of a natural right. *Angell on Water courses*, 32, 140; *Weston v. Alden*, 8 *Mass.* 136; *Palmer v. Mulligan*, 3 *Caines*, 307; *Platt v. Johnson*, 15 *Johns.* 213.

3 and 4. To these errors, they cited *Angell on Water courses*, 27, *note*, 40, 127; 3 *Kent's Com.* 354.

5. Neither party has a right, where a stream is the boundary, to build his dam beyond the thread of the stream. If it be extended beyond this, the owner of the opposite bank may abate it as a nuisance. *Angell*, 30; *Wigford v. Gill, Cro. Eliz.* 269; *Hodges v. Raymond*, 9 *Mass.* 316; *Jewell v. Gardiner*, 12 *Mass.* 311. Here the license from Dr. *Jones* was limited till he should want the privilege or water for his own use; and the defendants, having succeeded to his rights, might lawfully remove the dam from their own side of the river; and therefore might employ half the water in the manner they did.

6. The plaintiffs had no right to raise their dam, by the principles of *Sherwood v. Burr*, 4 *Day*, 244, and *Van Bergen v. Van*

Bergen, 3 *Johns.* 282. Having done so, they themselves have caused the water to flow through the defendants' channel, of which they now complain.

7. As long as the channel was not lowered deeper than the bed of the main stream, the defendants were in the exercise of a lawful right in clearing it as they did. In *Curtis v. Jackson*, 13 *Mass.* 507, the bed of the river was lowered, on the *Needham* side; which was not the case here.

8. The plaintiff's right, so far as it is prescriptive in its character, is limited to the mill and dam in their ancient state. But here they have erected a new double mill, requiring more water, and have raised their dam eight inches higher than before; thus destroying their own ancient rights, and opening the stream to new competition. 3 *Dane's Abr. ch.* 71, *art.* 1, *sec.* 7.

9. The action itself is misconceived. The law has gone no farther in the case of tenancy in common, than to allow trespass by one against his co-tenant for a disturbance of his possession, where the several occupation has been by agreement; *Keay v. Goodwin*, 16 *Mass.* 3;—or to give the remedy by action of account, for a due share of the profits. *Jones v. Harraden*, 9 *Mass.* 541; *Brigham v Eveleth*, 9 *Mass.* 538. But trespass does not lie for entry and enjoyment of the common property. 4 *Kent's Com.* 366. Trespass on the case for disturbance of a right of common lies only against strangers.

Greenleaf and *Eastman*, for the defendants in error, cited these authorities. That the original defendants had no right to deepen the channel and divert the water,—*Angell*, 30; *Bealey v. Shaw*, 6 *East.* 208; *Sands v. Trefuses Cro. Car.* 575; *Merritt v. Parker*, 1 *Coxe*, 460; *Colburn v. Richards*, 13 *Mass.* 420; *Beissell v. Sholl*, 4 *Dall.* 211; *Cook v. Hull*, 3 *Pick.* 269; *Anthony v. Lapham*, 5 *Pick.* 175; *Angell*, 36, 57, 138, 149, 71, 181. That no proof of specific damage is necessary, in order to maintain this action,—*Angell*, 50, 53; *Hobson v. Todd*, 4 *D. & E.* 71; *Pindar v. Wadsworth*, 2 *East.* 158. That erecting a double mill did not change the nature of the estate, or of their interest in the stream,—3 *Dane's Abr.* 5; *Cottrel v. Luttrel*, 4 *Co.* 86. And that tres-

pass on the case is the proper remedy,—*Co. Lit.* 200 *b* ; 2 *Bl. Com.* 193; 3 *Bl. Com.* 221, 235 ; *Angell*, 77.

This argument was heard at the last *May* term, and the opinion of the Court was now delivered by

WESTON J. The first question presented is, in what proportions the original plaintiffs (and wherever plaintiffs or defendants are adverted to in this opinion, those who were originally such are intended,) are seised and possessed of the mill and privilege, for an injury to which this action is brought. They claim thirteen sixteenths; while the defendants insist, that they should be restricted to three eighths, and one thirty second part, derived by inheritance from *Samuel Baker*, the elder. If his sons, *Nathaniel*, *Amasa* and *Samuel* the younger, were originally seised each of a quarter in common and undivided, the plaintiffs have established their title to the proportion they claim. If the father died seised of the whole, they are to be restricted to the proportion, accorded to them by the defendants.

It does not appear that the father ever claimed to be sole seised of the land and privilege, upon which the mill was built. His title commenced at the same period with that of his sons, and had its origin in possession and occupancy. Who were the owners in fee at that time is not stated; but it does not appear that the first occupants, or those who hold under them, have ever been disturbed by any paramount claim; and their title has now become indefeasable by lapse of time. It is stated that the father had before used the adjoining land for a pasture, but without title. He occupied and fenced the land bordering upon the river, and no one in his life time, except himself, claimed any part of it, saving the mill and privileges appurtenant, which were claimed, occupied and possessed in common by himself and his three sons. This privilege then, derelict by the true owner, was taken up by the father and his three sons, each claiming and enjoying one fourth part of the same, and of the mill thereon erected, in common. And it does not appear that the right of the three sons, or of those claiming under them, to their

three fourths, has ever been called in question, until the present action. And we are satisfied, that the title of the three sons is as well sustained as that of the father. His exclusive occupancy to the river might by construction of law have extended his right to the thread of the river, had it not been that this privilege was always excluded from his several and sole claim, and from the first possessed and occupied in common. The first error therefore is not well assigned.

The right to the use of a stream of water, is incident or appurtenant to the land, through which it passes. It is an ancient and well established principle, that it cannot lawfully be diverted, unless it is returned again to its accustomed channel, before it passes the land of a proprietor below. Running water is not susceptible of an appropriation, which will justify the diversion or unreasonable detention of it. The proprietor of the water course has a right to avail himself of its momentum as a power, which may be turned to beneficial purposes. And he may make a reasonable use of the water itself, for domestic purposes, for watering cattle, or even for irrigation; provided it is not unreasonably detained, or essentially diminished. For although by the case of *Weston v. Alden*, 7 *Mass.* 136, the right of irrigation might seem to be general and unlimited; yet subsequent cases have restrained it consistently with the enjoyment of the common bounty of nature, by other proprietors, through whose land a stream had been accustomed to flow. *Colburn v. Richards*, 13 *Mass.* 420; *Cook v. Hull*, 3 *Pick.* 269; *Anthony v. Lapham*, 5 *Pick.* 175. And the qualification of the right by these latter decisions, is in accordance with the common law.

It is insisted that the defendants, by deepening the channel running from the main stream, have made a reasonable use of the water, and that it falls within the principle of the right of irrigation, and that, therefore, although the plaintiffs may suffer thereby, it is *damnum absque injuria*. It must however be remembered that the right of irrigation can be exercised only, by returning what is not wanted for this purpose to its accustomed channel. But the defendants diverted the water, used it, and did not return it. They contend that the diversion is justified, because the channel, through

which it was made, was an ancient one. Whether the channel had ever before been made or deepened by artificial means, does not appear. But however that might be, the defendants had a right to the benefit of it in its former state; but this would not justify any new or further diversion. The case of *Bealey v. Shaw & al.* 6 *East.* 208, states the law in a very satisfactory manner upon this point. It results that the second, third and fourth errors, predicated upon the assumption of a right to deepen the channel, are not well assigned.

The fifth error assigned is, that the Judge decided that the plaintiffs had a right to extend their dam to the eastern shore. This is deduced from his instruction to the jury that the plaintiffs had all the right in the stream, which they had set forth. There may be reason to believe from the evidence reported, that those under whom the plaintiffs claim, originally acknowledged the right of Dr. *Jones* to the eastern shore, and extended their dam to that side by his permission. And if the cause turned upon this point, that fact should have been settled by the jury. The defendants, who have succeeded to the title of *Jones*, prior to the erection of the existing dam in 1828, forbade its extension to their shore, notwithstanding which, however, it was so extended. An adverse seisin and possession of the privilege on that side then commenced, if not before. In *Jewell v. Gardiner*, cited in the argument, the plaintiff was from the beginning a trespasser; and it was held that he derived no right from an appropriation of the stream, which was itself a wrong upon the defendant. But in the case before us, assuming that the privilege on the eastern side was occupied in subordination to the title of Dr. *Jones*, the appropriation of the stream was lawful, and it was continued long enough to give to the owners of the western shore a right, on their side, to the head of water they had raised, which *Jones*, and those holding under him, could not lawfully impair, by operations above or below. The assent and permission given by Dr. *Jones*, presents a case differing materially from that of *Jewell v. Gardiner*. It might admit of great question, how far it was competent for *Jones*, having consented that the owners on the western shore might extend their dam to the eastern side, until such time as he should want the priv-

ilege there, and they being thereupon led to make expensive erections, could revoke the license he had granted, to their prejudice, at least until he did want the privilege on that side. And if he might do so, no revocation is proved or pretended, until twenty eight years after the license was given. During all that time, the owners on the western shore, had lawfully raised and appropriated a head of water in their own right, on their side. Now this right they have never abandoned, but up to the commencement of this action, continued to enjoy. And if, in the exercise of their right, at and since the erection of the new dam, they have trespassed upon the defendants, they may be answerable to them in an action at law therefor, or it may be that the defendants may lawfully enter, and prostrate the dam on the eastern side, but the right of the plaintiffs to the head of water they had raised on the western side, would remain unimpaired. When a right of this kind becomes once lawfully vested, it may be asserted and maintained, until abandoned. *Hatch v. Dwight*, 17 *Mass.* 289. The privilege on the western side, was capable of being enjoyed by a diagonal or wing dam.

But independent of their actual seisin and occupancy of the dam across the river, the plaintiffs have made out a sufficient *gravamen* to sustain their verdict, which was for nominal damages. They are the undoubted owners of the proportion of the mill they claim, and of the stream on the western side to the thread of the river; and the water has been diverted by the defendants, to the prejudice of their right. A mill privilege not yet occupied, is valuable for the purposes to which it may be applied. It is a property, which no one can have a legal right to impair or destroy, by diverting from it the natural flow of the stream, upon which its value depends; although it may be impaired by the exercise of certain lawful rights, originating in prior occupancy. If an unlawful diversion is suffered for twenty years, it ripens into a right, which cannot be controverted. If the party injured cannot be allowed in the mean time to vindicate his right by action, it would depend upon the will of others, whether he should be permitted or not, to enjoy that species of property. The case of *Hobson v. Todd*, 4 *T. R.* 71, presented a similar question in principle, in which the court held, upon a review

of the authorities, that one commoner might maintain an action against another, for an injury to his right, without proof of actual damage. If the plaintiffs have not proved their whole declaration, they have proved the tortious act they complain of, and a consequent damage to their right. They have shown their title to the mills, and to the privilege to the thread of the river. A plaintiff is entitled to judgment, if he proves only a part of his declaration, if the part proved presents a cause of action. If therefore this judgment were reversed, and a new trial granted, the plaintiffs would be entitled to a verdict and judgment upon the same evidence.

The sixth error assigned is founded upon a deduction from the instructions of the Judge, that the plaintiffs had a right to raise their new dam and to maintain it, eight inches higher than their old one was. In *Beissell v. Sholl*, 4 *Dall.* 211, the court say, "that every man in this country has an unquestionable right to erect a mill upon his own land; and to use the water passing through his land as he pleases; subject only to this limitation, that his mill must not be so constructed and employed, as to injure his neighbor's mill; and that after using the water, he returns the stream to its ancient channel." The doctrine laid down by *Blackstone* is, that "if a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's prior mill, or his meadow." And in *Hatch v. Dwight*, before cited, *Parker C. J.* says, "the owner of a mill site, who first occupied it, by erecting a dam and mill, will have a right to water sufficient to work his wheels, if his privilege will afford it; notwithstanding he may, by his occupation, render useless the privilege of any one above or below him upon the same stream." Now as the defendants did not erect their mill, until the plaintiffs' dam was raised, they had, by these authorities, the same right to raise it, as they had originally to build it to its first elevation. The right however, arising from mere prior occupancy, to this extent, has not been held in some cases as exclusive, unless continued for twenty years. *Platt v. Johnson*, 15 *Johns.* 213; *Tyler v. Wilkinson*, 4 *Mason*, 397. And we do not deem it necessary in the present case to decide, that by prior occupancy, the plaintiffs had acquired an exclusive right to the entire head of water, raised by

their new dam. But if they had no lawful authority in 1828 to extend their dam to the eastern shore, or to give it at that time an additional elevation, and derive therefore no rights from it, the cause of action before stated, would remain unaffected. Within the limitation stated in *Beissell v. Sholl*, the defendants had a right to change the character of their mills upon their privilege as they pleased, and to take them, or either of them, down and substitute others. 3 *Dane* 5, and the cases there cited. It does not appear that the plaintiffs' double grist mill is a use of the privilege, beyond that of the mills, which were conveyed to them. And this is a sufficient answer to the eighth error.

The seventh error assumes that the defendants, as the owners of the eastern shore, had a right to half the water, and a right to divert it to that extent. It has been seen, that if they had been the owners of both sides, they had no right to divert the water, without again returning it to its original channel. Besides, it was impossible in the nature of things that they could take it from their side only. An equal portion from the plaintiffs' side, must have been mingled with all that was diverted.

The defendants lastly object to the form of the action. The plaintiffs have sustained an injury; and are therefore entitled to a legal remedy. No form more apt or appropriate has been suggested. It is that which has been used and approved, for injuries arising from the diversion of a water course. The objection is technical; founded upon the relation in which the plaintiffs stand, as tenants in common with the defendants. Trespass does not in general lie by one tenant in common against another; because each has an equal right to the possession. But if one destroy that which is held in common, it does. And, upon the same principle, case would doubtless lie, where the destruction was not immediate, but consequent upon the act of one of the tenants in common. If all the water had been diverted, the plaintiffs' privilege would have been destroyed. If partially, it would seem to have been a destruction *pro tanto*. If two several owners of houses have a river in common between them, if one of them corrupts the river, the other shall have an action on the

case. *Co. Lit.* 200, *b* ; *Hobson v. Todd*, before cited, was case by one commoner against another, for surcharging the common, and no objection was taken to the form of the action. And we are of opinion, that this action may be supported upon authority, and the fair analogies of the law.

Judgment affirmed.

The inhabitants of POWNAL *petitioners for a writ of certiorari.*

On an application to the County Commissioners to lay out a town road, in the nature of an appeal, founded on the unreasonable refusal of the selectmen, the unreasonableness of their refusal should be adjudged by the Commissioners, and entered of record, as the foundation of their jurisdiction, or it will be error.

THIS was an application for a writ of *certiorari*, to bring up the record of the location of a road in *Pownal*, which had been laid out by the County Commissioners, on the refusal of the selectmen. Several errors were shown in the record; the principal of which was, that it did not appear that the refusal of the selectmen was adjudged unreasonable.

Greenleaf and *R. Belcher*, for the petitioners, argued that the unreasonableness of such refusal was the sole foundation of the jurisdiction of the Commissioners; and that, being an inferior tribunal, the record should show that the subject was acted upon by them, and the unreasonableness established and proved. They can only affirm or reverse the decision of the selectmen. *Commonwealth v. Coombs*, 2 *Mass.* 489; *Commonwealth v. Great Barrington*, 6 *Mass.* 492.

And THE COURT was of this opinion, and granted the writ; and the record being brought up at a subsequent term, was for this cause quashed, without further argument.

Longfellow, for the respondents.

BOODY *vs.* YORK.

Where, in the extent of an execution, the appraisers deducted one third part of the actual value of the premises, for the possibility of dower existing in the debtor's wife; it was held that this was an error, which, if it appeared in the return, would vitiate the extent; but that parol evidence could not be received to show the fact.

IN this case, which was a writ of entry on the seisin of the demandant, his title was derived from the extent of an execution against the present tenant. The proceedings of the officer and the appraisers appeared in the usual form. The tenant offered to prove by the parol testimony of two of the appraisers, that in estimating the value of the land they deducted the value of the debtor's wife's possibility or right of dower, setting off to the creditor the worth of such supposed incumbrance by one third more land; the land being actually worth from eight hundred to a thousand dollars, but appraised at only six hundred and sixty two dollars, on that account.

This evidence the Chief Justice rejected, but saved the point for the consideration of the Court, the tenant being defaulted.

Fessenden & Deblois, for the plaintiff.

Greenleaf and *McArthur*, for the tenant.

WESTON J. delivered the opinion of the Court.

In the case of *Barnard v. Fisher*, 7 *Mass.* 71, the error into which the appraisers fell, appeared in the appraisement under their

hands, upon the face of the proceedings returned. What might have been the effect of the objection raised in this case, if it had appeared by the same evidence, it is unnecessary to determine. The appraisers manifestly overrated the value of the incumbrance, even if the right of dower had then accrued, upon any just principles of calculation. But it would be dangerous to suffer a title, apparently perfected by an observance of the forms of law, to be affected by parol evidence of this sort. If admitted, no one would be safe in purchasing such a title. There might besides be great danger of fraud and perjury. Parol evidence is inadmissible to uphold a title, arising from a levy upon land, where the return has been defective in some particulars, susceptible of being proved by parol; because every thing essential to such a title must appear of record. *Ladd v. Blunt*, 4 *Mass.* 402; *Wellington v. Gale*, 13 *Mass.* 483.

An appraisement may not be a just estimate of the value of the property, either from a misapprehension of facts, or an error of judgment, on the part of the appraisers. If this operates against the creditor, and is seasonably discovered, he may refuse to accept seisin, in which case the land remains the property of the debtor, and the judgment is unsatisfied. *Ladd v. Blunt*, before cited. If the land is undervalued, the debtor has a year within which to redeem; which is a much less exceptionable mode of correcting an error to his prejudice, than that now sought to be enforced.

The opinion of the court is, that the evidence offered at the trial, was properly rejected.

Judgment for the demandant.

Rodick *vs.* Hinckley *& al.*

The owner of the minor part of a vessel having refused to consent to a proposed voyage, his share was appraised, and a bond given to him by the other owners, conditioned that at the end of the voyage, which was to the *West Indies* and back, they would restore him his share in the vessel, unimpaired, or, if she should be lost, would pay him the appraised value. Instead of returning her directly from the *West Indies*, they employed her several months in trade from thence to southern ports and back, and thence home. Hereupon it was held,—that the obligee might maintain an action on the bond for the detention of the vessel; and that the rate for which she might have been chartered was a reasonable rule for the estimation of damages.

This was an action of debt on a bond dated *Sept.* 7, 1829, in the penal sum of six hundred dollars, conditioned thus: "Whereas the said *James Rodick*, being one eighth part owner of the brig *Trio*, did, on the first day of *September* instant, give due notice to the said *Hinckley* and *Thompson* that he declined loading his part of said brig, or being in any manner concerned in a voyage now about to be commenced with said brig, and demanded security for his share of said brig in case she was sent to sea: And whereas the said brig has this day been appraised at the value of three thousand one hundred dollars: Now if the said *Hinckley* and *Thompson* shall, at the end and termination of the voyage or adventure, now about to be commenced with said brig, to the *West Indies* and back to this port, restore to the said *Rodick* his share of said brig, in as good order and of like value as she was when she came from sea, on the last voyage, or, in case she should be lost, pay or cause to be paid to him the sum of three hundred and eighty seven dollars and fifty cents, the appraised value of his said one eighth part of said brig; then," &c.

The defendants pleaded the general issue, and filed a brief statement of various matters of defence, pursuant to the statute.

At the trial, before the Chief Justice, it appeared that a few days after the date of the bond, the vessel sailed for the *West Indies*;

thence she proceeded to *Savannah;* thence to *New York;* thence to the *West Indies* again; and thence to *Portland*, where she arrived in the early part of *June*, 1830; and that had she returned directly from the *West Indies* to *Bath*, instead of proceeding to *Savannah*, she would have arrived by the beginning of *December*, according to the usual length of such voyages. It further appeared that after her return, the parties being together, *Thompson* asked *Rodick* what was the least sum he would take for his part of the brig; to which he answered four hundred dollars; which *Thompson* replied he would give. *Rodick* then said he would take that sum if the defendants would pay him forty dollars for the run of the vessel; and would also pay two outstanding bills of about twenty dollars. The parties then separated. A few days afterwards, at the Custom house in *Portland*, *Rodick* executed a bill of sale of his eighth part of the brig to the defendants, taking their promissory note for four hundred dollars; but nothing was then said about either of the above mentioned sums, or about giving up the bond now in suit. The defendants, however, had previously paid the two outstanding bills.

Upon this evidence the counsel for the defendants contended that the jury ought to be instructed to presume that the forty dollars were paid; or, that the plaintiff waived the payment, and accepted the four hundred dollars and the discharge of the outstanding bills, in full satisfaction of the bond. They further contended that under the terms of the condition, the plaintiff was not entitled to recover for the detention and use of the brig, as charter or otherwise; but that if he had any rights, he ought to pursue them in *assumpsit*.

But the Chief Justice instructed the jury that the condition of the bond was violated by sending the vessel to *Savannah* and *New York*, and thence back to the *West Indies*, instead of returning her directly to *Bath;* and that for the damages thereby occasioned, the plaintiff had a good right to maintain this action. On the question of damages he instructed them that as there was evidence that, if she had been returned directly to *Bath*, she might have been chartered for at least a dollar per ton per month, they were at liberty to consider that, if they thought proper, as a safe rule of damages. He

further instructed them that if, from the evidence, they should be satisfied that the four hundred dollars and the discharge of the two outstanding bills were considered and accepted by the plaintiff in full satisfaction for damages and for the run of the vessel, then they should find for the defendants; that on this point the evidence was before them; and, as there was no proof of the payment of the forty dollars, and as the bond was not cancelled or given up, they would judge whether there was any settlement of damages, or waiver of the claim. The jury, under these instructions, found for the plaintiff; and the defendants filed exceptions to the ruling and instructions of the Judge.

Fessenden & Deblois contended that the defendants were entitled only to the appraised value of the vessel, as the liquidated damages agreed by the parties, in case of a breach. After the condition was broken, the rights of the parties stood at common law, by which one part owner of a chattel, having possession, may use it at his pleasure, and without liability to account. The appraised value having been paid, the bond was satisfied. If the plaintiff would claim any thing more, his remedy should have been pursued in *assumpsit*. *Abbot on shipping*, 71; 4 *Burr.* 2229; 1 *H. Bl.* 332; *Fletcher v. Dyke*, 2 *D. & E.* 32; 2 *B. & P.* 346; *Perkins v. Lyman*, 11 *Mass.* 76; 2 *Pet. Adm.* 288.

Mitchell, for the plaintiff.

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

The voyage about to be performed when the bond was executed is described in the condition as a voyage "to the *West Indies* and back to this port," that is, to *Bath*. The brig was appraised at the sum of $3100. By the terms of the condition the plaintiff's share of the brig was to be restored to him at the end and termination of the voyage; or, in case she should be lost, the said *Hinckley* and *Thompson* were to pay him $387,50, being the appraised value of the plaintiff's share. If the brig should be restored, according to the condition, at the end of the voyage, then they were to pay the plaintiff such sum as would be equal to the reduction in value of his

share, occasioned by the voyage. The language of the condition is plain and must receive a reasonable construction. It does not follow that because the plaintiff was unwilling to be concerned in the voyage abovementioned, that therefore it would be no inconvenience to him to be deprived of the opportunity of employing his share after the termination of the voyage. Besides, by having given the bond, *Hinckley* and *Thompson* had acquired the control of the brig only during the specified voyage. It is contended that the condition presents a case of liquidated damages. This is true as to one alternative, viz. the loss of the brig; but this event never happened; as to any thing beyond this there was no liquidation. The brig, instead of being at *Bath* early in *December*, as she probably would have been had no new voyage been undertaken, was absent six months after that time, in the unauthorized employment of *Hinckley* and *Thompson*. This is clearly a violation of the condition, and is admitted to be. It is also equally clear that the damage sustained by the plaintiff, by being deprived of the use of his share of the brig during the six months, was the immediate and direct consequence of such violation; and why should not such damage be recovered in this action? And why is not the fair charter of the plaintiff's share of the brig during the six months of her absence as correct and reasonable a rule of damages in such case, as the allowance of six per cent. interest, by way of damages, when a sum of money is not paid when it becomes due?

It is said that *Hinckley* and *Thompson* were tenants in common of the vessel with the plaintiff, and, as such, had a legal right to use the vessel as they did. This doctrine, if sanctioned, would at once render the jurisdiction of a court of admiralty in cases of this nature, little more than nominal. The design of the law in requiring a bond to secure the rights of a recusant owner would be easily evaded, if the other owner or owners, having given the bond and sent the vessel to sea, could employ her in their own service as long as they should please, instead of performing and terminating the specified voyage according to the condition of the bond. The principle of the maritime law, upon which the bond in question was required and given, is a salutary one; and it is our duty to see that it is fair-

ly carried into execution by those who avail themselves of its application. In the case at bar the condition of the bond has been violated without any pretence of reason or apology; and according to our late statute, the jury have assessed the damages. In view of this cause, we perceive no incorrectness in the construction of the condition, and the instructions given to the jury.

Judgment on the Verdict.

DORKRAY *& ux. vs.* NOBLE *& al.*

Where land is conveyed in mortgage, and no separate obligation is given for payment of the money, a deed of quitclaim and release of the land, from the mortgagee to a stranger, is sufficient to assign the mortgage, and all his rights and interest under it.

If such assignment be made before entry for condition broken, and without consideration,—whether the creditors of the mortgagee can avoid it, they having no right to levy on the land as his property,—*quære.*

Tender, to discharge a mortgage, must be made to him who has the legal estate, and the right to reconvey. Therefore where the mortgagee has assigned all his interest to a stranger, of which the mortgagor has actual or implied notice, the tender must be made to the assignee.

THIS was a bill in equity, by the assignees of a mortgagor, to redeem certain mortgaged premises. The bill was originally inserted in a writ of attachment, pursuant to the statute, and was brought against *Noble* alone. It contained no interrogatories, and did not call for an answer under oath. The answer, among other things, disclosed a prior conveyance of all *Noble's* right in the premises to *Eleazar Wyer*. A supplemental bill was then filed against *Wyer* and *Noble*, impeaching the conveyance to *Wyer* as collusive, and praying their answers under oath; which were accordingly so given, fully denying all the charges in the bill. The other facts, material to the case, will be found clearly stated in the opinion of the Court.

Daveis, for the plaintiffs, contended, *first*, that the conveyance to *Wyer* was no assignment of the debt itself, but only a naked release of *Noble's* lien ; or rather of his title to the land ; *Noble* at that time denying the plaintiffs' right to redeem. Its effect was merely a conveyance of *Noble's* right to redeem the mortgage to *Burnham*. For any other purposes, the seisin of *Wyer* was only for an instant, and cannot therefore be made the foundation of any right in the present case. *Holbrook v. Phinney*, 4 *Mass.* 569 ; *Clap v. Draper*, *ib.* 267 ; *King v. King*, 7 *Mass.* 499 ; *Clark v. Munroe*, 14 *Mass.* 351.

Secondly. The tender to *Noble* was good, notwithstanding the transactions with *Wyer ;* of which, however, the plaintiffs had in fact no knowledge. The mortgage itself, both debt and lien, must be assigned, in order to vest the assignee with the rights and liabilities of the mortgagee. And the assignee must hold both the title and the legal possession, to make a tender to him good. *Wing v. Davis*, 7 *Greenl.* 31 ; *Vose v. Handy*, 3 *Greenl.* 322 ; *Warden v. Adams*, 15 *Mass.* 236 ; *Gray v. Jenks*, 5 *Mason*, 520 ; *Clark v. Wentworth*, 6 *Greenl.* 260. The holder of the land is but a trustee for the mortgagee. *Smith v. Dyer*, 15 *Mass.* 23 ; *Crane v. March*, 4 *Pick.* 136 ; *Gould v. Newman*, 6 *Mass.* 239 ; *Hatch v. White*, 2 *Gall.* 155 ; *Jackson v. Blodget*, 5 *Cowen*, 202 ; *Wilson v. Troup*, 2 *Cowen*, 195 ; *Jackson v. Curtis*, 19 *Johns.* 231. The tender therefore could be made with safety to none but *Noble*. *Smith v. Dyer*, 16 *Mass.* 18 ; *Scott v. McFarland*, 13 *Mass.* 310 ; *Parker v. Lincoln*, 12 *Mass.* 19 ; *Cutler v. Haven*, 8 *Pick.* 490.

Longfellow and *Greenleaf*, for the defendants.

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

MELLEN C. J. The following is a brief summary of the principal facts. *Moses Plummer*, the former owner of the premises in question, mortgaged the same to *Noble* to secure to him the payment of $300 in ten years with interest. The mortgage is dated on the 22d of *April*, 1817. *May* 2, 1817, he made a lease to *Noble*

of the same premises for ten years from the date of the mortgage, at the annual rent of $18, under which lease *Noble* went into possession. *July* 15th, 1818, *Moses Plummer* conveyed the premises to his son *Moses Plummer*, jr. subject to the above mentioned mortgage. On 13th of said *July*, *Moses Plummer* junr. conveyed the same premises to *Noble* by a deed, absolute in form, conveying to him the same in fee. At the same time *Noble* gave to *Plummer* two negotiable notes, one for $200, payable in three months from date, and the other for $100, payable in six months; both on interest. At the same time *Noble* made and executed to *Plummer* a bond, with condition to "reconvey to said *Plummer* the aforesaid premises, in as full and ample a manner as the said *Plummer* conveyed the same to said *Noble*," if he, said *Plummer*, should pay said *Noble*, his heirs, executors, administrators or assigns, the said two sums at the times appointed for payment, or save *Noble* harmless from the payment of them, and return the notes to him. It is admitted that *Plummer* never paid either of said notes, but that *Noble* paid them to the holders of them. The above bond was recorded *July* 18th, 1818. On the 11th of *February*, 1825, said *Moses Plummer*, conveyed all his right and title in the premises to his daughter, *Mary-Ann-Smith Plummer*, now the wife of *Dorkray*, and co-plaintiff with him. Before summarily stating the residue of the facts we will inquire whether *Noble* has done any act, equivalent to an entry to foreclose. Being in possession of the premises in *April*, 1819, and at the times when *Plummer* neglected to pay the two notes, as mentioned in the bond of defeasance, he could not make a formal entry, before two witnesses, according to our statute, for breach of the condition; but he might do that which would have the same legal effect, viz. give notice to *Plummer*, that, in consequence of such breach, he then elected to hold the premises on account of such breach. Has such a declaration been made and such notice been given? The answer of *Noble* to the original bill, in relation to this point, is not evidence in the cause; as that bill does not contain any interrogatories touching the subject. It is a merely voluntary statement, which is denied by the replication. The only proof adduced on the part of the defence, is contained in the dep-

osition of *John Parsons*. The fact testified by him, is in perfect harmony with the mistaken idea entertained by *Noble*, as to the nature and effect of the bond of defeasance. By his answer it appears that, until several years after *April*, 1819, he did not know that *Plummer* ever claimed to have a right of redemption, and ever considered the contract as a mortgage. He himself did not so consider it. Why then should he have deemed any declaration or notice necessary to render his title absolute in due time? He considered it absolute some months before, by reason of the nonpayment of the notes. His declaration to *Plummer*, in the presence of *Parsons*, was, that the land was his own, and that he held it as an absolute estate. This he also says in his answer to the supplemental bill. His language excludes the idea of a conditional estate, requiring any act on his part, tending to render it absolute. We consider this as a stronger case, in this particular, against the defendant, than was made by the facts in *Scott v. McFarland*.

There being no other evidence in the cause upon this point, we proceed in the next place to inquire whether such preliminary steps have been taken by the plaintiffs as entitle them to maintain the bill; and this leads to the statement of the remaining facts, on which the inquiry must be answered. On the 1st of *September*, 1822, *Noble* released, remised, bargained, sold, conveyed and quitclaimed to *Wyer*, "all right, title and interest" in and to the premises in question, with special warranty; and on the same day a mortgage was made by *Noble* and *Wyer*, to *Burnham*, of that, and another parcel of land, owned by *Noble*, with general warranty. *Noble and Wyer*, in their joint answer to the supplemental bill, in relation to that conveyance, about which they were called upon to "set forth the whole and true circumstances, facts, trusts and matters of agreement and understanding between them respecting the premises particularly," state that "when the mortgage was made and executed, *Noble* had a right to make it, as respects the premises in dispute;" which means that, though both deeds were executed on the same day, the mortgage was executed first as they explain it; and they add, that property, though owned in severalty by them, was conveyed by the mortgage, executed by both of them, with covenants, binding them

jointly, to save the expense of two mortgages. According to these facts, which are not disproved, *Noble* spoke the truth and acted consistently, in executing the mortgage and making the covenants as to his ownership and seisin of the premises in question, absolute or conditional. This title or estate in the premises passed in mortgage to *Burnham*, leaving the right of redemption in *Noble*. This right was then immediately vested in *Wyer* by *Noble's* conveyance to him ; and on the discharge of *Burnham's* mortgage, the whole estate, once belonging to *Noble* was vested in *Wyer*. Again it appears expressly by the second answer that the deed from *Noble* to *Wyer* was made with good faith and for a full and valuable consideration ; that *Wyer* went into immediate possession of the premises, as his own property, and has peaceably and openly occupied them ever since ; that the sale was absolute ; that the deed was recorded on the 13th of said *September*, and that *Plummer* was personally notified of the deed soon after it was made. Upon the facts we have now stated, was the tender in *July*, 1825, made to *Noble*, a legal and effectual one ? The first section of the statute of 1821, *ch.* 39, provides " that where any mortgagee or vendee, claiming any lands or tenements granted upon condition, by force of any deed of mortgage, or bargain and sale with defeasance, or any person claiming and holding under them, have lawfully entered and obtained possession for condition broken, the mortgagor or person claiming under him, shall have a right to redeem the same at any time within three years next after the possession so obtained, and not afterwards upon payment of whatever may be justly due," to such mortgagee, vendee or person lawfully " claiming and holding under them, and in possession as aforesaid ;" and the person to whom such tender or payment is made is required by the statute to restore the possession, and to execute and deliver to the person thus making tender or payment a good and sufficient deed of release of all his right to the same or enter a discharge in the register's office. The plaintiffs' case, it seems, is not brought within the language of the statute above quoted, though they profess to found their bill upon it ; because they deny that *Noble* or any one else ever entered on the premises for breach of condition ; and there is no proof of such

entry or any thing equivalent to it. On the contrary, their counsel have contended that *Noble* was lawfully in possession under his lease from *Plummer*, at least until his conveyance to *Wyer;* and at that time the case shows that *Wyer* went into the full and open possession and has ever since so held it. A similar objection was presented against the maintenance of the bill in equity in the case of *Pomeroy v. Winship*, 12 *Mass.* 514, which led the court to the construction of the act of which ours above quoted or referred to is a copy. The Chief Justice observes, "It has been decided that where there has been an entry before the breach, the mortgagee may commence his foreclosure without any new entry, by declaring that he holds for condition broken, when that event shall occur. *Newhall v. Wright*, 3 *Mass.* 138. It seems to be a correlative principle that where the mortgagee is in, the condition being broken, the mortgagor, to secure his rights, may elect to consider him in, as claiming to foreclose; and that a tender of performance, made to him when thus in possession, shall avail to the mortgagor, as much as if there had been a public entry, or a judgment for possession, because the condition was not performed." But this construction of the statute does not bring the plaintiffs' case within it, because *Noble* was not thus in possession in *July*, 1825, when the tender was made, or afterwards. Without dwelling any longer upon this view of the cause, we will examine certain objections which have been urged by the plaintiffs' counsel to the defence as founded on the deed from *Noble* to *Wyer*, and the alleged insufficiency of the tender to *Noble* after the execution of that deed.

The first objection is, that nothing was conveyed and assigned by *Noble* to *Wyer* but the land; that there was no assignment of the debt; and that unless the debt is assigned by the mortgagee as well as the land, nothing passes by the deed. Several authorities have been cited in support of these positions. We are not disposed to question the correctness of any of them; nor do we. It is true, however, that though the cases cited from *Cowen*, are good law in *New York*, it does not follow that we should pronounce them correct as applied to our laws on the subject of mortgages, which, in many respects differ from those of that State. It is evident that all

the cited cases, as to this point, vary from the present. *Noble* had nothing to assign to *Wyer* but his right, title and interest in the land in question; all that he did assign. There was no debt due from *Plummer* to *Noble* when the deed and defeasance were made; and the contract was of such a nature that none could grow out of it. *Plummer* wanted to realize $300 in cash; he conveyed the land to *Noble*, who gave him the two negotiable notes, named in the defeasance, which he could easily get cashed, and then gave the bond to reconvey the premises to him if he would see the notes paid to the holders and indemnify *Noble* from all damage. But *Plummer* had his option to pay the notes and receive a reconveyance; or neglect to pay them, and let *Noble* pay them and keep the land by way of satisfaction and indemnity. The plaintiffs have considered the transaction as constituting a mortgage, and so has the court inclined to consider it; but it is one of those mortgages where there is no personal security or liability. "If the mortgagor will not voluntarily redeem the land, and there is no bond or covenant for payment of the money, he cannot be compelled to do it, but the land must remain the mortgagee's estate; at least after the three years are elapsed." Judge *Trowbridge's* opinion, 8 *Mass.* 563. Under these circumstances the deed from *Noble* to *Wyer* constituted a legal assignment of the mortgage, the bond of defeasance being duly recorded. In *Warder v. Adams*, cited by the plaintiffs' counsel, the court say that an assignment by a separate deed, makes the grantee the assignee of the mortgage. *Gould v. Newman*, 6 *Mass.* 239, 241.

Another objection is that there was no consideration for the deed from *Noble* to *Wyer*. The objection expressly contradicts the answer; but, the explanation given is satisfactory. *Wyer* paid for the land out of his several property, and the deed was made to him for the purpose of becoming advantageous to the firm. Why does it differ in this particular, from a purchase of some other person, instead of *Noble*? But another answer is, that the deed is good against *Noble*, and all other persons, except creditors of *Noble*, whether there was or was not any consideration; and perhaps good against them inasmuch as lands under mortgage cannot be levied upon as the estate of the mortgagee.

Another objection is, that *Wyer's* seisin under the deed from *Noble* was only instantaneous. Surely this objection is groundless as applied to this case. Whether instantaneous or not, the seisin of *Wyer*, in virtue of the deed, was never restored to *Noble*; and the question we are examining is whether his seisin was not terminated by his conveyance.

Another objection urged is, that by the terms of the condition of the bond, *Noble* was to reconvey, on performance of the condition; and that, therefore, the tender was made properly to him. Considering the transaction or contract between *Noble* and *Plummer*, as creating merely a conditional estate in *Noble*, and not a mortgage, this conclusion might be correct; but, in that view of the subject there would be no pretence for maintaining the present bill; for if it was not a mortgage, then the payment of the two notes given by *Noble*, should have been punctually made when they became due; and then *Plummer* or his grantee, perhaps, might regain the possession by an action at law. But, the transaction has been viewed in a more favorable light for the plaintiffs as a mortgage; it must therefore be governed by the law applicable to mortgages. By that law which we have quoted, a payment or tender, for the purpose of redemption, must be made to the mortgagee or vendee, or the person in possession and claiming and holding under him; that is, to the mortgagee or vendee, if there is no assignment, and if the mortgage has been assigned, then to the assignee, who only can reconvey. Such was the decision of this court in *Thompson v. Chandler*, 7 *Greenl.* 377. And in *Cutler v. Haven*, cited by the counsel for the plaintiffs, the court say that notwithstanding there was no legal assignment of the mortgage, there was an equitable one by a delivery over of the deed and note to *Valentine;* and therefore, if the administrator of the mortgagor had notice of such equitable assignment, a payment to the mortgagee or his representative would be deemed fraudulent in respect to *Valentine*. In the present case *Plummer* had notice; *a fortiori*, a payment or tender to *Noble* could not be regular or available, after a legal assignment to *Wyer*.

We have, by way of anticipation, endeavored to answer the objection, founded on the deed of mortgage to *Burnham*, and the peculiar manner in which it was drawn, and in which different parcels of estate, though owned by *Wyer* and *Noble* in severalty, were conveyed by them jointly, accompanied by joint covenants of ownership. We are satisfied with the answer we have given, and shall not repeat it here.

