REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE,

DURING THE PERIOD OF THESE REPORTS.

The Hon. PRENTISS MELLEN, L. L. D. Chief Justice.
The Hon. NATHAN WESTON, L. L. D. } Justices.
The Hon. ALBION K. PARRIS, }

Attorney General, ERASTUS FOOTE, Esquire.

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CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF PENOBSCOT, JUNE TERM, 1832.

ROBERTS *vs.* ADAMS & *al.*

The incompetency of the indorser of a writ, to testify as a witness for the plaintiff, arising from his liability to costs, may be removed by the plaintiff, by depositing with the clerk such sum as the court shall deem sufficient for the purpose, out of which the defendant's costs are to be satisfied, in case he should finally prevail.

AT the trial of this cause, which was an action of replevin, the plaintiff offered one *Daniel A. Cressey* as a witness; who was objected to, and excluded, because he was liable to pay costs, as the indorser of the writ. The plaintiff then offered to deposit with the clerk, for the use of the defendants, a sum of money amply sufficient to pay all the costs which they might recover; and thereupon moved for the admission of the witness. But the Chief Justice, before whom the cause was tried, refused to admit him, and ordered a nonsuit, reserving the question for the consideration of the court.

Abbot, for the plaintiff, argued that the payment of the defendant's costs was in this case sufficiently secured by the bond, it being replevin; and that the indorsement of the writ was superfluous. *McDonald v. Morton*, 1 *Mass.* 543; *Abbot v. Crawford*, 6 *Greenl.* 214; 5 *Com. Dig. tit. Parl. R.* 15, 16; 1 *D. & E.* 261; 3 *East* 8; 2 *Stark. Evid.* 758; 1 *Bing.* 92; 3 *Sarg. & Rawle*, 311; 2 *Chitty's Rep.* 103; *Barnes* 69; 8 *Johns.* 318; 1 *Phil. Ev.* 68; 1 *Pet. C. C. R.* 301; *Bailey v. Hale*, 13 *Sarg. & Lowb.* 449; 2 *Sarg. & Rawle*, 119; 3 *Martin* 166.

J. M'Gaw, for the defendants, relied on the *Stat.* 1821. *ch.* 59. *sec.* 8; and cited *Talbot v. Whitney*, 10 *Mass.* 359; *How v. Codman*, 4 *Greenl.* 79; *Davis v. McArthur*, 3 *Greenl.* 27. He also argued that the indorsement of the writ created a contract, conditional indeed, but yet binding, between him and the defendants, which no tribunal or party had power to impair or control. It was a security offered, and accepted, for a future debt, which was uncertain. Such a contract cannot be affected by a tender, for the debt is not due; and therefore cannot be discharged by any deposit of money. *Ball v. Comstock*, 1 *Stra.* 575; *Caldwell v. Lovett*, 3 *Mass.* 422; *Kingman v. Pierce*, 17 *Mass.* 247; *Ely v. Forward*, 7 *Mass.* 28.

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

It is not our province to inquire into the reasons which induced the Legislature to require that writs of replevin should be indorsed, or why a plaintiff should be obliged to indorse his own writ, if not indorsed by his attorney. The statute requires that all original writs should be indorsed by the plaintiff or his attorney before service; and a writ of replevin is certainly an original writ. The only question presented, arises upon the motion of the plaintiff's counsel to qualify *Daniel A. Cressey*, the indorser of the writ in this case, for admission as a witness, by depositing with the clerk of this court such a sum of money as the court shall deem amply sufficient for the payment of all costs which the defendants may, in any

event of the cause, recover against the plaintiff; the said sum to remain in court until judgment shall be rendered, and should it be rendered for the defendants, that then they shall have leave to take to their own use such part of said sum as shall be necessary to satisfy their costs as taxed and allowed by the court; the balance to be returned to the plaintiff. This is the import and essence of the motion. Without a release from the defendants or the qualification proposed, it is very clear the witness cannot be admissible. For it has often been decided in *Massachusetts* and in this State, that the court have no authority to permit the name of the indorser to be stricken out, and another name substituted in its stead; though in some States a different practice seems to have prevailed. In the parent Commonwealth and by this court it has been considered that the indorser of a writ, by the act of indorsing, enters into a contract with the defendant, of his interest in which the court have no legal authority to deprive him, and which they cannot impair. Even the Legislature of a State is prohibited by the constitution of the United States from passing any law impairing the obligation of contracts. Has this court then, power to produce the same effect? We apprehend not. But the foregoing objection is not applicable to the motion before us. To sustain it, will not impair any rights or affect any liabilities; it will only amount to an anticipated payment to the defendants of all costs which they may recover against the plaintiff, and may eventually recover on *scire facias* against the witness, as indorser, as soon as the same shall have been so recovered, taxed and allowed. In this mode the indorser is relieved from all possibility of loss or liability. It is strictly true that this arrangement essentially adds to the security and safety of the defendants, or it rather renders them absolutely certain. The case cited by the plaintiff's counsel where bail was admitted as a witness on the part of the defendant, on depositing in court the amount of the debt sworn to and costs, was decided on the same principle. To sustain the motion in this and similar cases will advance the cause of justice by admitting an indorser to testify. In many instances a plaintiff has been compelled to become nonsuit, because some un-

expected fact was found to depend on the testimony of the indorser. As to the danger of perjury, alluded to in the argument, it can be no greater than in those cases where releases are given at the bar upon the spur of the occasion. It is not probable that the testimony of the witness is more pure after the release is given than before. Our opinion is that by the plaintiff's depositing with the clerk of the court two hundred dollars, as costs, to be retained by him and finally disposed of as above mentioned in this opinion, the said *Daniel A. Cressey* will stand admissible as a competent witness in the trial of the cause.

Bailey *vs.* Fillebrown.

Where a farm was leased at will, with an agreement that the hay, deposited in the barn, should remain the property of the lessor, or be held by him as security till the rent should be paid; but no actual delivery of it was made to the lessor; the hay was held liable to attachment for the debts of the tenant.

This was an action of trespass, for taking and carrying away fifteen tons of the plaintiff's hay. It appeared that the plaintiff, by his agent, *Otis Briggs*, had made an agreement in *April* 1828, with one *Waterman*, for the use and occupation of the plaintiff's farm in *Waterville* college township, by which *Waterman* was to have the use and improvement of the farm for one year certainly, and, if the plaintiff should agree to it, for the term of five years; for the rent of seventy two dollars per annum; and was to cut the hay and put it into the barn upon the farm, there to remain the property of the plaintiff, till the rent should be paid. A memorandum of the agreement was made, of the following tenor:—"No. 3, Old Indian Purchase, *April* 11, 1828. Having this day made an agreement with *Otis Briggs*, agent of *Calvin Bailey*, for the *Web-*

ster place, so called, and not having time to execute a formal lease, I hereby agree that all the hay that may be cut on said farm shall be holden by said agent, as security, till payment of the rent, seventy two dollars per year shall be paid. (Signed) *Thomas Waterman.*" The hay cut in 1828 was accordingly put into the barn as agreed; and in *August* of that year it was seised by the defendant, by virtue of an execution in his hands against *Waterman.* The agent of the plaintiff testified that he had never been upon the farm since making the agreement, till after the hay was taken in execution and advertised for sale; nor had he taken possession of the hay before that time; but on the day of sale he went to the barn, and wrote a caution on the advertisements of the officer, forbidding the sale, the hay being the property of the plaintiff; but *Waterman* was not present to make any formal delivery of the hay. He also testified that he should not have let the farm to *Waterman* without some security for the rent, he being a man of no property.

Upon the evidence adduced, of which the foregoing is all that is material to the case in the view of it subsequently taken, *Parris J.* ordered a nonsuit, subject to the opinion of the court upon the question whether such possession and right to the hay was disclosed as entitled the plaintiff to maintain the action.

Brown, for the plaintiff, argued that it was a tenancy at will in *Waterman*, whose possession was that of the lessor. *Starr v. Jackson*, 11 *Mass.* 119. The writing was a mere pledge of the hay, which was never out of the lessor's control. The grass was part of the freehold, growing without labor; 2 *Salk.* 160; 1. *Cruises, Dig.* 263; it was not included in the meaning of emblements, which go to the executor; *Co. Lit.* 55, 56, 116; and it was delivered at the place named in the contract, which was a sufficient delivery to the party, though he was not present. *Atkins v. Barwick*, 1 *Stra.* 165; *Yelv.* 164. All was done which the nature of the case would admit, to give actual possession of the hay to the lessor. *Beaumont v. Crane*, 14 *Mass.* 400.

Kent, for the defendant, cited *Butterfield v. Baker*, 5 *Pick.* 522; *Waite, appellant*, 7 *Pick.* 100; *Stewart v. Doughty*, 9

Johns. 108; *Smith v. Putnam*, 3 *Pick.* 221; *Lickbarrow v. Mason*, 6 *East.* 27; *Heywood v. Warren*, 4 *Campb.* 291; *Parks v. Hall*, 2 *Pick.* 212.