We have thus examined the facts as displayed to us, and considered the authorities adduced and the arguments urged in support of the bill, and we are satisfied that for want of a legal and effectual tender, it cannot be maintained. The bill is accordingly dismissed, and costs are allowed to the defendants.

HARMON *vs.* WATSON.

The indorsement of a writ thus, "*A B* by his attorney,"—is not a sufficient compliance with the statute, for want of the attorney's name.

The employment of an attorney at law to commence an action, does not, of itself, give him authority to indorse the writ with the name of the plaintiff.

THIS was an action of replevin, in which the writ was indorsed thus :—*Phineas Harmon*, by his attorney" ;—and on motion of the defendant in the court below, the writ was abated for want of a sufficient indorsement ; it being admitted that it was made by Mr. *Mc Arthur*, the plaintiff's attorney, by virtue of his employment, as such, to commence the action, and without other authority. Whereupon the plaintiff appealed to this Court.

Greenleaf and *McArthur*, for the plaintiff.

R. A. L. Codman, for the defendant.

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

It is not necessary in this case to decide as to the effect of an indorsement of a writ, when the name of the plaintiff is written on the back thereof, by a person specially authorised for that purpose. Such is not the mode in which it was done in the present instance. It is admitted that the indorsement of the plaintiff's name was made by Mr. *M'Arthur*, by virtue of his employment, as attorney for the plaintiff. We are not aware of his having such an authority, merely in consequence of his employment to commence the action, as the attorney of the plaintiff. Such a construction of the statute would be a virtual repeal of it. An original writ must be endorsed by the plaintiff or his attorney; and we have decided in *Davis v. Mc Arthur*, 3 *Greenl.* 27, and again in *How v. Codman*, 4 *Greenl.* 79, that when the attorney signs the name of the plaintiff and adds his own too, thus: "*Green Cram*, by his attorney *R. A. L. Codman*," the attorney was bound. It is not worth while to try these experiments for the purpose of evading the statute; they cannot succeed. Had Mr. *McArthur* signed his own name, as he did in *Davis v. McArthur*, he would have been bound; as he did not, the writ is abated for the want of a legal indorsement.

Writ abated and judgment for a return.

WALKER *vs.* SANBORN.

The question of the recommitment of a report of referees appointed under a rule of court, is addressed to the discretion of the court; whose decision, therefore, is not the subject of a bill of exceptions.

Such also, it seems, is the question whether a report shall be accepted or not, on a hearing of objections founded on extraneous facts, relating to the course of proceedings before referees, where there is no proof of fraud, partiality or corruption.

Where a party defendant, having a good defence at law, agreed to submit the action to the determination of referees, in the usual form; he was considered, in the absence of all evidence to the contrary, as referring all questions, as well of law as of fact, to their judgment. If therefore their decision be against him, it is no ground for the rejection of the award that it is against law.

This Court has no authority to recommit a report of referees which had been returned to the court below, and there accepted; the case being brought up by exceptions to that decision.

THIS action, which was *assumpsit*, for the price of a canal boat, was submitted to referees in the court below, under a rule in the common form. Their report, which was in favor of the plaintiff, being offered for acceptance, the defendant urged these objections, which he offered to substantiate by the testimony of one or more of the referees :—1st. That it appeared in evidence, at the hearing before them, that a credit of two years was agreed by the parties at the time of sale, for payment of the price of the boat; yet that the action was commenced within four months after the making of this agreement:—2d. That it was proved before the referees that the price of the boat was to have been paid in freighting wood and lumber; which had never been demanded by the plaintiff, or refused by the defendant. But there being no suggestion of corruption on the part of the referees, or that they intended to proceed according to law, but had mistaken the law, *Whitman, C. J.* rejected the evidence offered, and accepted the report; to which the defendant filed exceptions.

R. A. L. Codman, in support of the exceptions, took a distinction between awards under a submission by bond, at common law,

and those of referees appointed under a rule of court; insisting that in the latter case the award was open to a much greater latitude of objection; and that it ought to be rejected or recommitted for the same causes for which a new trial would be granted. *Dillingham v. Snow*, 5 *Mass.* 553; *Hammond v. Wadham, ib.* 353; *Wait v. McNeil*, 7 *Mass.* 261; *Pierce v. Adams*, 8 *Mass.* 383; *Whitwell v. Atkinson*, 6 *Mass.* 272; *Boardman v. England, ib.* 70; *North Yarmouth v. Cumberland*, 6 *Greenl.* 21; *Bean v. Farnham*, 6 *Pick.* 269. For this purpose even formal objections have been suffered to prevail; as in *Drew v. Canady*, 1 *Mass.* 158. The award is not conclusive on the ground that both law and fact were submitted to the referees, unless it so appears in the submission itself. *Jones v. The Boston mill corporation*, 6 *Pick.* 148.

But, if the exceptions should be overruled, the defendant prayed to be heard on a motion to recommit the report.

S. Fessenden, Deblois and *W. P. Fessenden*, for the plaintiff, cited *Kyd on Awards*, 185, 351; *Shephard v. Watrous*, 3 *Caines*, 168; *Bailey v. Lechmere*, 1 *Esp.* 377; *Caldw. on Arbitr.* 53; 1 *Taunt.* 48; *Knox v. Simonds*, 1 *Ves.* 369; 8 *Mass.* 408; *Hawkins v. Colclough*, 1 *Burr.* 277; *Purdy v. Delavan*, 1 *Caines*, 315; *Kleine v. Catara*, 2 *Gall.* 61; *Chase v. Westman*, 13 *East.* 358.

Mellen C. J. delivered the opinion of the Court at the adjournment in *August* following.

In the case of *Cumberland v. North Yarmouth*, judgment was arrested on the ground that after the report was recommitted, it did not appear that *Elden*, one of the referees, ever attended with the other two, and that he did not sign the second report was apparent on the record. The question there presented was purely a question of law. In the case before us, there was an objection to the acceptance of the report, which was predicated on facts, not appearing on the record, but which the counsel for the defendant offered to prove; and, which, in the decision of the question before us, we must consider in the same manner as though they had been proved. It is urged that the rejected evidence should have been admitted, as it

might have induced the Judge to recommit the report, if not reject it. The question of recommitment is one of discretion and not of law, and, of course, not subject to the revision of this court on exceptions alleged; and we are inclined to the opinion that the question, whether a report shall be accepted or not accepted, on a hearing of objections, founded on extraneous facts, relating to the course of proceeding before the referees, where there is no proof of fraud, partiality or corruption on their part, is one of the same nature; but on this point, we do not mean to be understood as giving any definite opinion, as it does not appear to be necessary. We place our decision on another ground, distinct in its nature. The defendant, when he was sued, knew that, by his agreement with the plaintiff, a credit of two years was allowed to him on the sale of the boat; and that the price was to be paid in freighting wood and lumber. He knew also that within four months after the agreement he was sued for the price, in cash. He knew also, or is presumed to have known, that these facts would furnish a good defence at law. Still he consented to submit the decision of the cause to referees in the usual form; and, by so doing, we think that, in the absence of all language to the contrary, he must be considered as intending to refer, and as refering all questions of law and fact to their judgment. The nature of such an equitable and informal tribunal is universally known to the citizens of this State, and so is the mode of its proceeding in the administration of justice between man and man; and the parties in such cases expressly agree that the report of this tribunal, being duly accepted by the court, to which by law it is returnable, shall be final. Fraud never need be excepted in a contract, to save the contractors from the effect of it; the law always excepts it, as a poison which contaminates what it touches. Fraud, therefore, on the part of him in whose favor a report is made, as well as partiality and corruption in the referees or any of them, may always be legally proved to impeach the report. Had it not been the intention of the parties in the present case to refer the whole cause, including all questions of law as well as fact arising in its investigation, would they not have used some words of exception or limita-

tion? Parties may, and frequently do, refer causes with a proviso that the referees shall, in their decision, be governed by legal principles. So they may refer questions of title under a rule of court; they may impose terms and conditions, or refer generally. On the whole we think that as the cause was referred in the usual form, without any proviso limiting the well known and customary powers of referees, the defendant must be considered as having elected his tribunal for the very purpose of having the cause honestly and impartially decided on its merits; and according to those principles which that tribunal should consider reasonable and just. *Kleine v. Catara*, 2 *Gall.* 61. For the foregoing reasons, as there is no imputation of fraud, partiality, corruption or management in any one, we cannot sustain the exceptions. In many cases it may be proper to correct mere mistakes or prevent injustice by giving a further hearing of the parties, where new proof has been obtained, or fair notice as to the time and place of trial had not been given and received; but in all these cases the relief is granted by a recommitment of the report. Still, the grant or refusal of a recommitment, is a matter of judicial discretion, and can never be the subject of exception under the statute. In the present case this court has no authority to recommit the report, even if we had any inclination so to do.

Exceptions overruled and the judgment affirmed.

The BATH *bridge and turnpike company, petitioners for certiorari, vs.* MAGOUN *& als.*

The writ of *certiorari* is grantable only on the petition of those who have a direct and vested legal interest in the subject matter.

Therefore, though a county road was illegally laid out, and, being a free road, operated to the injury of a neighboring turnpike, by diverting the travel therefrom; yet a writ of *certiorari* was refused on the petition of the turnpike corporation, because it owned no land over which the road was laid, and was not directly affected in any of its vested rights, the damage it sustained being only remote and incidental.

BY the private statute of *March* 17, 1830, [*ch.* 114,] the Courts of Sessions for the counties of *Cumberland* and *Lincoln*, were authorised to lay out a county road across the tide waters of *New Meadows* river, and "running from the village in *Bath* to the village in *Brunswick*;" provided, among other things, the inhabitants of those towns, at any legal meeting within two years from the passing of the act, should give their assent to its provisions. To these provisions *Bath* gave an absolute assent; but *Brunswick* qualified its assent with the condition that a stone bridge be built over its portion of the river, and a good road made from the river to *Cook's* corner, where it was supposed the new road would terminate, at a cost not exceeding seven hundred dollars.

The Court of Sessions thereupon located the new road, beginning at a place on the old road, nearly half way from *Brunswick* to *Bath* village, thence crossing the river, and coming again into the old road a little north of the latter place. The record of the location was in the common form, no notice being taken of the act, or of the assent of the towns.

The *Bath* bridge and turnpike corporation, whose tolls would be diminished by the opening of this road, now applied to this Court for a writ of *certiorari* to quash the proceedings; alleging, for errors, that the road was laid over navigable waters, yet that the commissioners did not assume to act under the authority of the statute

of *March* 17, 1830; that the road was not laid from village to village in conformity with its provisions; and that the two towns never gave their assent in manner and form as the act required.

J. & E. Shepley for the petitioners.

Greenleaf and *Randall* for the respondents.

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

On inspection of the record of the location of the road described in the application, we entertain no doubt as to the irregularity of the proceeding, on account of the noncompliance with the condition of the act authorising the location over the tide waters therein described; and we should immediately grant the writ, as prayed for, were we not satisfied that we have no authority to grant it on the present petition. From the facts before us we have no doubt that the road, the location of which is complained of, if completed, would indirectly be essentially prejudicial to the private interest of the corporation; but such an indirect interest, does not authorise the interposition of the corporation in this mode.

In some respects there is a difference between a writ of error and a writ of *certiorari*, and in some respects there is a strong resemblance. The former lies where the proceedings are according to the course of the common law; in other cases a *certiorari* is the proper writ. A writ of error is a writ of right; a writ of *certiorari* is not; it is a matter of sound discretion to grant or refuse it. There are several other points of difference. They are alike in this, that no one but a party to the record, or one who has a direct and immediate interest in it or is privy thereto, can maintain either of those writs. *Porter v. Rumery*, 10 *Mass.* 64; *Shirley v. Lunenburg*, 11 *Mass.* 379; *Grant v. Chamberlain*, 4 *Mass.* 611; *Haines v. Corlis*, *ib.* 659; *Glover v. Heath*, 3 *Mass.* 252. In the above cases the rights and interests of heirs, devisees, executors and administrators, are recognised, as well as those of the original parties; but we are not aware that those, not having any such rights or interests, are entitled to either of the before mentioned writs. Numerous cases have occurred, and many are reported, in respect to

the location of roads, &c. but they have always been prosecuted by those having a direct, legal, statute interest in the proceedings complained of. As our laws on this subject now stand, the individuals whose land is appropriated for the road have a direct interest of a pecuniary character. So has the county, because liable by law to pay to the owner the estimated value of the land so appropriated. So has a town, because by law bound to make the road and keep the same in repair. On applications for a *certiorari* it is usual to notify one or more of the petitioners for the road, as being parties on the record. In the case before us the corporation does not present itself in either of the above mentioned characters. It is a stranger to the record and has not any direct statute interest in it. Any injuries it may sustain are of a remote and incidental nature. Suppose that by the location of a new road, the stages, and travellers of various kinds, are induced to leave the old road and a long established and profitable hotel, by means of which it becomes useless, and the owner is deeply injured in his property; surely these circumstances would not clothe him with the rights of a party and authorise him to prosecute a writ of *certiorari* for the purpose of obtaining a quashment of the proceedings by which the road was located. For the reasons above given, a

Writ of certiorari is not granted.

GILBERT *vs.* MERRILL.

The lien created by the attachment of a right in equity of redemption is not always limited to the amount of the judgment to be recovered; but may extend beyond that, to the whole amount for which the right may be sold by the sheriff.

Therefore, where a right in equity, while under attachment, was sold by the mortgagor to a stranger; after which judgment was recovered against the mortgagor, and the right in equity was duly sold on execution, by the sheriff, for a much greater sum than the amount of the execution;—it was held that the assignee of the mortgagor could not discharge the lien created by the attachment, by a tender of the amount of the judgment and costs; but must tender the whole sum which was paid by the purchaser at the sheriff's sale.

THIS was a bill in equity against *William Merrill*, jun. for the redemption of certain mortgaged premises. The facts were somewhat complicated; but the most material, collected from the bill and answer, were these. *Feb.* 18, 1826, one *Samuel Merrill*, being then seised in fee of the premises, mortgaged them to *Royal Lincoln*, to secure the payment of $343,94 and interest, in twelve months. *Feb.* 16, 1827, the right in equity of the mortgagor was attached in a suit in favor of *David Winslow* against him. *June* 20, 1827, *Samuel Merrill*, by deed of quitclaim, conveyed all his interest in the premises to *William Merrill*, jun. the defendant; who, on the day following, covenanted with *Samuel*, that on repayment of the consideration-money in four years, and on performance of certain other things therein expressed, he would reconvey the premises to him. This obligation *Samuel* afterwards assigned to *Gilbert*, the plaintiff, who was his creditor; but whether absolutely, or by way of collateral security, did not appear. The defendant, at the time of the conveyance to him, had no knowledge of *Winslow's* attachment. *July* 11, 1827, *Lincoln* assigned his mortgage to one *Isaac Sturdivant*, who, on the next day, assigned it to the defendant. *Winslow* recovered judgment in his suit against *Samuel Merrill*, jun. at *October* term, 1829, and having caused the right in equity, which had been attached, to be seasonably taken in execu-

tion, it was sold *Dec.* 18, 1829, by the sheriff, to *Gilbert*, the plaintiff, for five hundred and thirty four dollars. The amount of *Winslow's* execution was only $72,16; and to relieve the land from this incumbrance, the defendant, *July* 10, 1830, tendered ninety dollars, which the plaintiff refused to accept.

The question now raised and argued, was whether the defendant could discharge the lien created by the attachment, by the tender of this last sum.

The plaintiff further alleged in the bill that on the 21st day of *January*, 1831, he tendered to the defendant $453, to redeem the premises, requesting an account, &c.; and the defendant alleged an entry *July* 11, 1827, for condition broken, and a subsequent foreclosure by the lapse of three years. But this part of the case was not opened at this time.

Daveis for the defendant, contended that the attachment was in effect merely a prior mortgage to the amount of the debt and costs; that the subsequent purchaser might relieve the land by paying only that amount; that the balance of the purchase money paid by the plaintiff, did not belong to the mortgagor, but to his assignee; and therefore that the tender of the ninety dollars was sufficient. *Bigelow v. Wilson*, 1 *Pick.* 485; *Gore v. Brazier*, 3 *Mass.* 541; *Wyman v. Brigden*, 4 *Mass.* 150; 7 *Dane's Abr.* 358, 359; 3 *D. & E.* 288; *Hob.* 132; *Jewett v. Felker*, 2 *Greenl.* 339.

S. Fessenden, *Deblois* and *W. P. Fessenden* for the plaintiff.

Weston J. delivered the opinion of the Court.

The right, which *Samuel Merrill* had to redeem the premises mortgaged by him to *Royal Lincoln*, was, on the 16th of *February*, 1826, attached at the suit of *David Winslow*. At the *October* term of the Common Pleas in this county, 1829, he obtained judgment in that suit; and the equity attached was duly and seasonably sold to the plaintiff, upon the execution, which issued upon that judgment. The right of the plaintiff has relation back to the day of the attachment; and has therefore priority to the interest, conveyed by the said *Samuel* to the defendant, between the attachment and the sale of the equity.

This principle, the counsel for the defendant does not contest, but insists that the priority, created by the attachment, is limited to the amount of *Winslow's* judgment, and the expenses of sale. But we find no warrant in the statute, providing for the attachment and sale of equities of redemption, for this position. *Stat.* 1821, *ch.* 60. The equity is indivisible; but it may be attached by more than one creditor, who will become interested in the proceeds of the sale, according to their priority. But whatever may be the value of the equity, compared with the debt, any creditor may attach, seise and sell it, however small may be the amount of the judgment he obtains. The debtor however may dissolve the attachment, and prevent the sale, by paying the debt. And so we apprehend might a subsequent purchaser. So far as the lien affected his estate, he would have a right to represent the debtor, in making such payment.

But if the debt be not paid, the equity is liable to be sold, to satisfy a judgment however inconsiderable, although it may be of great value. This arises from the statute right to attach, seize and sell, and from the indivisible character of the equity. The statute presumes that there may be a surplus; and provides for its distribution to other creditors, or its payment to the debtor. It results that the purchaser may hold his purchase, for the whole sum by him paid. If it were not so, there would be no safety in buying at such sales. No one would bid beyond the amount of the execution, upon which such sale might be made, which would often occasion great sacrifice of this kind of property. We are of opinion, that unless the defendant has other grounds of defence, the plaintiff's lien, on the premises in question, subject to the prior mortgage to *Lincoln*, extends to the whole amount by him paid, with the interest.

DESCADILLAS & *al.* *vs.* HARRIS.

The master of a vessel, having, in a foreign port, borrowed money on the credit of the owner, for the necessary purposes of the voyage, is a competent witness for the lender, in a suit against the owner of the vessel to recover the money borrowed, though he may have drawn a bill of exchange on his owner for the amount.

A negotiable security, given in a foreign country, is not to be regarded here as an extinguishment of a simple contract debt there created, unless it is made so by the laws of that country.

The giving of such security here, is only presumptive evidence of the intent to extinguish the prior simple contract debt; liable, like all other presumptions, to be rebutted.

The master of a vessel, being in a foreign port, has authority to borrow money on the credit of his owner for the necessities of the voyage, though the necessity arose from his own misconduct.

Where the master, being consignee of the cargo, on his arrival at a foreign port, inquired at the custom house what would be the amount of the duties and charges there payable by him, and retained for that purpose, out of the proceeds of his outward cargo, the sum thus ascertained, investing the residue in a return cargo; but after being ready for sea, discovered that the sum computed at the custom house was too small by three hundred dollars;—it was held that this constituted a case of necessity sufficiently strong to authorize him to borrow the deficiency, on the credit of his owner.

THIS was an action, of *assumpsit*, brought by *Descadillas*, *Allaine* and Company, merchants in *Guadaloupe*, against the charterer of the brig *Pacific*, for money lent to *David P. Shaw*, master of the brig, at *Point Petre*, for the necessary purposes of the voyage.

It appeared that the brig was sent from *Portland* to *Point Petre* with a cargo of lumber, consigned to the master, who was ordered to invest the proceeds, together with other funds of the owner which were then in *Guadaloupe*, in a return cargo of molasses. The captain, on his arrival at *Point Petre*, inquired of the collector of the port what would be the port charges and duties, and was informed that they would amount to about five hundred dollars. When he went to the custom house to clear out his vessel, he found that the

amount of duties and charges was eight hundred dollars, the collector having erroneously computed them. Having retained in his hands only the sum first named, the residue of his funds being invested agreeably to the orders of the owner, he applied to several masters of vessels and to two merchants to obtain money for the deficiency, offering to turn out molasses for the amount; but without success. He at length borrowed it of the plaintiffs, to whom he offered a guaranty on part of his cargo, which they declined, but took his bill of exchange for the amount on the defendant, whose house they recognized as good. This draft was presented to the defendant, who refused to accept it; whereupon the plaintiffs sued *Shaw* as the drawer, and had judgment against him for the amount of the bill, interest, damages and costs; but not being able to obtain satisfaction, they brought this action against the defendant, charging him, on the common counts, for the same sum.

Shaw testified that he received the money of Mr. *Allaine*, who took the draft payable to the plaintiffs. And Mr. *Terasse*, a merchant, testified that *Allaine* procured the money through *Descadillas* and *Allaine;* which was the former name of the house to which two of the plaintiffs belonged, before the introduction of the third partner.

The principal facts were testified by *Shaw;* to whose competency the defendant objected; but *Weston J.* before whom the cause was tried, overruled the objection. It was also objected by the defendant that the money did not appear to have been advanced by the plaintiffs, but by *Allaine;* which the Judge left to the jury. It was further objected that the necessity for the loan was created by the folly and imprudence of the master, and that therefore he had no authority to bind his owner; and that no such necessity could have existed, as he might have raised the money by a sale of part of the cargo. And it was contended that even if any implied contract had been raised between the parties, it was extinguished by the acceptance of a negotiable security for the sum borrowed.

But the Judge instructed the jury that if there was a necessity for further funds, though such necessity might have arisen from a want

of due care and prudence on the part of the master, he had a right to hypothecate the whole or a part of the cargo to raise them ; and that where he might hypothecate, he might also borrow without it, on the credit of the owner. And a verdict being returned for the plaintiffs, the Judge reserved the questions raised at the trial for the consideration of the Court.

Longfellow, for the defendant, argued that *Shaw* was inadmissible as a witness, because directly interested in the matter in controversy ; and that if interested both ways, yet the balance of interest was against the defendant. *Emerton v. Andrews*, 3 *Mass.* 253 ; *Scott v. McLellan*, 2 *Greenl.* 199 ; *Jones v. Broke*, 4 *Taunt.* 464 ; *Gage v. Stewart*, 4 *Johns.* 293. But if he were admissible, the defendant is not liable, the claim of the plaintiffs being extinguished by the negotiable security taken. *Varner v. Nobleborough*, 2 *Greenl.* 121 ; *Exparte Hodgkinson*, 19 *Ves.* 291. He also contended that the money was not advanced by the plaintiffs, but by *Allaine* alone ; and that there existed no necessity for the loan, as the master had property in his hands out of which the money could have been made.

Greenleaf, for the plaintiffs, to the competency of the witness, cited *Milward v. Hallet*, 2 *Caines*, 77 ; *Ilderton v. Atkinson*, 7 *D. & E.* 480. To the authority of the master in a case like the present ; *Abbot on Shipping*, 107 *note ; Evan v. Williams*, 7 *D. & E.* 481 *note ;* 3 *Kent's Com.* 125 *note c ; Cupisino v. Perer*, 2 *Dall.* 195. And that the remedy against the owner was not extinguished ; *Gallagher v. Roberts*, 1 *Wash. C. C. R.* 320 ; *Parker v. The United States*, 1 *Pet. C. C. R.* 262 ; *Wallace v. Agry*, 4 *Mason*, 342.

The cause having stood for advisement since the last *May* term, when the arguments were heard, the opinion of the Court was now delivered by

Parris J. The first question presented by the report is as to the competency of *Shaw*, the witness. From the evidence reported, independent of his own testimony, it appears that he was master of the brig *Pacific*, chartered by the defendant for a voyage from

Portland to the island of *Guadaloupe*, and back. This fact appears by his letter of instructions given him by the defendant, and the testimony of several of the witnesses. We are then to consider the witness as master of a vessel in the defendant's employment, clothed with all the powers usually incident to such an office; and also, by virtue of special instructions, invested with the additional power of selling and purchasing cargo.

The witness is offered for the purpose of proving the circumstances under which the money, sought to be recovered in this action, was furnished, and the existence of such a necessity as would authorise the master to borrow on account of the owner.

He was the confidential agent of the owner, and as such, had authority to bind him in contracts relating to the subject matter of his agency. The witness had been appointed by the defendant to the charge of his vessel, with directions to proceed to her port of destination, sell the outward cargo, purchase a return cargo, and return to *Portland* with as little delay as possible. He procured from the plaintiffs three hundred dollars to enable him to defray the port and custom house charges required to be paid before he could be permitted to proceed on his return voyage; for which sum he drew bills on the defendant. As drawer of these bills, they not having been accepted and paid, he is liable to the holders at all events, and judgment has been rendered against him thereon for the full amount of his liability. That judgment not having been satisfied, the plaintiffs claim to recover of the defendant the sum by them advanced, as they allege for his use. Does *Shaw* stand indifferent as to interest between these parties? He received this money in the capacity of master of the defendant's vessel. His having drawn on the defendant for the amount did not create his liability. Not having exempted himself from personal responsibility by expressly confining the credit to the owner, he would have been personally answerable to the plaintiffs for the amount advanced, if no bills had been drawn.

The master is always personally bound by his contracts, and the person who deals with him concerning the usual employment of the ship, or for repairs, or supplies furnished her, has a remedy upon the master on his own contract, and also on the owner upon the

contract made on his behalf by his agent. It is this remedy against the owner which the plaintiffs now attempt to enforce. If they should be successful in this attempt, how would it relieve *Shaw*? In the first place, they have a judgment against him covering the sum loaned, and all damages, interest and costs growing out of the protest of the bills, so that whatever may be the result of this action, *Shaw* cannot avail himself of it in defence. But if the effect of a recovery by the plaintiffs here would be, to relieve *Shaw* to the same amount from their judgment recovered against him, by charging it upon the defendant, yet it does not exonerate *Shaw*, but merely changes his liability. Instead of being answerable to the plaintiffs for the amount loaned, he will be required to account for it with the defendant. If the plaintiffs recover against *Harris*, *Shaw* is answerable to him; if *Harris* recovers against the plaintiffs, *Shaw* is answerable to them. He has received the money, which is the subject of this suit, and is accountable for it to one or the other of these parties, and to which, must be matter of entire indifference to him. But it is said by the defendant's counsel that this question comes within the principle recognized by this court in *Scott v. McLellan & al.* 2 *Greenl.* 199. To us there seems to be a manifest distinction. That was a case where *Bradshaw*, a supercargo of defendants' vessel, had drawn a bill on his owners, which was holden by the plaintiff as indorsee. He attempted to charge the defendants as acceptors of the bill, on the ground that they had given their supercargo authority to draw it, and the deposition of *Bradshaw* was offered to prove his authority. The court held the witness incompetent, as he did not stand indifferent as to interest between the parties, he being liable to *McLellan* and *Turner* for the amount of the bill only, in case upon his evidence, the plaintiff recovered against them as acceptors, while on the other hand, if the defendants recovered, the witness would be answerable as drawer of the bill to the plaintiff, the holder, for the payment of damages, interest and costs, as well as the bill itself. Not so in the case at bar. This action is not brought on the bill. The defendant is not attempted to be charged upon that, but in *assumpsit* for monies advanced for his use. For

the damages and charges arising in consequence of the protest and nonpayment of the bill, the witness as drawer, is already fixed by a judgment, and the amount of his liability will not be increased or diminished by the result of this suit. If the plaintiffs' judgment against the witness would be cancelled to the amount which may be recovered against *Harris* in this action, then *Shaw* would stand indifferent, for his liability to *Harris* would be increased to the same amount that it would be diminished to the plaintiff. But if the plaintiffs' judgment against *Shaw* would not be affected by a recovery against *Harris*, then the witness would testify against his own interest, for by charging *Harris* he would render himself ultimately liable for the same amount.

The case of *Milward v. Hallet*, 2 *Caines*, 77, was precisely like the present, so far as it related to the admissibility of the witness. There the master of the defendants' vessel, being at *Hispaniola*, drew a bill on his owner in *Philadelphia*, who refused to accept it. The lender brought his action on the usual money counts against the owner for the amount furnished, and offered the master, as a witness to prove the necessity. The same objection was interposed to his competency, that has been urged at the bar, and although the court were divided in opinion upon other points in the case, they were unanimous in favor of his admissibility.

The case of *Evans v. Williams & al.* 7 *T. R.* 481 *note*, is also directly in point. That was *assumpsit* for money paid to the use of the defendant. The defendants were owners of an East Indiaman, whose captain, *Maxwell*, loaned money of the plaintiff, as the plaintiff alleged, for the use of the ship, but as the defendant contended, for the use of the captain himself.

The plaintiff called *Maxwell*, who was objected to as being interested to discharge himself by throwing the liability upon the owners. To this it was answered, that if so, the owners had a remedy over against him, and that he was perfectly indifferent, being liable to the plaintiff upon his own bill of exchange on the one hand, and to the owners on the other. Lord *Kenyon* thought the objection well answered and that the witness stood indifferent between

the parties;—for whichever way the case should be decided, he would be equally answerable.

At the following term a new trial was moved for, but, upon argument was refused. *Abbot on Shipping*, 103, *note* p. We think the deposition of *Shaw* was properly admitted.

Again, it is urged in defence, that the plaintiff cannot recover, because, having taken a bill of exchange of the master, the original liability of the owner was thereby extinguished, and the case of *Varner v. Nobleborough*, 2 *Greenl.* 121, is cited as authority to this point. It is true that this court has decided that the legal presumption arising from the fact of drawing a negotiable order or making a negotiable note, which is received by the creditor, is, that it was intended to be, and in fact is an extinguishment of the original demand or cause of action. But this presumption, like all others, is liable to be rebutted by proof of facts or circumstances inconsistent with it. In the case before us, the plaintiffs made advances to the confidential agent of the defendant, and for whose acts, within the scope of his authority, the defendant was answerable. The advances are alleged to have been made for the defendant's benefit, and under such circumstances as entitled the plaintiffs to a remedy against both master and owners. In cases of necessity, the master has the power of hypothecating the ship, and freight and even the cargo in a foreign port, for the purpose of procuring supplies or repairs; or, if he chooses not to hypothecate, he may borrow upon the credit of his owners, in which case his own credit will also be pledged, unless he expressly stipulates to the contrary. If he can obtain funds upon the personal credit of his owner, it is his duty to do so, rather than borrow on bottomry. The plaintiffs, on advancing their money, thus had, at least, a double remedy. They might look to the master, to the owner, or to both; or they might have accepted an hypothecation, which was offered.

Is it probable, or rather is it to be presumed, that they intended to discharge the most responsible security, and rely solely upon the most irresponsible; to decline the hypothecation, absolve the owner from his personal liability and trust wholly to the solvency of the master? And yet according to the principle contended for by the

defendant, such would be the effect of taking the master's bill of exchange.

But the deposition of *Terasse* explains this. He testifies, that the plaintiffs declined taking a guarantee upon a portion of the cargo, which was offered them by the captain, because the defendant's house was recognized as good;—clearly indicating that so far from relinquishing their claim upon the owner personally, they were willing to trust to him, rather than to a hypothecation of a portion of the cargo. By the common law a negotiable promissory note given by a debtor to his creditor for a subsisting debt is not a discharge of the debt, unless by express agreement; and such is understood to be the law in most of these States. The reason given for the modification of the common law here is, that as the creditor might indorse the note, if he could compel payment of the original debt, the debtor might be afterwards obliged to pay the note to the indorsee and thus be twice charged, without any remedy at law. Of such a state of things, however, the defendant in this action has no cause to be apprehensive. He has done nothing to affect or change his original liability. He has neither made himself answerable as drawer or acceptor, and a judgment against him in this case would be a perfect bar against any future suit for the same cause. If the drawing and receiving the bill had been a transaction between the parties to this suit, they residing and contracting within this jurisdiction, perhaps this point might have been successfully urged in the defence. But the money was loaned and the contract made and to be executed in a foreign country, and, unless discharged by the law of that country, is, *jure gentium*, to be carried into effect, whatever forum may be applied to for that purpose. When this money was advanced by the plaintiffs and received and applied to the defendant's use by his duly authorised agent, the defendant became answerable in law for its repayment. The contract, for such it may be considered, was made between the parties in this suit in submission to the laws in force at *Gaudaloupe*, which are understood to be the laws of *France*, and we have no evidence that by the French law the taking a bill of exchange is an extinguishment of a prior debt. Such is understood not to be the civil law, and

the French commercial code contains no such provision. If, however, this be the law at *Gaudaloupe*, it is incumbent on the party, who relies upon it in defence to prove it. Not having done so, it is to be considered like every fact not proved, as not existing. The defendant, by constituting *Shaw* master of his vessel, clothed him with full power, wherever he might be in the regular discharge of his duty as such, to bind his owner or principal, personally, for repairs and necessaries, and if the money sought to be recovered in this suit was fairly and regularly lent by the plaintiffs to supply the necessities of the ship and enable her to prosecute her voyage, and return to her home port, then is the defendant answerable for its payment, notwithstanding the giving the bill of exchange by the master.

But it is objected farther, by the defendant, that the advances were not made by the plaintiff, but by one *Allaine*, and that he alone can sustain an action therefor. The proof as to this fact is all in deposition, and comes from the master and one *Terasse*, to whom he sold a part of the outward cargo. The master testifies, that he obtained the money of *Allaine*, who took the draft payable to *Descadillas*, *Allaine & Company*, who are the plaintiffs in this action. *Terasse* testifies, that the master applied to *Allaine*, who could not furnish it himself, but procured it through *Descadillas* and *Allaine*, to whom the captain offered a guarantee upon a portion of his cargo, which was not accepted, as *Descadillas* and *Allaine* were satisfied with a draft of the captain on his owners, whose house was recognized as good. Who furnished the money was a question to be settled *in limine* at the trial. Unless advanced by the plaintiffs, the very foundation of their action was defective. The question was raised, and, as appears by the report of the Judge, who tried the cause, was submitted to the jury, who found, on this point for the plaintiffs. As a question of fact it is, therefore, settled, and is not now open for further discussion.

The only remaining point raised in the defence is, as to the necessity under which the advances are alleged to have been made.

It is contended in the defence, that there was no necessity for these advances, or if there were, that it was occasioned by the neg-

ligence of the master in not reserving sufficient means to meet the demand, for the payment of which this money was borrowed. From the report of the case, it appears that the defendant had chartered the brig for the voyage, and that *Shaw*, as his captain, was directed by him to proceed to *Point Petre* in *Gaudaloupe*, and there dispose of his outward cargo to the best advantage, and, with the proceeds, purchase molasses, which together with the proceeds of a former cargo sent out by the same owner, was to be shipped on board the *Pacific*, and the whole returned to *Portland* with as little delay as possible. Soon after his arrival at *Point Petre*, the captain made inquiry of the collector of the port what would be the port charges and duties, who, after making an estimate, replied that they would be about five hundred dollars.

On being about to clear out, the captain, again with the merchant to whom he sold, went to the custom house, and was then informed by the officer of the customs, that the amount to be paid was eight hundred instead of five hundred dollars, as had been estimated. The captain, being deficient of funds, having reserved only five hundred dollars, the amount first estimated, applied to *Terasse*, the merchant to whom he sold his outward cargo, requesting him to advance the money, and offering to turn out molasses to him for the amount, but this was declined. He then applied to two other merchants, for the same purpose, and also to some masters of vessels in port, but could not obtain the money. At length it was obtained of the plaintiffs, as before stated. It also appears from the report, that it would not have been in the power of the captain to have cleared out from *Point Petre* without having obtained the amount furnished him by the plaintiffs, and that the money, so furnished was applied to the payment of port and custom house charges on the vessel and cargo.

The captain is the authorised and confidential agent of the owners, both as to the employment of the ship and the means of her employment, and although he may have abused his agency by squandering their funds, and the existing necessity may have been caused through his unfaithfulness, still if the necessity do actually exist, and the master, on his application, is furnished with the

means of relieving such necessity, the owner is personally answerable. The creditor has to prove merely the existence of the necessity, not what led to it. It would be an anomalous procedure to allow an owner, whose property had been relieved from peril, to shield himself from remuneration, on the ground that the peril had been caused by his own folly, or the unfaithfulness or fraud of his agent. If indeed the necessity be caused by the creditor, or with his privity, then, standing in his own wrong, he may be remediless. But against the claim of one, who has furnished relief when actually necessary, himself not having been instrumental in causing the necessity, the fraud or the negligence of others, for whom he is in no wise responsible, cannot be urged, much less the acts of the owner himself or his authorised agent.

But we cannot perceive, in this case, any evidence of negligence or want of proper caution on the part of the captain. He knew that on his clearance, duties and port charges would be payable, and that he must reserve the means of discharging them, whatever they might be. He well understood that the residue of the owner's funds in his hands was, by his instructions, to be invested in a return cargo, and his application to the collector of the customs, previous to the investment of his funds, for the purpose of ascertaining the probable amount of charges payable on his clearance, was the only safe and proper course to be pursued. If the officer, whose duty it was to calculate and receive the duties, made a mistake in his estimate, it was not the fault of the master. He might well presume upon the accuracy of the chief officer of the customs, and if, instead of reserving the five hundred dollars he had reserved eight, and the collector's estimate had proved correct, his owner might well have charged him with disobedience of orders in not investing the full amount of his disposable funds in the return cargo. What was the situation of the master? His vessel in a foreign port ready for sea, the cargo on board, and a deficiency of means requisite to pay custom house charges. The money must be raised or the brig be detained. How could it be raised except by borrowing? By a sale of a part of the cargo, is the defendant's answer. The proof is that this was attempted by the master, but

without success. The cargo was the produce of the Island. The merchants there were sellers not purchasers, and it was not to be expected that from such a source, under such an exigency, money could be raised, at least without a sacrifice.

The proper mode of ascertaining what is necessary, is to ask what a prudent owner would himself have done, had he been present. Would the defendant, under existing circumstances, have unladed a portion of his cargo and thrown it into the market to raise money to pay port charges, especially when his house was considered good (as the witness *Terasse* testifies was the case) and he could readily have procured it on his personal security? We think he would not, and that his captain would not have been justified in so doing; or what is sufficient for this case, that he discovered no want of fidelity and prudence in not doing it.

The fact that the vessel could not put to sea without the payment of the port charges, and that the master had not the means of paying them, constituted the necessity under which he was authorised to borrow on the personal responsibility of his owner. The sum borrowed was all requisite and applied to relieve the necessity; advanced on the credit of the defendant's house; procured and expended for his benefit, by his authorised agent, and it would be severe law indeed, that would not, under such circumstances, afford relief to the lender.

This is a stronger case for the plaintiff than was that of *Milward v. Hallet*, before cited, and is relieved from the objection which was urged by *Kent J.* to that decision. In that case, the owner of the ship was not the owner of the cargo, and *Kent* held, that although the master was the agent of the owner of the ship, and might bind him for necessaries for the ship, yet he was not his agent, so far as related to the cargo, and that the payment of the export duties, in that case, was made by the master in the assumed character of agent respecting the cargo. But no such difficulty exists here. *Harris* was the charterer, and consequently is to be considered as the owner for the voyage, and he was also the owner of the cargo. By appointing *Shaw* master of his vessel, he constituted him his agent, so far as related to her employment, and

supplying the means of her employment, and by his special instructions in writing, he constituted him supercargo, or agent for the voyage so far as related to the cargo. Whatever he did therefore, relating to either vessel or cargo, he did as the authorised agent of the defendant, and so far as he kept within the limits of his authority, his acts are as binding upon the defendant, as if done by himself. *There must be judgment on the verdict.*

WHITMORE, *plaintiff in error*, *vs.* SANBORN.

It is not the enrollment of a citizen on the muster roll of a local militia company, but it is his residence within its limits, which renders him liable to do military duty therein. Such residence is therefore a material fact to be proved by the clerk, in every action for a penalty for neglect of military duty.

THE writ of error in this case was brought to reverse the judgment of a Justice of the peace, rendered in favor of *Sanborn*, clerk of a company of local militia, in an action of debt against the plaintiff in error, for a penalty for neglect of appearance at a company training, to which judgment exceptions had been filed by the original defendant, now plaintiff in error.