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

The lease to *Waterman* was a lease at will; but it does not appear that it has been determined by either party. According to the written promise or agreement of *Waterman*, all the hay that might be cut on the farm was to be held by *Otis Briggs*, the agent of the plaintiff, as security, till payment of the seventy two dollars rent *per* year should be made. The hay was put into the barn on the farm, but no possession was ever taken of it by said *Briggs*; though, after the defendant had seised it by virtue of an execution against *Waterman*, he went to the barn and left notice to the defendant not to sell the hay. The case of *Butterfield v. Baker*, cited by the counsel for the defendant, is almost exactly like the one before us; and the decision seems to rest on sound and well settled principles. The hay when made and placed in the barn, was the tenant's hay, and remained in his possession till seised on execution. The plaintiff should have protected the intended lien for his security, by holding possession. Unless these principles are applied in such cases as these it will be in the power of a tenant, by making such an arrangement as was made by the plaintiff and *Waterman*, to secure to himself the complete control and enjoyment of the fruits of his labor and the produce of the farm he may occupy, without being compellable to appropriate any portion thereof to the payment of his debts. This is a consideration that should not be disregarded. We think the case must be decided on the same principles as though the lease had been in writing for a limited time. Our opinion is that on the facts before us, the action is not maintainable. The nonsuit is confirmed.

Judgment for defendant.

Weston J. being related to the defendant, did not sit in this cause.

WOODSUM *vs.* SAWYER.

In order to give jurisdiction to referees, appointed pursuant to *Stat.* 1821, *ch.* 77, it is necessary that the demand made by the claimant be signed by him. The want of his signature will be error.

THIS was a writ of error brought to reverse a judgment of the Court of Common Pleas rendered upon a report of referees appointed pursuant to the statute, made in favor of the defendant in error, who was the original claimant. The errors assigned were all special; but the judgment was reversed for an error not assigned; which appears in the opinion of the Court, delivered by

MELLEN C. J. The plaintiff originally assigned eight errors. Under leave of court he has amended the assignment of errors by striking out all but the second. We have not examined that, because there is one not assigned, which is fatal, on account of which the judgment must be reversed. Our statute on the subject, under which the foregoing submission was made, is a transcript of the act now in force in *Massachusetts*. In *Monosiet* in error *v. Post.* 4 *Mass.* 530, the court say, "the statute must be strictly pursued." In the case before us the demand of *Sawyer*, annexed to the agreement of submission, was never signed by him, as the statute expressly requires. Such was the omission in the case of *Mansfield v. Doughty*, 3 *Mass.* 398; and the court for that reason reversed the judgment. It is true that in *Humphrey v. Strong*, 14 *Mass.* 262, the court decided that the demand annexed, was sufficient, though not formally subscribed, because it was stated in the record, as the ground on which the report was accepted, that the demand was in the hand writing of *Strong*; which circumstance they rested upon as equivalent to signing, and as distinguishing that case from *Mansfield vs. Doughty*. In the case before us it does not appear that the annexed demand was in the hand writing of *Sawyer*:—of course the *Judgment is reversed.*

Appleton, for the plaintiff in error.

Rogers, for the defendant in error.

Avery *vs.* Butters.

The clerk of a militia company was duly appointed, and sworn before the captain, who certified that he had subscribed the oath, omitting to state that he had taken it; but this omission the captain, being still in office, was allowed to supply by amending the certificate, even pending a suit brought by the clerk to recover a military fine.

Error to reverse the judgment of a Justice of the Peace in a suit brought by the clerk of a militia company to recover a fine for delinquency. It appeared from the record sent up, that the clerk was duly appointed, and took the oath of office before the captain, who certified his appointment on the back of his warrant, and that he had subscribed the oath of office before him, omitting to certify that he had taken it. This omission being discovered after the action was brought, the captain, being still in office, amended the certificate by interlining the words "and took;" to explain which, he was admitted as a witness for the plaintiff, before the magistrate, being first released. The magistrate, however, was of opinion that the amendment was illegal and void, and that there was no legal evidence of the plaintiff's having been duly qualified; and gave judgment for the defendant; to reverse which, the plaintiff sued out the present writ of error.

J. Appleton, for the plaintiff in error, cited *Commonwealth v. Hall*, 3 *Pick.* 262; *Clap v. Watson*, 8 *Pick.* 449; *Welles v Battelle*, 11 *Mass.* 477; *Thatcher v. Miller*, *ib.* 413.

Gilman, for the defendant, contended that the certificate was a mere nullity without the words omitted; and that it was essential to the appointment of the clerk that the certificate should be completed at the time the oath was taken. The amendment went to the creation of a new certificate, which could only take effect from the time it was made, and therefore was of no avail in this action. *Abbott v. Crawford*, 6 *Greenl.* 214.

PARRIS J. delivered the opinion of the Court, at *June* term, 1833.

By *Stat.* 1821, *ch.* 164, *sec.* 12, for organizing, governing and disciplining the militia it is provided, in relation to clerks of companies, that, before they enter upon the duties of their clerkship, they shall be sworn to the faithful discharge of their duty, by taking an oath, the form of which is prescribed, before the captain or commanding officer of the company to which they respectively belong.

Having taken such oath, in the manner directed, they are duly qualified to discharge the duties devolving upon the office.

That the qualification may be the more readily proved, the law further provides, that the captain or commanding officer of the company, so administering the oath, shall, at the time of administering it, certify on the back of the warrant of the sergeant appointed to be clerk, that he was duly qualified by taking the oath required by law.

In this case the proper certificate of the captain appears regularly entered on the back of the warrant; but it is proved that subsequent to the commencement of this suit, a material word was added by interlineation, by the officer who administered the oath. If that amendment was properly made, the plaintiff's authority as clerk was fully proved, and the judgment must be reversed. If the amendment was not authorized by law, the judgment is correct.

We have repeatedly permitted officers to amend their returns or official certificates of their doings in cases where no new rights have been acquired, which would be affected by such amendments. Such was the case of *Howard v. Turner*, referred to in *Means v. Osgood*, 7 *Greenl.* 148; where the magistrate, who administered the oath to appraisers, was allowed to add his official title to his signature, it not appearing in the original return that he was a Justice of the Peace; and this was done pending the suit in which the appraiser's return and magistrate's certificate were to be used as conclusive evidence. So in *Buck v. Hardy*, 6 *Greenl.* 162, an officer was permitted to amend his return of an extent, by inserting notice to the debtor and his absence from the county, after the

execution was recorded and returned, and pending an action for the land. Such has also been the practice in *Massachusetts*, both before and since the separation. In *Welles & al. v. Battelle & al.* 11 *Mass.* 477, the court held that where a town clerk has omitted to enter of record, that town officers were sworn into office, he might afterwards, being in the same office, make such entry, if consistent with the truth of the case, and that the record so amended, would be sufficient evidence of their being sworn. In that case also, the amendment was made pending the suit in which the record was to be used as important evidence. The same principle was recognized as correct in *Thayer v. Stearns*, 1 *Pick.* 109; *Clapp v. Watson*, 8 *Pick.* 449, was very similar to the case before us. The magistrate overruled the motion to amend the certificate on the back of the warrant by affixing the date when the appointment was made and the oath administered; but the court resolved that the captain should have been allowed to amend. The language of the statute of *Massachusetts* of 1809, *ch.* 108, *sec.* 8, providing for the qualification of clerks, is precisely similar to the 12th *section* of our *statute* of 1821, *chap.* 164, before referred to. The reason why an amendment was not allowed in *Commonwealth v. Hall*, 3 *Pick.* 262, was, that there was nothing to be amended. The defect was a want of certificate of appointment, and the court say the motion to amend could not be granted, for there was no certificate of appointment to be amended. In *Sherman v. Needham*, 4 *Pick.* 66, and *Commonwealth v. Sherman*, 5 *Pick* 239, there was no certificate and of course nothing which could be amended.

We think the amendment in the case at bar comes fully within the principles established in the several cases before cited. Here the officer, who administered the oath, was still in office when he made the amendment, and having executed a release, had no interest in the event of this suit. The oath itself, when administered, was extended in a correct form on the back of the warrant, and signed by the clerk. The captain certifies that the clerk personally appeared and subscribed the oath, but accidentally omits the word "took." The whole, before the amendment, was in the most

perfect form, with the exception of a single word, and there is no reason to doubt but that word was omitted by accident, and should be supplied, in order to render the certificate conformable to the truth of the case. We are of opinion that the official character of the clerk was fully proved

COPELAND *vs.* BEAN.

Where the title to real estate has been specially pleaded to an action of tresspass *quare clausum fregit*, brought before a Justice of the peace, and the cause has been brought up from the Common Pleas by demurrer, it is not the course of this Court to permit the defendant to add any other plea which could have been tried by the Justice.

IN this case, which was an action of trespass *quare clausum fregit*, brought before a Justice of the Peace, the defendant pleaded that the close was the soil and freehold of another, under whom he justified; and the cause being thereupon carried into the Court of Common Pleas, pursuant to the statute, it was brought up thence by demurrer, with the usual reservation of leave to waive the demurrer and plead anew in this Court. And at the last term the defendant moved for leave to amend the pleadings, and add a plea in bar that the plaintiff gave him license to do the acts complained of; but the Chief Justice, before whom the issues were tried, overruled the motion, and the defendant submitted to be defaulted, subject to the opinion of the Court upon be question whether he was entitled so to plead.

Gilman, for the plaintiff.

Rogers, for the defendant.

WESTON J. delivered the opinion of the Court.