Several errors were assigned, but the judgment was reversed for the fourth only, which is stated in the opinion of the Court.

Boyd, for the defendant in error, contended that the enrollment was conclusive evidence of the liability to do military duty in the company; for which he cited *Johnson v. Morse*, 7 *Pick.* 253. At least it was *prima facie* evidence, requiring the other party to show that he was exempted. But the record shows that the enrollment was in a militia company in the town of *Standish*, commanded by Capt. *William Marean*, and that the original defendant was a citizen of that town. It is therefore to be presumed that this was the

only company of militia there, the contrary not appearing; and that the limits of the company were identical with those of the town. And this was sufficient to throw the burden of proof on the defendant.

Fairfield, for the plaintiff in error.

PARRIS J. delivered the opinion of the Court.

The fourth error assigned in this case is, "that although the original plaintiff was called upon by the defendant so to do, he did not introduce any evidence to shew the bounds or limits of the company, of which he was clerk and that the defendant resided within those bounds. Yet the Justice decided that it was not necessary for the plaintiff to produce such evidence."

By the laws of the United States and this State, every able bodied white male citizen between the ages of eighteen and forty five years, with few exceptions, is liable to the performance of a certain military service for the public security. The law has pointed out the mode in which this service shall be performed, and clothed certain officers with power to superintend and require its performance. The power of these officers is particularly defined, and is to be exercised only within certain territorial limits. These limits are prescribed by the Governor with the advice of the council. Whoever claims to exercise this power over any of the citizens must shew that his claim is founded in legal right. He must shew that he is properly authorized, and that his authority extends to the case in question.

The original defendant is prosecuted for not attending a training of the company of infantry commanded by *William Marean*, of which the plaintiff is clerk, and the allegation in the writ is, that the defendant belonged to said company, and was liable to do military duty therein. By the defendant's plea that he is not indebted, every material allegation in the plaintiff's writ is put in issue. This being a local company, not raised at large by voluntary enlistment, must have some certain, fixed territorial limits, and is composed of such persons only as reside within those limits. The commanding officer of the company is presumed to know the extent of his com-

mand, and to be able to show it by competent proof. The clerk, also, who has the custody of the official papers and records of the company, is presumed to be furnished with proof of its limits, or he would be unable to decide who were and who were not liable to enrollment. These officers claim to exercise authority over a portion of the citizens; and is it unreasonable that they should be held to prove their authority, before requiring submission to it, or rather before exacting a penalty for not submitting to it? They are held to produce the evidence of their official character, by which it appears that the one is captain and the other clerk of a company within a certain regiment; but neither the commission of the captain or the warrant of the clerk will shew the bounds of their command. This will appear only by the record of the order of the Governor and council, by which the company was formed and its local limits prescribed. A copy of that record is, or ought to be on the files of the company. It was, or ought to have been passed down, through the several grades of officers, to him whose immediate duty it was to superintend the first organization of the company. If it was so done, the prosecuting officer has the highest proof at hand, by which he can at once shew, conclusively, the bounds of the company. If that proof be not on file, but has been lost by time or accident, there can be no difficulty in supplying the deficiency, by obtaining a new copy from the proper office. And if there should be a case where the original record itself is not to be found, or is defective, the commanding officer of the company has only to apply to the Governor and council for a new order, establishing the bounds of his company, and every difficulty will be obviated. Such proof ought to be in the possession, and with the records of every company.

Suppose the clerk, by mistaking the territorial limits, should place upon his roll, by direction of the captain, the names of persons residing without the bounds of his company. Do they thereby become members of, and liable to do duty in the company? Clearly not. And must he not show that they are members, and are so liable, before he can charge them with a penalty for neglect?

It is not the placing the name on the company roll that creates the liability to perform military duty in any particular company, but

it is a residence within the bounds of that company. If that be established, the citizen's liability is fixed, unless he fall within the class of exempts. But in order to enforce this liability, he must be enrolled and warned.

If the proof of enrollment is evidence of belonging to the company, and liability to perform military duty therein, why is not the proof of warning, evidence of the fact also? The law requires that the enrollment shall be by the captain or commanding officer, of such as reside within the bounds of his company; and as to the warning it requires that the captain shall issue his orders to notify the men belonging to his company. If the act of enrolling by the captain is to be evidence of membership, why not the act of warning? If by the proof of enrollment it is to be presumed that the person enrolled resides within the bounds of the company, because the captain is to enroll no others, why shall not the proof of warning be presumptive evidence that the person warned belonged to the company, because the captain is not authorised to cause any others to be warned? And yet it was never contended that this would be sufficient. The plaintiff alleges that he is clerk, must he not prove it? He alleges that the defendant was warned; is he not required to prove it? He alleges the neglect to appear, and can he, without proof, rely upon his allegation merely and call upon the defendant to shew that he did appear? Is not the defendant safe, under his plea that he is not indebted, until these affirmative allegations are all supported by proof? No one ever doubted it. And can it be that the more important allegation, of belonging to the company and liability to perform duty in it, can be proved, either presumptively or conclusively, by the mere exhibition of the company roll; by proof manufactured by the captain and clerk, the very persons between whom the penalty, if any shall be recovered, is to be divided? We think not. That is proof of enrollment merely; but as enrollment does not of itself constitute membership; is not in itself the foundation of the liability, we think that he, who, as clerk, claims a penalty for neglect to perform military duty, must in the first place, establish the liability, especially, when it is in his power so easily and satisfactorily to do it; and that he should be

required to prove, otherwise than by his own acts or those of his captain, that the person, whom he attempts to charge with neglect, resided within the bounds of the company of which he is clerk.

Without giving any opinion upon the other errors assigned, we are of opinion that the fourth is well assigned, and for that, the judgment is reversed.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF OXFORD, MAY TERM, 1832.

Memorandum. The Chief Justice was not present during this term.

FURBISH *vs.* HALL.

Overseers of the poor have no authority, as such, to intermeddle with the property of persons who receive relief from their towns, as paupers.

Therefore where the overseers of the town of *B*, *virtute officii*, submitted the claim of a pauper to arbitration, the award was held void, for want of mutuality.

THIS was an action of *assumpsit*, for not performing an award; and the case was thus: One *Abigail Furbish*, a woman of feeble understanding, had lived sometime in the defendant's family as a servant; and being afterwards chargeable to the town of *Buckfield*, as a pauper, the Overseers of the poor, in that capacity, made a demand against the defendant for the balance claimed as her wages, to be applied in payment of expenses already incurred by the town, and which might afterwards accrue, for her support. This demand the defendant and the overseers jointly submitted to the determination of certain referees; who awarded a balance due from the defendant, which he refused to pay; and for the nonpayment of which this action was brought, in her name. And the question was wheth-

er the Overseers had authority to enter into the arbitration and bind the pauper, by virtue of their office.

Fessenden and *Brown*, for the plaintiff, contended that the Overseers had this power, as incident to the right of the town to be reimbursed its expenses out of the estate of the pauper. Without such power, indemnity would not be had in any case where the only means of payment consisted in a remedy against a third person. Besides, the lesser right, of controlling the property of paupers, is involved in the greater one of restraining their persons, requiring their labor and services, and receiving remuneration for the expenses of their support.

S. Emery, for the defendant, cited *Kyd on Awards*, 42, 45; *Stat.* 1821, *ch.* 122, *sec.* 19, 20; *Wilson v. Church*, 1 *Pick.* 23.

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

PARRIS J. The plaintiff alleges in her writ that, having a just demand against the defendant which he refused to pay and denied to be due, the parties mutually submitted it to the determination of arbitrators, and mutually promised each other to abide by the award and perform the same.

The arbitrators having awarded in favor of the plaintiff's claim, this action is prosecuted for the recovery of the sum awarded.

On looking into the submission, it does not appear to have been entered into by the plaintiff or by any one purporting to act as her special agent or attorney, but by persons calling themselves Overseers of the poor of the town of *Buckfield*, who make the demand in the name of the town, for the use of the plaintiff as a pauper, to be appropriated in payment of expenses heretofore incurred for her support, and for her future maintenance.

In actions on the award itself, it is necessary to set out, in the declaration, only so much as is sufficient to support the plaintiff's case. 1 *Burr.* 278. But the plaintiff must state a mutual submission. 2 *Str.* 923; for if the submission be not mutual it is a mere nullity; the award is not final, and is consequently void. *Kyd on Awards*,

208. And it will be too late after the award is made, for the party in whose favor it is made to rectify the submission, if he was not bound by it at the time of the hearing and making the award. 1 *Roll. Abr.* 245; 19 *Johns.* 143, 573. Was the submission mutual? Was it entered into by the plaintiff, or by those authorised by her, or by law? If the Overseers acted as her agents or attornies, and were specially authorised to enter into the submission, their act would be the act of their principal, and the award would be binding on her. 1 *Wils.* 28, 58. But there is no evidence of any such delegated authority, neither does it appear, by the submission or the award, that the plaintiff was present at or had knowledge of the execution of any of the papers; or was notified of, or present at the hearing; or had any knowledge of, or assented to any of the transactions. It cannot be contended that she was bound by the submission, or her legal rights in any manner affected thereby, unless the Overseers were authorised, *ex officio*, to bind her.

Every person is presumed to be competent to manage his own property, and no stranger can interfere, unless under authority of law, which it is incumbent on him to shew. Minors, by reason of their inexperience, and consequent exposure to the stratagems of the dishonest, are not authorised to bind themselves or their property in civil contracts, except for necessaries. But no one, not even the parent, is vested with power to act in their stead, touching their property, unless in the character of guardian, duly appointed. Lunatics, spendthrifts, idiots, and persons *non compos*, are placed under the same disability. But no person, however much he may waste his estate and expose himself to want, and the town to which he belongs to "charge and expense for his maintenance and support," is rendered incapable of contracting or discharging debts or disposing of his property, except by the appointment of a guardian, in the manner provided by statute. The Overseers of the poor, as such, have no power to interfere. *Stat.* 1821, *ch.* 51, *sec.* 53. Nor do we perceive that Overseers have any authority to interfere in the management or disposition of the property of those persons, who actually become chargeable to their respective towns. It is certain that such power is not expressly given by statute, nor can it be fair-

ly inferred. Towns are made liable for the relief and support of all poor and indigent persons lawfully settled therein, whenever they shall stand in need thereof. *Stat.* 1821, *ch.* 122, *sec.* 3. Overseers are to have the care and oversight of all such poor and indigent persons, see them suitably relieved, supported and employed—*sec.* 4.

By the 19th section the pauper is made answerable for the expenses incurred for his support, and provision is made for its recovery in an action of *assumpsit* for money paid, laid out and expended for his use. If the Overseers of the poor had, *ex officio*, the right of control and appropriation of the pauper's estate, why should it be necessary to authorise the town to recover in an action at law? Why not merely direct the Overseers to apply the property of the pauper in payment of the expenses thus incurred. By the 20th section it is provided "that, upon the death of any pauper, who, at the time of his decease, shall be actually chargeable, the Overseers of the poor may take into their possession all the personal property belonging to such pauper, and if no administration shall be taken upon the estate within thirty days after his decease, said Overseers may sell so much of such property as may be necessary to repay the expenses incurred for such pauper." If the Overseers had the legal custody and control of the pauper's property, while living, why should it be necessary to empower them to take it into their possession after his death? The inference to be drawn from these sections seems to be, that, while living, the pauper has the control of his property, if any he has; that he and his property are liable to the town for such expenses as may have been incurred for his support, which may be collected by a suit at law; that upon his death, and not till then, the Overseers have a right to "take into their possession the personal property belonging to such pauper, and hold it subject to the right of the administrator, if any shall be appointed within thirty days.

It is not perceived that any inconvenience will result from this construction. If the pauper have property and withhold it, the town by which he has been supplied can be reimbursed by attachment and sale. If he squander it, he may be restrained by the appoint-

ment of a guardian, and if he die, his property is to be administered like that of any other person, if any one interested will take administration upon it within thirty days ; if not, so much as shall be necessary to repay the expenses incurred by the town for his support may be sold.

The effect of a different construction might be inconvenient. Persons may, and without doubt do sometimes need and receive relief from towns during the most inclement season of the year only, or while their families are visited with sickness, or while temporarily destitute in consequence of conflagration or other disasters, and yet may possess some property and have outstanding claims. If in consequence of receiving relief from the town as " poor and indigent persons," they at once become incapable in law of managing what little property they have, of selling, purchasing, paying or collecting, and their whole power, in this respect, is transferred to the overseers, it is visiting upon the poor the chastisement which would seem to be due to malconduct, not to misfortune.

Such, we think, was not the intention of the legislature. We are therefore of opinion, that the overseers of the poor had no power to submit the plaintiff's demand to arbitration, unless thereto specially authorised by her ; that the award was not binding upon her, and, not being mutual, she cannot now take advantage of it, by making it the foundation of this action.

Suppose the award had been in favor of the defendant. Would it constitute a bar to an action brought by the plaintiff on the original demand ? We think not, for those only who are actually parties to the submission shall be bound by the award. *Jacob's Law Dict. Award II. Kyd on Awards*, 42. Every one who is capable of making a disposition of his property, or a release of his right, may make a submission to an award, *ibid.* If, therefore, the plaintiff was not rendered incapable of releasing her right, by reason of her pauperism, then the overseers of the poor were not, *ex officio*, clothed with the power of submitting her demands to arbitration, but she retained it.

STEARNS *vs.* HUBBARD *& al.*

This court has no power to decree the specific performance of a contract to convey real estate, which is not in writing; even as it seems, though a parol contract be confessed by the answer.

THIS was a bill in equity; in which the plaintiff set forth that one *Jacob Daniels* having made his will, which was exhibited, with the bill, and appointed the defendants his executors, died, leaving a widow, and *Sally Daniels* his daughter, and only heir, then a minor:—That the defendants were appointed guardians to the minor, who was a devisee in the will; and in that capacity represented to the Circuit Court of Common Pleas that it would be for her benefit to sell all her real estate and invest the proceeds in securities on interest, according to law; which they were accordingly licensed and authorised to do:—That they gave bond to the Judge of Probate, in all things to observe the directions of law in such sale, and afterwards sold the same to the plaintiff at public auction, *March* 13, 1813, for four hundred dollars;—That the plaintiff, confiding in the knowledge and integrity of the defendants, and presuming in the regularity of their proceedings, and being ignorant of his own rights, did not take any deed of the land; but paid the purchase money to the defendants, and thereupon entered into and has ever since continued to occupy and improve the premises, paying the taxes thereon, making improvement, and receiving the rents;—That the said *Sally Daniels* has arrived at full age, and has brought her writ of entry against the plaintiff, which is now pending, to recover possession of the premises:—And thereupon prayed that the executors might be required to execute to him a deed of the land; and that *Sally Daniels* might be enjoined no farther to prosecute her suit for possession.

The executors answered that the testator, by the will, directed that four hundred dollars should be raised out of the real estate, and devised the residue of the real estate to his daughter *Sally* in fee, reserving the improvement of one third to the widow for her life:

That as executors they applied for and obtained license to sell the whole of the real estate of the deceased, reserving to the widow her right of dower, to the end that they might be enabled to carry into effect the provisions of the will;—That they gave bond to the Judge of Probate, for the performance of their duty as executors, in making the sale, "in order to discharge the just debts of the deceased and incidental charges thereon, and legacies";—That inasmuch as in and by the will, and also by the license, they were authorised to sell the whole of the real estate, and as it might sell for more than sufficient to discharge the legacies of four hundred dollars with which it was charged by the will, they gave another bond, in their capacity of guardians, conditioned in all things to observe the directions of the law relative to the sales of such estates, so that the interests of the minor should be secured;—That thereupon, at public vendue, the whole real estate was exposed for sale by the defendants as executors, and not as guardians, and was struck off for four hundred dollars, bid by the plaintiff, being the most they could obtain; which sum they then understood from the plaintiff and still believe was bid by him for and in behalf of his daughter *Mary Daniels*, she being the widow of the testator, and the mother of *Sally Daniels* their ward;—That the business was well understood by the parties to be so arranged for the benefit of the widow, who herself paid part of the purchase money; and for the purpose of discharging the real estate from the four hundred dollars with which it was charged, and not for the purpose of vesting the title in the plaintiff;—That the widow conferred with them relative to the procurement of the money to make the payment;—That she is since deceased, leaving her said daughter her sole heir;—That during her life time one of the defendants occupied the premises under and by virtue of an agreement with her;—That they had no knowledge of any request from the plaintiff to execute a deed to him, till since her decease;—That the plaintiff has since occupied the premises under an agreement with the defendants that such occupancy should be without prejudice to the rights of any party concerned;—And that they have declined making any deed to the plaintiff, from the belief that *Sally Daniels* had an equitable inter-

est in the premises as heir to her mother; but submit themselves to the decree of the court.

The case was briefly argued upon bill and answer, by *Fessenden* for the plaintiff, and *S. Emery* for the defendants; and the opinion of the Court was read at the ensuing *October* term, as drawn up by

Mellen C. J. In the plaintiff's bill he prays for a decree against the respondents, directing them to make and execute a deed to him of the real estate described therein and for the reasons he has stated. By law, this court has power to compel a specific performance of a contract in writing; but no such contract is set forth in the bill, nor, indeed, is there an allegation of any parol contract on the part of the defendants to make and execute to him a deed of the premises in question; neither does the answer of the defendants contain any admission that there ever was any such contract, in writing or by parol. In *Mitford's* pleadings, pages 215, 216, it is stated, as settled in courts of equity, that the statute of frauds may be relied on by plea or answer; and that though a parol agreement to convey be stated in the bill and confessed by the answer, still the defendant is entitled to the protection of the statute; and no decree can be made merely on the ground of such confession. Viewing the cause in this light, we do not perceive what authority we have to compel a performance, or rather a conveyance of the land in question, any more than in any other case where one person, who has purchased real estate and paid for it, cannot obtain a deed of it. And, even in the case put, if the court should decree a conveyance on the ground of fraud, still in the case before the court there is no suggestion of fraud or conspiracy on the part of the defendants, or pretence of any. On the facts appearing on the bill and answer, the bill is not sustainable. But, in addition to this, on looking into the case, we are left in total doubt whether the estate was purchased at auction by the plaintiff for his own benefit, or for the benefit of, or in trust for *Polly Daniels*; or whether the purchase money was paid by him out of his own funds, or from funds furnished to him by the said *Polly Daniels*. This want of certain-

ty probably is owing to the long interval of time which the plaintiff has suffered to pass since the sale, without asserting his alleged title. In this state of the case, and with these clouds resting on the claim of the plaintiff, we cannot decree the conveyance prayed for ; nor, for the same reason, do we think there is any ground for granting an injunction upon *Sally Daniels*, enjoining her no further to prosecute her action against the said *Stearns*, now pending in this court, as stated in the complaint. *Bill dismissed.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF LINCOLN, MAY TERM, 1832.

McLaine *vs.* Bachelor.

A second suit having been brought for the same cause of action, the attorney of record for the plaintiff in the first action is competent to testify that he received of the defendant the sum sued for, and discharged him of the demand, notwithstanding the attorney also claims the money under an alleged assignment from the plaintiff to himself.

The material facts in this case appear in the opinion of the Court, which was delivered by

Parris J. *Alexander McLaine*, having a demand against the defendant, put it into the office of *Wilson & Porter* for collection. After a suit was commenced upon it and while pending, the action was referred, and the demand assigned to the plaintiff, *Nathaniel McLaine*.

This action is brought by *Nathaniel*, in his own name, on the award, to recover the amount awarded.

In defence it was proved by the testimony of *John Wilson*, Esq. one of the firm of *Wilson & Porter*, that, before any final award was made, the action was settled, and *Bachelor* discharged by them, they being attornies of record, and consequently having full power

to act in the premises. It is objected that *Wilson* was not a competent witness on account of interest, having disclosed that the firm of which he is surviving partner, held an assignment of the demand executed by *Alexander McLaine* of prior date to the plaintiff's assignment.

If a decision in this case could at all affect *Wilson's* interest the objection should prevail. But we do not perceive that he can be so affected. The assignment to him has nothing to do with this action. He was authorised, as attorney of record, to settle with *Bachelor* and give a discharge. He is competent to prove that he did so. When he proves this fact he testifies against his own interest, by admitting his receipt of the money.

The validity of his assignment is not now to be tried. He holds the money, and is accountable for its appropriation. If the plaintiff's assignment will overreach that to *Wilson & Porter*, it must be tried in a suit by him against them, in which the judgment in this case cannot be used as evidence.

We think *Wilson* was competent to prove the fact that, as attorney, who prosecuted the suit, he settled with the defendant and discharged him. That discharge ought unquestionably to avail in defence of the present action. The plaintiff, himself, seemed to understand that *Wilson & Porter* had made the settlement, for he called upon them for the money, claiming it as his own.

We do not perceive how the plaintiff can avoid the other point in the defence. His action is on the award; but it clearly appears that no final award was ever made.

One of the referees did testify that an award was made; but it was proved, with equal certainty, that this award was set aside, and the whole subject recommitted, and that, previous to any further proceedings, the adjustment was made with *Wilson & Porter*.

If they received the money to which the plaintiff is entitled, he must look to them; there seems to be no ground for charging the defendant with the payment a second time.

Judgment for the defendant.

Allen and *Harding* for the plaintiff.

Ruggles for the defendant.

ULMER *vs.* HILLS.

Subsequent possession by the vendor, of the thing sold, is never taken as conclusive evidence of fraud; but is to be considered by the jury in connexion with any explanatory proof which may be adduced.

Where a party was notified to attend at the taking of a deposition on the Saturday before court, and attended accordingly, but it was not taken; and he was given to understand that it would not be taken; but was afterwards notified to attend in the forenoon of the following Monday, being the last day of the vacation, and also the day of the annual election of State officers, at which time he did not attend; it was held that the deposition, taken under these circumstances, was very properly rejected.

THIS was an action of trespass, for taking and carrying away the plaintiff's horse; and was tried before *Parris J.* upon the general issue.

The plaintiff proved that in *July* 1826, he, as a deputy sheriff, had in his hands for collection an execution against *Samuel Quiggle & al.;* that *Quiggle* agreed to sell him the horse, he agreeing to pay the creditor the amount of the execution; that the horse was accordingly delivered, with a bill of sale, to the plaintiff, at his own door; whereupon the plaintiff discharged the execution, and paid the amount to the creditor.

The defendant proved that after the horse was thus delivered to the plaintiff, *Quiggle* requested permission to take him home; to which the plaintiff assented, saying he might keep the horse till he should call for him, which might be the next day; but giving directions how he should be kept, to improve in flesh. The horse remained in *Quiggle's* possession, the plaintiff occasionally calling to see him, and giving directions how he should be kept, till *May* 22, 1828, when the defendant, who was an officer, seized him under an execution against *Quiggle.*

It further appeared that in 1827, while the horse was in *Quiggle's* possession, he gave a bill of sale of him to *Daniel F. Harding,* Esq. who had become his surety, or had paid a debt for him; but the

horse was not produced, nor was any actual possession of him ever taken by Mr. *Harding;* and that the plaintiff was soon afterwards informed that the horse had been thus conveyed, and that *Quiggle* expected soon to pay the debt and redeem him ; to which the plaintiff replied " very well, neither he nor any other person can hold him from me."

The defendant offered the deposition of one *Boggs*, taken about thirty five miles from the place of trial, on the day before the sitting of the Court, being the first Monday in *September*, and the day of the annual State elections; and it appeared that the plaintiff had been notified to attend at the taking of this deposition on the Saturday previous ; and had attended accordingly ; but the defendant declined taking it on that day, and gave the plaintiff to understand that it would not be taken ; but afterwards served him with a new notice for the Monday following. Under these circumstances, the plaintiff objecting to the deposition, it was rejected.

The counsel for the defendant requested the Judge to give the jury certain specific instructions, to the following effect:—that if *Harding* had no previous knowledge of the sale to the plaintiff, and took possession by *Quiggle*, the sale to him was good against the plaintiff, and operated to bar this action :—that the plaintiff was barred by acquiescing in that sale from the time it was made, till the taking by the defendant ;—that at all events the plaintiff, after an absolute purchase, having suffered the property to remain so long in the possession of the vendor, could not now set up his title, against an attaching creditor of the vendor :—and, that if he could, yet he was bound to show a good and satisfactory reason for the continuance of such possession in the vendor ; and that the accommodation and convenience of the vendor was not a sufficient reason.

But the Judge instructed them that the vendor's possession was a strong mark of fraud ; which, however, was removable by clear and satisfactory evidence ; which it was incumbent on the plaintiff to produce, and to remove all suspicion of fraud :—that if they were satisfied that the sale to the plaintiff was actual, *bona fide*, for a full consideration, and without any secret trust for the vendor, and that

his subsequent possession was fairly accounted for, as consistent with perfect honesty in the transaction; the plaintiff's title was good; unless he assented to the sale to *Harding;* of which they were to judge from the evidence. And they found for the plaintiff; the Judge reserving the questions of law raised at the trial, for the opinion of the Court.

Harding, for the defendant, read an argument sent by *Sprague*, who was at Congress in his place as a Senator of this State. He contended that the deposition ought to have been admitted, because it was taken with all the formalities of law, with none of which could the Court dispense, neither could they impose any other. If any inconveniencies arise from the existing law, the remedy is with the legislature alone.

Upon the merits of the case he argued that where a vendee, by an absolute sale, suffers the vendor to retain the possession as before, to hold out to the world the same *indicia* of ownership, and to make a second sale, to an innocent purchaser, who consummates his title before any actual possession by the first; the first purchaser was estopped to set up his title against the second. It is against the principles of law; and is forbidden by public policy; by mercantile good faith; by the favor the law shows to the vigilant; and by all the inducements to suppress fraud. It is no valid answer to say that the intentions of the vendor and first vendee were honest. The objection lies deeper than their intention, in the wide spreading mischiefs which result from relaxing the rule in favor of such parties, however honest their particular intentions. If the rule may be relaxed in any case, and the possession of the property be still retained by the vendor; his own convenience and accommodation form no sufficient reason; and the jury ought so to have been instructed. To hold the law otherwise, is to lend facilities for the perpetration of fraud to an extent limited only by the interest of the parties.

But however the general rule may be taken, yet the conduct of the plaintiff does not entitle him to hold the property. He gave the original owner every facility for imposing on innocent third persons, by appearing still to own the horse as before; and after receiving

notice of the sale to *Harding*, he expressed no dissent, and gave *Harding* no notice of any claim of his own. This conduct ought to have been ruled at least a ratification of the second sale. *Badlam v. Tucker*, 1 *Pick.* 284; *Bartlett v. Williams*, *ib.* 288; *Lanfear v. Sumner*, 17 *Mass.* 110; *Lamb v. Durant*, 12 *Mass.* 54.

Ruggles for the plaintiff.

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

On examination of the facts in relation to the deposition of *Boggs* we think it was properly rejected. The plaintiff was notified to attend to the taking of it on the Saturday afternoon preceding the session of the court at last *September* term. His counsel attended for the purpose, but the counsel for the defendant omitted to take it, though urged so to do, and gave the plaintiff to understand that he did not intend to take it; notwithstanding which, a new notice was served on the plaintiff to attend on *Monday* forenoon, being the day before court, and the day of the election of governor, senators and representatives; and the place of caption being about thirty-five miles from the place of trial. In addition to the circumstance that the plaintiff is presumed to have been travelling to court on the preceding day, we consider the conduct of the defendant's counsel on Saturday, as amounting to a waiver of all answer to the objection now urged by the plaintiff, and of the right to use the deposition under the circumstances of the case.

In respect to the main question, we are at a loss to discover on what grounds it could have been anticipated that the court should pronounce the instructions of the presiding Judge as incorrect. Those instructions are in perfect accordance with principles which have been settled, sanctioned and recognised over and over again in Massachusetts and in this State; and the practice in both has been in unison with those decisions. The possession of property sold, by a grantor or vendor, after the sale, though that sale be absolute, is not fraud *per se*; it is only evidence, and generally strong evidence of fraud, to be submitted to a jury, with proper instructions, as was done in the present case. Such continued possession

may be explained and accounted for on principles perfectly consistent with truth and justice.

The requested instructions were at variance with a series of decided cases. It is needless to cite them, and it would seem to be useless to continue to increase their number.

Judgment on the Verdict.

LITHGOW *vs.* EVANS.

A note, and the mortgage given to secure the payment of it, having been assigned to a third person when over-due, in an action on the mortgage, brought by the assignee against the mortgagor, it was held that the latter might set up in defence against the assignee any payments made by him to the original mortgagee, prior to notice of the assignment.

The mortgagee is in such case a competent witness for the assignee, being properly released. And where the release was of all demands, it was held that this did not affect the validity of the assignment, which was absolute on its face, nor consequently, the plaintiff's right to recover; though the witness testified that the assignment was in fact intended as collateral security for the payment of a debt due to the assignee; the legal operation of the release being to vest the mortgage absolutely in the assignee, and to discharge his claim of indemnity against the assignor.

THIS was a writ of entry on a mortgage given by the defendant to *J. & W. Chism*, and by them assigned, with the debt, to the plaintiff; and it was tried before *Parris J.* upon the general issue. The assignment was made more than two years after the day of payment mentioned in the note. The defendant offered to prove that prior to the registry of the assignment he had made sundry payments to the original mortgagees; which evidence, though objected to, was admitted by the judge. To rebut this evidence the plaintiff offered *John Chism*, the mortgagee, as a witness, to testify that the defendant had notice in fact of the assignment, prior to his payments. And the witness, being specially released, was admit-

ted. In the course of his testimony, he stated that the assignment, though absolute in its terms, was made to secure and indemnify the plaintiff for monies paid and liabilities incurred by him for the *Chisms;* and that unless the debt in controversy was recovered, the plaintiff would not be indemnified. Hereupon the defendant objected that the witness was still interested for the plaintiff, notwithstanding the release; to which, the plaintiff altered the release by adding the words "all other demands." The defendant then contended that by the release as enlarged, the plaintiff had extinguished his claim against the *Chisms*, and, consequently, his interest in the mortgage; and that it was now competent for the defendant to avail himself of any payments made to the mortgagees, even after notice of the assignment. But this the Judge overruled; and reserved these questions for the consideration of the court; a default being entered by consent, subject to its opinion. Some other points were raised, which it is not material to state, as they were afterwards abandoned.

Sprague, for the defendant, sent a written argument to this effect. The plaintiff was never the absolute owner of the note and mortgage, they having been put into his hands as collateral security for the performance of certain obligations on the part of the *Chisms*. This claim he has forever discharged by the release filed in the case; and the interest thereupon reverted to the original mortgagees. As between them and the defendant, the debt has long since been paid; and the effect of suffering the plaintiff to recover, would be to give the *Chisms* an immediate right of action against him, and the defendant another against them, to recover the same amount; contrary to the plainest principles and the policy of the law. The defendant therefore is entitled to the whole benefit of the defence he has set up.

Allen and *Barnard*, for the plaintiff, cited *Lokee v. Haynes*, 11 *Mass.* 498; *Worcester v. Eaton*, *ib.* 368; *Twombly v. Henley*, 4 *Mass.* 441; *Warren v. Adams*, 15 *Mass.* 236; *Thorp v. Thorp*, 1 *Ld. Raym.* 235, 664; *Lyman v. Clark*, 9 *Mass.* 235.

PARRIS J. delivered the opinion of the Court.

All the questions raised in the report of this case were abandoned at the argument, excepting that relating to the legal effect of the release.

The plaintiff claims as assignee of a mortgage given by the tenant to *J. & W. Chism*, to secure the payment of a promissory note for three hundred dollars. The tenant contends that the note has been paid to the *Chisms*, and that the mortgage has consequently become inoperative. The note having been assigned after it became due, the plaintiff took it subject to all the equities existing between the assignor and the maker at the time the latter had notice of the assignment.

It became important, therefore, to prove the time when such notice was given.

For this purpose *J. Chism*, one of the assignors, was offered as a witness, and having been released by the assignee from all liability by reason of the assignment of the mortgage and note, was admitted. In the course of his testimony it appeared, that the note and mortgage were assigned to secure and indemnify the plaintiff for monies paid and liabilities incurred for the assignors; and that unless the note secured by the mortgage should be recovered, the plaintiff would not be indemnified.

The Judge having thereupon ruled that the witness had a remaining interest, notwithstanding the release, the plaintiff inserted therein the words "all other demands," and the witness was re-examined without objection.

It is now contended that the action cannot be maintained because the plaintiff held the mortgage as collateral security only; and having by the release discharged *Chism* from all demands, the collateral security re-vests in the original payees.

Such undoubtedly would be the case, if the plaintiff so held the mortgage, and if there had been an actual payment by *Chism* in discharge of his liabilities, other than by the assignment.

But it is to be kept in view that the assignment was absolute on its face, requiring nothing further to be done by *Chism*, the witness,

to vest the note and mortgage unconditionally and irrevocably in the plaintiff. If there was any understanding or verbal agreement between *Chism* and the plaintiff inconsistent with the absolute character of the assignment, such agreement could not vary the legal effect of the written contract.

The plaintiff's right to the mortgage depended upon the construction of the written assignment; and whenever the mortgagor had actual notice of that assignment, he became the debtor of the assignee, and *Chism's* legal right to the debt, or to exercise any control over the security ceased.

The release, therefore, could have no legal operation or effect upon the assignment.

The latter was absolute, unconditional, depending upon no contingency, but vesting in the plaintiff all the rights which the mortgagee had at the time the mortgagor had notice of its execution.

If there was any understanding or verbal agreement between the plaintiff and *Chism*, the witness, that the latter was to remain liable for any balance that might be due the former after enforcing his legal rights, under the assignment, against the tenant, that liability is effectually discharged by the release. In our opinion, the legal operation of the assignment and release is to vest the mortgage absolutely in the plaintiff, and discharge the witness from all demands arising in consequence of the assignment, or any debt or liability which it was originally intended to secure.

Judgment for the plaintiff.

FORD, *treasurer of* ALNA *vs.* CLOUGH *& al.*

Where the bond given by a collector of taxes contained a recital that he was duly chosen, and was conditioned for the faithful discharge of his duty; it was held, in an action on the bond for not paying over monies collected, that the sureties could not controvert the legality of the meeting at which he was chosen, nor the validity of his election, nor the legality of the assessment of the taxes, antecedent to their commitment to him; nor any act of the town for which they themselves would not be liable in consequence of their suretyship.

If the return on a warrant for calling a town meeting does not show how the meeting was warned, it will be presumed, in the absence of other proof, that it was warned in the mode agreed upon by the town.

It is no valid objection to such return, that it bears date on the day of the meeting.

An article in the warrant for a town meeting, "to see what measures the town will take to build" a certain bridge, "or any matters and things relating thereto," was held sufficient to authorise the raising of money for that purpose.

A town, legally assembled in its corporate capacity, may lawfully raise money for parochial purposes, as well since the *Stat.* 1821, *ch.* 135, as before.

In an action on the official bond of a collector of taxes, where the point in issue was whether the money collected had been paid over to the treasurer or not, it was held that the treasurer, being released by the town, was a competent witness to disprove the payment.

It is competent for a town, in its corporate capacity, by a vote of the majority, to release a debt, as well as to contract one.

THIS was an action of debt on a bond dated *June* 29, 1826, given by *Samuel Clough* as principal, and the other defendants as his sureties, to *Carlton Dole*, treasurer of *Alna*, or his successor in office; reciting that *Clough* "was duly chosen and appointed on the third day of *April* to the office of collector of taxes within said town of *Alna* for the year next ensuing"; and conditioned that he should "faithfully discharge his duty as collector as aforesaid." The pleadings, which were special, resulted in the following issues to the country:—1st, That *Clough* paid over two thousand eight hundred and nineteen dollars and seventy nine cents for the taxes of 1826, to *Carlton Dole* and the plaintiff, being treasurer, &c.:—2d. That he paid the like sum to *Dole* for the taxes of 1826:—3d.

That there were no legal assessments of taxes for 1826 :—4th. That no legal lists of assessments were committed to *Clough* :—5th. That *Clough* had no legal and sufficient warrant to collect the taxes :—6th. That he paid to the State Treasurer two hundred and five dollars and ninety cents and to the County Treasurer one hundred and ninety-seven dollars and twenty-nine cents, and to *Dole* and the plaintiff two thousand four hundred and sixteen dollars and sixty cents for the town tax of 1826, which were accepted and receipted by said Treasurers in full of the taxes of *Alna* for 1826.

At the trial of these issues before *Parris J.* the plaintiff produced the warrant for a town meeting in *Alna*, to be held on the third day of *April*, 1826, to raise the annual taxes for that year, on which the constable's return was in these words : " Pursuant to the within warrant I have summoned and notified the inhabitants of *Alna*, qualified to vote in town affairs to meet at the time and place, and for the purpose within named ;" without saying how they were notified. To this return the defendants objected that it was insufficient in not showing how the inhabitants were notified, and for other defects. At the meeting thus held it appeared that two thousand three hundred and fifty-three dollars and twenty-two cents were voted for the town taxes for 1826, and it appeared that the State tax of *Alna* for that year was two hundred and five dollars and ninety cents, and the county tax one hundred and ninety-seven dollars and twenty-nine cents, for which warrants were duly issued to the assessors, requiring their assessment. The overlayings were forty-one dollars and fifty cents, and the highway deficiencies twenty-one dollars and eighty-eight cents. The plaintiff then produced a paper book, stated to be an assessment of taxes in *Alna* for that year. To this the defendants objected that it was not certified to be the assessment of taxes upon the town of *Alna* for 1826. The certificate on it is in these words :—" The aforesaid list of taxes, assessed on the polls and estates of the persons therein named, include State, county, town and minister tax for the year 1826." Here follows a specification of the amount of each. " A copy of the aforesaid list of taxes we committed to *Samuel Clough*, collector, for collection, on the 29th day of *June*, 1826, and ordered him to pay the State tax

to *Elias Thomas*, Esq. by the first day of *January* next, and to pay the county tax to *William M. Boyd*, Esq. before the last day of *August* next; the town tax, one third, 20th of *August*, one third the 20th *January*, one third 1st of *April* next. *Jere. Jewett*, *John McLean*, assessors of the town of *Alna*." *John McLean* and *Jeremiah Jewett* were also defendants in this action, being sureties for *Clough*; and the whole certificate of commitment, except the signatures, was proved to be in the hand writing of *Jewett*. It was also proved that certain persons in said list paid taxes in *Alna* to *Clough* for the year 1826. The defendants called for proof that the assessment, or a copy thereof, was deposited in the clerk's office or assessor's office in *Alna*; and objected to the admission of the tax bills, as insufficient without such proof; but no such proof was produced during the trial. The defendants produced a receipt signed by *Carlton Dole*, as treasurer, to *Clough*, dated *March* 1826, for six hundred and fifty-five dollars and sixty-seven cents, in part of taxes for 1825. Also a receipt from the same to the same, as follows: "Received of *Samuel Clough*, collector of taxes in *Alna*, for the years 1825 and 1826, the taxes for State and county of said years as to said town per warrants and treasurer's books. *March* 31, 1827. *C. Dole*, Treasurer." The defendants also produced eleven receipts from the plaintiff to *Clough*, dated on different days between *June* 18, 1827, and *Nov.* 8, 1828, inclusive, for monies paid on account of the taxes of 1825 and 1826, without discrimination, amounting in all to twelve hundred and seventy-one dollars and claimed the right to apply these payments first to the taxes of 1826, in the absence of any proof of assessment of taxes for 1825. The plaintiff, to show a legal assessment for 1825, then read the warrant for a town meeting *April* 4, 1825, to raise money, &c. for that year. To this the defendant objected that the warrant and return were both illegal. The warrant ran thus:— "You are hereby required, in the name of the State of Maine, to notify and warn the inhabitants of said town, qualified according to the constitution, to assemble at the meeting-house in said town, on the first *Monday* of *April* next, being the fourth day of said month, at ten

o'clock in the forenoon, to give in their votes to the selectmen for one representative, to represent them, that is, Lincoln District, in the Congress of the United States of America. You are also required in the name of the State of Maine to summon and notify the inhabitants of said town, qualified to vote in town affairs, to assemble, and at the same time and place as abovementioned, to act on the following articles," &c. The return thereon was thus:— "Pursuant to the within warrant I have notified the inhabitants of the town of *Alna*, qualified as within expressed to appear," &c., without saying how such notice was given. In the transactions of this meeting, as well as that of 1826, it appeared that five hundred dollars were voted for the Rev. Mr. *Johnson's* salary; to which the defendants objected as illegal, on the ground that a town, as such, had no right to raise money for parochial purposes since the passage of the act of 1821 concerning parishes. There was no evidence offered of any division of said town of *Alna* into parishes in fact, or by operation of law.