The Justice, before whom this action was commenced, had jurisdiction of the cause, if the title to real estate had not been drawn in question, by the special plea of the defendant. *Stat.* 1821, *ch.* 76. This plea being interposed, it was carried to the Common Pleas, as the statute prescribes. And this is the only case, where an appeal lies to this court from the Common Pleas, in an action originally commenced before a Justice of the Peace. The defendant now moves to file a plea, which does not bring in question the title of the plaintiff, but admits it; and this he claims as a matter of right, against the ruling of the presiding Judge. If this were allowed, Justices of the Peace might be ousted of their jurisdiction, in all cases, where the title to real estate might be formally drawn in question by the defandant's plea, although not intended to be seriously litigated or tried. And the appellate jurisdiction of this Court might be extended to a class of cases, which by law ought to terminate finally in the Common Pleas. This is prevented effectually, by holding the defendant to abide by his plea before the Justice. Such has been the practice; and we are not disposed to disturb it.

Judgment for plaintiff.

Dwinel *vs.* Fiske & *al.*

The *Stat.* 1821, *ch.* 158, *sec.* 11, creating a lien on mill-logs, against the general owner, in favor of those who float them to market with their own timber, in which they happen to be intermingled, does not apply in favor of a wilful trespasser, against the owner of the land on which he had cut the logs.

This was a review of an action of replevin for 166 mill-logs, originally sued out by *Fiske & Bridge* against *Dwinel*. It appeared, at the trial, that the logs were cut by *Dwinel*, on the land of *Fiske* and *Bridge*, without license; the lines of which land he previously well knew, and was thus a wilful trespasser. He afterwards drove the logs down the *Penobscot* river, intermixed with a larger number in which he claimed a special property; and he resisted the action of replevin on the ground that having driven them with his own, he was entitled to detain them till the expenses of driving were paid, pursuant to *Stat.* 1821, *ch.* 158, *sec.* 11. But the Chief Justice, before whom the action was tried, instructed the jury that the provisions of the statute were not applicable to cases like the present; and a verdict being returned for the original plaintiffs, the point was reserved for the consideration of the Court.

J. McGaw, for the plaintiff in review.

Allen, for the original plaintiffs.

Weston J. delivered the opinion of the Court.

If the logs in question were put into the *Penobscot* river, for the purpose of being floated to market, and were mixed with other logs in such manner, that they could not be sparated, it was because they were voluntarily and unlawfully put into that condition by the original defendant, in violation of the rights of the original plaintiffs. To allow him to predicate rights, upon a trespass of this sort, would be to permit him to take advantage of his own wrong, against an ancient and well established maxim of law. The

statute was intended to provide for a reasonable compensation to a party, who in driving his own logs, renders a similar service to other owners, whose logs are casually so intermixed with his, that they cannot be separated. It does not allow him to meddle with the logs of others, until so intermixed with his own. Otherwise any one without interest and without right, might unnecessarily and voluntarily intermeddle with property of this description, belonging to various owners, with whom he has no connexion, and claim of all compensation, for services thus obtruded; which the statute never could have intended. The section in question, could never have been designed to favor trespasses.

There is no just analogy between this statute, and those which have been made for the settlement of certain equitable claims, arising in real actions. A title to real estate, commencing by disseisin, is one well known in law. By lapse of time it may become indefeasible, entitled to complete legal protection. And the legislature have thought proper to recognize certain equitable interests of this sort, at an earlier period.

Judgment on the verdict.

KENDRICK *vs.* GREGORY *& al.*

The condition of a debtor's bond for the liberty of the yard, if not previously broken, is saved as soon as he is lawfully admitted to the poor debtor's oath.

The certificate of the oath is intended merely as a notice to the prison keeper of what has been done, that he may set the debtor at liberty if in his custody; but he may do this upon any other satisfactory information of the fact, taking upon himself the peril of proving it.

THIS was an action of debt on a bond given for the enlargement of *Gregory*, the principal defendant, who was committed to gaol on an execution in favor of the plaintiff.

At the trial in the court below, it appeared that the debtor after his commitment, had caused the plaintiff to be duly notified of his intention to take the poor debtor's oath, which he afterwards took, in the forms of law, before two Justices of the *quorum*, the gaoler being present; but the certificate of his having taken the oath, though made out and signed, was withheld by the Justices, till he should pay their fees; which he did not pay, and therefore did not receive the certificate, till after the commencement of this action. Having thus taken the oath, he went beyond the prison limits; for which act, as a breach of the bond, this action was brought. When the plaintiff's attorney called on the gaolor for the bond, he was informed that the oath had been administered.

Upon this evidence *Whitman C. J.* ruled that the debtor had not been lawfully discharged, being of opinion that the delivery of the certificate was essential to the completion of the proceedings; and directed the jury to find for the plaintiff; to which the defendants excepted.

Gilman argued in support of the exceptions.

Kent, e contra, contended that the discharge was not complete till all the solemnities of the law were observed; one, and the most material of which, was the official certificate, under the hands and seals of the magistrates, delivered to the gaoler. And he likened the case, in this particular, to that of one excused from military duty upon a certificate presented to the captain; as in *Dole v. Allen*, 4 *Greenl.* 527, and to that of a bankrupt, not discharged till his certificate is obtained. *Whitney v. Crafts*, 10 *Mass.* 23.