The plaintiff, in further proof of the legal voting of the monies assessed for 1825, offered the transactions of a town meeting held *April* 18, 1825. To the return on the warrant for this meeting the defendants made the same objection as before made to the return on the warrant for *April* meeting, 1826; the returns being similar. In the warrant for the meeting, *April* 18, 1825, the article relied on was in these words:—"3d. To see what measures the town will take to build a bridge near *Ezekiel Averill*, 2d, which was lately burnt; or any matter and things relating thereto." The vote thereupon was in these words:—"Art. 3. Voted to have a committee of three. Voted that the sum of one hundred dollars be raised towards building the bridge near *Ezekiel Averill*, 2d, and that the selectmen be a committee to contract for the erection of said bridge, with power to determine upon the kind of materials which compose the same, the time in which it shall be completed, and the place where located, and to draw their order on the town treasurer, for the sum necessarily expended in completing said bridge." To this the defendants objected that the article did not authorise the vote

of money. The defendant here also objected that the plaintiff's evidence of legal assessments was imperfect, without proof that the assessment, or a copy, was lodged in the office of the town clerk or assessors; but no such proof was exhibited during the trial.

The defendants, in relation to certain paper books produced as assessments for 1825, further objected that there was no certificate on them showing what taxes they contained or for what town. They were in the hand writing of *John McLean*, one of the defendants, and were signed by him and *Nathaniel Plummer*. The tax bills, in the hands of *Clough* for the year 1825, were produced, pursuant to the call of the plaintiff, and were signed by *John McLean* and *Nathaniel Plummer*. The bills of 1825, produced by *Clough*, contained on the first leaf a commitment of the taxes to him for collection, but without any warrant to enforce payment, and no such warrant appeared in the book, the latter leaves of which were blank; and it appeared in evidence that it had been the general usage of the assessors to write the warrant for collection at the end of the tax books. But these bills were much worn and mutilated, and it was left for the consideration of the jury, upon all the evidence on this point, whether a warrant originally accompanied them.

The bills of 1826 were not produced at the trial, although notice was given to the defendants to produce them. *Carlton Dole* testified that when this cause was tried in the Common Pleas, in 1829, he saw the bills of 1826 then produced by the defendants; that the warrant was then connected with the bills, and he read a part of it. The existence of a warrant for collection of the taxes for 1826, was also left to the jury. The plaintiff, to prove that the receipt produced by the defendants, dated in *March* 1826, for six hundred and fifty-five dollars and sixty-seven cents, was involved in the subsequent receipt of *March* 31, 1827, offered *Carlton Dole* as a witness; to whose admission the defendants objected on the ground of interest; and to the point that his interest had been released, the plaintiff offered a vote of the town to that effect, passed *April* 4, 1831. The return on the warrant for calling this meeting was similar to that in 1826 before mentioned, and was objected to for the

same reason. The defendants also showed that the town, at a subsequent meeting, held *Sept.* 12, 1831, voted to reconsider the above vote, passed *April* 4th. They further objected that the vote to release the witness was in itself insufficient, being without consideration paid, and not being by deed; and for other reasons. Also that the receipts, being official acts, and admissions of facts, amounting to contracts with *Clough*, it was not competent for the plaintiff to control them by other proof. It was also contended by the defendants, that if the town had any remedy to correct the mistake of *Dole*, their treasurer, it was against *Clough* alone, in *assumpsit*; and not against his sureties on the bond, who were *ipso facto* discharged by the treasurer's official receipt given for the money. But for the purpose of making progress in the trial the Judge overruled all the defendants' objections, excepting such as were matters of fact, which were left to the jury. The books and paper evidence before mentioned were admitted subject to all legal objections by either party; and a verdict being returned for the plaintiff, the points of law raised at the trial were reserved for the consideration of the court.

Greenleaf and *Barnard*, for the defendants, contended that they were not liable unless *Clough* had legal authority to collect the taxes; *Foxcroft v. Nevens*, 4 *Greenl.* 72;—that the warrants for the town meetings in 1825 and 1826, were insufficient, in not describing the persons to be notified;—that the returns were insufficient in not saying who were notified, nor how the notice was given; *Lancaster v. Pope*, 1 *Mass.* 88; *Davis v. Maynard*, 9 *Mass.* 242; *Mitchell v. Osgood*, 4 *Greenl.* 124;—that the commitment of taxes legally assessed was a condition precedent on the part of the town; *Elwell v. Shaw*, 1 *Greenl.* 339; *Dillingham v. Snow*, 5 *Mass.* 558; *Nelson v. Milford*, 7 *Pick.* 25; *Waldron v. Lee*, 5 *Pick.* 329;—that the town, as such, could not lawfully raise money for parochial purposes, nor be at the expense of its assessment, since the *Stat.* 1821, *ch.* 135;—that the want of a copy of the assessment lodged in the office of the town clerk or assessors was fatal; *Thurston v. Little*, 3 *Mass.* 429; *Blossom v. Cannon*, 14

Mass. 177; *Thayer v. Stearns*, 1 *Pick.* 482; *Stat.* 1821, *ch.* 116; *Stat.* 1826, *ch.* 337;—that the vote of money to build the bridge was illegal, and vitiated the whole assessment; because it was not authorised by the article in the warrant; nor was it within the authority of the town, which could only call on the inhabitants for labor and materials, and not for money, till the passage of the statute of 1828; *Stetson v. Kempton*, 13 *Mass.* 272; *Bussey v. Gilmore*, 3 *Greenl.* 191; *Libby v. Burnham*, 15 *Mass.* 144; *Stat.* 1821, *ch.* 188;—that the assessments were not under the hands of the assessors in the manner required by law; *Colby v. Russell*, 3 *Greenl.* 227;—that there was no evidence of a warrant to collect the taxes, and it was improperly left to the jury to presume this fact, it not being an ancient transaction;—that Mr. *Dole* was not a competent witness; the meeting at which he was released being illegally warned; and the release of the debt being beyond the legitimate powers of the town, without payment;—and that the treasurer's receipt, though erroneously given, was an official act, and as such a valid discharge of the sureties; the remedy, if there was any mistake, being by *assumpsit* against the collector alone. *Boston Hat Man. Co. v. Messenger*, 2 *Pick.* 223; *Baker v. Bridge*, 8 *Pick.* 22; 1 *Mad. Chan.* 233, 234.

Allen, for the plaintiff, cited *Blackburn v. Walpole*, 9 *Pick.* 97; *Saxton v. Nimms*, 14 *Mass.* 315; *Gilman v. Holt*, 4 *Pick.* 258; *Mussey v. White*, 3 *Greenl.* 290; *Thayer v. Stearns*, 1 *Pick.* 109; *Waldron v. Lee*, 5 *Pick.* 523; *Woodbury v. Hamilton*, 6 *Pick.* 101; *Taft v. Montague*, 14 *Mass.* 282; *Nelson v. Milford*, 7 *Pick.* 18; *Johnson v. United States*, 5 *Mason*, 425.

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

By inspection of the bond declared on, it appears that the condition contains the following recital: "Whereas the said *Samuel Clough* was duly chosen and appointed on the third day of *April* to the office of collector of taxes within said town of *Alna*, for the year next ensuing from said third day of *April*, and fully to be

complete and ended." Then follows the condition of the bond as copied into the report that "said *Samuel Clough* shall faithfully discharge his duty as collector as aforesaid." The report states that he was chosen for the year 1826. From the language of the condition nothing appears to be assumed by the obligors but that *Clough* should faithfully perform those duties which the law, on his acceptance of the office of collector, devolved upon him, and required him to perform. The sureties have not bound themselves to indemnify the town against the consequences of any irregularities on the part of the town in its corporate transactions, or any irregularities or neglects on the part of the selectmen or assessors or constable. If the object of the action were to recover damages for any such irregularities, they might well say that the condition did not embrace liabilities consequent upon such irregularities or neglects; *non in hæc fœdera venimus* would be a very natural and pertinent answer to such an asserted claim. The inhabitants of *Alna* complain of no one, as having violated his official duty, but *Samuel Clough;* but as to him they complain that he had neglected to pay over the monies which he had collected for the town. He contended that he had paid to the treasurers of *Alna* twenty-four hundred and sixteen dollars and sixty cents, for the town taxes of the year 1826, and that the same was accepted by said treasurers in full for such taxes. This contested question of fact the jury have settled by returning a verdict in favor of the plaintiff for the sum of six hundred and thirty-nine dollars and sixty-five cents.

Viewing the cause in this light, the inquiry at once presents itself, "If the defendants are not legally answerable for the misconduct or neglect of the town, the selectmen, assessors or constable, on what principle should they be permitted to defend themselves in the present action, by shewing that the proceedings of the town, the selectmen, the assessors and the constable, in relation to the taxes in question, were irregular?" Should it be admitted that those proceedings were irregular, as has been alleged, and that *Clough* might be prosecuted by those whose taxes he has collected and be compelled to reimburse the monies thus demanded and received by him

on account of such irregularity; still that is no reason why proof of such irregularities should be admitted for the purpose of defeating this action. For in this action the obligors are all bound by their own bond, sureties as well as principal, for the official fidelity of *Clough*; but the sureties would not be answerable to those from whom he exacted the payment of taxes, if he acted without legal authority. No facts appear on the report tending to show that the taxes were not all voluntarily paid to the collector; nor have we any ground for presuming that any of those who have paid their taxes to him would ever think of attempting to reclaim the monies so paid. Besides, a proper action for the purpose of reclaiming such taxes, if illegally assessed, would be an action of *assumpsit* against the town, whose agent had received the money; *Amesbury Woolen and Cotton Manufacturing Company v. Inhabitants of Amesbury*, 17 *Mass.* 461; or an action of trespass against the assessors for the illegality of the assessment. Such is the usual action, where the illegality is on the part of the assessors; and by our *Stat.* of 1826, *ch.* 337, the assessors are declared to be liable for their own acts only, and not any antecedent acts on the part of the town or parish, whose officers they are. For the same reason the collector is not considered as responsible for any irregularities on the part of others, antecedent to the commitment of the assessment to him for the purpose of collection. His warrant is his protection against all illegality but his own. *Holden v. Eaton*, 8 *Pick.* 436. For these reasons we are of opinion that according to the facts, as found by the jury, the condition of the bond has been violated by the unfaithfulness and negligence of *Clough*, in not paying into the town treasury the monies he had collected on the bills of assessment committed to him for collection; though such bills were liable to the objections urged against them by reason of the specified imperfections therein and omissions of duty on the part of the assessors, before and at the time of commitment. He violated the condition of the bond by not paying over the sums collected, as he would have violated it by his not duly collecting it of the persons named in the bills of assessment. After having thus collected the money,

we think he ought not to be permitted to deny the legality of the assessment of 1825 or 1826, on account of the omissions of the assessors named in the report.

With respect to the other objections which have been urged, we proceed to express our opinion, though perhaps it may be considered as to some of them, an unnecessary labor.

The objection to the legality of the meeting in *April*, 1826, cannot be sustained a moment. The condition of the bond contains an explicit recital that *Clough* was duly chosen at that meeting, which could not have been the case if the meeting was not a legal meeting. By this recital the defendants are estopped to deny its legality. 1 *Roll.* 872, *b.* 50; *Dyer*, 196, *a.*; *Willes* 9, 25; 4 *Com. Dig. Estoppel a.* 2. The meeting being legal, the proceedings mentioned in the report were also legal.

As to the warrant for the meeting in *April*, 1825, it is not illegal, because two town meetings were called by it. The qualifications of the respective voters in each, were distinctly specified. The case of *Craigie v. Mellen & al.* 6 *Mass.* 7, is directly in point. The return of the constable is not now open to objection. The case of *Tuttle v. Cary*, 7 *Greenl.* 426, differs essentially from this. That was the case of a warrant for calling a parish meeting, the manner of warning which was particularly prescribed in the parish act. But the manner of warning a town meeting is not prescribed by any statute in this State. The words of the third section of our statute *ch.* 114, in relation to this subject are these, viz. "the manner of summoning the inhabitants to be such as the town shall agree upon." Now the case before us does not show that the town of *Alna* had ever agreed upon the manner of summoning the inhabitants; but as it appears that they did assemble in town meeting, at the time appointed, and act under the warrant, by electing town officers, raising sums of money, &c. &c. we ought to presume that they knew how they had been summoned and were satisfied; so that in regard to that meeting they agreed to the manner of summoning, whatever it was: their conduct sanctioned it as a legal meeting duly warned and lawfully assembled. The constable's re-

turns on the several warrants for the meetings in 1825, 1826, and 1831, all bear date of the days on which the respective meetings were holden; but this has frequently been decided to be no legal objection to the legality of the meetings. *Thayer v. Stearns*, 1 *Pick.* 109. It is the common practice, and sanctioned as legal.

Neither can the objection prevail which has been urged against the assessment of 1825, on the ground that a town cannot legally vote money for parochial purposes since the parish act was passed in 1821. A similar objection was made in *Jewett v. Burroughs*, 15 *Mass.* 464, considered and overruled. The same principle was also recognized and confirmed by this court in *Parsonsfield v. Dalton*, 5 *Greenl.* 217; *Richardson v. Brown*, 6 *Greenl.* 355, and again in *Osgood v. Bradley*, 7 *Greenl.* 411, especially in reference to the character and operation of the parish act. We do not perceive any weight in the objection as to the supposed insufficiency of the article in relation to the building a bridge to authorize raising money for the purpose. To raise the sum mentioned was deemed the most proper and effectual measure for the purpose.

In answer to the objection urged against the admissibility of *Dole*, we would observe that the town meeting of *April* 4, 1831, must be deemed to have been legally warned and holden, for the same reasons which we have assigned in regard to the meeting of 1825. But it is contended that the town had no authority to pass the vote, releasing *Dole* from all liability to the town, as it amounted, if it could have any operation, to a gift of whatever sum of money he owed the town. In the first place there is no proof that he did owe the town any thing. There was a question then depending, whether he or the defendants owed it. The town believed that the sum in controversy had never been accounted for to the treasurer, *Dole*, while in office; and, in order to establish the fact and save the town from loss, it was deemed most for the interest of the town to release a doubtful, or possible claim on *Dole*. Towns must always act by majorities, and we are not aware of any decision showing that the town could not legally release a debt as well as contract one. We apprehend that perhaps it does not follow ne-

cessarily that a town may not expend or give away a sum of money lawfully, though they could not legally reimburse the treasury by a tax, voted and assessed specially for that purpose. In *Kempton v. Stetson & al.* 13 *Mass.* 272, the court, by *Parker C. J.* say, "whether any money actually in the treasury, beyond what is needed for the ordinary expenses of the town, and which is not appropriated, may not be disposed of, in pursuance of a vote of the inhabitants, for the common defence of the inhabitants, is a different question from the present, and which we need not now determine. We confine ourselves to the case before us, which is that of a tax founded on a vote to raise money, &c." The vote passed releasing *Dole* from liability so as to remove the objection of interest, operated as effectually as a release by one individual to another formally executed. A corporation may contract by vote and the vote will bind the corporation; and may by vote release an individual from a contract by which he is bound to such corporation. There can be no question we think as to the correctness of this principle. *Nelson v. Milford*, 7 *Pick.* 18. It follows, as a necessary legal consequence that the vote of reconsideration, passed at the meeting in *September* following, was wholly unavailing. It did not and could not affect the vested rights of *Dole*, acquired by him under the vote passed at the *April* meeting. The result is that *Dole* was a competent witness and properly admitted. We have thus noticed all the objections of a legal nature which have been urged, and the rulings of the Judge upon all of them; all of which we approve. We see no grounds for sustaining the motion for a new trial, and there must be

Judgment on the Verdict.

BARRETT *vs.* BARRETT.

Where an administrator in another State appointed an agent in this, who received money belonging to the estate; it was held that he might maintain an action for this money, against the agent, without taking out letters of administration here, the claim not being in his representative capacity.

THIS action, which was *assumpsit* for money had and received, was submitted to the court upon a case stated by the parties.

The plaintiff, *Charles Barrett*, a citizen of *New Hampshire*, was duly appointed in that State administrator of the estate of *Charles Barrett*, of the same State, deceased; in which capacity he held a promissory note given to the intestate by three persons in this county. One of the promissors dying insolvent, the plaintiff presented before the commissioners on his estate a claim for the third part of the note, due from him, which was allowed by them to the plaintiff, and a decree of distribution was passed by the Judge of Probate, directing the payment of the dividend to him, in his capacity of administrator. The amount thus decreed was received by the defendant, under a written order from the plaintiff upon the administrator of the promissor; and for this sum the present action was brought by the plaintiff, in his private capacity, as money had and received to his own use. And the question was whether he could maintain any action for the money, without first taking out letters of administration in this State, and suing in his representative character.

Greenleaf and *Harding* maintained that he could; and cited *Coburn v. Ansart*, 3 *Mass.* 319; *Talmadge v. Chapel*, 16 *Mass.* 71; *Mosher v. Allen*, *ib.* 451; *Hunt v. Stevens*, 3 *Taunt.* 115; *Mauran v. Lamb*, 7 *Cowen*, 174; *Marr v. Plummer*, 3 *Greenl.* 73; *Lovell v. Evertson*, 11 *Johns.* 52; *Williams v. Matthews*, 3 *Cowen*, 253; *Smith v. Barrow*, 2 *D. & E.* 476.

Thayer, for the defendant.

WESTON J. delivered the opinion of the Court.

The defendant, by authority from the plaintiff, received a sum of money, which the latter had a right to claim. The defendant assumed the character of agent for the plaintiff. Shall he be held to account to his principal? We do not hesitate to decide that he must. He has no right to inquire into the origin of the plaintiff's title; whether, when received, it will be his own money, or held for others. The cause of the present action has accrued, since the decease of the intestate. The administrator then may bring the action in his own name. The case of *Smith v. Barrow*, 2 *D. & E.* 476, is an authority to this point. An executor or an administrator takes a note, given to him as such, for money due the estate he represents. He may sue such note in his own name. Cases of this kind are not of unfrequent occurrence. A man may have title to personal property as an administrator, which would be recognized every where; and upon any contract made in relation to it, after the decease of his intestate, he may bring an action in his own name. So he may for any injury done to such property. And it can make no difference in principle, whether such contract is implied by law, or depends on an express promise. The defendant having received money for the plaintiff, the law raises a promise on the part of the defendant to pay it to him; and the plaintiff has the same remedy upon the promise thus implied, which he would have if it had been express. It is only where the administrator must sue in his representative capacity, that his character as such can be called in question, or required to be proved under the laws of the State, where the action is brought.

Defendant defaulted.

SMITH *vs.* HALL *& al.*

M. made a lease to *H.* of a mill and other premises, with certain special agreements respecting repairs; the rent for which, when ascertained, was agreed to be paid to *S.* to whom the premises had been mortgaged by *M.*—On the same day *M.* assigned the lease to one *T.* who afterwards drew an order on the lessee in favor of *S.* for the payment of whatever sums might be found due for rent; which was accepted. Afterwards *T.* and *H.* entered into an arbitration of the various subjects of rent, expenses and repairs, pursuant to the statute; on which judgment was rendered in favor of *T.* for the balance found due by the award.—In a subsequent suit by *S.* against *H,* for the use and occupation of the premises, *H.* tendered the amount of this judgment; but it was held that *S.* was not bound by the account thus adjusted by the referees, it being *res inter alios acta.*

Where the plaintiff, in *assumpsit* for use and occupation, alleged himself to be sole owner of the premises by assignment from *M.* and the defendant pleaded that *M.* was the legal owner, with whom he had entered into a rule of submission of the same subject-matter, pursuant to the statute on which judgment had been rendered against the defendant, the amount of which, with costs, he now tendered to the plaintiff as a subsequent assignee of *M's* claim for rent;—the plea was held ill for want of a traverse of the plaintiff's title as set forth in the declaration.

THIS case, which was argued by *E. Smith* for the plaintiff, and *Greenleaf* and *Barnard* for the defendant, is stated in the opinion of the Court, read at the ensuing *September* term, as drawn up by

MELLEN C. J. The amount alleged to be due from the defendants to the plaintiff is for the use and occupation of the premises described in the declaration for the period therein specified, for taxes assessed on the same, and for interest. All the sums claimed are claimed as due in consequence of the alleged occupation before mentioned. The declaration contains six counts. The first is on account annexed for thirteen hundred and eighty dollars and fifty cents. The second is for the use and occupation of the premises from *April* 28, 1827, to *March* 6, 1829, for which he claims fourteen hundred dollars. The third is a special count, stating that one *Maguire, May* 15, 1827, by deed indented, undertook to lease to the defendants, the premises described for one year from the time

the mills should be put in a situation to begin to saw, (which was on the 28th of said *May*,) at a stipulated rent, and on certain conditions specified; which rent, after the deduction of certain expenses for repairs, was to be paid to the plaintiff, on the written order of *Maguire*:—That on the same day *Maguire* assigned to one *Tufts*, all his interest, powers and privileges under the deed of lease derived. The count then goes on and states "the plaintiff then and there being the sole owner of the same leased estates, and said *Maguire* only tenant at will thereof;"—that the plaintiff refused to sanction said lease, unless the defendants would consider the same as made solely for the use and benefit of the plaintiff, and obligate themselves to perform all their stipulations in the lease, to the plaintiff, and for his sole benefit, which they assented to, in consideration of being permitted to hold and occupy the premises according to the terms of the lease, in the same manner as though the plaintiff were the lessor; and the averment is that they did so occupy for one year, and from the expiration of the year until *May* 6, 1829; during which time they sawed large quantities of timber, &c. and in various ways injured the mills.

The fourth count states the lease from *Maguire*, with the assignment to *Tufts*; and that on the 20th of *September*, 1827, he, with the consent and approbation of *Maguire*, drew his order in writing on the defendants, requesting them to pay the plaintiff all sums that might or had become due for rent of the premises in question, according to the tenor of the lease; that on the 26th of said *September*, the defendants accepted the order; and that the sum due for rent, and which they ought to have paid, was twelve hundred dollars.. The fifth count is, in substance, the same as the third. The sixth count is, in substance, the same as the fourth.

The defendants have pleaded the general issue; and also a special plea in bar of all damages beyond the sum of one hundred and thirty-four dollars and interest and costs, which sums they allege have been brought into court under the common rule. In this plea they aver that "they leased the premises of *Maguire* who was the legal owner of the same, for the term aforesaid, and during the whole time said estate was occupied by said defendants, and had

perfect right to lease the same as aforesaid; that *Maguire* and his assigns were the persons legally entitled to receive the rents and profits;" and that for the purpose of ascertaining their amount, *Tufts*, the assignee of *Maguire*, and they referred that question to certain persons whose report was accepted by the court to which it was returnable and judgment was entered thereon; the amount of which with interest, is the sum deposited in court as beforementioned. To this plea the plaintiff has given a special demurrer, assigning nine causes of demurrer; and the question is whether the plea, as pleaded, is a bar to further damages than the amount brought into court.

It is a principle of law that in an action for use and occupation, *nil habuit in tenementis* is a bad plea. The reason assigned is that as the defendant has occupied under the plaintiff's permission and enjoyed all the benefits of the lease, it is unjust that he should be allowed to contest the lessor's title. But in the case before us, though the plaintiff alleges, that the defendants occupied the premises under him and by his permission, yet this fact is explicitly denied by the plea; in that they allege that they occupied during the whole time of their occupancy, under lease from *Maguire*; and if the plea in bar is good and well pleaded, then the demurrer admits the facts stated in the plea. On this ground the legal principle abovementioned would not be applicable.

We are satisfied that the first cause of demurrer, which is, that the plea does not answer the count of *indebitatus assumpsit*, nor the charge for taxes, nor for the rent of the miller's houses, is not well assigned. The premises leased included the miller's houses, and the sum charged for taxes, was for one half of the taxes on the said mills; of course the plea in bar is pleaded as an answer to the whole declaration.

Our opinion is the same as to the second cause assigned; which is, that the sum tendered does not include the costs of reference. The sum reported as damage was one hundred and thirty-four dollars, and for costs of reference twenty-six dollars, being in the whole one hundred and sixty dollars.

The sums brought into court on the common rule are as follows. Sum reported as damage, one hundred and thirty-four dollars; interest thereon five dollars and sixty-three cents; costs of suit thirty-four dollars and ninety-five cents. The above sum of thirty-four dollars and ninety-five cents probably is composed of the above named sum of twenty-six dollars, cost of reference, and eight dollars and ninety-five cents, costs of Court.

The ninth cause of demurrer, which relates to the form of the submission, and to the allowance of the defendant's set-off, is not well assigned. It is predicated on certain assumed facts, which do not appear on the record. The submission is in the usual form and it does not appear that the referees exceeded their powers. Besides, the report has been accepted; and the judgment rendered thereon cannot in this mode be impeached.

Indeed, all the objections alleged against the plea in bar, are as good on a general as a special demurrer; not being for matters of form. The defendants have averred that they occupied merely as lessees of *Maguire*; and so were never answerable to the plaintiff as lessor of the premises, but only in virtue of their acceptance of the order drawn on them by *Tufts*, the assignee of *Maguire*, under whom they occupied, during the whole period of their occupancy. If the sum which the defendants were bound to pay in virtue of said acceptance was more than the sum of one hundred and thirty-four dollars, as reported by the referees, then their contract has not been performed; for they were bound as far as the terms of the order extended their liability. The allegation in the fourth count is that at the end of the year there was due for rent the sum of twelve hundred dollars. The defendants attempt to avoid this averment, as to the amount payable on the order in virtue of the acceptance, by pleading the decision of the referees and judgment on their report. The plaintiff contends that the referees could not bind him by their report, he being no party to that reference; that he never assented to the submission or agreed to be bound by the decision, the transaction being *inter alios acta*. What proof is there, but the report of the referees, that more was not due on the order than one hundred and thirty-four dollars. None. Does the

plea then shew payment of that order, or what is equivalent in this action? This part of the cause seems to present a difficulty which the defendants cannot easily remove. It cannot be contended with any hope of success by any one, that the decision of the referees is evidence for the defendants, or in any manner binding on the plaintiff. The parties are different. The law on this point is perfectly at rest. We are now confining our remarks to the defendants' liability on the acceptance merely; for, if the plea is well pleaded, as we have before intimated, we think it discloses facts sufficient to exonerate them from all asserted claims resting on any other grounds. Our opinion then is, that for the reasons above assigned, the plea is insufficient, as not presenting on the record those facts, which, in an action founded on the order and acceptance, would form a valid defence in a trial before the jury. Being presented on the record, as we see them, we are bound to pronounce them furnishing no legal defence. But there is also another objection to the plea. The plaintiff in his declaration alleges that at the time the lease was made by *Maguire*, he himself was the sole owner of the property leased, and that *Maguire* was only a tenant at will. But the plea alleges in direct and positive terms that at that time *Maguire* was the legal owner, and so continued during the occupancy of the defendants. It is true the defendants have protested, in their plea, against the abovementioned allegations in the writ; but that circumstance has no operation in this case, though perhaps it may have in some other action. A protestation is not a denial of the facts alleged. It is a general rule that whenever any material fact is alleged in any pleading, which, if denied, will, upon issue joined, decide the cause one way or the other, if the adverse party plead a fact inconsistent with and contrary to such allegation, he must traverse it. *Digby v. Fitzherbert*, *Hob.* 103; 1 *Saund.* 22, *note* 2, and cases there cited; *Ib.* 209, *note* ; *Yelv.* 140. "When the plea varies from the declaration in the nature or quantity of estate alleged, there must be a traverse. These authorities clearly show that the plea is bad for want of a traverse: and this objection is good on general demurrer. *Spear v. Bicknell*, 5 *Mass.* 125.

Plea in bar adjudged insufficient.

BARRETT *vs.* BARRETT *& al.*

Where an administrator in another State held, in that capacity, a negotiable note payable to his intestate and indorsed by him in blank; it was held that the administrator might maintain an action upon it in this State, as indorsee; subject, however, to any defence originally open to the promissor.

Where a new promise is relied on as an answer to the plea of the statute of limitations, the declaration is founded on the original cause of action; and the new promise is set forth in the replication, or adduced in evidence.

THIS was an action of *assumpsit* upon a negotiable promissory note dated *June* 15, 1806, signed by the defendants and one *Archibald McLain*, deceased, payable in nine years to one *Charles Barrett*, deceased, and by him indorsed in blank. The declaration contained one count for money had and received; one for money lent; one upon the express promise of the defendants to pay the plaintiff as holder and assignee of the note; and another, added under leave to amend, upon their liability to him as indorsee, in the usual form. The defendants pleaded the general issue, with a brief statement pursuant to the statute; in which they relied for defence upon the statute of limitations; and also alleged that the plaintiff held the note as the administrator of the payee, under letters of administration granted in *New Hampshire*, of which State the plaintiff and the payee were citizens; that no administration had been granted in this State, though here were both *bona notabilia* and creditors; and that the promises set forth in the declaration were made to the plaintiff as administrator.

At the trial, before *Parris J.* the plaintiff, after proving the signatures and indorsement, produced letters from one of the defendants to himself within six years, promising to pay the note. And the defendants offered evidence tending to show that these letters were addressed to him as administrator, and that he was not recognized by them as holding the note in any other capacity.

The jury were instructed, if they should find that the note belonged to the estate of the intestate, and that the subsequent promises were made to the plaintiff solely in his capacity of administrator, to return a verdict for the defendants :—but if they should find that the note was the property of the plaintiff, and that the subsequent promises were made to him in his private capacity, then to return a verdict for the plaintiff. And they found a verdict for the defendants ; which was taken subject to the opinion of the Court upon the correctness of those instructions.

Greenleaf and *Harding* for the plaintiff.

Thayer for the defendant.

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

The count, wherein the plaintiff declares as indorsee against the defendants as makers, was not inserted in the plaintiff's writ, until after the entry of the action, under leave to amend. This count is objected to as inadmissible under such leave. But all the counts were for the same cause of action, depending on the note as evidence. This is not denied ; and one of the original counts shows that the action was brought, to recover the note declared on in the new count. The rule is, that a new count shall not be added for a new cause of action ; but under leave to amend new counts may be added at pleasure for the same cause, which are consistent with the nature of the action brought.

The plaintiff as indorsee, adduced in evidence the note declared on, with the name of the payee indorsed in blank. This was *prima facie* evidence that the note was his property. But if it in fact belonged to the estate of the payee, and he would be answerable over for the amount to that estate, his right to recover would be unaffected. Whether he sues in his own right, or as trustee for others, is a question, which does not affect the defendants' liability. If they, or either of them, had any matter of offset against the estate of the payee, they might avail themselves of it in defence of this action, if the

plaintiff sues for the benefit of the estate, or it can be shown that he is not the *bona fide* holder. But no claim of offset is set up or pretended. If the note belongs to the estate of the payee, it is under the control of the plaintiff, as his administrator. Being negotiable and indorsed in blank, it was competent for him to bring an action upon it in his own name as indorsee, or to permit any other person to do so. *Marr v. Plummer*, 3 *Greenl.* 73, and the cases there cited.

It was neither necessary or proper, that the action should be brought upon the new promise. Where a new promise is relied upon as an answer to the statute of limitations, the declaration is founded upon the original cause of action; and the new promise is set forth in the replication, or adduced in evidence.

To take a case out of the statute, there must be an acknowledgment of indebtedness, or a promise, absolute or conditional, to pay. But the latter includes the former. A promise to pay, is an acknowledgment of indebtedness, by necessary implication. It is unimportant to whom made. It is an admission, that the debt is due and unpaid.

We are therefore of opinion, that the ground, upon which the jury returned their verdict for the defendants, was not warranted by law.

New trial granted.

HATHORN *vs.* CURTIS *& al.*

The managing owner of a coasting vessel, let to the master on shares, and employed in a distant place in the wood-trade, wrote a letter to a third person, requesting him to "say to *E.* [the master of the vessel,] that he had better buy a load of good wood on the best terms he can, if he can get a deck load of hay on freight:" —which was held sufficient authority to the master to purchase on account of the owners, according to the terms of the letter.

THIS was an action of *assumpsit* against the defendants as owners of the schooner *Five Brothers*, of which one *Eastman* was master, to recover the price of a quantity of wood and bark, shipped by the plaintiff on board the schooner at *Dresden*, to be carried to *Boston* and sold, and the proceeds to be remitted to the plaintiff; alleging that it was so conveyed and sold, but that the proceeds had not been paid over.

At the trial, which was before *Parris J.* upon the general issue, the plaintiff proved that about the first of *June*, 1829, the schooner arrived in the *Kennebec* river, in charge of one *Moore* as master, who soon after made a parol contract with *Eastman*, by virtue of which the latter received the vessel, agreeing to victual, man, and take charge of her, for one half of her earnings. *Eastman* made one trip in her to *Boston*, with a cargo of wood belonging to one *Carney* and others, which was sold to *Curtis*, one of the defendants and managing owner, and the price, after deducting half the freight, was paid by *Curtis* to *Eastman*, and by him, after deducting the other half the freight, to *Carney*, on the return of the vessel to the *Kennebec*. After remaining in the river unemployed for some time, *Curtis* addressed a letter to one *Stover*, master of another vessel of the defendants then lying in the *Kennebec* river; in which he requested him to "say to *Eastman* he had better buy a load of good wood on the best terms he can, if he can get a deck load of hay on freight, as it sells quick now at ten dollars per ton." This message was accordingly communicated to *Eastman*, and by him to the plaintiff,

who thereupon contracted with him for the wood and bark mentioned in the declaration; which was delivered, and a memorandum of the purchase made by *Eastman* and handed to the plaintiff, in which the cargo was entered as bought of the plaintiff "for the schooner *Five Brothers*." *Eastman* agreed either to leave the proceeds of sales with the owners in *Boston*, or to bring the money to the plaintiff; and he testified that his application to the plaintiff for a cargo was solely in consequence of the above letter; but for which, he should have waited for a freight. *Curtis* alone kept a wood wharf in *Boston*, and, with the other defendants, had several vessels employed in carrying wood, bark, &c. from the *Kennebec* to *Boston*. No express agreement was ever made between *Eastman* and the defendants respecting the terms on which he was to use or employ the vessel; nor did he communicate to them the parol agreement between himself and *Moore*.

The cargo in question was sold by *Eastman* to *Curtis*; after having ascertained, from the state of the *Boston* market, that no one would give more; and a bill of parcels was given, as of a private sale between them, in common form. The price was paid by *Curtis* to *Eastman*, who brought the money to the *Kennebec*, but never paid it to the plaintiff, though requested. On his return in the schooner, he delivered her up to one *Libby*, as master, and never afterwards went in her. The owners never interfered in the management of the vessel while she was in *Eastman's* hands, except in the message sent by *Curtis*, as above stated. It also appeared that when *Eastman* applied to the plaintiff, he stated that *Curtis* had sent down to him to buy a hold full of wood or bark, and get a deck load of hay; and that his own credit was so low, that he could not have obtained such a cargo on his own account. And it was proved that people concerned in such business, on the *Kennebec*, were in the habit of sending wood and bark to *Boston*, on account of the vessel, consigned to the master for sales and returns.

Upon this evidence the counsel for the defendant requested the Judge to instruct the jury that the action was not maintainable. This he declined; but he instructed them that if they should find from

all the evidence in the case that *Eastman* was employed by the general owners as master, for which he was to receive one half the earnings as his compensation, they retaining the right to control the vessel or direct her employment, they might then consider the direction in the letter to *Stover* as sufficient authority to *Eastman* to purchase on account of the owners. Or, if they were satisfied that the general owners retained the right to control the vessel and direct her employment, and that the wood and bark were taken on board by *Eastman* to be transported to *Boston* and sold for and on account of the plaintiff, then they might consider the owners answerable. But if, from the evidence, they were satisfied that *Eastman* purchased the wood on his own account, or that he took the vessel on shares, either for a limited or unlimited time, and that during such time the general owners retained no right of controling the vessel or directing her employment, and that the wood and bark were taken on board to be transported to *Boston* and sold for and on account of the plaintiff, then their verdict should be for the defendant.

The jury thereupon found for the plaintiff; and on being interrogated by the Judge, answered that they found for him under the first instruction. And the defendants moved for a new trial.

Allen, for the defendants, cited *Abbot on Shipping*, 100, 102; *Thompson v. Snow*, 4 *Greenl.* 264; *Emery v. Hersey*, *ib.* 470; *Reynolds v. Toppan*, 15 *Mass.* 370; *Colson v. Bonzey*, 6 *Greenl.* 474; *Taggard v. Loring*, 15 *Mass.* 336; *Champlin v. Buller*, 18 *Johns.* 169; *Perry v. Osborn*, 5 *Pick.* 422.

Evans, for the plaintiff, cited some of the same cases, and *Kemp v. Coughtry*, 11 *Johns.* 107.

Parris J. delivered the opinion of the Court.

The contract, under which *Eastman* had charge of the *Five Brothers*, was an important fact in this case to be settled at the trial. If he was the hirer of the schooner for the voyage, or for a term unexpired, when the wood and bark, charged in the plaintiff's writ, were taken on board and transported to *Boston*, then, as in law he would be considered the owner while the vessel was thus under his

management and control, the liability of the general owners ceased, and was transferred to him. If he was the master only, and had control of her merely as such, then the liability of the general owners in this action would depend upon the nature of the contract and the circumstances under which it was made.

It is very clear, therefore, that the several questions of fact raised at the trial were properly submitted to the jury, and that the general instruction, requested by the defendants' counsel, that the action was not maintainable, was properly withheld. There are facts in the case tending to shew that *Eastman* was owner for the voyage; such as his contract with *Moore* to take charge of the vessel, victual and man her and have half the earnings; his carrying wood for *Carney* and others, selling it and accounting with them for the proceeds; and several other facts and circumstances which appear in the report. There were also facts in proof which had a tendency to show that *Eastman* was merely master, and acted in that capacity only; the general owners still reserving and exercising the power of directing and controlling the employment of the vessel. Such was the fact that the general owners were interested in a wood wharf; that the schooner was employed in transporting wood from the *Kennebec* river to *Boston;* that her several cargoes, while under *Eastman's* command were delivered to *Curtis*, the managing owner; and the letter from *Curtis* to *Stover*, in which he was directed to say to *Eastman* that he had better buy a load of good wood, &c. It being important that the relation, which *Eastman* held to the vessel should be ascertained, it was properly left to the jury to decide whether he was employed by the general owners as master, they retaining the right to control the vessel and direct her employment; or whether he took her on shares, being clothed, during the existence of the contract, with the power and authority of owner as well as master.

That question, which was one of mere fact, the jury settled; having found that *Eastman* was employed as master only, the general owners retaining the right to control the vessel and direct her employment.

Had he authority, as master, to purchase the wood and bark on account of the defendants ?

The master, in his capacity as such, has power to bind the owners of the ship, in contracts relative to her usual employment only. This power relates merely to the carriage of goods, and the supplies requisite for the ship ; but the owner of the ship cannot be bound by any contract of the master concerning the purchase of cargo. To bind the owner in such a contract, the master must be clothed with powers other than those which are necessarily incident to his office as commander of the ship. He may, indeed, act in the double character of master and supercargo or consignee ; but his power to sell, cases of necessity excepted, or to purchase cargo flows not from his official character as master, but from special authority conferred for that purpose. The evidence, by which this agency is to be proved, may, as in other cases, be positive or presumptive ; by direct appointment contained in letters of instruction, or by general and long continued usage, under which all interested may be presumed to have contracted ; or by subsequent ratification. But unless this agency be superadded to his authority as master, he has no power to bind his owners in any contracts excepting such as relate to the usual employment of the vessel committed to his charge, and the means requisite for that employment. *Eastman*, therefore, merely as master of the *Five Brothers*, had no authority to purchase the wood and bark, charged in the plaintiff's writ, on account of the defendants.

Was he so authorised by the letter to *Stover ?*

The material expressions in that letter are, " say to *Eastman* he had better buy a load of good wood on the the best terms he can, if he can get a deck load of hay on freight, as it sells quick now at ten dollars per ton."