PARRIS J. delivered the opinion of the Court at the *June* term the following year.

The laws of this state still recognize the rights of the creditor to resort to imprisonment of the person of the debtor, as one of the means of enforcing the payment of his debt. Such are the various stratagems to which the dishonest will resort to secrete their property from attachment, and defraud honest creditors, that the

Legislature has not deemed it an unjust infringement of personal liberty, under such circumstances, to permit the body of the debtor to be holden until he yields up his secreted property, to be applied in fulfilment of his voluntary stipulations.

But it is not the policy of our laws to inflict imprisonment upon the debtor as a punishment for his poverty, or for having heedlessly or even fraudulently contracted debts which he is unable to discharge. Whatever of restraint may be authorized, is upon the presumption that the debtor, having received an equivalent for the debt, which he has contracted, has estate wherewith to discharge it, but that he withholds his property by concealment, or has fraudulently conveyed it, for the purpose of securing it to his own use.

If he yields it up, the object of the law is answered. If he remove the presumption of property by shewing that he has none, the purpose for which restraint is permitted being unattainable, the law permits him to be holden no longer. The mode of establishing this fact is prescribed by statute. It can only be done before two Justices of the quorum. The parties interested are to be examined and heard; evidence is to be produced by the debtor, and by the creditor, if he think proper; a judgment is to be entered in due form as in other cases, and the whole proceedings to be recorded by one of the Justices composing the court of examination.

In the case before us, all this appears to have been done. The Justices, after such investigation as they thought proper to make, decided in the words of the statute, that, in their opinion, the debtor had not estate real or personal sufficient to support himself in prison, except the goods and chattels by law exempted from attachment and execution, and that he had not conveyed or concealed his estate with design to secure the same to his own use, or to defraud his creditors, and they thereupon administered to him the oath prescribed by the statute. Every thing of a substantial character, that the law requires, had been done to entitle the debtor to a discharge. If he be in the immediate custody of the prison keeper, as he actually is, unless liberated on bail, it is necessary that the keeper have knowledge of the proceedings, before he can be re-

quired "to set such prisoner at liberty." The statute has therefore given a form in which the Justices are to certify the facts to the prison keeper; and unless such certificate is produced, he is not bound to liberate the prisoner. It is evidence which he has a right to require, as the most convenient and direct, and without which the debtor would have no remedy against the keeper for refusing to set him at liberty.

But does it follow that the gaoler may not lawfully act upon other evidence equally satisfactory? What is the foundation of the discharge? Is it the certificate of the Justices, or is it the fact which they certify, as having been ascertained and adjudicated by them? Is it the form, or is it the substance upon which is to depend the decision of a question involving personal liberty?

If this debtor had not been liberated, but was now before us on *habeas corpus*, and we were called upon to decide upon his rights, could we hesitate to discharge him upon the production of the record of the Justices, showing, that, after examination, they adjudged him, in this case, a proper person to take the poor debtor's oath, which oath they actually administered. That record a *Subpœna duces tecum* would bring forth.

But in this case the debtor, having the liberty of the yard, was not confined in the prison, nor was he in the custody of the gaoler, and the language of the statute, which requires the gaoler "to set the prisoner at liberty" has no applicability to his case. The condition of the bond is, that the debtor will not depart without the exterior bounds of the gaol yard until lawfully discharged. The words "set at liberty" are not used in this connexion. The prisoner is already set at liberty from the lawful restraint of the gaol keeper, and consequently, cannot, by him, be set at liberty again. Having given bond for the liberties of the yard, he may go wherever and whenever he pleases beyond the prison limits, without being amenable to the gaoler, and any further restraint on the part of that officer would be a trespass.

What act of the gaoler then is necessary to a "discharge according to law" of a debtor having the liberties of the gaol yard?

The examination has been had; the creditor has had opportunity to oppose by evidence, and by interrogatories to the debtor; the adjudication has been made by the Justices; the oath administered and the proper entries and records made up, and all this in the presence of the gaoler. And will it be said that, having witnessed all these proceedings, he may not enter on his kalendar the fact that they actually did take place; and if he make the entry conformably to the fact, will it not amount to a discharge? What more could he do upon the production of the certificate itself? That gives him no command to set at liberty? neither does it purport, of itself, to be a discharge. It is a mere recital of what has been done. True if having released the debtor from close imprisonment, he had made the entry without the certificate, he would have done so at the peril of being able to prove the facts of which the certificate would be plenary evidence. If he produced the certificate that would be conclusive proof of his authority to set at liberty, beyond which he would not be required to go; and if that be proof, shall not the original record itself, upon which the certificate is founded, be of equal force?