If the purchase was not to be on account of the defendants, why were they so apparently interested ? What had they to do with the terms of purchase, or the contingency of procuring a deck load of hay on freight ? Can it be considered as the mere advice to one in their employment to purchase on his own account. It is to be kept in mind that the jury found that *Eastman* was the master only,

and not the owner for the voyage, and unless they thus found they were directed not to consider the letter as direction or authority, but merely as advice. If such a letter had been written to the owner, it would be advisory merely, as the defendants' counsel contends, because the writer, having no authority over or right to control the vessel, it is not to be presumed that he would attempt to exercise any such power, or that it would be so understood by the person receiving it. But when such language is addressed by an owner to a master in his employment, it may well be considered as clothing him with authority to do what is recommended. Indeed, it can be susceptible of no other construction. *Eastman* and the plaintiff appear to have so understood it, for on the survey bill and memorandum of purchase signed by *Eastman*, and delivered to the plaintiff, it is certified that the wood and bark were purchased of the plaintiff for the schooner *Five Brothers;* clearly indicating the intention of the plaintiff to sell, and *Eastman* to purchase on account of the vessel.

The distinction before mentioned was clearly kept in view in the directions to the jury, they being expressly charged not to consider the leter to *Stover* as sufficient authority to *Eastman* to purchase on account of the defendants, unless they found that the general owners retained all their powers as such, and that *Eastman* had charge of the vessel, as master only in their employment; but having so found, they might consider the letter as directory; as coming from those who had the right to direct, and consequently, whatever was done in pursuance of such direction, and within its true intent and meaning, would be binding on the defendants.

We think, therefore, that the instructions to the jury were correct, and that, if *Eastman* was master only, as they have found, he was authorised to purchase on account of the defendants, agreeably to the directions in the letter.

But it will be perceived that the authority was to purchase wood only, and not even that unless he could get a deck load of hay on freight. It does not appear that he procured any hay on freight, so that the condition on which he was authorised to purchase wood

was not complied with. Moreover, if that difficulty could be obviated, there is still another. The authority to purchase does not include bark, but the verdict covers not only the wood, but also a large quantity of bark charged in the plaintiff's account. These are objections which do not appear to have been noticed at the trial, but which remaining unexplained, require us to send the cause to another hearing.

But the plaintiff contends that the verdict may be sustained under the second instructions of the Court, which were, that if the jury should be satisfied that the general owners retained the right to control the vessel and direct her employment, and that the wood and bark were taken on board by *Eastman* to transport to *Boston* and sell for and on account of the plaintiff, then they might consider the owners answerable. The jury have not so found, but have found that there was a purchase by *Eastman* pretending to act under the authority of the letter to *Stover;* and a purchase, whether authorised or not, is altogether inconsistent with the position of carrying for hire. If *Eastman* exceeded his authority as agent, he alone is answerable and not his principal, for whom he claimed to act.

The PEJEPSCOT *proprietors vs.* NICHOLS.

In a real action, in which the general title was admitted to have been originally in the demandants, but an adverse title by disseisin was set up by the tenant, it was held that the latter could not give in evidence the parol declarations of the demandants' agent, tending to prejudice their title.

THIS was a writ of entry on the seisin of the demandants, and was tried before *Parris J.* upon the general issue. The general title to the premises was admitted to have been in the demandants; but the tenant claimed under a disseisin against them, committed

more than twenty years before the commencement of the action; and in proof of the fact, offered, among others, the deposition of *Thomas Lambert*, who testified to certain declarations of the late *Josiah Little*, Esq. well known and acknowledged as the agent of the demandants, tending to show that the land in question was not claimed by them, but was owned by certain persons in *England*. To the admission of this deposition the demandants objected, but the objection was overruled :—and a verdict being returned for the tenant, this point was reserved for the consideration of the Court; together with some others, which, not being considered by the Court, are not here noticed.

Allen, for the defendants.

Mitchell, for the tenant.

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

The principal question in this case is, whether the deposition of *Thomas Lambert* was properly admitted in evidence. By the report it appears that, on the trial of the cause, the general title to the premises demanded was admitted by the tenant to have been in the demandants; and the tenant does not pretend to have derived any title under them by any deed or other conveyance in writing. He merely relies on a title by disseisin, which he contends, he has established by the evidence reported. *Lambert* deposes to certain declarations made by *Josiah Little*, who, at the time of making them, was the general agent of said proprietors. In reply to an enquiry made by *Nichols*, he said, when speaking of the lot in question, "We do not own it; we are not agents for it." He went on to observe that it was a part of four hundred acres belonging to certain persons in *England*. Was this legal evidence? Could *Little*, as general agent, by his confessions, affect or impair the title of the demandants? The land in question having been the undisputed property of the *Pejepscot* proprietors, *Little* could not, by parol, transfer the property to any one, or waive their title, and thus defeat it,

and the action brought to recover the possession of it. To allow this, would in effect, be to repeal and do away the unquestioned principle of law, that real estate, in no case, can be transferred by parol. The declarations abovementioned were calculated only to deceive and mislead the jury. What effect they had on their minds we do not know; but they might have considered it as an abandonment of the land by the demandants and sufficient to bar a recovery; and thus they might have been induced to return their verdict for the tenant. As the proof in question might have had an influence, and yet ought not to have had any, we think the verdict must be set aside and a new trial granted. A decision on this point renders it unnecessary to examine any of the other questions which have been discussed at the bar.

Verdict set aside and new trial granted.

DAY & *al.* *vs.* STETSON.

All ferries set up in this State since the statute of 7. *W.* 3. in 1695, derive their authority solely from the license of the Sessions.

The person keeping any such ferry has no vested interest therein, beyond the public control; the franchise itself not being granted by the Sessions, but only the right to receive a fixed compensation for certain services, when performed.

The Sessions may therefore license as many ferries at the same place, as may suit the public convenience.

The delegation of powers to the Sessions does not restrain the legislature from directly interposing, whenever the public exigencies may require.

A horse-ferry is so far a work of public interest as to justify the taking of private property for its establishment, by paying compensation to the owner.

The private statute of 1830, *ch.* 89, constituting *T. P. S.* "and his associates" a corporation by the name of the *Bath*-ferry-company, did not impose on him the necessity to take associates, but virtually conferred on him alone the right to exercise sll the corporate powers therein granted.

So far as the fifth section of that statute, authorizing the erection of piers and wharves for a horse ferry, on the land of others, for such compensation as the Sessions might assess, did not secure to the owners of the land the right to a trial by jury, its provisions would afford no protection against a suit at law, brought for the recovery of damages.

The general statute of 1821, *ch.* 166, directing the manner of publishing notice of private petitions pending before the legislature, is merely directory, and does not prevent the legislature from acting, in its discretion, upon a different notice, or upon none.

THIS was an action of the case for disturbing the plaintiffs' ferry, by setting up a horse ferry at the same place; and it was submitted to the decision of the Court upon a statement of facts drawn up by a commissioner agreed upon for that purpose. The plaintiffs claimed the ferry as an ancient ferry, which they proved had been kept at the same place ever since the year 1762, and probably at an earlier period, as no evidence existed to the contrary. In that year the Court of Sessions granted a license to *Samuel Harnden* to keep a ferry at his landing in *Woolwich*. He then owned and occupied a large farm, extending far above and below the ferry. In 1769,

a license was granted to his son, Brigadier *Harnden*, who was owner and occupant of the same farm. A few years afterwards the farm was sold to *Theophilus Bradbury*, Esq. whose tenants kept the ferry, but without license from the Sessions, till 1788, when he sold the farm to *Nathaniel Day* and *Zebulon Smith;* the former of whom was licensed as a ferryman in the same year. The plaintiffs derived title to the ferry-house, landing, and adjacent grounds, by divers intermediate conveyances from the grantees of *Bradbury;* and it appeared that licenses had been granted to their grantors and themselves in the years 1805, 1812, 1822 and 1826. No other licenses had been granted; and none but owners of the ferry house had ever pretended a right to keep a ferry at this place. From the year 1788 it had always been called *Day's* ferry.

The defendant justified the erection of the works and the setting up of the horse ferry, under the private statute of *March* 30, 1830, constituting himself "and his associates" a corporation by the name of the *Bath* ferry company; and authorizing the establishment of a horse ferry at the place in question; and the appropriation of any landings and grounds necessary for that purpose, under the direction of the Sessions, paying to the owners such compensation as the Sessions might assess. The defendant's petitition for this act was published in certain newspapers, but not in the manner required by *Stat.* 1821, *ch.* 166, in similar cases. He never associated any persons with him, under this statute; but carried its objects into effect, alone, with his own capital. No damages had ever been assessed by the Sessions. Some other facts were reported by the commissioner, respecting some conflicting claims of title to part of the ferry-landing, in a portion of which the defendant claimed a tenancy in common; which are here omited, as no decision was had upon this part of the case.

Greenleaf, for the plaintiffs, argued that the evidence was sufficient to show a title to the ferry by prescription; though the action was maintainable on possession alone. 2 *Dane's Abr.* 685, 686, 687; *Blesset v. Hart*, *Willes*, 508; *Tripp v. Frank*, 4 *D. & E.* 666. And he contended that the act of *March* 30, 1830,

was inoperative, because the defendant had never brought himself within its provisions; neither by taking associates, which the act by implication requires; nor by causing compensation to be made, under an assessment by the Sessions. *Canal Com'rs. v. The People*, 5 *Wend.* 455; *Ex parte Jennings*, 6 *Cowen*, 518. It is also unconstitutional, as it goes to take private property from one citizen to give it to another; the horse ferry being merely a private franchise, and not a public work. 2 *Kent's Comm.* 275, 276; *Bowman v. Middleton*, 1 *Bay*, 252.

Mitchell and *Groton*, for the defendant, cited *Gayetty v. Bethune*, 14 *Mass.* 49; 7 *Pick.* 371; 4 *Com. Dig. tit. Grant. G*; *Co. Lit.* 131, *a*; 2 *Wend.* 109; 2 *Inst. sec.* 281, 494.

WESTON J. delivered the opinion of the Court.

The right to keep a ferry is in England an incorporeal hereditament, being a franchise granted by the crown, or depending upon prescription, which supposes a grant. The party entitled to the franchise, has imposed upon him by law certain duties, incurs certain liabilities, and has a remedy against any one, who, without right, interferes with his profits, or disturbs him in the enjoyment of his property. *Blisset v. Hart, Willes*, 508; 5 *Com. Dig.* 291. Ferries received the attention of the colonial government of Massachusetts, soon after its first settlement. As early as 1641, [*Colony and Prov. laws*, 110,] which was only thirteen years after the date of the first charter, an act passed relating to ferries; but how granted, for what periods, or by what tenure, does not appear. They were probably set up and licensed, from time to time, as the public convenience required, by the towns or other colonial authorities. By the provincial statute of the seventh of William the third, [*Col. and Prov. laws*, 280,] it was provided that no person should thereafterwards attempt to keep a ferry, so as to demand or receive pay, unless upon license first had and obtained from the court of quarter sessions for the county where such ferry is, except such ferries as were then already stated and settled, either by the court or the towns to whom they appertain. This act was revised in 1797 in

the Commonwealth of Massachusetts, and in 1821 in Maine, with the same inhibition in each, and with the same exception. *Stat.* 1796, *ch.* 42. *Stat.* 1821, *ch.* 176. All ferries therefore in Massachusetts or in Maine depend upon the general law, except such as were stated and settled as early as 1695, either by the court or the towns to whom they appertained, if any ferries are now in fact held, in virtue of a grant or license of a date so ancient.

The case of *Chadwick v. The Proprietors of Haverhill Bridge*, reported by Mr. *Dane* in his Abridgment, *vol.* 2, *p.* 686, was founded upon the claim of the plaintiff to be seised in fee of a ferry between *Haverhill* and *Bradford*, which became of no value, by reason of the erection of the defendants' bridge. The plaintiffs proved, that in 1652, the town of *Haverhill* voted that one *Symonds* and his heirs should keep the ferry on certain terms, and for a limited ferriage. The plaintiff traced back his title to the ferry, by deeds for eighty years to one *Griffin*, who was proved to have been in possession of the ferry. The action was referred. The referees awarded in favor of the plaintiff; and their report was accepted by the Supreme Judicial Court. From this and another action of the same character, Mr. *Dane* deduces that some ferries in Massachusetts are considered as private property, and as estates in fee, and not as appendant to any corporeal estate. Whether this opinion is well founded in law would depend on facts, which we have no means of investigating, and which we are not called upon to decide. We are not advised of any ferries of this description in Maine, and it may be doubted whether any such exist here. It is very manifest that the ferry in question is not of this character. Its existence is not traced back to a period earlier than 1762, since and long anterior to which time, no ferry could be established, except in virtue of a license from the Court of Sessions. And it appears in the case before us, that those who have successively held this ferry, have been licensed under the general law.

It does not appear that the right to keep a ferry, and to demand and receive toll, either in England or in this country, has at any time been incident or appendant to any estate in land. The Court of Sessions, in the exercise of their discretion, may, if they deem it

expedient, as they did in this case, license those who may be the owners of the land contiguous to the usual landing place. Or they may deem it equitable, when a ferry has become profitable, to license the children or other heirs of those, who may have sustained the ferry, when it afforded little or no profit. But this does not change the tenure, under which they hold. It could not be done by any authority, short of the legislative power. We deem it therefore unimportant to determine how the *Bradbury* estate, from whom the plaintiffs deduce their title to land on the *Woolwich* side, has been divided, or in whom the fee or right of possession vested, when this action was brought. The best and only valid title, which the plaintiffs have made to the ferry they claim, is under a license from the Court of Sessions. This they have established; and no question is raised as to its regularity. And if the defendant is not justified in setting up the horse ferry, which has impaired or destroyed that of the plaintiffs, he is answerable to them in damages.

He relies upon the act to establish the *Bath* ferry company, statute of 1830, *ch.* 89. The efficacy of this act as a justification to the defendant, is contested on several grounds; but principally because it transcends, as it is insisted, the legislative power. A jurisdiction over tide and other navigable waters in England is vested in the king, and all private interests have been held in subordination to this well established prerogative. To this jurisdiction the state governments have succeeded; and it has been repeatedly exercised in authorizing the erection of bridges, under various limitations and restrictions. No restraint upon this power has been understood to exist, except what arises from former grants. These, being once vested in corporations or individuals, cannot be resumed by the legislature; except in pursuance of a power, reserved at the time of the grant. This principle, respected in all regular governments, where the rights of private property are held sacred, in this country is placed under the protection of the federal constitution; a grant being a contract executed, which is placed beyond the reach of state legislation. But a license to a party to receive, for a period not fixed or limited, a compensation for services rendered, supposed to

be a fair equivalent, cannot be regarded as a vested interest beyond public control. The prohibition imposed upon all other persons, does not attach to him; and that he may not abuse his immunity. he is restrained from taking a compensation, beyond a limited amount. The right to the ferry, the franchise, in perpetuity, or for an indefinite period, like a grant of this nature from the crown, which is a species of private property oftentimes of great value, the public do not part with. The license is in the nature of an appointment to an office, having certain fees annexed, to be held at the pleasure of the appointing power.

Indeed there is nothing to restrict the Sessions from licensing as many persons as they think proper. No one may attempt to set up a ferry, so as to receive a compensation for it, unless under a license first had and obtained from the Sessions. But all who do obtain such license, may set up a ferry, and entitle themselves to the compensation limited. A monopoly may be necessary to command the services required; and wherever it is so, no more than one will be licensed. Over many rivers, streams, or arms of the sea, a person on each side is licensed, each of whom finds it a profitable employment; while the public are better accommodated. The Court of Sessions act under a delegated power; and the authority deputed to them does not restrain the legislature from interposing, whenever the public exigencies require. They may avail themselves of private enterprise for public purposes in the grant of a bridge, where a ferry existed before. As has been before stated, this has been repeatedly done. We have examined the acts, authorizing the erection of bridges in Massachusetts and Maine. In very few instances has provision been made for compensation to the persons, receiving the emoluments of the ferry. Whether in any case, without such provision, any thing could be recovered at law of the bridge corporation, might admit of great question. Where the ferry was private property holden in fee, as appears to have been the fact in the case cited by Mr. *Dane*, perhaps it might; although that was one of the few cases, where the act of incorporation required satisfaction to be made to the owner of the ferry. There may be cases where such a provision for a licensed ferryman may be equitable, which if

seen and understood, would probably always be enjoined by the legislature. But it would be a condition imposed not upon, but by them; not arising from a limitation of their power, but depending upon the exercise of their discretion.

The act, under which the defendant justifies, does not provide for the erection of a bridge, but it authorizes the use of boats, propelled by steam or horse power, confessedly a great improvement upon the ordinary mode of propelling by oars. The plaintiffs' ferry is superseded by the superiority of the defendant's mode. The Sessions certainly had authority to license the defendant or any other person to set up a ferry; for this power is expressly given to them by law. If they could do so, without invading or violating private rights, the legislature may in the same way exercise their prerogative over the tide waters of the *Kennebec*, without being liable to that imputation. For these reasons, we are not satisfied that the constitutional objection made to the act establishing the *Bath* ferry, is well founded.

Notice was not given that the defendant would prefer his petition to the legislature, according to the general act, directing in what manner such notices may be published. *Stat.* 1821, *ch.* 166. That act was intended to facilitate the progress of business before the legislature, in all cases where orders of notice might be deemed expedient. It is a preliminary step, which if not complied with, might occasion the failure of a petition, or a postponement of its objects to a succeeding session. But the legislature may proceed, without requiring notice to be given, or may be satisfied with notice varying from that prescribed, without affecting the validity of their acts.

It is urged that the defendant is not invested with the powers contemplated by the act, inasmuch as he never took associates. He was created a corporation by the act, which took effect from its passage. It was intended to embrace such associates, as he might thereafter receive. If the duty was imposed upon him to take associates, it was a condition subsequent. But he is not required by the act, to call in the aid of others. If he was possessed of adequate funds, he could serve the public as effectually by himself and

his agents, as if other persons shared in the duties and the profits. The seventh section empowers the defendant to call the first meeting, and prescribes what notice he shall give. This assumes that persons were to assemble, entitled to be notified of the time and place of meeting. It would have been necessary, if the defendant had taken associates; but if he had no one to notify, and no one to consult, it would have been a useless formality.

If the defendant has not done what the legislature intended, he is entirely in their power. Besides the ordinary process of law, by which his franchise, if forfeited, may be declared vacated, the legislature have reserved to themselves the right at any time to enlarge, restrain, or annul the powers granted by the act. But individuals, whose rights are not violated, have no authority to call him to account. *Charles River Bridge v. Warren Bridge*, 7 *Pick.* 371.

By the fifth section, the defendant was empowered to erect such piers, railways, wharves, buildings or other conveniences, as might be necessary for maintaining his ferry, at such places, on the shores of the *Kennebec*, in the towns of *Bath* and *Woolwich*, as the Court of Sessions should adjudge convenient, making such compensation to the owner of the land or privilege so occupied and improved, as the Court of Sessions might assess. If this provision does not secure to such owner his constitutional right of a trial by jury, the statute would afford no protection against a suit at law brought by him for the recovery of damages. And if the plaintiffs, as owners of the land or privilege, so taken and occupied by the defendant, had brought their action for damages, we do not decide that it might not have been maintained. So far as they claim to be reimbursed for the profit they have lost by the defendant's ferry, we have already disposed of the case. The damages found by the commissioner, are predicated upon this ground alone. They do not complain that the defendant has erected his wharves, piers, platforms or other works on their land. And if they did, these erections appear to be placed upon land of which he is either sole seised, or seised as tenant in common, and it does not appear that the plaintiffs have been prevented from participating in the benefit

of them, or that they have been ousted or deprived of any interest in common, to which they can make title.

Upon the whole, we are of opinion that upon the facts found, the plaintiffs have failed in their action.

Plaintiffs nonsuit.

The President, &c. of the GARDINER BANK *vs.* WHEATON *& al.*

W. conveyed certain real estate to his sureties in a promissory note, by an absolute deed, for their indemnity; taking their written agreement, not under seal to reconvey, on being saved harmless. The estate was worth two thousand dollars. *W.* paid all the debt but four hundred and fifty dollars, which the sureties were compelled to pay, he being insolvent. Afterwards *W.* requested *P.* to redeem the estate out of the hands of the sureties, with their consent, and take a conveyance to himself, for the benefit of *W.* which he did; it being further understood that *P.* should pay such other debts of *W.* as they might subsequently agree upon. He accordingly paid such debts to the amount of four hundred and sixty dollars, for which he had no other security than the real estate:—Hereupon a prior creditor of *W.* filed a bill in equity against *W.* and *P.* impeaching the conveyance for fraud, and praying a discovery and relief. The answers denied all fraudulent intent and covin, but admitted the foregoing facts. And it was held:—

That the transaction between *W.* and his sureties was legal, and that by the terms of it the estate vested absolutely in them on their paying the note:—

That as between *W.* and *P.* it was in law fraudulent and void, against the plaintiffs:—

But that here being no actual covin, *P.* might lawfully charge upon the estate all his payments and expenses actually made and incurred, under the agreement, before the conveyance was impeached.

Whether if a deed declare the purchase-money to have been paid by *A.* parol evidence is admissible to show that it was in fact paid by *B.* so as to raise a resulting trust in favor of *B.*—*quære.*

BILL in equity. The plaintiffs alleged that they were judgment creditors of *Wheaton*, who had conveyed his property to *Prince*,

the other defendant, to defraud them of their due. It was set forth in the bill that *Wheaton* was the owner of the two stores, and the land under them; that in *June*, 1827, being indebted to the *Thomaston* bank in about eighteen hundred dollars, he agreed with *John Gleason*, *Halsey Healey* and *William Cole*, to become responsible for that debt, which they did; and to indemnify them he conveyed to them these stores and land; taking back their written engagement, not under seal, to reconvey the same, on being indemnified against their suretyship;—that *Wheaton* continued in possession of the property, making sundry payments on this debt till he had reduced it to four hundred and eleven dollars and twenty-five cents;—that *Healey* having become insolvent, he by deed of *Jan.* 2, 1830, conveyed all his interest in the premises to *Gleason* and *Cole*, who, at *Wheaton's* request, and in secret trust for him, conveyed the same premises to *Prince*, *May* 22, 1830, taking up their obligation to reconvey, upon *Prince's* paying to the bank the above mentioned balance; that no other consideration was paid by *Prince*, though the stores were worth twenty-five hundred dollars;—and that *Prince* entered into possession of the stores, and has continued ever since to receive the rents. There were various other allegations of fraud in the conveyance of other property by *Wheaton* to *Prince*, which were satisfactorily repelled by his answer, and were thereupon abandoned by the plaintiffs.

On the 10th of *Nov.* 1831, the plaintiffs filed an amendment to the bill, as of the *September* term preceding; in which they alleged that *Wheaton*, having a demand against divers persons to whom he had conveyed certain vessels, and which being under arbitration, was confided to the agency of *Cole*, drew an order on *Cole*, directing him to pay to *Prince* whatever monies he might receive under the award of the arbitrators; by virtue of which order *Prince* afterwards received eight hundred and sixty-seven dollars and thirty-four cents, for which he paid no consideration, and which he still held in secret trust for *Wheaton*, in fraud of his creditors, &c.

The defendants in their answers, admitted the stores to be worth two thousand dollars; and denied all the fraudulent intent charged in the bill. They stated that *Wheaton*, having become involved by the failure of *Healey*, was unable to pay the balance due the *Thomaston* bank, which at that time amounted to four hundred and forty-four dollars and eighty-one cents, and which was paid by *Gleason* and *Cole*, in *August* following, whereby the title to the stores became absolute in them, in equity as well as at law;—that being desirous of realizing the utmost value of his property for the benefit of his own creditors, he requested *Prince* to redeem this estate out of the hands of *Gleason* and *Cole*, if they would consent, and take a conveyance to himself for *Wheaton's* benefit;—that they refused to convey unless *Prince* would not only refund the amount which they had paid to the bank, but would also pay certain other debts due from *Wheaton* to the bank and to individuals, for which they stood liable as his indorsers, which were in suit, secured by attachments on other portions of his real estate, amounting to about nine hundred and fifty dollars; which he accordingly bought up, and ultimately satisfied by extents upon the real estate attached;—that upon payment of these monies *Gleason* and *Cole* conveyed the stores to *Prince* in fee; which, by agreement between him and *Wheaton*, he was to hold as his own property, and pay such of *Wheaton's* debts as might afterwards be agreed on;—that he had accordingly paid such other debts to the amount of four hundred and sixty dollars, for which he had no other security but the stores; and had incurred certain liabilities to the amount of about five hundred dollars, which were pending in law;—and that he had given no writing to *Wheaton*, relating to the property, &c.

As to the money mentioned in the amendment, as having been received from *Cole*, they answered that it was attached in *Cole's* hands, as the trustee of *Wheaton*, in certain suits, which were contested; that *Cole* refused to pay it over unless indemnified; that *Prince* thereupon entered into an obligation to indemnify *Cole*, and received the money from him; which, on the same day, viz. *Sept.*

26, 1831, he paid over to *Wheaton*, who afterwards applied the same to the payment of his own just debts.

The cause was set down for argument upon the bill and answer.

Allen, for the plaintiffs, to show that the case was within the jurisdiction of the court, cited 1 *Mad. ch.* 168, 169; *Mountfort v. Taylor*, 6 *Ves.* 792; *Hadden v. Spader*, 20 *Johns.* 554, 572; *Spader v. Davis*, 5 *Johns. ch.* 280; *Hendricks v. Robinson*, 2 *Johns.* 283; *Brinkerhoff v. Brown*, 4 *Johns. ch.* 671; *Williams v. Brown*, *ib.* 682; *McDermutt v. Strong*, *ib.* 687. That the inadequacy of price was sufficient proof of fraud; 1 *Mad. ch.* 213, 214; *Franklin v. Osgood*, 14 *Johns.* 548; *Rogers v. Cruger*, 7 *Johns.* 607; *Hildreth v. Sands*, 2 *Johns. ch.* 35; *Sherwood v. Sutton*, 5 *Mason*, 144. And that the statute of frauds was no bar; especially if not expressly insisted upon in the answer. 1 *Mad. ch.* 305; *Booth v. Jackson*, 6 *Ves.* 37; *Moor v. Edwards*, 4 *Ves.* 24; *Whitchurch v. Bevis*, 2 *Bro. ch. ca.* 559. If here was no fraud, then *Prince* has a lien for all his payments. But if there was, he has none. *Sands v. Codwise*, 4 *Johns. ch.* 563; *Boyd v. Dunlap*, 1 *Johns. ch.* 478; 7 *Johns. ch.* 756; *Ripley v. Severance*, 6 *Pick.* 474; *Roberts on frauds*, 102, 103; *Harris v. Knickerbacker*, 5 *Wend.* 638; *Sherwood v. Marwick*, 3 *Greenl.* 295; *Clark v. Foxcroft*, 7 *Greenl.* 348; *James v. Johnson*, 6 *Johns. ch.* 417; 3 *Stark. Ev.* 1009, *note*. *Livingston v. Byrne*, 11 *Johns.* 554.

Greenleaf, for the defendants, argued that inadequacy of price was no ground on which creditors could set aside a conveyance, unless it was so gross as to afford evidence of actual fraud and covin. 7 *Johns.* 607; 1 *Mad. ch.* 267, 268; *Newland on Contr.* 357—359; 1 *Dane's Abr.* 664. To the point that it was not necessary that the statute of frauds should be pleaded; and that this defence was sufficiently set up in the answer; he cited *Mitford's Plead.* 216, 217, 249; *Cooth v. Jackson*, 6 *Ves.* 12; *Harris v. Knickerbacker*, 5 *Wend.* 638. *Chancery Rules*, 14. As to the stores, the title was absolutely and legally conveyed from

Wheaton to *Gleason* and *Cole*. *Reed v. Woodman*, 4 *Greenl.* 400. *Prince* bought of them, paying all they demanded. His act in taking the property, did not put it out of the reach of *Wheaton's* creditors, for it was already beyond their control. And his verbal promise, to allow something to *Wheaton*, was a mere benevolence, and raised no trust in his favor. *Blagden v. Bradbear*, 12 *Ves.* 466; *Rowe v. Teed*, 15 *Ves.* 375. In the absence of actual fraud, which is totally denied in the answer, and is not contradicted, the plaintiffs can only put themselves in the place of *Wheaton*, who could claim nothing of *Prince*, for he has sold him nothing. They might as well have claimed the land against *Gleason* and *Cole*. *Prince* bought the land of them for the price they required. If this was less than its value, and he is disposed to allow something more to the former proprietor, no creditor, it is insisted, has a right to step between him and the object of his private bounty.

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

Mellen C. J. This cause comes before us upon bill and answer. The plaintiffs have abandoned a part of the charges in the bill; and the attention of counsel has been confined to two particulars only. 1st. The nature of the conveyances of the two stores and the land connected with them, and of the title of *Prince* under those conveyances. 2d. The receipt of eight hundred and sixty-seven dollars and thirty-four cents, of *Cole* by *Prince*, belonging to *Wheaton*. As the deed of *June*, 1827, executed by *Wheaton* to *Gleason*, *Healey* and *Cole* was absolute, it conveyed the fee to them absolutely; inasmuch as the contract on their part to reconvey was not under seal and did not constitute a defeasance. *Kelleran v. Brown*, 4 *Mass.* 443. This deed is liable to no impeachment. It was sustained by a legal consideration, and was executed more than two years before *Wheaton* became indebted to the plaintiffs, or was embarrassed in his circumstances in consequence of the failure of *Healey* in *December* 1829. The title having thus been conveyed from *Wheaton*, the question is whether the legal or

equitable title has since been vested in him. Prior to *January* 2, 1830, *Healey* had conveyed all his right and title in the premises to *Gleason* and *Cole*; and on that day there was due on the note given to the bank, nearly four hundred and fifty dollars, *Wheaton* having by several payments reduced the original amount of the note to the above sum. *Wheaton*, being unable to pay that balance, requested *Prince* to redeem the same property from the hands of *Gleason* and *Cole*, by paying the amount of the above sum, and taking a conveyance to himself for *Wheaton's* benefit; he being desirous to realize the utmost value of all his property for the benefit of his creditors; both *Prince* and *Wheaton* then considering the property to be worth two thousand dollars, and not more than that sum. *Gleason* and *Cole* were unwilling to make the conveyance, unless *Prince* would assume and pay two debts, amounting to nine hundred and forty-eight dollars and seventy-nine cents, for the payment of which *Gleason* and *Cole* stood responsible as sureties for *Wheaton*. Accordingly, the above sums having been paid, *Gleason* and *Cole*, in *August*, 1830, conveyed the same stores in common form to *Prince*, to hold to him and his heirs. The consideration is stated in the deed to have been received of *Prince*. Since the deed was given, and before the bill was filed, *Prince* paid four hundred and sixty dollars on account of other debts due from *Wheaton*, pursuant to a verbal agreement, made at the time the deed was executed, that the property was to be held by *Prince* as his own, and that he should pay such debts as should afterwards be agreed upon. No other sums than those above named, appear to have been paid by *Prince*. There was no writing given by *Prince* to *Wheaton* relating to the stores. Every allegation in the bill as to a combination, or any fraud or collusion between the respondents, is distinctly denied by the answer. Still it is contended that, on the face of the answer, the transaction, as presented to the court, is of such a character that the deed cannot be considered in any other light than as conveying to *Wheaton* an equitable interest by way of resulting trust. On this principle only can the bill be maintained, as to the stores. Where a deed is made

to *A.* and it is stated in the deed that the consideration was paid by *B.*, a trust results to *B.* and no parol evidence is necessary to prove it; but where it does not appear on the deed that *B.* paid the consideration, the authorities are at variance on the question whether the payment by him can be proved by parol. The learned Mr. *Dane*, in his Abridgment, *vol.* 4th, 265, has collected a large number of cases on each side of the question, and then observes: "After all the various opinions on the point, if *A.* take a deed of land to himself, and it is expressly stated in it that the purchase money is his, and there is no evidence in it, that it is another's, *B's*, for instance, and there is no evidence of fraud or mistake, there can be no resulting trust; for to admit parol evidence to prove the purchase money is *B's*, is to admit it to prove it is not *A's*, directly against the deed, which says it is his." Mr. Justice *Story* in *Powell & al. in equity v. Monson and Brimfield Manufactory*, 3 *Mason*, 347, seems to make no distinction between the cases where the parol proof is inconsistent with the statement in the deed and where it is not. He also observes, "the general principle has long been settled in equity, that if one person purchase land in the name of another, the latter, the deed being taken in his name, shall, without any declaration in writing, be held the trustee of the former. The ground of this doctrine is, that he who pays the consideration is to be deemed the owner in equity. But the point whether proof of such a purchase could be made out *aliunde* the deed or other written evidence; or in other words, whether parol evidence is admissible to establish the manner of paying the purchase money, has been involved in some doubt; but the more recent decisions have gradually settled in its favor. On the present occasion I have examined the subject at large—the result of that examination is that the question is no longer fairly open to debate. I should have gone somewhat into a commentary on the leading cases, if that excellent and laborious Judge, Mr. Chancellor *Kent*, had not in *Boyd v. McLean*, 1 *Johns. Ch.* 582, and *Botsford v. Burr*, 2 *Johns. Ch.* 405, collected and reviewed them." A multitude of cases are cited by him and also by Chancellor *Kent*

to support their decisions. *Story J.* does not seem to consider proof of fraud as a necessary preliminary in establishing a resulting trust. However, if such was the idea intended to be conveyed by the learned Judge in the above quotation, we would observe that, without expressing any assent to, or dissent from the doctrine, in the present case, constructive fraud is relied upon as appearing on the answer, from the facts it discloses, notwithstanding the general denial of fraud. In *Hadden v. Spoder*, 20 *Johns.* 554, *Platt J.* observes: "the defendant denies that there is any fraudulent combination to delay or defraud creditors, but in the same answer he admits a series of facts from which both law and equity impute fraud." So in *Hendricks v. Robertson*, 2 *Johns. Ch.* 283, the court say the purchaser and the vendors say that this was an honest and *bona fide* transaction; but do not the facts they admit, outweigh the declaration? All circumstances must be considered." In the case before us, does it not appear from the answer that, though by the deed, it is stated that the consideration was paid by *Prince*, still it was in reality paid out of *Wheaton's* funds, that is, out of the very property which *Wheaton* requested *Gleason* and *Cole* to convey to *Prince* for *Wheaton's* benefit? This fact, however, was concealed from public view; for no writing on record or in existence, nor the deed itself, gave third persons any knowledge of the circumstance. It has been called forth by the interrogations in the bill. The inquiry is natural, why were they concealed? At the time the deed was given, *Prince* paid only the sum due to the bank, say four hundred and forty-four dollars and eighty-one cents, and the two sums beforenamed, amounting to nine hundred and forty-eight dollars and seventy-nine cents; but these two sums were soon after reimbursed by a conveyance of the lands on which the executions of those creditors had been extended. So that the only consideration paid, when the deed was executed, turns out to be four hundred and forty-four dollars and eighty-one cents; and the property is admitted to be worth two thousand dollars. It is true there was a verbal engagement to pay such other debts, "as might afterwards be agreed on," and he says he paid other debts amount-

ing to four hundred and sixty dollars. Even this parol agreement, void by law, did not bind him to pay any thing more than he had paid; and, even if the promise had been binding, it was only to pay such other debts as might afterwards be agreed upon; that is, it was a promise to pay such sum or sums as he might incline to pay at some future time. *Prince* in his answer says he has no other security for the four hundred and sixty dollars he paid, but the stores. Here is a confession that he does not hold the property as his own, but as security for payments made on account of *Wheaton*. Whether *Prince* has ever suffered any loss or been compelled to pay any thing in consequence of his liabilities, to the amount of about five hundred dollars mentioned in his answer, does not appear. If we were now trying the question whether the deed was void as against the creditors of *Gleason* and *Cole*, we should consider this inadequacy of consideration as a strong circumstance impeaching the validity of the conveyance; as being inconsistent with the usual character of *bona fide* transactions. For the same reason we consider this inadequacy, in connexion with some other particulars which we have noticed, as marking the transaction as one where a friendly, but in legal contemplation, a fraudulent, understanding subsisted between *Wheaton* and *Prince*, and proving a resulting trust in favor of *Wheaton*, in respect to all the property; beyond what *Prince* has paid on account of his debts since the conveyance. Considering *Prince*, as we do, as holding the title to the premises in trust for *Wheaton* or rather for his creditors, we see no reason in equity why he should not be allowed all payments properly made by him to creditors in consequence and in consideration of the premises conveyed to him, and for his agency and services respecting the property, deducting all rents and profits received by him up to the time of a final decree.

Before proceeding to the consideration of the second question we would observe that when we pronounce the transaction between the defendants, in respect to the conveyance from *Gleason* and *Cole* as fraudulent, we do not mean to insinuate that there was any moral turpitude on the part of *Prince*; nor do we believe there was

any; but though the motives of a party may be good in such a transaction, still, where the design, if sanctioned would defeat or delay creditors and thus impair their rights, neither law nor equity can sanction the proceeding; and on that account it is termed a legal fraud, or a fraud upon the law; hence a trust legally results from the facts stated and admitted in the answer, under the hands of the defendants.

With respect to the sum of eight hundred and sixty-seven dollars and thirty-four cents, with which the plaintiffs seek to charge the respondent, *Prince*, there can be no ground for its allowance. In the original bill no claim was made for the above sum. At *September* term, 1831, the bill was amended so as to embrace this subject and assert this claim for the money as then being in the hands of *Prince* by means of a fraudulent arrangement with *Wheaton*, but it is admitted in argument that no notice of the above mentioned amendment was given to either of the respondents, or to their attorney, until the 19th of *November* following; which was between two and three months after the money had been paid over to *Wheaton*, to whom it belonged; *Prince* having acted in the receipt and payment over of the money, merely as the agent of *Wheaton*. Why should he be compelled to pay it again, on any principle of justice? *Brinkerhoff v. Brown*, 4 *Johns. Ch.* 671; *McDermott v. Strong*, *ib.* 687; *Spader v. Davis*, 5 *Johns. Ch.* 283.

If the deed had been fraudulent as between *Prince* and his grantors, it would have been a mere nullity, as it respects the creditors of those grantors; but completely to destroy the effect of the deed in that or any other manner, would at once defeat the bill; because the plaintiffs are not the creditors of those grantors, but of *Wheaton*. But by showing the secret understanding between *Prince* and *Wheaton*, a resulting trust is established for the benefit of *Wheaton*, of which the plaintiffs may rightfully avail themselves. For the reasons above assigned, the bill, as to all the charges it contains, excepting that which relates to the two stores, and the land connected with them, is hereby dismissed. And as to that part of the bill, it is ordered that said *Prince* render an account of

all payments made on account of said *Wheaton's* debts, since said deed was made to him and prior to filing of the bill, and of his services and expenses in the management of said property, and of the value of said property, and of all rents and profits received up to the time of rendering such an account; the same to be rendered to a master, who is to be appointed to hear and investigate the same, and state an account, as by him allowed, to this court.

OVERLOCK *vs.* HILLS.

Where a creditor received of his debtor the note of a third person as collateral security, which he promised to use all reasonable means to collect, and to account for; and afterwards the principal debt was otherwise paid; it was held that he was thereby absolved from all further obligation to collect the note, thus deposited with him, and was bound to return it to the owner.

THIS case, which was *assumpsit*, came up by exceptions taken to the opinion of *Perham J.* before whom it was tried in the court below.

The plaintiff and one *Matthews*, being joint promissors in a note made payable to the defendant on the 20th day of *April*, 1829, the plaintiff delivered to the defendant, as collateral security, a note which he held against one *Robbins*, taking the plaintiff's written promise "to take all reasonable means to collect the same, and to account for what may be collected," &c. *Robbins* had been for seven or eight years, and still was resident at *Miramichi*, in the British Province of New Brunswick. In *March*, 1830, the plaintiff complaining that no diligence had been used to collect the amount of *Robbins*, and the note given by the plaintiff and *Matthews* to the defendant being about to become due, the defendant agreed that if the plaintiff would obtain a new note for the amount, signed by *Cutler* and *Harding*, he would give up the *Robbins* note,

and the note signed by the plaintiff and *Matthews*, the plaintiff agreeing to give up the obligation aforesaid. Such a note was accordingly procured and sent to the defendant by *Matthews*; who, however, did not carry the defendant's obligation, and had no orders to ask for *Robbins's* note; and the defendant accepted the note sent, and delivered up that of the plaintiff and *Matthews*. This was done in two or three weeks after the agreement in *March*. In *June* following, the defendant sent *Robbins's* note to *Miramichi* for collection. And on the 1st day of *December*, 1830, the plaintiff tendered to the defendant his obligation, and demanded *Robbins's* note; which the defendant said he could not deliver, having sent it out of the country in *June* preceding, to be presented for payment. The action was brought upon the obligation or agreement of *April* 29, 1829; and the breach alleged was that the defendant had not accounted for the note, but had refused to deliver it up when demanded, after having compelled the plaintiff to pay the principal debt. The defendant produced *Robbins's* note at the trial, and offered it to the plaintiff, but it was not accepted.

The defendant's counsel requested the Judge to instruct the jury that he had a right to send the note to *Miramichi* at any time while his written promise remained in the hands of the plaintiff; that the plaintiff, to entitle himself to the note at any time prior to its being sent away, was bound to have tendered to the defendant his said obligation; and that the defendant had a right to consider the contract as subsisting in force, till it was returned to him. This the Judge declined to do. But he instructed the jury that if they believed that the defendant agreed and promised to deliver up the note of *Robbins*, upon receiving that of *Cutler* and *Harding* in lieu of the plaintiff's, then they ought to find for the plaintiff. But if they should not find such an agreement, they would inquire whether a reasonable time to obtain *Robbins's* note and return it to the plaintiff, had elapsed from the 1st day of *December*, 1830, when it was demanded, till the time of commencing the action; and if it had not, then to find for the defendant. On returning a verdict for the plaintiff, and being interrogated by the Judge at the defendant's

request, they said they had found the agreement to deliver up the note, as stated; and therefore had not inquired as to the reasonableness of the time.

The defendant took exceptions to the refusal of the Judge to give the desired instructions.

A. Smith, for the plaintiff.

Allen, for the defendant.

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

The defendant in *April*, 1829, when he received the *Robbins* note, promised to take all reasonable means to collect it, and to account for what might be collected, after paying the costs, on a note given him hy the plaintiff and *Matthews*.

The *Robbins* note was then due, and *Robbins*, himself, was at *Miramichi*, in the Province of New Brunswick, where he had resided seven or eight years.

In *March*, 1830, the defendant, having the *Robbins* note in his possession, made a further agreement, as found by the jury, that he would deliver up that note on receiving another signed by *Harding* and *Cutler*, which, as appears by the testimony of *Cutler* reported in the case, was procured by *Matthews* and sent to the defendant some time in *April*, 1830, and was by him received in pursuance of the latter agreement.

The defendant having accepted *Harding* and *Cutler's* note in payment of that which he had against the plaintiff and *Matthews*, ought not to be permitted longer to hold the *Robbins* note, under the original agreement. That was manifestly received as collateral security, and when the principal debt was discharged, the collateral or pledge ought clearly to be given up, independant of any agreement to that effect But the jury have settled the fact, that there was such an agreement. The agreement was in *March*;—the condition, upon which it was to be returned, was performed and accepted in *April*, and from that time the defendant's lien upon the *Rob-*

bins note ceased, and he held it subject to the demand of the plaintiff.

The argument, that the defendant was liable on his promise to take all reasonable means to collect the *Robbins* note, and therefore, that he had a right to control it until his receipt was tendered, is inconsistent with his preceding conduct, as well as his agreement found by the jury. He received the note in *April*, 1829, and then made the written agreement under which he attempts to shield himself. After keeping it for nearly a year, without using any means to collect it, he agrees to return it, upon receiving other satisfactory security. That is procured, he accepts it, and immediately, according to his own account, begins, for the first time, to "take reasonable means to collect" the *Robbins* note, by sending it to *Miramichi*. His interest in that note had ceased, the debt for which it was pledged having been paid; he had agreed to return it; and if, after this, by sending it away, he put it out of his power to return it, he did what his original agreement did not, at that time require; what his subsequent agreement forbid; and what the law will not justify.

Judgment affirmed.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF KENNEBEC, MAY TERM, 1832.

WARE *ex'r.* *vs.* OTIS.

The principal debtor in a promissory note conveyed to his surety a certain quantity of timber, by a writing in these terms;—"In consideration that *B. D.* has become my surety to *J. W.* in the sum of three thousand dollars, I hereby assign to him all the timber cut or to be cut the present season at my mills," &c. The surety himself also borrowed money of the same lender; and afterwards, by indorsement, assigned all his interest in that instrument to *J. O.*, whom he subsequently directed to apply the proceeds of the timber, *first* to the last mentioned debt of his own, and the balance to the debt of three thousand dollars, due from his own assignor. Hereupon it was *held*:—That the instrument conveyed to *B. D.* all the timber described in it;—yet not absolutely; but in pledge and trust, to pay the debt for which he had become surety;—and that he had no right to change the appropriation, by applying the proceeds to his own debt.

THIS action, which was *assumpsit* for money had and received, was defended on various grounds; but was decided upon one only; all the facts relating to which will be found in the opinion of the Court, delivered by

MELLEN C. J. Various objections have been urged against the plaintiff's right to recover in this action. It seems that *John Ware*,

the testator, loaned two sums of money; one sum was three thousand dollars loaned to *White* and *Warren*; for which they made their note to the testator, and *Mann* and *Davenport* signed the same also as their sureties. The other sum was one thousand dollars, loaned by said testator to *Davenport*, for which he made his note, and *White* and *Warren* also signed the same as his sureties. The assignment mentioned in the report, is in these words;—"In consideration that *Benjamin Davenport* has become my surety to *John Ware* in the sum of three thousand dollars, I hereby assign to him all the timber cut or to be cut the present season, at my *Warramontogus* mills, and also all the boards, laths and clapboards, so far as they belong to me, to be delivered on the east bank of *Kennebec* river. *Dec.* 19, 1826. *Eben. White.*" On the back of the original assignment is the following writing;—"*Hallowell, April* 3d, 1827. I *Benjamin Davenport*, by these presents assign and transfer the within contract and agreement to *John Otis*. *Benjamin Davenport.*" On the first of *September*, 1827, *Davenport* delivered to *Otis* a direction in writing, of the tenor following:—"You will apply the proceeds of the lumber and other property transferred to me by *Ebenezer White* and *E. I. Warren*, or either of them, as follows; first, to pay the amount of execution, *John Ware v. Ebenezer White, E. I. Warren* and myself, recovered at the Court of Common Pleas, *Somerset* county, with interest thereon; and the balance, if any, to be applied to the payment of a note given to said *Ware* by myself and others for three thousand dollars. *Sept.* 1, 1827. *Benja. Davenport.*" The principal question between the parties seems to be, whether the money, alleged to have come to the hands of the defendant, ought to be applied towards payment of the three thousand dollar note, or that given for one thousand dollars. The plaintiff contends that it ought to be applied towards payment of the one thousand dollars. The defendant contends that it should be applied towards payment of the three thousand dollar note. The proceeds of the lumber collected were not sufficient to pay either note. From the language of *White's* assignment to *Davenport* and the consideration mentioned, we cannot discover that evidence of an absolute sale of the

lumber which the plaintiff relies upon. No quantity of lumber is specified; nor any price. All is uncertain; and yet all is intelligible and consistent with the usual course of business, if we consider the assignment as made to *Davenport*, to secure him against his suretyship, by enabling him, by the proceeds of the lumber, to pay the debt, and thus relieve principals and sureties from their obligation to *Ware*. On this construction of the assignment *Davenport* had no right to pay his own debt out of the property; but the second assignment to *Otis* would and did enable him to carry into execution the designs of all concerned, by an appropriation of the proceeds of the lumber towards payment of the three thousand dollar note. Viewing these instruments, and the circumstances attending their execution, our opinion is that the plaintiff has no right to claim the sum demanded as payment on account of the one thousand dollar note, and on this ground the action is not maintainable. And, if the construction contended for by the counsel for the plaintiff, should be adopted, we apprehend the result might be the same; for if we are to construe the assignment as an absolute sale of the lumber to *Davenport*, for the same reason we must consider the assignment from *Davenport* to *Otis*, as a transfer of all his interest to him; there is no condition expressed in either instrument of conveyance. On this principle the proceeds of the lumber were rightfully in the hands of *Otis*, if he has actually received them; and, of course, are not demandable in this action by *Ware*. Several other objections have been urged against the maintenance of the action which it might be difficult to answer; but we place our decision on the ground first above stated; that being the ground on which the merits of the cause has been principally discussed by the counsel.

We are all of opinion that the verdict must be set aside and a nonsuit entered.

D. Williams, for the plaintiff.

Otis, pro se.

BULLEN, *plaintiff in error*, *vs.* BAKER, *original plaintiff.*

In a suit for a fine for neglect of military duty, if it be alleged that the defendant belonged to the company, and was liable to train therein; or, was duly enrolled therein; this is a sufficient allegation of enlistment.

The proper evidence of enlistment in a company raised at large, is the signature of the party enlisting himself.

But where the defendant, in a trial before a Justice of the peace for neglect of military duty in such company, admitted that he had always done duty in that company and no other, and that he was duly enrolled and legally warned; this admission was held equivalent to direct proof of enlistment.

An allegation that the company was drawn out for improvement in military arts and exercises, must be understood as intending only an ordinary company training, and not a company inspection and drill.

The Judgment of a Justice of the peace, upon the evidence before him, is not to be reversed unless clearly against the weight of the evidence.

THIS was a writ of error, brought to reverse the judgment of a Justice of the peace in a suit brought by the defendant in error as clerk of a volunteer militia company, against the plaintiff in error, for neglect to appear and do military duty therein at three several company trainings. The first count in the writ stated the first training to have been on Tuesday, *Sept.* 15, 1829, for non-appearance, at which a fine of four dollars was demanded; and the second training in *November* following, for neglecting which three dollars was demanded; and the like sum for another subsequent neglect, stated in the second count. The errors assigned, as well as the principal parts of the record, are sufficiently stated by the Judge, in the opinion of the Court.

Pope, for the plaintiff in error, argued that there was no legal proof of the enlistment; which being a contract, to continue in force seven years, should be in writing, or it was void by the statute of frauds. *Howard v. Harrington*, 4 *Pick.* 125.

H. Belcher, for the defendant in error, cited *Commonwealth v. Smith*, 11 *Mass.* 456.

PARRIS J. delivered the opinion of the Court.

It is contended that the judgment, in this case, should be reversed, because there is no averment, in the original declaration, that *Bullen* was legally enlisted into the light infantry company, of which the defendant in error is clerk.

The allegation, in the first count, is, that the original defendant "belonged to said company and was liable to train in it." Although there is no direct averment that he ever enlisted into the company, yet, as he could not belong to or be liable to train in it unless he had so enlisted, we think the judgment on the first count ought not to be reversed for this cause, the fact of enlistment being substantially, although not directly averred.

In the second count, the averment is that he "belonged to said company and was duly enrolled therein." He could not be duly enrolled in a company raised at large, as light infantry companies are, unless upon voluntary enlistment; and the averment that he was thus enrolled may be considered, especially after judgment, as substantially an averment that he was legally enlisted. The declaration is not so defective as to require a reversal of the judgment for that cause.

But it is assigned as error that there was no proof of enlistment. No man is bound to join any light or volunteer company, or company raised at large, unless by voluntary enlistment; and the proper evidence of such enlistment is the signature of the person enlisting. In this case, the Justice, who sends up the record, has certified that *Bullen* admitted that he had always done military duty in the light infantry company and no other; that he had been legally warned, and that he was duly enrolled. This admission is equivalent to direct proof of enlistment.

It is urged that *Bullen* was not an able bodied man, and, therefore, not liable to be enrolled in any company. From the evidence reported by the Justice it does appear, that, two years previous to the alleged neglect, *Bullen* was in a very precarious situation as to bodily health; and such were the indications, at that time, as to render it probable that he would never again be sound in body. But

the evidence as clearly shows, that, at the time of the alleged neglect, and for a long time previous, he was sound and able bodied, and could endure fatigue and exertion to as great a degree as any person in the district to which he belonged. This fact is proved by the surgeon of the regiment, who had been present and witnessed *Bullen's* bodily agility and power, and for that reason refused to certify his inability to perform military duty on account of bodily infirmity. We think the weight of evidence is in favor of the Justice's decision; and, unless clearly against it, his judgment ought not to be reversed.

Another error assigned is that the fines imposed are not authorized by law. In the first count it is alleged that the commander of the company on two separate days drew up and mustered his said company to improve them in military arts and exercises, at the usual place of parade, and that the said *Bullen*, by neglecting to attend each of those musters, forfeited seven dollars.

By the first section of the Act of *Feb.* 28, 1825, the fine for neglecting to attend any company training is three dollars, and for neglecting to attend any company inspection and drill the fine is four dollars. What is intended by company inspection and drill is explained in the second section, where it is provided that every commanding officer of a company shall parade his company on the Tuesday following the second Monday of *September* annually, for inspection and drill, and on one other day for company discipline. The object of the inspection being to examine and take an account of the equipments of the members of the company, to note all deficiencies of equipment, and correct the company roll; a higher fine is imposed for absence from a company inspection and drill than from a company training. The fine for the former neglect is four dollars, for the latter three. As neither of the trainings mentioned in the first count is alleged to have been for inspection and drill, no higher fine than three dollars could be legally imposed for neglecting to attend either of them. It is not improbable that the first training was actually for inspection and drill; and if it had been so alleged, the judgment would be correct. But this cannot be presum-

ed, especially against the direct allegation in the writ. We must consider both, as they are alleged to be company trainings; and, inasmuch, as the judgment is for a greater sum than the Justice was authorized to impose, it must be reversed for the excess over three dollars for each neglect.

FULLERTON *vs.* HARRIS.

The action of debt lies in this State for the escape of a debtor in execution; and the plaintiff will be entitled to recover the whole amount of his debt and costs.

Where a blank bond for the liberty of the prison was signed by the debtor and his sureties, and the approval of two Justices of the *quorum* was certified thereon; and all the blanks were afterwards filled up by a third person, by verbal authority from the obligors; it was held that this was a good bond against them; and that the approval, however irregular, was sufficient to justify the gaoler in enlarging the prisoner.

In an action against the gaoler for the escape of an execution-debtor, after taking such a bond, it was held that the testimony of the approving magistrates was not admissable to show that the sureties were not sufficient, or that the bond was not regularly approved.

Whether debt for the escape of an execution debtor lies agaist one exercising the office of gaoler *de facto*, but not *de jure*,—*quære*.

THIS was an action of debt, against the keeper of the gaol in *Cumberland*, for the escape of *Stephen Lee*, jun. an execution debtor. The defendant pleaded first, the general issue, which was joined: Secondly, that *Lee* was enlarged by giving bond as the law directs for the liberty of the yard; which plea was traversed, and issue joined on the traverse.

The bond, alluded to in the second plea, was dated *April* 25, 1829, signed by the debtor, with two sureties, and approved on the same day by *Peter O. Alden* and *Jonathan Page*, Esquires, two

Justices of the peace, *quorum unus*. It was annexed to the deposition of a witness, who testified that in *June*, 1829, he then acting in behalf of the plaintiff's attorney, the bond was produced and delivered to him by the defendant, then acting gaoler; who admitted that when he first saw the bond it was a blank as to the names of the parties, the penal sum, the description of the execution, and the written parts over the signatures, seals, and attestation of the witnesses; and that it was filled up by himself, or by some other person by his direction, under verbal authority communicated by the bearer of the bond.

The defendant offered in evidence the certificate of the Secretary of State, that *Joseph E. Foxcroft*, Esq. was appointed Sheriff of *Cumberland*, *Feb.* 15, 1825; that *Noah Hinkley*, Esq. was appointed *March* 30, 1830; and that there was no intervening appointment. This was opposed, as incompetent evidence, but was admitted by *Weston J.* before whom the cause was tried.

The plaintiff then read the deposition of Justice *Alden*, who testified that he supposed the amount of the execution to be only fifty or sixty dollars; that if it had been six hundred and fifty dollars, he should not have approved the bond; but that had the bond been in its present state, (the debt and costs being about half that sum,) he should have approved one of the sureties, who was able to pay seventy five *per cent.* on five hundred dollars and upwards; that the other surety was worth but little, and the debtor nothing. He also read the deposition of Justice *Page*, who thought he was told that the amount of the bond was not to be so much. These depositions were objected to by the defendant, but the objection was overruled.

The counsel for the defendant insisted, first, that the enlargement of the prisoner was justified from the evidence; secondly, that case, and not debt, was the proper remedy; and thirdly, that the plaintiff had assented to the transactions, by accepting the bond. It was admitted that *Lee* took the poor debtor's oath *January* 4, 1830.

The jury, by consent of parties, were instructed to return a verdict for the plaintiff; and particularly to inquire whether the blanks

in the bond were filled by the consent and authority of the principal and sureties; and they found that they were; also, whether the sureties were sufficient; and they found that they were not. And the verdict was taken subject to the opinion of the Court; it being agreed that if they should be of opinion, from the evidence, that the action was not sustained by competent proof, or that the defence was so sustained, the verdict should be set aside and a general verdict entered for the defendant.

Allen and *Greenleaf* argued for the defendant, in support of the points made at the trial, citing, to the admissibility of the certificate, 1 *Stark. Ev.* 172, 173; *Kinnersley v. Orpe*, *Doug.* 57; to the legality of the execution of the bond, *Smith v. Crooker*, 5 *Mass.* 538; *Hale v. Rust*, 1 *Greenl.* 334; *Hunt v. Adams*, 6 *Mass.* 519;—to the point that the gaoler, not being in office at the time of the escape, was guilty of a breach of personal trust, merely, and not of official duty, *Maxwell v. Pike*, 2 *Greenl.* 8;—and that the irregularity complained of was waived by the plaintiff's acceptance of the bond, *Bartlett v. Willis & al.* 3 *Mass.* 86.

Sprague and *Robinson*, for the plaintiff, contended that the enlargement was illegal. The bond was never approved by the magistrates. They approved a bond for fifty or sixty dollars; but this was fraudulently filled with upwards of six hundred. As to the character of the defendant, the Court must presume every thing against him. He has assumed to act in the character of gaoler, receiving the perquisites of the office; and is now precluded from denying his official character. *Riddle v. Prop'rs. of locks, &c.* 7 *Mass.* 169. To do this, he must be permitted to allege that he was guilty of false imprisonment, of obtaining money by false pretences, and of usurping an office, which last is rendered criminal by statute.

The position that the bond was accepted, is not supported by the evidence. Nor had the agent any authority to that extent. But if he had, yet being subsequent, it would not purge a prior escape Nor was it a valid instrument, having been materially altered.

Smith v. Crocker, 5 *Mass.* 538; *Hunt v. Adams*, 6 *Mass.* 519; *Hatch v. Hatch*. 9 *Mass.* 307; *Creole v. Long*, 4 *Cranch*, 60.

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

This case presents several questions for consideration, viz:

1st. Is an action of debt a proper action to be brought against a sheriff or his deputy, or prison keeper for a voluntary escape of a prisoner committed on execution for debt?

2d. If it is, can the plaintiff recover the full amount of the execution, or only such damages as a jury may estimate under all the circumstances of the case?

3d. Was the bond, in virtue of which *Lee*, the debtor, was liberated from prison, duly executed by the obligors, so as to be their deed?

4th. If so, was it approved by two Justices of the peace, in such a manner as to become a proper ground on which *Harris*, the defendant, could lawfully proceed to act in the liberation of *Lee* from confinement?

5th. Was *Harris* the lawful under-keeper of the prison when *Lee* was committed and till he was liberated, so as to have a right to detain him; or, in other words, was *Harris* answerable to any one for permitting *Lee* to go at large, if the bond was not so executed and approved, as to constitute a legal defence?

6th. Was the evidence, which was objected to by the counsel for the defendant, properly admitted?

As to the first and second questions above stated, we apprehend there is no room for legal doubt. The statute of *Westm.* 2, expressly gives an action of debt; and it seems to be familiar law that a creditor may elect to bring debt or case as he shall think proper. And it seems also to be well settled, that when he brings debt, he is entitled to recover the full amount of his debt and costs; that is, the amount due on the execution. In support of the principles thus stated, we will merely cite the following cases. *Bonafous v. Walker*, 2 *T. R.* 126; *Planck v. Andrews*, 5 *T. R.* 37; *Burrell v. Lithgow*, 2 *Mass.* 526; *Colby v. Sampson*, 5 *Mass.* 310; *Porter v.*

Sayward, 7 *Mass.* 377; *Burroughs v. Lowder*, 8 *Mass.* 373; *Rawson v. Dole*, 2 *Johns.* 454; *Speake v. United States*, 9 *Cranch*, 28; *Wooly & al. v. Constant*, 4 *Johns.* 55. There seems to be, at the present day, little or no reason for the above mentioned distinction between an action of the case and an action of debt for an escape on execution, whether voluntary or negligent, as to the amount to be recovered; but the court can only declare what the law is. It is the province of the legislature to abolish the foregoing distinction, should that measure be deemed expedient. It would seem adaped to promote the ends of justice, if a creditor, in all cases of escape of a debtor, committed on execution, should be required to seek his remedy by a special action on the case, and in no other mode whatever.

With respect also to the third question, we perceive no room for doubt or hesitation, inasmuch as the jury have distinctly found, that though at the time the bond was signed by *Lee* and his sureties, the several blanks, mentioned in the report, existed and remained until it was presented to *Harris*, as a preliminary to the liberation of *Lee*, yet that they were all filled up by the consent and authority of the principal and sureties; which was prior to the delivery of the bond to *Harris*. *Markham v. Goraston*, *Moor*, 547; *Zouch v. Clay*, 1 *Ventr.* 185; *Paget v. Paget*, 2 *Ch. R.* 187; *Smith v. Crocker*, 5 *Mass.* 538; *Hunt v. Adams*, 6 *Mass.* 519; *Hale v. Rust*, 1 *Greenl.* 334. According to these cases, a bond executed and completed in the manner mentioned in the report of the Judge, is as binding an instrument as if it had been executed in the usual manner, and made perfect in all respects before signature.

The next inquiry is whether the bond was duly approved by two Justices of the peace, *quorum unus*, as prescribed in the fourth section of the act of 1822, *chap.* 209, or by the creditor? If it was, the above section says "the gaol keeper shall release him (the debtor) from close confinement, without requiring any other condition in such bond." No responsibility is thrown upon the gaol keeper, as to the sufficiency of the sureties. The Justices or the creditor must judge of that. The gaol keeper is to be governed by their

certificate, and he is not bound to inquire into their motives in making the certificate, or into the facts on which their certificate was predicated. It is true that, in the present case, the certificate of approbation was indorsed after the bond was signed, but before the above mentioned blanks in the bond were filled, when no penal sum was inserted, nor the amount of the judgment; but it does not appear that the defendant knew of any misapprehensions of the Justices in regard to its amount, even if their errors or carelessness could affect him. He must be considered as acting under the natural conclusion that they acted understandingly in the discharge of the duty by law assigned them, and in making the certificate of their judgment in the premises; for the names of the sureties, at least, were signed before the certificate of approbation was indorsed. The obligors must be considered as understanding that all blanks were to be filled before delivery to the gaol keeper; and the same presumption applies as to the understanding with which the Justices made their certificate. No doubt the above course of proceeding in relation to the execution and approval was a very careless and improper one; subjecting all concerned to inconveniences and perhaps dangerous consequences; but, we repeat, the gaol keeper is not answerable for this looseness of proceeding on the part of the approving Justices, in signing their approbation, without ascertaining the sum due on the execution. Viewing all the facts in regard to the approval of the sureties by the Justices, we are of opinion that the gaol keeper was fully justified in releasing *Lee* from his confinement upon the strength of it. Why would he not have been liable in damages to *Lee* for false imprisonment, had he not restored *Lee* to his liberty? In the examination of this fourth question, we have, by anticipation, decided the merits of the sixth objection; that is, that the explanatory depositions of *Alden* and *Page* were not by law admissible. Having made their certificate and permitted the debtor to carry it to the defendant, where the blanks in the bond were filled in the manner before mentioned, they had given to him that protection which was intended by that provision of our statute which requires the approbation of two Justices of the peace as to

the sufficiency of sureties. The defendant, confiding in the legal protection thus given, released the prisoner. For these reasons the Justices could not be allowed to contradict or explain away their own certificate, disprove the facts certified, and thus expose an innocent officer to a severe penalty, because he reposed confidence in their official sanction. Applying legal principles to the facts which we have thus been examining, the result is, that the action is not maintainable. It is therefore unnecessary for us to express any opinion as to the fifth question, or the incidental one connected with it; and as it is unnecessary, it may be advisable for us to be silent in respect to it, as questions between other parties may call for a decision of it.

Verdict set aside, and a general verdict entered for the defendant.

Note. The remedy by action of debt for an escape is now abolished, by a statute passed *Jan.* 21, 1834.

Folsom *vs.* Mussey.

In all written simple contracts, evidence of the consideration may be received, in an action between the original parties.

Therefore, where the defendant, being agent of the plaintiff for the sale of his lumber, had sold some and taken the purchaser's note for the amount, payable to the plaintiff; and afterwards the plaintiff, being apprehensive of suits by his own creditors, made a sale of this note and of the rest of his lumber to the defendant, taking his note for the estimated amount, but under a verbal agreement that the defendant should be holden to pay only so much as he might actually realize from the property, in the same manner as if no note had been given; it was held that these circumstances might be shown in defence against an action upon the note, to avail so far as they might prove a partial failure of consideration; but that they did not absolve the defendant from the obligation to use diligence in collecting the note sold to him.

Assumpsit on a promissory note dated *July* 1, 1828, given by the defendant to the plaintiff, for six hundred and fifty-three dollars and forty-three cents, payable in nine months. At the trial, which was before *Weston J.* upon the general issue, the defence set up was, that under the circumstances in which the note was given, connected with subsequent facts, the defendant ought not to be holden beyond the amount paid and indorsed on the note. The admissibility of proof of these circumstances and facts was opposed by the plaintiff; but the objection was overruled; and the facts proved were as follows.

The defendant was a wharfinger in *Gardiner*, to whom the plaintiff, living in *Palmyra*, had been in the practice of sending his lumber, of various kinds, for sale; which the defendant sometimes sold for cash, and sometimes on credit. Whenever he made sales, he credited the plaintiff with the amount; it being however understood that he was not to be debtor therefor to the plaintiff, till he should actually receive the money. On the 10th of *June*, 1828, he sold to one *Houdlette* four hundred and seventy-eight dollars and fifty-six cents worth of the plaintiff's lumber, taking his negotiable note for that sum, payable to the plaintiff in ninety days; the purchaser

being then in good credit, and the time comporting with the usage in such cases. For the proceeds of this sale, among others, the plaintiff was credited in the defendant's books. On the day of the date of the note now in suit, the plaintiff, wishing to make arrangements to preserve his property from being sacrificed by his creditors, made a nominal sale to the defendant, of all his lumber then on the defendant's wharf; for the amount of which, and of the sum credited as above to the plaintiff in the defendant's books, including the amount sold to *Houdlette*, the note in controversy was given; it being then agreed by the parties that the defendant should sell the lumber, and collect what was due for what had already been sold, and account to the plaintiff for the same, in the same manner as if no note had been given; and that his liability to the plaintiff should not be changed or affected by his giving the note. The plaintiff then indorsed the note of *Houdlette*, and delivered it to the defendant. It did not appear that the defendant took any measures for the collection of this note, though *Houdlette* continued in extensive business, till sometime in *November*, after its maturity; when his solvency beginning to be suspected, the defendant actively adopted prudent measures to secure the debt, which, however, proved of no avail.

The counsel for the defendant requested the Judge to instruct the jury, first, that the plaintiff living only forty or fifty miles from *Gardiner*, and being frequently at this place, the defendant was not bound to commence a suit against *Houdlette*, without an express request; secondly, that the plaintiff, knowing the person to whom the credit was given, was bound to give such direction to the defendant as he wished him to follow: And thirdly, that the defendant, without such direction, would not be guilty of negligence by omitting to put the note in suit; especially at his own expense.

These instructions the judge declined to give; but he did instruct the jury that if, from the evidence, they were satisfied that the defendant might have procured payment of that note, or have secured it, by due diligence between its maturity and the time when he began to take measures to that end; he had no claim on the plain-

tiff to be allowed its amount, which was finally lost. And the jury returned a verdict for the plaintiff; which was taken subject to the opinion of the court upon the questions whether the desired instructions were properly refused; and whether proper directions were given to the jury.

A motion for a new trial was subsequently filed by the defendant, on the ground of newly discovered evidence.

Evans, for the plaintiff, argued that the defence was untenable, as it depended on parol testimony to control a written contract, and to show that an absolute promise to pay on a certain day, was in fact merely a contingent undertaking to pay on the happening of an uncertain event. To which he cited *Stackpole v. Arnold*, 11 *Mass.* 27; *Hunt v. Adams*, 7 *Mass.* 518; 6 *Mass.* 519; *Hanson v. Stetson*, 5 *Pick.* 508; *Rose v. Learned*, 14 *Mass.* 154; *Woodbridge v. Spooner*, 3 *B. & A.* 233; *Free v. Hawkins*, 1 *Moore*, 535; *Hoare v. Graham*, 3 *Campb.* 57; *Richards v. Kilham*, 10 *Mass.* 244; *Preston v. Merceau*, 2 *W. Bl.* 1249; *Fitzhugh v. Runyon*, 8 *Johns.* 375; *Thompson v. Ketchum*, *ib.* 189; *Howes v. Barker*, 3 *Johns.* 498; *Deland v. Amesbury Man. Co.* 7 *Pick.* 244. And that the consideration was sufficient; *Amherst Academy v. Cowls*, 6 *Pick.* 432; *Howard v. Witham*, 2 *Greenl.* 393; *Train v. Gold*, 5 *Pick.* 384.

Allen, for the defendant.

Weston J. delivered the opinion of the Court.

The defendant having received the *Houdlette* note, in the course of his business, as the factor and agent of the plaintiff, and holding it afterwards in the same capacity, was bound to use due diligence in its collection. Fidelity in his trust, is imposed by the relation in which he stood. In all transactions of trade and commerce, the law requires promptness and vigilance on the part of agents, and of all persons, who happen to be entrusted with the business of others. This is a principle too well settled, to require the citation of authorities for its support. And if they were necessary, those cited by

the counsel for the plaintiff, are full to this effect. If from the want of diligence by the factor, a loss arises to the principal, the factor is bound to make it good. If the jury were satisfied, that the *Houdlette* note was lost by a want of diligence on the part of the defendant, they were instructed that the defendant had no claim to be allowed the amount of that note against the plaintiff.

It was not incumbent on the plaintiff to give special directions, as to the course to be pursued by the defendant. That would depend upon what the exigency of the case required; which the defendant, residing more in the neighborhood of *Houdlette* than the plaintiff, had the best means of knowing. But if that had not been the case, the business was deputed to him, and the plaintiff had a right to expect, that it would be faithfully performed. The plaintiff was under no obligation to pledge himself expressly, to reimburse any expense, the defendant might necessarily incur in his business. This obligation the law imposed upon him, without a direct promise. We are therefore satisfied, that the instructions requested were properly withheld, and that those given to the jury, were warranted by law.

These are the only points reserved by the report; but as there is to be a new trial, on account of newly discovered evidence, we have looked into the question, raised at the former trial, and insisted upon in argument by the counsel for the plaintiff, as to the admissibility of the evidence, upon which the defence turned.

It is an undoubted rule of the common law, that parol testimony shall not be received, to vary or contradict a written contract. In support of this principle, many cases have been cited. That the defendant did make the contract declared on, is not to be controverted. It is a note of hand, which like a specialty imports a consideration; and indeed acknowledges one. Shall this written acknowledgment be contradicted by parol evidence? The rule upon which the defendant relies, strictly understood, would exclude it. And yet that such evidence is admissible for this purpose, is as well settled as the rule. Between the decisions, which illustrate and enforce the rule, and those which recognize the exception, there

may be an apparent discrepancy. But that will generally be found to arise, from the different aspects, in which they have been viewed.

The case of *Barker v. Prentiss*, 6 *Mass.* 430, and the opinion of Chief Justice *Parsons* there given, has maintained its ground in practice; although the language used in subsequent opinions, cited for the plaintiff, appear sometimes to lose sight of the distinctions there made. The position laid down in that case is, that in all written simple contracts, evidence of the consideration may be received, between the original parties. And this is the uniform practice of our courts. If upon this inquiry it results, that there was no consideration; or that it has failed totally or partially; or that the contract was signed under mistake or misapprehension, the rights of the parties are determined, as the justice of the case requires, upon a view of all the facts. The plaintiff fails to recover; or he recovers a part only, of what the note or other contract expresses; according to equity and good conscience. Of this character was the evidence received, in the case before us. It went to the consideration. The lumber which formed part of the consideration of the note, was assumed to be worth a certain sum; but its final value was to depend on the sales. If overvalued, there would be a failure of consideration, by the amount of the excess. If undervalued, the defendant was to pay the difference. As the estimate fell short of the value as ascertained, this part of the evidence operated in favor of the plaintiff.

With regard to that part of the note in suit, which arose from the *Houdlette* debt, if that was not at the defendant's risk, if lost without negligence imputable to him, there would be a failure of consideration to that amount. Now the evidence proves that the defendant did not become the guarantor of the *Houdlette* note, and that it was not taken at his risk. It has been lost. That loss must fall upon the plaintiff; unless negligence in relation to it, is chargable upon the defendant.

Lawson *vs.* Lovejoy.

The voidable contract of an infant may be ratified, after he comes of age, by his positive acts in favor of the contract; or by his tacit assent under circumstances not to excuse his silence.

Therefore where an infant purchased a yoke of oxen, for which he gave his negotiable promissory note; and after coming of age he converted them to his own use and received their avails; it was held that this was a ratification of the promise; and that the indorsee of the note was entitled to recover.

Assumpsit by the indorsee against the maker of a promissory note. The defence was infancy; and the case was submitted to the determination of the Court upon the following facts. The note was given for the price of a yoke of oxen, sold by the payee to the maker; who at that time was an infant; but after his arrival at full age, which was after the maturity of the note, he "converted the oxen to his own use, and received the avails of the same."

D. Williams, for the plaintiff, cited 3 *Maule & Selw.* 481; 1 *Pick.* 124; 1 *Vern.* 132.

Boutelle, for the defendant, cited 16 *Mass.* 460; 1 *Pick.* 203, 223.

Parris J. delivered the opinion of the Court.

It seems to be a well settled principle that such contracts of an infant as the court can pronounce to be to his prejudice are void; such as are of an uncertain nature, as to benefit or prejudice, are voidable, and may be confirmed or avoided at his election, and such as are for his benefit, as for necessaries, instruction and the like, are valid.

The law so far protects him, in the second class of contracts, as to afford him an opportunity, when arrived at full age, to consider his bargain, its probable tendency and effect, to review the circumstances under which it was made, and, having weighed its advanta-

ges and disadvantages, to ratify or avoid it. If it be ratified, the original contract becomes binding and may be enforced. The ratification gives life and validity to the old promise, and if the contract be enforced at law, it will be by an action on the original agreement, and not on the ratification. But a ratification must, on the one hand, be something more than a mere acknowledgment of the debt, while, on the other, it need not be a direct promise to pay or perform. A direct promise is, indeed, evidence of a ratification, but not the only evidence. The contract of an infant may be rendered as valid, when he arrives at full age, by his mere acts as by the most direct and unequivocal promise. His confirmation of the act or deed of his infancy may be justly inferred against him, after he has been of age for a reasonable time, either from his positive acts in favor of the contract, or from his tacit assent, under circumstances not to excuse his silence. It was even said by Chief Justice *Dallas*, in *Holmes v. Blogg*, 8 *Taunt.* 35, that in every instance of a contract voidable only, by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time. Although this doctrine may not have been fully recognised to its utmost extent, yet such circumstances as shew that the infant either received a benefit from the contract after he arrived at full age, or did something from which assent might be presumed, have frequently been adjudged sufficient evidence of a ratification. Such as the silence of the infant after his arrival at full age, coupled with his retaining possession of the consideration, or availing himself in any manner of his conveyance. *Hubbard v. Cummings*, 1 *Greenl.* 11; *Dana v. Coombs*, 6 *Greenl.* 89. So if an infant lease land, and after he come of age receive rent; this is equivalent to an express promise that the lease shall stand, and the infant is bound by it. *Ashfield v. Ashfield, Sir W. Jones*, 157; *Litt. sect.* 258. So if an infant take a lease for years rendering rent, which is in arrear for several years when he comes of age, and he thereafter continues in possession. This makes the lease good and him chargeable with all the arrears which accrued during his minority; for though, at full age, he might have disaffirmed the

lease and thereby have avoided payment of the arrears, yet his continuance in possession, after his full age, ratifies and affirms the contract *ab initio*. *Com. Dig. Enfant c.* 6; *Evelyn v. Chichester*, 3 *Burr.* 1717. So receiving interest on a contract. *Franklin v. Thornebury*, 1 *Vern.* 132. The occupancy of lands taken in exchange for other land. *Cecil v. Salisbury*, 2 *Vern.* 225. And any other act indicating an intention to affirm. *Kline v. Beebe*, 6 *Conn.* 494.

The law wisely protects youth from the impositions of those who might be disposed to take advantage of their inexperience, and compels them to the performance of no engagements or the payment of no debts contracted within age, except such as are for necessaries suited to their condition in life. But while it affords this protection as a shield, it will not sanction its use as an offensive weapon of injustice, by which the unsuspecting and honest community are to be defrauded of their property. The privilege is afforded for no such purpose. The law requires of the infant the strict performance of his engagement, if subsequent to his arrival at age, it has been ratified and confirmed, either by a new promise, or by any act by which an acquiescence is implied. But if there have been no such ratification, and he repudiate the contract, common honesty will not, and legal principles ought not to permit him to retain the consideration, which was the foundation of the promise he thus avoids. He should place himself and the person with whom he contracted in the same situation as if no contract had been made. Surely he ought not to be permitted to keep all and pay nothing.

But in this case we are not called upon to decide whether the law would afford any remedy for one who had sold his chattels to an infant, by whom they had been converted into cash during infancy, there having been no subsequent confirmation of the contract. If the principles which have been recognized by this court in *Hubbard v. Cummings* and *Dana v. Coombs* stand unshaken, as we think they do, and can be applied to contracts for personal as well as real property, as we think they may, the contract, which is the

foundation of this action, was fully ratified by the acts of the dedefendant after he arrived at full age.

According to the agreement of the parties, the defendant must be defaulted.

CHANDLER *vs.* FURBISH.

A judgment debtor is not discharged by the seizure of land in execution, as he would be by the seizure of his goods; because the title to the land is not changed but by a return of the officer, showing a compliance with the requisites of law and made matter of record, as the statutes require.

Therefore where, on an execution against a principal debtor and his two sureties, a right in equity of redemption belonging to one surety was seized, and sold to the other, by the sheriff; but no deed was given, nor any return made of the sale; and afterwards, the purchaser, abandoning the purchase, paid the execution, and sued his co-surety for contribution;—it was held that such sale, being no discharge of the debtor, nor affecting the title to the land, constituted no bar to the action.

THIS was *assumpsit* for money paid; and came up by exceptions taken by the defendant to the opinion of *Whitman C. J.* in the court below.

The plaintiff and defendant, with others, were sureties to the sheriff of this county, on a bond given by his deputy; on which judgment was afterwards recovered for the deputy's default. Execution was issued *Aug.* 27, 1829, and partially satisfied by levy on the goods of the principal debtor. On the 18th of *September* the officer seized two equities of redemption, one belonging to the deputy, and the other to the defendant, which were duly advertised for sale. On the following day the plaintiff placed in the hands of the officer two promissory notes, as collateral security for the balance due, taking his recept therefor, under an express agreement that

the execution was not thereby discharged, but might be collected under the direction of the plaintiff. On the 23d of *October*, the two rights in equity were put up for sale by the officer, and struck off to the plaintiff, he being the highest bidder, for a sum exceeding the balance of the execution. But no deed was given, nor was any return of the sale or seizure made by the officer; and afterwards, the notes deposited in his hands being collected by him, the execution was satisfied out of that fund. Whereupon the plaintiff brought this action against his co-surety, for contribution.

It was contended by the defendant that the execution was satisfied by the seizure and sale of the rights in equity; and that therefore the subsequent payment, by the plaintiff, was voluntary and officious. But the Judge ruled otherwise; to which the defendant filed exceptions.