For what purpose is the certificate made except to notify the gaoler of the facts contained in the record; and if he have personal knowledge of those facts, derived from his own observation, is not the object of the law answered? If he waive the production of the certificate, who is injured or endangered? Surely not the creditor. If the examination has been had, the adjudication made, the oath administered, and the record of the proceedings and judgment entered up in due form, the object of the law, so far as the creditor is interested, has been fully answered. The certificate would not be competent evidence for him in any prosecution that he might institute against the debtor, whether by indictment for perjury, or any other form. It seems to be intended merely as a notice to the prison keeper of what has been done, that he may set the debtor at liberty, if he be in his custody; and it is manifest from the phraseology of the statute providing for the certificate, as well as the form of the instrument itself, that it refers more par-

ticularly, if not exclusively, to cases where the debtor is in close confinement. The language is this, "which oath or affirmation "being administered by the said Justices to, and taken by such pris- "oner, and a certificate thereof made under the hands and seals "of the Justices administering the same, to such gaoler or prison "keeper, he shall thereupon set such prisoner at liberty, if he "is committed for no other cause, and the body of such prison- "er shall not be held in prison any longer upon such execution." *Stat.* 182, *ch.* 209, *sec.* 15, latter clause.

But whether it does or does not embrace the case of an imprisoned debtor liberated on bond, we think that upon such proceedings as were had in this case, of which the prison keeper was fully informed, having been present at the examination and decision of the Justices and the administering the oath, he might safely enter the facts in his kalendar, and do whatever was necessary to be done by him to discharge the debtor, relying upon the record of the Justices as his authority; and that the proceedings of the Justices may be proved by their record, which the statute requires them to keep, as well as by a certificate founded on that record.

The exceptions are sustained.

The President &c. of the COMMERCIAL BANK *vs.* WILKINS.

If several successive attachments be laid on the same goods, at the suit of several creditors, and the officer neglect to seize and sell them on any of the executions; and the last attaching creditor sues the officer for this neglect; the defendant may show that the judgment of the prior attaching creditors, to whom he is still liable, would absorb the whole value of the goods; and this, it seems, would constitute a good defence.

The mere insolvency of a copartnership is sufficient to defeat an attachment made by a creditor of one of the firm; although the partnership creditors have commenced no action for the recovery of their debts.

Therefore where an officer had attached the partnership effects, in a suit against one of the partners, and afterwards, with the consent of the firm, suffered the effects to be applied to pay a partnership debt due to a stranger; it was held that he was not responsible to the first attaching creditor, in an action for not having seised the goods in execution.

Although the effects were applied to pay a judgment against the firm, which included some demands not yet due and payable, yet this circumstance was held of no importance, the claim being good between the parties to the judgment, and resting, not on priority of attachment, but on the superiority of the plaintiff's title as a creditor of the partnership.

In such action against the officer, the partnership creditor is a competent witness for the defendant, having no interest either in the event of the cause, or in the record as an instrument of evidence.

THIS was an action of the case against the late sheriff of this county, for the alledged default of one *Fillebrown*, his deputy, in releasing certain personal property by him attached at the suit of the plaintiffs. It was tried before the Chief Justice, who reported the following facts. On the 24th day of *March*, 1826, *Ira Fish*, *George D. Varney* and *Isaac Wendall*, entered into partnership in the lumber business. On the 27th day of *December*, 1827, they jointly and severally promised, by their note, to pay $3.240 to the plaintiffs; on which note an action was commenced *April* 28, 1828, in which certain personal property was attached on the day following, by *Fillebrown*, subject to six prior attachments. Three of these actions were adjusted by the parties, before proceed-

ing to judgment. Of the other three, one was brought by *A. & J. Wendall*, and another by *Asa Perkins*, against *Isaac Wendall*; and the third by *Mark L. Hill* against *Ira Fish*. The plaintiffs recovered judgment in their suit at *June* term, 1829; and within thirty days placed their execution in the hands of *Fillebrown*, who returned it in no part satisfied. The *Wendalls*, *Perkins* and *Hill*, recovered judgments in their suits, and placed their executions seasonably in the hands of *Fillebrown*, who never returned them. It appeared that some monies had been indorsed as paid on each of these executions; but it was admitted that the balance due on them was greater than the value of all the goods attached.

The counsel for the plaintiffs contended, that theirs was a partnership debt; and that therefore their attachment, though subsequent in time, had precedence in point of right, to all the others. The fact that it was a partnership debt was denied by the defendant; and to this point there was evidence on both sides, which the Chief Justice left with the Jury, instructing them that if the claim of the plaintiffs was due from the partners as such, they ought to find for the plaintiffs, and assess damages to the amount of their judgment and interest.

It was further contended for the plaintiffs, that if *Fillebrown*, was ever liable to the three prior attaching creditors, for his neglect to apply the property towards satisfying their executions; they must be considered as having, by their silence and delay, released or waived all claims for damages against him on account of such neglect. This point of waiver or release the Chief Justice also left to the Jury, there being no direct evidence respecting it.