Otis, for the defendant, argued that the plaintiff might still compel the officer to perfect the sale, by executing a deed and making a return of his doings; and that it was his duty to have resorted to all legal means for this purpose, before paying the judgment in any other mode. Neglecting so to do, he had precluded the defendant from all benefit of the sale of the equity belonging to the principal debtor; which was an act of bad faith, and ought to bar him of this action. 8 *Mass.* 226; *Ladd v. Blunt*, 4 *Mass.* 402; 1 *Lev.* 282; 6 *Mod.* 209; *Dyer*, 363; *Cro. Jac.* 246; 1 *Salk.* 322; *Cro. El.* 227; 2 *Ld. Raym.* 1072.

D. Williams, on the other side, was stopped by the Court, whose opinion was afterwards delivered by

Weston J. A judgment and execution, for which the defendant was jointly liable with the plaintiff, has been paid and discharged at the expense, and with the funds of the plaintiff. He thus makes out a case for contribution; unless the defendant can show some just cause why he should be excused therefrom. He relies upon the seizure and sale of the equities; one of which was sold as his property. But those sales were not perfected. The officer made no return of his doings. The title therefore to the equities remains

unaffected, by any thing done under the execution. The defendant paid nothing, and has lost nothing. The only competent evidence of the seizure and sale, is the officer's return.

In *Ladd v. Blunt*, 4 *Mass.* 402, *Parsons C. J.* distinguishes between a seizure of goods on execution, and an extent upon land. By the former the debtor is discharged, although the sheriff misapply or waste the goods, or does not return the execution. It is otherwise when land is taken. The title is not changed; unless what the statute requires to produce this effect, appears of record. If it does not, the land remains the property of the debtor, and the judgment is unsatisfied. There the fee or freehold was in question. But the same principle applies to an equity of redemption. That is an interest in real estate; and the seizure and sale must appear of record, to affect the title. No question of fraud or collusion, from the facts set forth in the exceptions, is raised here; that having been disposed of, as it is suggested, in the Common Pleas. The exceptions are overruled, and the judgment affirmed.

COPELAND & *al. vs.* WELD & *trustee.*

If goods be assigned in trust for the payment of debts, and the assignee be summoned as the trustee of the debtor, in a suit brought by a dissenting creditor the latter is to be preferred to such creditors as had not assented to the assignment prior to the service of his process.

The assent of preferred creditors to an assignment for the payment of debts may well be presumed, their claims being fully provided for; that of other creditors must be expressed.

Where goods were so assigned, which the trustees sold, taking the purchaser's notes on time, which were not yet payable, it was held that he was still chargeable for their value, as the trustee of the debtor, in a foreign attachment.

Where property of various descriptions is assigned for the payment of debts, and the assignee is summoned as the trustee of the assignor, in a suit brought by a dissenting creditor, the Court will not undertake to marshal the assets in his hands, by designating the fund out of which any creditor shall be paid.

Whether, if a general assignment be made, for the equal benefit, *pro rata*, of all the creditors of the assignor, their assent to it may be presumed;—*quære.*

Whether a verbal assent to such assignment is sufficient;—*quære.*

Whether, if the written assent of the creditor be necessary, and the indenture be made in triplicate, his signature to one of the parts is sufficient;—*quære.*

THE principal question in this case was whether the trustee was chargeable. The facts, as disclosed, were these. *Weld*, being in failing circumstances, made an assignment of all his property, consisting of stock in trade, book-debts and securities, to *Laban Lincoln*, the trustee in this action; in trust, to convert the property into money, and after deducting the necessary incidental expenses, and a reasonable compensation to the assignee, then to pay the sums due from *Weld* to the *Vassalborough* Bank, by notes signed by *Ebenezer Dole* and *Gow & Lincoln* as sureties, or to reimburse these sureties for any sums by them paid on the same account; secondly, to pay all debts due from the assignor for borrowed money, being a note for one thousand dollars due to *James Parker*; thirdly, to pay all other of his debts, *pro rata*; and the balance, if any, to be refunded to the assignor. The assignment was by indenture

of three parts, between *Weld*, *Lincoln*, and such creditors as might become parties; but it contained no covenants on the part of the latter; and was executed *March* 22, 1831, by the assignor, assignee, *Parker* and *Dole*. The assignee sold between two and three hundred dollars worth of the goods, at retail, for cash; and on the 9th of *May* following, he sold all the residue for $2200,26, secured by negotiable promissory notes payable in twelve, eighteen, and twenty-four months, without interest. The book accounts and securities assigned to him amounted nominally to $2138,93, of which a considerable part was deemed of no value. All the money he had received, from any source, had been paid over to the *Vassalborough* Bank, after deducting contingent expenses, but did not suffice to discharge that debt, by about forty two dollars. In this stage of the transactions the assignee was summoned as the trustee of *Weld*, in this action. Afterwards the assignment was signed by two other creditors. One *Sullivan Kendall*, a creditor of *Weld* to the amount of one hundred dollars, assented verbally to the assignment, and signed one part of the indenture soon after it was made, and before the service of the plaintiffs' writ; but he had never signed the part in the hands of the assignee.

At the time of disclosing, the trustee had collected about four hundred and thirty dollars, of the debts assigned to him; but the whole of this class of property, which could be collected, would not suffice to pay the preferred creditors. He had also paid the balance due to the bank, whose debt amounted in all to six hundred and forty two dollars. *Dole* and *Gow & Lincoln*, were not creditors of *Weld;* but were merely his sureties to the bank. The notes which the assignee had taken for goods sold by him remained in his hands, unpaid; except one of them, which he had transferred to *Parker*, in part payment of his debt. And after a calculation of interest and expenses, he stated that the amount of the last mentioned notes, reduced to their cash value, would be $2038; and that the preferred debts, with incidental expenses and store rent would amount to $1900, leaving a balance of $138 in his hands, applicable to *Kendall's* debt, and to the expenses incident to this suit.

Otis, for the trustee, contended that he ought not to be charged: first, because, at the time he was summoned, he held only *choses in action*, which are not subject to be attached by this process. *Lupton v. Cutter & tr.* 8 *Pick.* 298; *Gore v. Clisby & tr. ib.* 555; *Perry v. Coates & tr.* 9 *Mass.* 537; 7 *Mass.* 438; *Andrews v. Ludlow*, 5 *Pick.* 28; *Clark v. Brown*, 14 *Mass.* 271. And the circumstance of the goods having been sold for some of the notes, by the assignee, makes no difference; for the sale having been fairly made, in the due execution of the trust, he is not responsible should the debtors become insolvent. 2 *Pick.* 86; 3 *Pick.* 65.— Secondly, if he is chargeable for the amount of these last mentioned notes, yet it is not sufficient to pay the debts of the preferred creditors and of those who had assented previous to the present attachment; allowing the assignee a reasonable indemnity for the expenses of this suit. Thirdly, it is for the trustee to determine out of what funds in his hands he will pay the preferred debts; and the court will not interfere in the marshalling of the assets. *Webb v. Peale*, 7 *Pick.* 247.

Sprague and *Robinson*, for the plaintiff.

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

By the general policy of our law, the property of debtors, with certain exceptions, is liable to be taken by their creditors, by due process of law. A debtor however is at liberty to prefer one creditor to another, by transferring any thing he has in payment; or by pledging or mortgaging it, by way of security. He may also assign his property, *bona fide* in trust for the payment of his debts, and such assignment, at least when assented to by his creditors, will be binding and operative. And it has been held in Massachusetts, that such assent is essential; and that creditors assenting subsequently to an attachment, at the suit of any other creditors, are to be postponed, and to give place to such intervening attachment. *Widgery v. Haskell.* 5 *Mass.* 144; *Stevens v. Bell*, 6 *Mass.* 339. Without such assent, the instrument of assignment may be valid to transfer

the property in trust; and the trustee may be compellable to fulfil the duties thereby imposed upon him. 4 *Johns. Ch.* 531; *Brown v. Mintum*, 2 *Gall.* 557.

In *Brooks v. Marbury*, 11 *Wheat.* 78, *Marshall C. J.* was of opinion, that the assent of preferred creditors was to be presumed, and that their rights vested by the assignment, and could not be defeated by any other attaching creditor. In the other cases, last cited, there is a leaning to the same opinion. But the decisions of Massachusetts, prior to the separation, and the practice of both States since, so far as we are informed, has been otherwise; and the rights of an attaching creditor have been preferred to those of creditors, who had not actually assented, prior to the attachment. To adopt a different principle, would enable an insolvent debtor to confide to his friends the administration of his affairs, and would entirely take away the advantage, which the policy of the law has given to the vigilant, over the slumbering, creditor. The assent of the preferred creditors may well be presumed. They may exhaust the whole fund; and the dissent of the other creditors is equally presumable, if by their vigilance, they may place themselves in a better situation. The law, as adopted and understood here, gives them this chance in the race. If they start earlier, and arrive at the gaol sooner, the prize is theirs. If an insolvent debtor should make an assignment, *bona fide*, of all his property, for the benefit of all his creditors, *pro rata*, imposing no conditions upon them, there might be strong reasons for presuming, that an assignment so beneficial might be assented to by all, who do not expressly dissent. Whether if such a case should arise, such presumed assent should be regarded, as having the same effect as an express one, we are not now called upon to determine. In the present case we are of opinion, that the attaching creditor is to be preferred to such creditors, as had not assented, prior to the service of his process. We reserve ourselves with respect to the rights of *Sullivan Kendall*, who had before that time notified his assent, but had not executed the instrument. It is not necessary to decide that point, upon the

question now submitted, whether the trustee is or is not to be so adjudged.

Of the goods assigned, and sold on a credit, the cash value exceeds two thousand dollars. For these, notes had been taken, payable to the trustee, not collected at the time of the service. These it is insisted, are not liable to be taken under this process. The trustee, under the assignment, did not, upon these sales, become the debtor of the insolvent debtor, or the assenting creditors, until he had received the money, or was chargeable with neglect. But it must be remembered that the attaching creditor overreaches the assignment, and has a right to insist that as to him it has no validity, except so far as the property was appropriated to previously assenting creditors. He has a right therefore to hold the trustee liable, as the receiver of the goods of his debtor, and it is no sufficient answer on his part to say, that he has sold them on a credit. But the amount of sales, which appear to have been made beneficially for all concerned, may be regarded as the proper measure of their value. And the expenses and disbursements, fairly incurred in the management of the business, are to be allowed to the trustee. To the amount of goods sold on credit, is to be added the amount, previously sold for cash. The trustee does not precisely fix the amount; but the aggregate, from the data given us, appears to be little, if any, short of twenty three hundred dollars. The liabilities incurred and amount due, to the prior assenting creditors, if *Sullivan Kendall* is regarded as one of them, does not appear to exceed two thousand dollars; so that it is very clear that the trustee must be adjudged to be such, upon his disclosure.

But as further intimations may aid the parties, we proceed to the consideration of some of the other grounds, upon which it is insisted he may be charged. First, that the *Vassalborough* bank is not an assenting creditor, and that the trustee is not to be allowed for the payments made to that bank, at least since the service of this process upon him. But as he was liable as a surety for that debt, it was perfectly competent for the principal debtor to assign property for his security, and as his assent was prior, so his right to hold the

extent of his liability, is prior to the attachment. Secondly, although it is conceded that the trustee is not chargeable directly for the notes and demands assigned to him; yet the court are called upon so to marshal the assets, as to appropriate this fund to the payment of the preferred creditors. In *Lupton v. Cutter & tr.* 8 *Pick.* 298, and in *Gore v. Clisby & tr.* 8 *Pick.* 555, the court refused a similar application; and very satisfactory reasons are assigned, in the former of these cases. For so much only of these, as had been collected prior to the service of this process, he is to be charged. The amount thus collected, is not stated by the trustee. This sum, when known, being added to the proceeds of the goods, after deducting therefrom the amount to be allowed to the trustee, upon the principles before stated, the extent of his liability may be ascertained. There may be enough to satisfy the attaching creditor, without postponing the right of *Sullivan Kendall.* If there is not, and the parties cannot adjust it, the question in regard to him may be settled upon *scire facias.*

Trustee charged.

THOMAS *vs.* HARDING *& al.*

Four defendants were sued as copartners, and served with notice to produce the written agreement of their association; and three of them having been defaulted, the other appeared, denying the copartnership. And the agreement not being produced, it was held that the plaintiff might give parol evidence of its contents, having first proved that it was seen in the hands of one of the other defendants, and that the party appearing acknowledged that he signed it.

Where one was constituted agent of the owners of a paper mill, to "make sale of the paper and collect stock"; and he purchased a bale of cloth on credit, intending to sell it at a profit for the common benefit, in exchange for paper-rags; for which he gave a promissory note in the name of the company; it was held that such purchase was not within the scope of his authority; and that the owners were not bound.

The declarations of the agent in such case are not admissible to prove that the cloth was applied to the use of the company, in order to charge the others as joint promissors with himself.

THIS case came up by exceptions taken to the opinion of *Ruggles J.* in the Court below. The action was *assumpsit* on a promissory note, dated *May* 27, 1830, payable to the plaintiff, and signed by "*Swan, Woodcock & Co.*" The defendants, *Swan, Woodcock* and *Pierce*, were defaulted. *Harding*, the other defendant, appeared and pleaded that he never promised with them; on which issue was joined.

It appeared that the defendants had been served with regular notice to produce at the trial any and every written agreement between them to carry on business for the purpose of making paper, or for any other purpose; and that in *August* 1830, the defendant, *Pierce*, showed to a witness a paper signed by all the defendants, respecting an arrangement for carrying on a paper mill with economy, until they should alter it or adopt some other. The plaintiff then proposed to prove the contents of this paper by the witness; to which the defendant, *Harding*, objected, until the paper were first proved to have been lost, or to be within his control. But the Judge overruled the objection; and the witness stated the contents

to be in substance these: that *Woodcock* should be foreman, and keep the books; and receive one dollar and twenty five cents a day, boarding himself; that *Swan* should be employed in the mill at one dollar a day, and board himself; that *Pierce* should make sale of the paper and collect stock, at the same wages, and his expenses be paid; and that one *Barrett* was to act as engineer, at eighteen dollars a month, for three months.

It further appeared that the note was given by *Pierce* for a bale of factory cloth; that the stock for a paper mill is rags; but that factory cloth is a suitable article to barter for such stock. Mr. *Harding* is an attorney of this court, dwelling upwards of twenty miles from the paper mill.

The witness, by permission of the Judge, who overruled the defendant's objection to the evidence, further testified that *Pierce*, at the time of showing him the paper, stated that the cloth for which the note was given went to the use of "the concern." He also testified that on the following day he stated to the defendant, *Harding*, the contents of the paper, and what *Pierce* had told him; and that *Harding* did not deny having signed the paper, but said it did not make him answerable as a partner; and that he knew nothing of the cloth, nor whether it went to the use of the concern, or not. Hereupon the jury were instructed that *Harding* was to be regarded as a partner, and liable for the payment of the note; provided they were satisfied that the cloth went to the use of the concern; and that on that point they would consider *Pierce's* declarations as evidence against the defendants. And the verdict being for the plaintiff, the defendant, *Harding*, excepted to the admission of parol evidence of the contents of the paper, and of *Pierce's* declarations respecting the cloth; and to the instructions given to the jury.

Harding, *pro se*, to the inadmissibility of *Pierce*, or any parol evidence of the contents of the paper, cited 10 *Mass.* 332; *Storer v. Batson*, 8 *Mass.* 440; *Tuttle v. Cook*, 5 *Pick.* 414; *Robbins v. Willard*, 6 *Pick.* 464; 4 *Johns.* 250; *Whitney v. Sterling*, 14 *Johns.* 215; *Gow on Partn.* 210. And that in purchasing cloth he had exceeded his authority. *Gow on Partn.* 25, 26, 27. He

also contended that the evidence, if admitted, did not prove a partnership; but was merely a mode of ascertaining how each man should be paid for his services, and what services he should perform.

Allen, for the plaintiff, cited *Doak v. Swan & al.* decided in *Waldo*, *July* term, 1831, to the effect of the writing, as proving a partnership; and *U. States Bank v. Binney*, 5 *Mason*, 188, to its admissibility. And he contended that it constituted *Pierce* the general agent of the company for the procurement of stock; 3 *Stark. Ev.* 1073, 1074; *Martin v. Root*, 17 *Mass.* 227; *Wood v. Braddick*, 1 *Taunt.* 104; and that the mode adopted in this case, by barter of cloth for rags, was advantageous to the company, and within the scope of his authority. *Emerson v. Providence Hat Man. Co.* 12 *Mass.* 237; *Odiorne v. Maxcy*, 13 *Mass.* 178; 15 *Mass.* 339.

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

Three of the defendants having been defaulted, the only question is whether *Harding* is chargeable as a joint debtor with them. If not, the declaration is not proved, nor the action maintained. The defendant, *Harding*, denies that a partnership existed between him and the other defendants. To show the partnership, the plaintiff was permitted to prove the contents of an agreement entered into by all the four defendants; notice having been previously given to them to produce the same on trial; which, however, was not done. The witness who testified to the contents of the agreement which was in the hands of *Pierce*, states that on the next day he saw *Harding* and communicated to him what the contents were, and that *Harding* did not deny his having signed the same. This circumstance, taken in connexion with the notice to produce the agreement, justified the admission of the proof of the contents of the paper, by the testimony of the witness who examined it. This disposes of the defendant's first objection. The second objection is that the contract or agreement, thus proved, does not constitute a

partnership. In the case of *Doak v. Swan*, cited at the bar, this same contract was under our consideration, and we then decided that it did constitute a partnership; and we see no reason for any change of opinion on that point.

The other objections depend, for their decision, upon the nature and extent of the partnership, which is proved by the plaintiff to have been formed for the purpose of carrying on a paper mill. For the sake of doing so as economically as they could, certain duties were assigned to each one of the parties, except *Harding*. The duty assigned to *Pierce* was "to make sale of the paper and collect stock;" which, the exceptions state, consists of rags. The note in question was signed by *Pierce*, with the name of the firm; but it was not given for rags or stock, but for a bale of factory cloth. It is contended that this was not a material suitable for the business of the partnership; and that it had no more connexion with it than the purchase of sugar, coffee or tin ware; either of which articles might have been exchanged for rags, as well as factory cloth. There seems to be no dispute as to the principles established or recognized in the cases cited by the respective counsel; but they differ in their application of them in the present case.

There is no question that in cases of partnership, the power of each partner to bind the firm, is confined to the general scope of the partnership and the business, for the prosecution of which, it was formed; to this extent each member of the firm is considered as the lawful agent of the firm. All the authorities cited by the plaintiff's counsel proceed upon or recognize this doctrine. The limitation above mentioned is always carefully noticed. From the language of the contract, in relation to the duty assigned to *Pierce*, it would seem plain that the intention was that the stock or rags were to be collected either by an exchange of paper, or by funds produced by the sale of paper. In this mode the partnership business would be aided and advanced. As has been contended, the purchase of bales of factory cloth has no more connexion with the art and mystery of paper making and an establishment for the prosecution of that kind of business, than the purchase of any other sale-

able articles. Besides by procuring stock by disposing of paper, as mentioned in the contract, a purchase on credit would be unnecessary. But it is contended that none of the foregoing objections ought to avail the defendants, because the factory cloth went to the use of the concern, and the jury under the direction of the court have found that fact. The admission of the evidence on which the instruction of the Judge was conditionally predicated, was objected to at the trial; and its admission is one of the grounds of exception. The only evidence of the above fact is derived from the declarations of *Pierce* to the witness. They derive no legal character from the circumstance that the witness on the next day stated them to *Harding;* for he, so far from admitting their truth, said he knew nothing about the cloth, whether it went to the use of the company or not. The question then is whether those declarations were properly admitted to prove that the cloth did go to the use of the partnership concern. It is undisputed law, that in an action where two or more are jointly sued as copartners, as in the present case, the confessions of either cannot be admitted to prove the partnership. His confessions are only good against himself, but not against the other defendants. But when the asserted partnership has been proved, then the confessions of one, in relation to the partnership concerns, are legal evidence. The counsel for the plaintiff contends that the purchase of the cloth was a partnership concern, and within the scope of the business of the firm; and that if it was not, still it was appropriated to the use of the concern. The fallacy of the argument is, that it is wholly predicated on an assumed fact; and the consequence is that it proceeds in a circle. The counsel assumes the fact which he wishes to prove by *Pierce's* declarations, and then contends that, such being the fact, the declarations of *Pierce* are legal evidence to prove the fact. The language of the Judge in his instructions is this: "provided they were satisfied that the cloth went to the use of the concern, *Harding* was to be regarded as a partner, and liable for the payment of said note; and on that point they would consider *Pierce's* declarations as evidence against the defendants." Our opinion is that the foregoing

instruction was incorrect. Accordingly the exceptions are sustained, the verdict set aside, and a new trial granted, to be had at the bar of this court.

KAVANAGH *vs.* SAUNDERS *& al.*

From the time of the passage of *Stat.* 1822, *ch.* 209, to that of *Stat.* 1831, *ch.* 520, a debtor committed on mesne process, might be enlarged by giving either a bail bond for his appearance, or a bond conditioned not to depart without the exterior limits of the goal yard.

Where a debtor, committed on mesne process, reciting that he was then "a prisoner at the suit of *M. K.*," and conditioned that he would not depart out of the exterior limits of the goal yard, the description of the suit in the recital was held sufficient.

No bonds are held void for ease and favor, unless given to the sheriff or arresting officer.

If an officer, having a debtor lawfully in his custody on mesne process, require, for his enlargement, a bond containing more than is authorised by law, it seems that the debtor may be considered under duress, so far as respects such bond.

But if the debtor, in order to obtain his enlargement, voluntarily offers to the creditor other or greater security than the statute requires, and it is accepted; it becomes a valid contract between the parties.

The *Stat.* 1822, *ch.* 209, prescribing a mode in which an imprisoned debtor may obtain his liberation from close confinement, by giving a bond to the creditor, has not excluded all other modes; but has left the parties to adopt any other, not contrary to law.

Therefore where a debtor, committed on mesne process, gave bond to the creditor, conditioned not only that he would not depart without the exterior limits of the gaol yard, but also that he would "surrender himself to the gaol keeper, and go into close confinement as is required by law;" it was held that this last condition, not being required by the statute, did not vitiate the bond; and that being insensible and uncertain, it might be rejected, without affecting the validity of the residue as a statute bond.

THIS action, which was debt on bond, was submitted to the decision of the court upon a case stated by the parties, as follows.—

On the first day of *March*, 1830, the plaintiff sued out a writ of attachment against the defendant *Saunders*, by virtue of which he was arrested and committed to prison. The writ was returnable at *April* term. On the fourth day of *March* the debtor was enlarged, by giving to the plaintiff the bond now in suit; conditioned "that if the above bounden *John Saunders*, now a prisoner in the State's gaol in *Augusta*, within the county of *Kennebec*, at the suit of *Morris Kavanagh*, of *Hallowell*, in said county tailor, will not, from the time of the execution of this bond, depart without the exterior bounds of the gaol yard, until lawfully discharged, and will surrender himself to the gaol keeper, and go into close confinement as is required by law, then," &c. Soon afterwards, and before judgment in that suit, he left this State, into which he has never returned.

W. W. Fuller and *Bachelder*, for the plaintiff.

Evans, for the defendants.

PARRIS J. delivered the opinion of the Court, at a subsequent term.

The first point taken in the defence is, that the bond declared on is void, because it is not a bail bond authorised by *Stat.* 1821, *ch.* 67;—and the counsel have referred to the case of *Holmes v. Chadbourn* in this court, 4 *Greenl.* 10, in which it is stated in the marginal abstract to have been decided, that when a debtor, committed on mesne process, is enlarged on bond before the return day, the condition should be for his appearance at court, and not for his remaining within the debtors' limits.

The condition of the bond in that case was for the debtor's appearance, in the usual form of bail bonds given before commitment. The creditor had treated it as a bail bond under the Statute of 1821, *ch.* 67, by bringing *scire facias*, and pursuing his remedy under that statute, and the defendants admitted it to be such, and claimed the protection of the statute; and the court sustained it as a statute bail bond, and decided that a bond for the debtor's ap-

pearance at court might be taken, as well after commitment on mesne process as before; and repudiated the position, contended for by the defendants' counsel, that, after commitment, no bail could be taken for appearance at court, but only a bond for the liberties of the prison. But the court did not decide that, under such circumstances, the condition of the bond must necessarily be for the debtor's appearance at court, and that a bond, with a condition not to depart without the bounds of the gaol yard, would be illegal and void. To have thus decided, the court must have gone directly in the teeth of the Statute of 1822, *ch.* 209, *sec.* 4, which was in force at the time when the bond declared on in *Holmes v. Chadbourn* was given. By that statute, it is provided that "whenever any person who is or may be imprisoned for debt on mesne process, or execution, shall give bond to the creditor with one or more sureties, approved by the creditor, or two justices of the peace, *quorum unus*, in double the amount for which he is imprisoned, conditioned, that from the time of executing such bond, he will not depart without the exterior bounds of the gaol yard, until lawfully discharged, and if imprisoned on execution, further conditioned that he will surrender himself to the gaol keeper, and go into close confinement, as is required by law, the gaol keeper shall release him from close confinement, without requiring any other condition in such bond."

A similar statute provision had been in force in Massachusetts long before the separation, *Stat.* 1784, *ch.* 41, *sec.* 9, and continued as law in this State, until the general repealing act was passed in 1821, *ch.* 180, when the whole statute of 1784 was repealed. From the time when our repealing act was passed, which was *March* 21, 1821, until the time when the act for the relief of poor debtors was passed, on the 9th of *February* 1822, *ch.* 209, there was no provision for the liberating a debtor committed to prison on mesne process, except by giving a bail bond conditioned for his appearance at court. Since then and until the act for the abolition of imprisonment of honest debtors for debt, *Stat.* 1831, *ch.* 520, debtors, committed on mesne process, might be liberated by giving a bail bond, as was the case in *Holmes v. Chadbourn*;—or by giv-

ing a bond not to depart without the limits of the gaol yard, as provided in the 4th *sec.* of *stat.* 1822, *ch.* 209. The bond declared on in this suit cannot, therefore, be avoided for the reason that it was not given conformably to the act regulating bail in civil actions, *stat.* 1821, *ch.* 67.

It is further contended, that the description of the cause of arrest and commitment is imperfect, and that the same particularity of description is required in a bond for the liberties of the gaol yard, as in a common bail bond. The latter is given to the Sheriff by the name of his office, and for the party's appearance at the day; and upon non-performance of the condition by the avoidance of the principal, the judgment creditor has his remedy by *scire facias* against the bail. It is, therefore, necessary that there should be such minuteness of description in the bond, that it may therein distinctly appear in what suit it was taken, and for what the bail were answerable; that the bond might, with certainty, apply to that suit only. But the bond for the liberties of the gaol yard is given to the party, at whose suit the debtor is committed, and consequently there can arise no doubt as to the liabilities assumed by the obligors. They bind themselves to the creditor, that the debtor will not depart without the exterior bounds of the gaol yard, until lawfully discharged from that particular arrest. Their contract can apply to no other suit. If the principal observes the condition, the sureties are safe; if he break it, they may be liable to the creditor to the amount of his debt. But as that is not ascertained until judgment, it could not have been inserted in the bond. It is apparent from the instrument itself, that the principal obligor was a prisoner on mesne process at the suit of the plaintiff, and that fact is agreed by the parties; and also that the bond was given to procure his release, and that upon its being executed, he was set at liberty. It is not perceived that either the principal or sureties can be endangered, by reason of there not having been inserted in the bond a more full description of the suit, on which the former was arrested; and so long as it is not specially required, as necessary to the validity of the transaction, the bond is not considered mate-

rially defective on that account. Even in a bail bond, if the condition is, in effect, that the party shall appear, according to the design in the writ, it is sufficient; no set form of words is necessary.

It is also contended, that the bond is void, having been given for ease and favor. If it had been a bail bond, and given to the sheriff with any other condition than that for the appearance of the party at the return of the writ, the objection would have been unanswerable; the bond would have been void. The statute 23, *Hen.* 6, *ch.* 9, which has been adopted here as our common law, expressly declares it so. But it was early decided, and has been ever since held, that this statute is confined to obligations given to the sheriff, and does not extend to such as are given to or for the benefit of the plaintiff. As the bond under consideration was not given to the sheriff, it is not liable to this objection.

It is further contended, that the bond was given under duress of imprisonment, and for that cause is void. The principle of law applicable to this point is, that if a man be under illegal restraint of liberty until he gives a bond, he may allege this duress and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, gives a bond, this is not by duress of imprisonment, and he is not at liberty to avoid it. There is no pretence that the imprisonment of *Saunders* was illegal. It was under regular and valid process, founded on a good cause of action, and executed by an officer duly authorised for that purpose. Neither is there any evidence or circumstance in the case tending to show that he was required, either by the creditor or the officer who held him in custody, to procure such a bond as the one before us, as a condition of his discharge from imprisonment.

When a debtor is restrained of his liberty in due course of law, and offers such security as the statute requires, either as bail, or for the liberties of the gaol yard, the officer is bound to discharge him, and if he do not, the debtor has ample remedy. If the officer still hold him in custody, and, as a condition to his discharge, require more than the law authorises, the debtor may then, perhaps,

be considered as under duress, and if so, whatever he is compelled to do, to procure his release, beyond what the law requires, may be avoided. But if the imprisoned debtor, for the purpose of procuring his discharge, without any such compulsion, voluntarily offers to the creditor other or greater security than the statute requires, and it be accepted, it becomes a valid contract between the parties and may be legally enforced. Such is the character of the transaction under consideration. A debtor lawfully imprisoned, for the purpose of procuring his discharge, voluntarily offers to the creditor a bond which is accepted. The obligor, after having had the full benefit of the contract, must be bound by it. There is nothing like duress in the case.

The argument *ab inconvenienti*, against this mode of liberating from prison those who are committed on mesne process, would deserve much respect and consideration from those who have the power of modifying the law. The difficulties are fully stated in *Whiting v. Putnam*, 17 *Mass.* 175, referred to in the argument of the defendant's counsel. But it is to be recollected, that there are difficulties, which the debtor is not required to encounter. He may, by giving a common bail bond to the sheriff, avoid them all; and such a bond may be given at any time, as well after commitment on mesne process as before. If he and his sureties prefer the other course; if they choose to give bond for the liberties of the gaol yard, rather than for the debtor's appearance at court; if they prefer to incur the liabilities of the former rather than the latter course, why should they complain of the law or its administration? But although such a provision may be inconvenient, yet so long as it is law, it must be administered. The evil, if there were any, is however probably now remedied by the statute for the abolition of imprisonment of honest debtors, before referred to.

The only remaining question is, as to the effect of the second part of the condition upon the validity of the bond. The whole condition is, that *Saunders* will not depart without the exterior bounds of the gaol yard until lawfully discharged, *and will surren-*

der himself to the gaol keeper, and go into close confinement as is required by law.

By recurring to the 4th *sec.* of the *Stat.* 1822, *ch.* 209, before recited, it will be perceived, that the condition of this bond is such as is required of those who are committed on execution, and that in cases of commitment on mesne process, the words in italic are to be omitted. The law does not require, that the debtor, committed on mesne process, shall ever surrender himself to the gaol keeper and go into close confinement, after having once given bonds for the liberties of the gaol yard; but it does require, that the judgment debtor committed on execution and thus enlarged shall, under certain circumstances, surrender himself, as is provided in the 21st *sec.* of said act. The case shows that the commitment was on mesne process, and the error undoubtedly crept in through inadvertence. The counsel for the defendants contend, that the addition of the clause in italics renders the whole instrument void: and that, as the legislature have authorised arrests and imprisonment for debt, and also have prescribed the mode of release and the degree of personal liberty to which the debtor shall be entitled on certain conditions, common law principles have no applicability. So far as it respects the liability of the debtor's person to arrest, the mode of imprisonment and release, the principles of the common law are not to be applied, especially where the manner is pointed out by statute; but the validity of the bond, whether taken conformably to the statute or not, is to be tested by these principles. The statute has prescribed a mode by which an imprisoned debtor may obtain an enlargement from close confinement by giving bond for the liberties of the gaol yard, but it has not excluded all other modes of doing it. This statute was intended to secure the debtor against the oppression of the creditor, by prescribing the manner in which a release from personal restraint might be made certain, whether the creditor would or would not consent; but it has not, like the *Stat.* 23, *Hen.* 6, declared that a bond taken in any other form shall be void. It has left it to the parties to agree upon such other mode as they please, not however contravening the principles

of the common law. Whether the debtor obtain more indulgence or less, whether he agree to terms more or less onerous than the statute provides, are not circumstances by which the validity of his contract is to be conclusively tested. The case of *Winthrop v. Dockendorff*, 3 *Greenl.* 156, and the cases there cited, fully sustain this position.

It is true, that such is not the law relating to bail. But this depends upon the strong phraseology of the ancient statute above referred to, which has become our common law, and which in the language of another "made sure work of it, not leaving it to exposition what bonds should be taken; and therefore adding that bonds taken in any other form should be void." *Maleverer v. Redshaw*, 1 *Mod.* 35. Accordingly it has been decided, that the condition of such bonds must be for the appearance of the party, and for no other purpose, so that if there be any other condition expressed in the bond, or the bond be single without any condition, or be with an impossible one, the bond is void. 2 *Saund.* 60, *note* 3. In the condition of the bond before us we perceive nothing by which the whole instrument is to be avoided. The rule of law is, that if a bond be conditioned for the performance of a thing *malum in se*, or against a positive law, not only is the condition void, but the bond also; but if the condition be only to do a thing contrary to a maxim of law, the obligation is good. But here is nothing immoral or prohibited; nothing but what has been voluntarily assented to by the defendant, and in consequence of which the principal obligor has derived the expected benefit. The bond is therefore, not void in consequence of the insertion of the latter clause in the condition. To this point numerous authorities might be cited. Even where bonds are taken to public officers under statute provisions, and the conditions of the bond exceed the requisitions of the statute, it has been often decided, that the excess may be rejected as void, but that the bond shall remain good for the residue. In *Armstrong v. The United States*, 1 *Peter's Circuit Rep.* 46, *Washington J.* held, that when a statute bond is taken, it ought to conform, in substance at least, to the requisitions of the

statute; and if it go beyond the law, it is void, at least, so far as it does exceed those requisitions. That was a case where a bond was given by a collector of the internal revenue, under a statute of the United States, condititioned that the collector had accounted and would account for all taxes collected or to be collected. The court held the bond void so far as it related to collections made previous to its execution, but good for the residue. The same principle is recognized as law in *Greenfield v. Yeates*, 2 *Rawle's Rep.* 158. So in a recent case in 7 *Bing.* 423, *Collins v. Gwynne.* The action was on a bond given by a collector of taxes. By statute, the bond given to the commissioners by a collector of taxes is to be conditioned for demanding the taxes, enforcing the provisions of the act, and paying the sums collected to the receiver general. The bond, on which the defendant was sued, contained those conditions, and also a condition for accounting and paying to the commissioners. It was held that this latter condition might be rejected as surplusage, and did not avoid the bond. In the course of his opinion, *Tindal, C. J.* said, "if the condition had been solely to pay the commissioners, it would have imported an illegal act, and the bond would have been void. But it becomes unnecessary to consider that, because there is a separate condition, under which the obligor is to pay the receiver general. I cannot see why we are to call in aid a distinct condition, which may be illegal, to vitiate that which is clearly legal." So in the case of a probate bond, it was said by *Wilde J.* in delivering the opinion of the court in *Hall v. Cushing*, 9 *Pick.* 395, that "in an action on such a bond, the plaintiff cannot be entitled to judgment, unless the bond is conformable to the statute in all its material parts, and if more be added than the law requires, although it will not vitiate the whole bond, unless the matter be illegal, yet no breach can be assigned in any part of the condition not included within the requisitions of the statute." In all the cases to be found in the books, where bonds for the liberties of the gaol yard have been held not good within the statute but good at common law, the bonds did not conform to the statute in all their material parts; the imperative requisitions of

the statute were not complied with. In each of the cases of *Clap v. Cofran*, 7 *Mass.* 98; *Freeman v. Davis*, *ib.* 200; *Burroughs v. Londer*, 8 *Mass.* 373, the penalty of the bond was less than double the sum for which the prisoner was committed, and in this respect did not, in a material part, conform to the statute. *Morse v. Hodsdon*, 5 *Mass.* 314, was debt on a replevin bond, in which a material part of the condition required by statute was omitted, and a different and more onerous engagement substituted; and *Winthrop v. Dockindorff*, before referred to, was on a bond given when there was no existing statute upon the subject.

We are not, however, called upon in this case to decide whether a superadded condition, beyond what the statute requires, may be rejected as surplusage and leave the residue good as a statute bond, as we are satisfied that the latter clause in the condition of this bond is to be rejected upon a different principle.

The plaintiff has alleged a breach of the first part of the condition, and from the case it appears that this was broken soon after the execution of the bond. The debtor did depart without the exterior bounds of the gaol yard, not having been lawfully discharged. But suppose he had continued within the gaol yard until the rendition of judgment, and for thirty days thereafter, his body not having been taken on execution. He would then have been lawfully discharged. The *Stat.* 1821, *ch.* 110, *sec.* 5, expressly declares, that he shall be no longer held in prison upon such process. That portion of the condition, which is now alleged to have been broken, would, in the case supposed, have been fully kept. Will it be contended that under any circumstances an action could be sustained for an alleged breach of the residue of the condition, even if he had never surrendered himself to the gaol keeper, and gone into close confinement? How would the breach be assigned? That the obligor did not surrender himself, &c. as is required by law; and the answer would be that he could not do it, for there was no law requiring it. When would the condition be broken? Not until he neglected to do what the law required, for the surrender was only to be in conformity to law; and if a surrender was not re-

quired by law, then a neglect to surrender would not be a breach. Having been once liberated, the gaol keeper had no further power over him by virtue of his commitment on mesne process. He was not required, by law, ever to surrender himself and go into close confinement. It is true that in case a judgment should be rendered against him, and he should be committed on execution, and should under that commitment give bond for the liberties of the gaol yard, he would be required to surrender himself and go into close confinement, if not discharged, according to law, within nine months after having been first admitted to the liberty of the yard.

But it would be preposterous to suppose, that this bond could reach that case, or that the parties contemplated such a contingency.

If, in the case before us, the principal obligor had fully kept the first part of the condition, by not departing without the prison limits until lawfully discharged, it must have been a very extraordinary stretch of construction that could, under any circumstances, have held him liable for a breach of the residue. It is either uncertain or insensible, or it was impossible at the time of making it, and has continued so ever since. In either case, it has no legal operation upon the bond. If the words of a condition are insensible, the obligation shall be single. *Com. Dig. Obligation, E.* So if the condition of an obligation was impossible at the making, the obligation is single. *Com. Dig. Condition, D.* 8. If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain or insensible, the condition alone is void, and the bond shall stand single and unconditional, 2 *Blackst. Com.* 340. When a condition is so insensible and uncertain that its meaning cannot be known, it is void and the obligation must be performed. 5 *Dane's Abr.* 180, *sec.* 10. Such is precisely the case at bar. If the parties intended any thing by the clause under consideration, it is so obscurely expressed as to be impossible to ascertain it. Probably nothing was intended; that it was inserted by mistake; or rather, through inadvertence, was not obliterated from a printed

blank prepared for a different case. This suggestion is, however, not to influence our judgment. We must take the bond as it is, and ascertain the meaning of the parties if we can; and that intention, when ascertained, is always to be chiefly regarded. But if the parties make use of language, which conveys no meaning, it consequently can have no effect. An instrument good without it, is not vitiated, void without it, is not aided by its insertion. If the whole condition be insensible, the bond is relieved from its double character, and becomes absolute. If the condition is in the conjunctive, and one branch is sensible, certain and possible, and the other not, it is a good condition for performing the former, and the latter is to be wholly disregarded. *Cro. Eliz.* 780; 2 *Jac. Law Dict. Condition II.*

These are common law principles; but as was said by the court in *Winthrop v. Dockendorff*, they are those by which this and every bond are to be construed. Whether they be bonds at common law, or statute bonds, the same principles apply to each.

By thus relieving this bond from the latter clause in the condition, it becomes strictly conformable to the statute, and, as the alleged breach is admitted by the defendants, the plaintiff is entitled to judgment.

Hall & *al.* *vs.* Williams.

In debt on a judgment of the Superior Court of *Georgia*, the defendant pleaded in abatement that the judgment was rendered against him and another, who was still living, at *Boston* in *Massachusetts*; and on demurrer the plea was held ill; for that the other living out of the state, the action was well brought against the one alone.

In such action the absent defendant should be named in the declaration, as party to the record declared on, to avoid the effect of a plea of *nul tiel record*.

Where a judgment is declared on, without a *profert*, no *oyer* can be had.

This was an action of debt on a judgment, as rendered against the defendant alone by the Superior Court of *Chatham* county in the State of Georgia; and brought originally in this Court; but no *profert* was made of the record. At a former term the defendant prayed *oyer* of the record declared on; which the plaintiffs resisted, on the ground that *oyer* was not to be had where there was no *profert*; and that no *profert* need be made of a record, which was equally accessible to both parties. 1 *Chitty's Pl.* 352, 416, 417; 1 *Saund.* 9 *b. note* 1; 1 *Ld. Raym.* 250, 347; 1 *D. & E.* 149. And the Court denied the motion.

The defendant then pleaded in abatement that the judgment was rendered against himself and one *Abijah Fisk*, jointly; and that the latter was still living, in *Boston*, in the Commonwealth of Massachusetts. The plaintiffs replied that the judgment was rendered against *Williams* alone, and not jointly against him and *Fisk*. The defendant rejoined, setting forth an attested copy of the record, by which it appeared that process was issued against *Fisk* and *Williams*; that the former was not to be found; that service was made on *Williams*, *May* 4, 1824; that the latter appeared by attorney and pleaded that he never promised; the plea being filed *July* 15, 1824; that on the 11th of *Jan.* 1825, the jury found for the plaintiffs; upon which judgment was entered against both defendants, *Feb.* 12, 1825; and that afterwards, on the 19th of *Jan.* 1829, on motion of the plaintiffs' attorney, notice of which had been previous-

ly served on Mr. *Gordon* the attorney of record to the defendant *Williams*, it was ordered that the judgment be amended, and that the plaintiffs have leave to enter judgment *nunc pro tunc* against the latter alone, which was done ;—and thereupon the defendant alleged that *June* 1, 1824, he removed from *Georgia* to *Maine*, leaving no property in that State ; and that he had had no agent or attorney there since *Feb.* 12, 1825, when the judgment was rendered. The plaintiffs surrejoined that the defendant was served with process, and made an attorney, by whom he contested the suit, as above stated ; and that he had never discharged his attorney, or caused his authority to cease. To this the defendant answered, by rebutter, that his attorney was retained no longer than during the pendency of the action ; which was terminated, and judgment rendered therein, *Feb.* 12, 1825. To which the plaintiffs put in a general demurrer.

The case was argued in writing, by *Sprague & Robinson* for the plaintiffs, and *Allen* for the defendant ; but as the arguments turned chiefly upon the form of the pleadings, the right of the court in *Georgia* to amend the record of judgment, and the effect of the amendment when made, it is unnecessary to report them, the decision being made on other grounds.

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

This cause has been ingeniously argued by the counsel on both sides ; but the ground on which we place our decision, renders a particular examination of the authorities they have cited, and the arguments they have urged, in our opinion unnecessary. The principle is a very familiar one, that in deciding upon demurrer, the court will trace back the pleadings, and ascertain which party has committed the first fault. We need only examine the plea and declaration. The plaintiffs declare on a judgment which they allege that they recovered against the defendant, in the superior court of the State of *Georgia*. The defendant pleads in abatement that it was recovered against him and *Abijah Fisk* jointly, and not against him alone, and that said *Fisk* is still living at *Boston*, in the Commonwealth of *Massachusetts*, and of course ought to have been

named in the writ and declaration. Is this a good plea? A plea must be good when pleaded; but if then bad, and must have been so pronounced, had it been demurred to, it is equally bad and must be pronounced so, though the demurrer be to the last stage in the pleadings. In *U. States v. Arthur*, 5 *Cranch*, 257, *Marshall C. J.* says, " the want of oyer is a fatal defect in the plea ; and the court cannot look to any subsequent proceedings ; the plea was bad when pleaded." Without looking to any of the facts disclosed in the rejoinder, and considering the judgment as now remaining in the same form in which it was entered, against *Williams* and *Fisk* jointly, does the plea contain matter sufficient in law to abate the writ ? Had the defendant pleaded in bar that there was no such record as that on which the plaintiffs had declared, a very different question would have been presented, which the plaintiffs must have answered. The principle of law is, that a plea in abatement is to be construed strictly. The plea states that *Fisk* should have been named in the writ and declaration as one of the judgment debtors. So he should have been in order to prevent the plea of *nul tiel* record ; but, as against the plea in abatement, the insertion of the name of *Fisk* was of no importance. Suppose it had been so inserted, the writ could not have legally been served upon him, because he was an inhabitant of *Massachusetts* at that time ; and it is not averred in the plea that he had any property, agent or attorney within this State. The plea states that the plaintiffs' judgment is a joint one against him and *Fisk*. Be it so. How can the plaintiffs commence an action against *Williams* and *Fisk* jointly, they being inhabitants of different states ? This is not a new question. In *Tappan v. Bruer*, 5 *Mass.* 193. *Parsons* C. J. in delivering the opinion of the court observes : " It has been an immemorial practice, in the service of a writ sued on contract against two or more defendants, if some of them are without the jurisdiction of the Commonwealth, so that their bodies cannot be arrested, and having no usual place of abode within the State at which a summons may be left, to cause the writ to be served on the defendants within the State, and to proceed against them for breach of the contract by all

the defendants. This practice originated from necessity, as no mode of service is provided by our laws upon a debtor without the state, who has no place of abode or property within it." In the case of *Dennett v. Chick*, 2 *Greenl.* 191, this court has adopted the same principle in its full extent and acted upon it, and we are perfectly satisfied with that decision. In our opinion, these cases settle the present cause, assuming, as the defendant in his plea assumes, that the judgment is still a joint one against the defendant and *Fisk*, then, according to the doctrine relied on by his counsel, no action on that judgment can ever be maintained, because the judgment debtors choose to live in different states, and are not amenable to the same tribunal. The plea, to use technical language, does not give the plaintiffs a better writ. If in the present action the plaintiffs had declared upon a judgment alleged to have been recovered against *Williams* and *Fisk* jointly, and the defendant had pleaded in abatement the non-joinder of the two judgment debtors as defendants and the plea had contained the same averment it does now as to the life and place of habitancy of *Fisk*, it must have been adjudged insufficient, according to the foregoing decisions ; and surely it is not of a different character, merely because it discloses the existence of a fact, which, if alleged in the declaration, would have furnished no objection to the maintenance of the action. In thus deciding the insufficiency of the plea, we at the same time decide the declaration to be good. The demurrer is overruled, and a *respondeat ouster* awarded.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF SOMERSET, JUNE TERM, 1832.

ADAMS *vs.* GOULD *& al.*

A sheriff, being liable to answer for certain defaults of his deputy, and being insolvent, delivered over to his own sureties, who had already suffered damage, the deputy's official bond, with authority to put it in suit, and apply the money to their own indemnity. They appointed one of their number as agent to defend all suits which might be brought against them, and pay such demands as he might judge advisable. The deputy's bond was then put in suit, and judgment rendered for the whole penalty, and execution awarded and issued for a lesser sum, being the amount of damages for existing breaches. Upon payment of this lesser sum by a friend of the deputy, to the agent, the latter assigned to him the judgment, designated only by the names of the parties and the term in which it was rendered.

Hereupon it was held that the authority granted by the sheriff was not sufficient to authorize a discharge of the whole penalty of the bond, unless it was necessary for their indemnity, which was not the present case;—and that if it were, yet the agent had no sufficient authority to assign the judgment.

Where judgment is rendered for the whole penalty of a bond, to stand as security against farther breaches; and upon a hearing in chancery a decree is made, that execution be issued for a lesser sum, being the amount of existing damages; and the plaintiff, in consideration of the payment of this sum, releases "the judgment" without more saying;—*quære* whether the release extends beyond the judgment or decree in chancery, for the lesser sum.

THIS was a *scire facias* brought in the name of the late sheriff of this county, to have further execution of a judgment rendered upon

the bond of one of his deputies ; and was sued out in behalf of the sheriff, in his official bond to the Treasurer of the State.

It appeared that the sureties of *Adams* had suffered for his defaults, occasioned by those of *Gould*, and that for their indemnity he had delivered over to them the bond of *Gould*, with a written assignment, not under seal, authorizing them to put it in suit, to apply whatever monies they might collect to their own use, until fully indemnified, and to " discharge the execution." These sureties, ten in number, constituted *James Dinsmore*, Esq. one of them, as agent for the whole, " to defend all such suits as might be brought against them as the bondsmen of *Adams*, employ attornies, and pay such demands as he in his judgment should think advisable ;" agreeing to reimburse him for their proportion of such monies as he should expend, and for his services. This writing was not under seal. The bond of *Gould* was then put in suit, and his property attached sufficient to satisfy the first execution which was ultimately awarded upon the judgment ; for which property one *David Gilman* gave his receipt to the attaching officer. Upon the issuing of that execution, *Gilman* gave his promissory note to *Dinsmore* for the amount; taking his assignment under seal, in these terms :—" In consideration of a note signed by *David Gilman* for the sum of $333,20, payable in six months and interest, I hereby assign over and transfer to the said *Gilman* a judgment obtained in the Supreme Judicial Court in and for the county of *Somerset*, *June* term 1828, in favor of *Benjamin Adams* against *Joshua Gould* and others ; hereby authorizing the said *Gilman* to collect the same for his own use and benefit, without recourse to me or to said *Adams* for the payment of debt or costs. Witness my hand and seal. *James Dinsmore*, agent for *Adams* and bondsmen." On the back of this instrument *Gilman* executed a regular release of the judgment to *Gould* and his bondsmen.

The defendants relied upon these transactions as constituting a discharge of the entire judgment rendered for the penalty of the bond. But it was insisted on the other side that the sureties of *Adams* had no authority to transfer the judgment to *Gilman ;* and

that if they had, yet they in fact had only assigned to him the amount for which execution had then been awarded. The jury were instructed by *Weston J.* before whom the cause was tried, that the defendants were not discharged, if they were satisfied that only the amount for which execution was obtained, was assigned, or intended to be assigned. And they found for the plaintiff; the points raised at the trial being reserved for the consideration of the Court.

Allen, for the plaintiff.

Boutelle, for the defendants.

WESTON J. delivered the opinion of the Court.

The defendants claim to be released and discharged from the judgment, upon which this suit is brought, by the party to whom the same had been assigned. To this defence, two objections are made. First that Mr. *Dinsmore*, the party making the assignment, had no authority from the plaintiff so to do. And, secondly, that the instrument, relied upon as an assignment, transferred a former execution only, and not the judgment. The authority of *Dinsmore* is derived from the plaintiff to his sureties, and from them to *Dinsmore*, as their agent. The power, which the plaintiff executed, recites that his sureties had been called upon to pay money for the default of *Joshua Gould*, his deputy, and he thereupon authorizes them to put his bond in suit, against him and his sureties, and to apply whatever money might be collected thereon to their own use, until fully indemnified. For which purpose, he thereby assigned and delivered over the bond to the sureties. The purpose was a limited one. They were to avail themselves of the bond only for the collection of such sums as might be wanted for their indemnity. It contains no authority to discharge the bond, or to discharge or assign the judgment for the penalty, which might be rendered thereon. In this the plaintiff might have an interest, beyond what was wanted to reimburse the sureties.

The instrument, given by the sureties to *Dinsmore*, appoints him agent to defend, at their joint expense, such suits as had been, or

might be, brought against them, by reason of their having become sureties for the plaintiff. And it contains no other authority. The release therefore cannot have the effect to discharge the defendants, for the want of authority in *Dinsmore* to assign the judgment.

But if he had such authority, it is by no means clear, that the judgment for the penalty was necessarily assigned, by the language used. In a suit on a bond, conditioned to indemnify the obligee or save him harmless from certain liabilities, judgment is technically rendered for the whole penalty, to stand as security for existing or subsequent breaches. But there is a further order or judgment of court that the plaintiff have execution for a sum then liquidated, being a part of the penalty. Now we are not satisfied that the term judgment, used in the instrument of assignment, is by law so exclusively appropriated to the technical judgment for the penalty, as to be beyond the reach of all explanatory testimony. If not, the coincidence between the sum paid by the assignee, and the amount of the execution, and the fact that he could have no just claim upon the sureties beyond that amount, satisfied the jury, and we think fairly, that the judgment assigned was that rendered in chancery, determining the sum for which execution should issue. But it is unnecessary to decide upon this point, as we are all of opinion that the sureties of the plaintiff had no authority to assign the judgment for the penalty.

Judgment on the Verdict.

JUDKINS *vs.* LANCEY.

Where an agent, appointed by parol, paid the money of his principal to the creditor of the latter, in part payment of the debt; but took the creditor's receipt and promise in writing to account for the money to the agent himself; and the creditor afterwards demanded and received payment of his whole debt from the debtor, without any deduction or allowance of the sum thus paid;—it was held, in an action brought by the principal against the creditor to recover back this sum, that the agent was a competent witness to prove the fact of his appointment, the extent of his authority, the terms of the contract with the creditor, and that his agency was known to the latter.

Held further,—that this testimony did not fall within the class which is inadmissible as contradicting the terms of a valid written contract, but it went to show that the writing was of no force when made, for want of authority in the agent to make it.

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

The plaintiff, at the trial below, offered his son *E. H. Judkins*, as a witness; who testified that in *October*, 1828, he let the defendant have a promissory note against one *Young* for something more than twenty dollars, which he had received for the price of a yoke of the plaintiff's oxen, sold by himself to *Young*; that the defendant paid him for part of the value of the note, leaving twenty dollars still due; which they agreed should be accounted for or allowed in part payment of a larger sum due from the plaintiff to the defendant, by promissory note, which became due in *January* following. He also testified that he acted in the whole matter as the agent of the plaintiff; that the oxen were sold to *Young* by the plaintiff's directions, in order to provide funds to meet the payment of his note due to the defendant; that the capacity in which he acted was known to the defendant; and that the latter gave him a receipt for the twenty dollars, which he had delivered over to the plaintiff. This receipt being called for, was produced; and ran

thus: "Received of *E. H. Judkins* twenty dollars in a note against *Samuel Young*, and agree to account to him for the same in sixty days." It appeared that the defendant had subsequently demanded and received of the plaintiff the full amount of his note, without deducting the twenty dollars.

The counsel for the defendant objected to the admission of this testimony to vary or control the terms of the receipt. But the Judge admitted it; and instructed the jury that if they believed that the defendant knew that the note against *Young* was the property of the plaintiff, and that *E. H. Judkins* was his agent; and if they also believed the testimony of the witness respecting his agreement with the defendant, the plaintiff was entitled to recover. To which the defendant excepted; the jury having found for the plaintiff.

H. Warren, in support of the exceptions, argued that the receipt was, in effect, a promise to pay money; not a mere acknowledgment of having received it; but an agreement to account for it by a fixed day; and that it was plain and unambiguous. The testimony of the plaintiff's son went to contradict this written contract, and destroy its effect, by substituting another contracting party, and thus depriving the defendant of his right of set off; in violation of a well settled rule of law. *Stackpole v. Arnold*, 11 *Mass.* 27; *Mayhew v. Prince*, *ib.* 54; *Arfridson v. Ladd*, 12 *Mass.* 173; *Delande v. Amesbury Man. Co.* 7 *Pick.* 244; *Brown v. Gilman*, 13 *Mass.* 161; *Small v. Quincy*, 4 *Greenl.* 497.

Allen, for the plaintiff, cited *Lyman v. Clark*, 9 *Mass.* 235; *Ford v. Clough*, *Lincoln*, *May* term, 1832; *Wilkinson v. Scott*, 17 *Mass.* 249.

Parris J. delivered the opinion of the Court at the ensuing term in *Penobscot*.

The nature of the transactions in which agents are engaged, being frequently such that the contracts they make for others cannot be proved without the agent's testimony, they are considered as competent witnesses on the ground of necessity. It is the constant practice to admit them to be witnesses for their principals, in order

to prove contracts made by them; and every person who makes a contract for another is an agent within the meaning of the rule. 1 *Phil. Ev.* 99. By their own testimony they may prove their agency, excepting where the appointment was in writing; and, with few exceptions, may be called as witnesses generally, either for or against their principals. *Fisher v. Willard*, 13 *Mass.* 379; 2 *Stark. Ev.* 54.

Ebenezer H. Judkins was, therefore, a competent witness. By his testimony it was proved that the oxen sold to *Young* were the plaintiff's, and were sold by his direction to raise money to pay the defendant's note; that the defendant received the note against *Young*, knowing that it was the plaintiff's property, and with the full knowledge that the witness acted as the plaintiff's agent.

It is incumbent on a party dealing with a special agent to inquire and ascertain the extent of his authority. *Chitty on Contr.* 58; *Schimelpennick v. Bayard*, 1 *Pet.* 290. Now whatever might have been the tenor of the defendant's promise, whether to account with the plaintiff or the witness, if the *Young* note was actually the plaintiff's property and the defendant knew it, and also knew that it was entrusted to the witness as an agent appointed for the special purpose of negotiating with the defendant in payment of his note against the plaintiff, the defendant could not acquire an interest in the *Young* note in any other manner than that prescribed to the agent by his principal. An agent constituted for a particular purpose and under a limited power cannot bind his principal, if he exceed his power. It is well settled law that whoever deals with such an agent, deals at his peril, when the agent passes the precise limits of his power. 2 *Kent's Com.* 484. Any contract, therefore, which the defendant might have made with the plaintiff's agent, could not so avail him as to defeat the plaintiff's rights. Even a note taken in the name of the agent, if identified as taken for the goods of the principal, may be recovered by him as his property. *Thompson v. Perkins*, 3 *Mason*, 241.

It has been shown that the witness was competent to prove his agency, and if so, then to prove whether it was general or special.

He was also competent to prove that he notified the defendant of his agency and its character, and of the plaintiff's interest in the note; and when once these facts are established, as they were, no arrangement which the agent and defendant could make would divest the plaintiff of his interest in the note, unless such arrangement conformed to the power under which the agent acted.

The principle recognized in the cases cited by the defendant's counsel is that where one contracts as agent for another, if he would avoid being personally liable, the contract itself must shew the character in which he contracts, and that he does not intend to bind himself. But no case has been cited which sanctions the contract of an agent made in violation of his authority to the prejudice of his principal, where the person contracted with had knowledge that the agent's powers did not authorize such contract.

It is to be kept in mind that this action was not brought on any written contract, and that no attempt was made to vary or explain such a contract by parol evidence. The parol evidence was offered to prove the plaintiff's property in the *Young* note, that the witness was the plaintiff's agent, the character and extent of the authority with which he was invested, and that the capacity in which he acted was known to the defendant. These facts might be inconsistent with the contract actually made between the witness and defendant, but they go not to vary or explain that contract, but only to show that the witness was not authorized, as the plaintiff's agent, to make it. The receipt was offered in evidence by the defendant, and so far as it had a tendency to contradict or throw suspicion on the testimony of the witness it was properly offered, but that it could uncontrollably bind the rights of the plaintiff is not admitted.

The decision of *Snow v. Perry*, 9 *Pick.* 539, depended upon principles applicable to this case. *Perry* sent bank bills by a special agent to pay *Snow* a note which he held against *Perry*, with directions to the agent to see them endorsed on the note or take a receipt for the same. The agent took *Snow's* receipt promising to endorse the bills on the note, or return them when called for. The agent was permitted to testify that *Snow*, who was from home when

he received the bills, promised to endorse them on the note when he should return home at evening. The court held that the agent, in taking a conditional receipt, exceeded his authority, and that the acceptance of the bills by *Snow* was to be considered as payment of the note.

In the case at bar, the receipt was surely calculated to produce doubt of the correctness of *Ebenezer H. Judkins's* testimony relating to the particular agreement between him and the defendant, and consequently to weaken the force of his testimony upon other points. But the Judge submitted all these considerations to the jury, where they properly belonged. His instructions were even more favorable for the defendant than he could have properly requested. The jury were instructed, substantially, not to find for the plaintiff unless they believed the defendant knew that the note against *Young* was the property of the plaintiff, and that *Ebenezer* was acting for and as agent of the plaintiff, and also believed the testimony of *Ebenezer* as to his agreement with the defendant. If there be any cause to complain of the instructions of the Judge, it is with the plaintiff, for the latter clause, from which the jury might, perhaps, infer that the plaintiff would be bound by the agreement between his special agent and the defendant, although the latter knew that the former had exceeded his authority and violated his trust.

It is not our business to reconcile the discrepancy in the testimony, or inquire into the nature of the transaction between the witness and the defendant. Whether the former has testified erroneously as to the owner of the oxen and the *Young* note, his agency and the arrangement with the defendant; or whether the receipt was improperly drawn by the defendant for the purpose of accomplishing some object not disclosed in the case, we are not called upon to decide.

The witness has testified apparently against his own interest, and proof of his testimony will protect the defendant from any action that the witness may bring on the receipt; the jury have believed him, and we do not perceive any legal ground for disturbing their verdict. *The exceptions are overruled.*

JEWETT *vs.* GREENE.

If the plaintiff would avoid the bar of the statute of limitations, by having seasonably sued out process which failed of service through inevitable accident in the transportation by mail; it is incumbent on him to show that he previously ascertained the course of the mail, and that a letter enclosing the precept, and properly directed, was put into the post office sufficiently early to have reached the officer, by the ordinary route, in season for legal service.

The plaintiff is not bound, in such case, to send to the nearest officer; but is at liberty to send to any one within the county or precinct.

The eleventh section of the statute of limitations, 1821, *ch.* 62, which saves the remedy where the suit has been actually declared in, but the writ has casually failed of service, applies only to the actions mentioned in the eighth section, which are limited to six years.

If therefore, a suit against the sheriff for default of his deputy, which, by the sixteenth section, is limited to four years, is not commenced within the time mentioned in the statute, though the writ fail of service by inevitable accident, the remedy is gone forever.

THIS cause came up by exceptions filed by the plaintiff to the opinion of *Ruggles J.* in the court below. It was an action of the case against the late sheriff of the county of *Lincoln*, for the default of his deputy in not serving nor returning an execution, issued on a judgment recovered in the Common Pleas in this county. The defendant pleaded the general issue, and the statute of limitations applicable to actions against sheriffs for this cause. The plaintiff replied that a prior action had been commenced within the four years mentioned in the plea; and that the writ was sent to an officer for service; but that through inevitable accident it was not received by the officer in season to be served for the term at which it was returnable; and that the same writ was duly altered for the then next term of the same court. This replication was traversed; and issue taken thereon.

The execution was issued *July* 2, 1825, returnable in three months; and was proved to have been in the hands of the deputy in the course of that summer, who demanded payment of the debtor; but it was not returned till the term in which the present action

was tried. The writ in this case bore date *Feb.* 4, 1830. The coroner, who resided in *Dresden*, testified that the original writ in this case was sent to him in a letter from the plaintiff's attorney, postmarked at *Norridgewock*, Oct. 14, 1829; but was not received by him in season for service for the ensuing *November* term, to which it was returnable; wherefore he sent it back; and afterwards received it again, altered for *March* term 1830, to which he returned it duly served. He further stated that the mail came to *Dresden* only once a week; that there were two post offices in the town; and that letters sometimes came directed to the wrong office, which occasioned considerable delay.

The only evidence of the date of the original writ was derived from inspection of the writ itself, the date of which had been partly erased and altered; and from comparison of the writing, which was that of the plaintiff's attorney, with other writings proved or admitted to be his. The attorney himself was offered as a witness; but was rejected, being interested as indorser of the writ in the present suit. He then offered to make affidavit that the date was originally *Sept.* 4, 1829, and was afterwards altered to *October;* but this was not admitted.

Hereupon the counsel for the defendant contended that there was no competent evidence tending to prove the time when the first "action was actually declared in, and the writ therein purchased;" that the date of the first writ, if proved, would not be legal evidence of those facts; that there was no evidence of the date of that writ, except what was derived from the deposition of the coroner, which only proved its existence *Oct.* 14, 1829, which being the earliest time it was proved to exist, must be taken, in default of other proof, as the day it was actually made and purchased. He also contended that here was no evidence of any unavoidable accident by which the first writ failed of service; and that it failed only by the negligence of the plaintiff in not sending it to an officer in season. And the Judge was requested to instruct the jury on these points.

But the Judge instructed the jury that they might consider the default, if any, to have taken place from and after the return day

of the execution, which was *Oct.* 2, 1825; that the plaintiff must satisfy them that the first writ was made prior to that day; and that if from inspection of the writ, and from the other evidence in the case, they should be satisfied that the writ was so made, and was returnable to the then next court in this county; that it failed of service through inevitable accident, or the neglect of the coroner to whom it was directed; and that it was duly altered within three months after the term to which it was returnable, and was then made returnable to the next succeeding term, at which it was duly entered and prosecuted; they might consider the statute of limitations as thereby saved, and find for the plaintiff:—That if they were satisfied, from the same evidence, that the writ bore date, as suggested by the plaintiff's counsel, *Sept.* 4, 1829, at the time it was first sent to the officer for service, the date was *prima facie* evidence that it was made and declared in on that day.

And that if the first writ was inclosed and forwarded by the mail for service, a reasonable time before the setting of the court to which it was returnable; and the attorney who sent it had a reasonable and well founded expectation of its being received by the officer in season for service; but it was not so received; this was evidence of an unavoidable accident, within the meaning of the statute; and they would determine from the evidence whether it was so inclosed and forwarded.

To which the defendant excepted; the jury having found for the plaintiff.

Allen and *W. W. Fuller*, in support of the exceptions, to the admissibility and effect of the evidence, cited *Brigham v. Esty*, 2 *Pick.* 420; *Ilsley v. Stubbs*, 5 *Mass.* 280; *Tidd's Prac.* 90, 293; 3 *Stark. Ev.* 1403;—that here was no evidence of the date of the writ, 2 *Stark. Ev.* 888, 889, *note*;—that it was for the court, and not the jury, to determine whether the delay was unavoidable or not; 1 *Stark. Ev.* 415, 416, *note (t.)*; *Attwood v. Clark*, 2 *Greenl.* 249;—and that the saving clause in the statute applied only to actions of debt founded on a lending or contract, and not to suits against sheriffs, *Cook v. Darling*, 2 *Pick.* 605.

Tenney, for the plaintiff, argued that the evidence of the date was properly left to the jury, and that they were right in presuming the apparent to be the true date; 1 *Stark. Ev.* 284. The failure of the service presented a question, not of reasonableness or unreasonableness of delay in the plaintiff; but of accident or no accident; which was purely a question of fact, and therefore properly submitted to the jury. 1 *Stark. Ev.* 412, 417, 424; *Brier v. Woodbury*, 1 *Pick.* 368. And he contended that the saving clause in the statute extended to all actions of the case, for whatever cause they might be brought.

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

PARRIS J. The statute having been pleaded in bar it is incumbent on the plaintiff to remove the bar. He contends that his case comes within the class of cases provided for in the 11th section of our limitation act. If so, and he has shown that the first writ failed of a sufficient service by unavoidable accident he is entitled to judgment. We will first consider the proof of accident. If the plaintiff relies upon accident arising from irregularity or miscarriage of the mail, he must shew that his letter was put into the post office sufficiently early to reach the officer to whom it was directed in season for service by due course of that mail by which he sends. Through some parts of the county of *Lincoln*, the mail passes every day. It does so through *Bath*, where the defendant resides, and through other towns which are as near his residence as *Dresden*. If, from any consideration, the plaintiff saw fit to send his writ for service to an officer in *Dresden* or any other town in the county, even the most remote, he had a perfect right to do so, and is not to be prejudiced thereby, provided he sent it in such season as that by the due and usual course of the mail to that town the precept would reach the officer sufficiently early for legal service. This he must show as a necessary link in the chain of evidence to prove the accident; for if the letter was not seasonably put into the

office, then its non-arrival cannot, by the party sending it, be attributed to unavoidable accident.

From the exceptions it appears that the letter was post marked *Oct.* 14, which was Wednesday. Whether it left *Norridgewock* on that day, or was then received at the office and sent by the next mail, does not appear; probably it was sent on that day. The time of service for the court to which the writ was returnable expired on the next Tuesday. To establish the fact then that it was seasonably deposited in the office he must shew that a letter put in at *Norridgewock* on Wednesday, as this was, would, by due course of the mail, arrive at *Dresden* sufficiently early to enable an officer, after receiving it there, to make service of a precept in *Bath*, before the expiration of the Tuesday next ensuing; for unless that fact be proved, the legal inference from what does appear in the case is, that the delay in receiving the letter is attributable to the omission of the plaintiff or his attorney to put it seasonably into the post office, rather than to any accident growing out of the irregularity or failure of the mail.

This presumption arises from the want of proof, on the part of the plaintiff, to show how the fact was, and which, easily obtainable as it was, he would not probably have neglected to procure, if such proof would have made in his favor. The exceptions do not show that this fact was established either directly or by any inference that can be drawn from the testimony. On the contrary if the mail arrived at *Dresden* on Wednesday in each week it is certain, or if on Tuesday it is probable, that the letter containing this writ could not have reached there in season for service. On what day it did regularly arrive does not appear by the exceptions. As the exceptions purport to give all the evidence in the case, and as upon the point under consideration there was no conflicting testimony, we are called upon to decide as a question of law, whether the proof offered by the plaintiff, standing uncontradicted, as it does, supports the allegation of unavoidable accident; and we have no hesitation in saying that it does not. The writ may have failed of service from that cause, or, what is more probable from the facts proved, the failure is attributable to the plaintiff's neglect. He has not shown

the former, and the law requires him to do it even before the defendant is to be called upon to support his defence.

The statute protects the sheriff, generally, from all actions for the misconduct and negligence of his deputies, unless commenced and sued within four years next after the cause of action, and that protection must avail the defendant in this case, unless the plaintiff can avoid it by establishing the facts alleged in his replication, and by showing that his case comes within the exception. It is not sufficient that he merely allege the facts. On him rests the burthen of proving them. He asserts that the first writ was made on the 4th of *Sept.* If so, it remained in his hands, or his attorney's from that time to the fourteenth of *October*, a period of nearly six weeks, and until less than one week previous to the expiration of the time of service for the court to which it was returnable. It was then sent to an officer residing in a town where the mail arrives but once a week: and without showing that by due course of mail it could have possibly reached the officer in season for service, and when, from his own testimony, it is apparent that he might not, he calls upon the jury to say that it failed of service by unavoidable accident. Such a procedure cannot comport with either the letter or spirit of the statute. If the mail performed its usual course, and the letter was conveyed without miscarriage, but did not reach *Dresden* in season for service, how can the failure be attributable to accident, or how can the plaintiff's well founded expectations of its arrival have any bearing upon the question of accident?

It was incumbent on him to ascertain the course of the mail, and at his peril to send his writ in such time as that, without miscarriage, it would arrive in season. But further, the four years expired on the second of *October*, and yet, according to the plaintiff's statement, notwithstanding the writ had then been made four weeks, he continues to keep it in his possession nearly two weeks longer before he transmits it to the officer. If he had shown that there was then time for it seasonably to reach the officer by the conveyance which the plaintiff selected, he would not be chargable on account of the previous delay. But, inasmuch, as he neither does or attempts to show this, the presumption is that it failed by reason

of not having been seasonably put into the post office; and without any evidence to rebut that presumption, and there was none, the defendant might well ask that the jury should be instructed that there was no evidence of unavoidable accident by which the first writ failed of service.

But if the facts alleged in the plaintiff's replication had been abundantly proved, we are of opinion that they do not avoid the plea. By recurring to the statutes of Massachusetts, it will be perceived that our general statute of limitations is made up of several statutes of the Commonwealth, passed at different times, and applicable to different kinds of suits. The 8th and 11th sections of our statute are copied *verbatim*, or nearly so, from the Massachusetts statute of 1794, which relates solely to actions of the case or of debt grounded upon any lending or contract declared in within the term of six years next after the cause of action accrued. This statute was limited in its application to actions arising *ex contractee*, and the first section provides what shall be deemed the commencement of such an action. By other statutes the limitation was so extended as to embrace personal actions of almost every description, limiting their commencement to different periods after the cause of action arose, but omitting the declaratory provision, as to what should constitute the commencement of an action, contained in the first section.

Upon a revision of the statutes by our Legislature, section 7th is made to include all or nearly all actions of a personal nature, including those arising *ex delicto* as well as *ex contractee*; and the provision that the actions "shall be commenced and sued within the time and limitation expressed," applies to all actions whether of *tort* or contract. Then follows the 8th section, which provides what shall be deemed and taken to be the commencement and suing of an action of the case or of debt grounded upon any lending or contract, viz. declaring in a proper writ, returnable according to law, purchased therefore within the term of six years next after the cause of action accrued; and the 11th section, which contains the saving clause on which the plaintiff relies, provides that any action which shall be actually declared in as aforesaid (that is, in a proper

writ, returnable according to law, purchased therefor within the term of six years next after the cause of action accrued,) and in which the writ purchased therefor shall fail of a sufficient service or return by any unavoidable accident, &c. then, and in any such case, the plaintiff or plaintiffs or his or her executor or administrator, may commence another action upon the same demand, and shall thereby save the limitation thereof.

As the 11th section is wholly silent as to the limitation within which the first action shall have been commenced, it is necessary to refer to other parts of the statute to ascertain to what the phraseology "any action, which shall be actually declared in as aforesaid" applies; and we find nothing to which it can refer, except the 8th section, the declaring in the action not being mentioned or referred to in any other section.

If the 11th section refers only to the class of cases embraced in the 8th, it is manifest that it cannot include the case before us, as such actions are by the 16th section to be commenced and sued within four years, while the 8th section embraces only such cases as are to be commenced and sued within six years. This distinction seems not to have been noticed at the trial, and would be fatal to the plaintiff's action, however strong might be his proof.

What consideration influenced our Legislature to keep up the distinction which seems to have been adopted in Massachusetts in favor of the class of actions included in the 8th section of our statute, it is not material for us to inquire. It has been judicially settled in that State in *Cook v. Darling*, cited in the argument, that the distinction exists under their statute, the language of which, the court say, is too clear to be misunderstood. The language of our statute is equally clear, being nearly similar and must have the same construction.

The exceptions are sustained, and a new trial is ordered at the bar of this court.

Joy *vs.* Foss.

Where the promissor in a note payable in specific articles performed services for the holder, which were accepted in payment of the note; after which the holder sold it to a third person;—it was held that the promissor could not maintain an action for the value of his services, they still constituting a good defence to an action on the note.

This was *assumpsit* for work and labor; and it came up by exceptions taken by the defendant to the opinion of *Whitman C. J.* before whom it was tried in the court below.

It appeared by the record sent up, that the defendant was the holder of a promissory note which the plaintiff had given to one *Libby*, payable in specific articles; that the labor was performed by the plaintiff for the defendant, in payment of the note, "and that the note was paid by said labor;" after which the defendant sold the note to one *Woodsum*. And the Judge ruled that this sale of the note gave to the plaintiff a right of action for the value of his labor. To which the defendant excepted; the jury having found for the plaintiff.

Wells, in support of the exceptions, argued that the note, being paid, was *functus officio*, and could not be the foundation of any further claim against the plaintiff; who therefore had no right of action for the services by which it had been paid. *Tucker v. Smith*, 4 *Greenl.* 415; *How v. Mackie*, 5 *Pick.* 44; *Wilby v. Harris*, 13 *Mass.* 496.

Boutelle, for the plaintiff, contended that the defendant, by selling the note, had deserted the contract of payment, and was estopped now to set it up as a defence against an action for the value paid. And he likened it to the case of money paid, but not indorsed, on a promissory note, the whole amount of which was afterwards recovered, and collected on execution. *Goodrich v. Laflin*, 1 *Pick.* 57; *Thurston v. Percival*, *ib.* 415; 2 *Phil. Evid.* 83, *note*; 1 *Dane's Abr.* 221, 229.

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

PARRIS J. The case finds that the labor charged in the plaintiff's account was performed by him in payment of a note which the defendant as assignee then held against him, "and that the note was paid by said labor." The note being payable in specific articles, was not assignable by indorsement as a bill of exchange; and consequently, whatever payments might have been made to the original promisee, while it remained in his possession and until notice of the assignment, would avail the promissor in defence of any action that might be prosecuted on it, either for the benefit of the promisee or any subsequent assignee.

It is familiar law that the assignment of a *chose in action* passes the equitable interest in the debt immediately to the assignee, and, as between the parties to the assignment, the assignor has no right thereafter to control it. But, until the debtor has notice of the assignment, he may safely make payment to the promisee. Upon assignment, the assignee takes it, subject to all the equity existing between the debtor and creditor in relation to the debt assigned, not only at the time of the assignment, but until the debtor has notice. The assignment operates as a new contract between the debtor and assignee, commencing upon notice of the assignment, by which the promissor becomes the debtor of the assignee, to the amount of what was equitably due the assignor. As the assignee thus succeeds to all the equitable rights of the original creditor, he alone has power to compel payment and give discharge, and whatever payments are made to him, while he holds the evidence of indebtedness, operate as effectually a discharge of the debt, as if made to the original creditor

The party who makes a payment has a right to apply it as he chooses. If he does not apply it, the party who receives it may make the application. But the application once made, he who receives has no power to change it; he who pays, none to withdraw it.

In applying these principles to the case before us, we are led to inquire wherefore this suit is prosecuted. Wherein has the plaintiff sustained injury. He has paid the defendant a note which he justly owed him. The defendant had a right to receive it; and having received the labor in payment of the note, as the case finds he did, the note was discharged, and it is now too late for the plaintiff to change the appropriation of his payment. It might operate unjustly if he could. There may have been reasons influencing the defendant to accept the labor in payment of the note, when he would not have received it and render himself answerable therefor in cash.

It is contended by the plaintiff's counsel that both parties having departed from the special contract, it is consequently no longer binding, and that *Joy* may, therefore, claim the value of his labor of *Foss*, and *Woodsum* the amount of the note of *Joy*. The cases cited in support of this argument all apply to an executory contract, which may, undoubtedly be rescinded by the parties at any time before its execution. But when executed it is not to be revived by any rescinding of, or departure from its provisions. The parties may make a new contract, but the old one having been executed, is *functus officio*. As in *Stephens v. Wilkinson*, 2 *Barnw. & Ald.* 320. The purchaser of goods paid part of the purchase money, and gave the bill on which the action was brought for the remainder; he had possession of the goods delivered to him, kept them for two months, and was then dispossessed by the vendor. It was held that this constituted no defence, the contract was not rescinded, and the remedy for the dispossession was by trespass.

It is not perceived how the transaction between *Foss* and *Woodsum* can affect a contract executed between *Joy* and *Foss*. Besides, it is not pretended that *Joy* has paid *Woodsum* any thing on the note, and it does not appear that he has been or ever will be called upon to pay it. It would seem to be sufficiently early for him to move when he has sustained, or at least, become liable to injury.

From the exceptions it appears that the proof of payment came from the plaintiff, of course he has it in his power to prove it again;

and whenever proved, as it was in the court below, it will be abundantly sufficient to protect him against any suit that may be brought on that note, either by the defendant or his assignee.

If *Foss* has practised deceitfully and dishonestly with *Woodsum*, what cause is that for the plaintiff's interference. If the note had been paid when *Foss* passed it to *Woodsum*, it was thereby discharged. There was no longer any subsisting contract between the promissor and the first assignee. *Foss* had no claim, either legal or equitable, against the plaintiff, and of course could assign none to *Woodsum*.

When *Woodsum* purchased the note, it was his business to have ascertained what claims the debtor had upon the promisee or any previous assignee, that might diminish or destroy its value. This he might readily have done by application to the debtor. If he neglected to do this, he must have purchased it principally upon the credit of the defendant, the party from whom he received it, and if he has been deceived by *Foss*, he, *Woodsum*, would seem to be the person to complain, rather than the plaintiff, around whom the law throws its full protection.

As the case finds that "the note was paid by the labor," we do not perceive how the plaintiff can be allowed for it again. If, as was suggested at the argument, the exceptions state the case relative to payment stronger than the proof justified, the plaintiff will have an opportunity of correcting it on a new trial.

The exceptions are sustained, and a new trial granted.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.