The defendant offered in evidence, a judgment recovered at *June* term, 1828, by *Fiske & Billings*, against *Ira Fish*, for $13,325, 37, and another against *Fish*, *Varney* and *Wendall*, for $15,995, 06, the latter including the same debt recovered in the former suit. In this latter suit, the same property was attached *May* 2, 1828, which the present plaintiffs had caused to be attached in their suit on the 27th day of *April* preceding. And it was proved that the debt was justly due from the partnership of *Fish*, *Varney* and *Wendall*, to *Fiske & Billings*; and that the goods, so attached,

were afterwards sold by them at private sale, by the consent of *Fillebrown*, and the proceeds appropriated, by the consent of the firm, in part payment of the debt of *Fiske & Billings*. The defendant also offered the *affidavit* of his counsel, *Jona. P. Rogers*, Esq. which was admitted by the plaintiffs as proof of what Mr. *Fiske*, if a competent witness, would testify, he being then absent; but which was objected to, on the ground that *Fiske*, was interested in the event of the cause, from the situation in which he and *Billings* were placed, in relation to the goods in question; but the objection was overruled.

It was proved that in the judgment recovered by *Fiske & Billings*, against the partners, the sum of $6500, was included by consent of the parties, though it was not due and payable till after the action was commenced; and that the partnership, at the time of the attachments, was insolvent.

Upon this evidence, and under the foregoing instructions of the Chief Justice, the jury returned a verdict for the defendant; which was taken subject to the opinion of the Court upon the question whether the instructions and rulings of the Chief Justice were correct, and the action was maintainable.

Allen, for the plaintiffs, cited *Warren v. Leland*, 9 *Mass.* 265; *Rich v. Bell*, 16 *Mass.* 294; *Lane v. Jackson*, 5 *Mass.* 157, 164; *ib.* 399, 402; *Bailey v. French*, 2 *Pick.* 586; *Clark v. Foxcroft*, 7 *Greenl.* 348.

Rogers, for the defendant, cited *Knapp v. Sprague*, 9 *Mass.* 258; *Gardiner v. Hosmer*, 6 *Mass.* 325; *Simmons v. Bradford*, 15 *Mass.* 82; *Learned v. Bryant*, 13 *Mass.* 224; *Montague on Partn.* 99; *Pierce v. Jackson*, 6 *Mass.* 242; *Phillips v. Bridge*, 11 *Mass.* 242; *Goodwin v. Richardson*, *ib.* 469; *Hobart v Howard*, 9 *Mass.* 304; *Kingman v. Spurr*, 7 *Pick.* 235; *Fisk v. Herrick*, 6 *Mass.* 271; *Upham v. Naylor*, 9 *Mass.* 490; *Ex-parte Smith*, 16 *Johns.* 102; *Scott v. Scholey*, 8 *East.* 467; *Weld v. Bartlett*, 10 *Mass.* 470.

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

MELLEN C. J. The jury have found that the note signed by *Ira Fish*, *George D. Varney* and *Isaac Wendall*, on the 27th of *December*, 1827, and payable to the *Commercial Bank*, was not given for a partnership debt; and therefore the attachment made by *Fillebrown*, on the 29th of *April*, 1828, in the plaintiff's suit upon that note, had no legal priority to the attachments made by the same officer, of the same property, in the three suits of *A. & J. Wendall v. Isaac Wendall; Asa Perkins v. the same*, and *Mark L. Hill v. Ira Fish*, subject to which attachments was that of the *Commercial Bank;* because they were all prior in point of time. The report states that judgments were duly recovered in all the four actions abovementioned; that executions were duly issued on all the judgments, and placed in the hands of *Fillebrown*, for service, within thirty days next after judgment; that the plaintiff's execution was returned in no part satisfied; and that the other three executions were never returned. The report also states that after allowing and deducting all payments made on the execution of *A. & J. Wendall v. Isaac Wendall; Perkins v. the same;* and *Hill v. Ira Fish*, there is a balance due on them, greater in amount than the value of all the goods attached in said suits. Therefore, admitting for the present that *Fillebrown* had a right to sell all the goods on those three executions, if he had sold them, it is evident that nothing would have remained to be applied towards satisfaction of the plaintiff's execution; and in such a case, the return of the Bank's execution in no part satisfied, would have occasioned no damage to the Bank, nor subjected the officer to any thing beyond a mere nominal liability. The reason is obvious. But *Fillebrown* did not sell the property which he had attached, on those executions or on either of them, towards payment of the debts due to the attaching creditors; and if he had a legal right so to sell them, then, by neglecting so to do, he at once rendered himself liable to those creditors to the full value of the property so attached, in the same manner as if he had sold the goods, but neglected legally to account for the proceeds; and, being thus responsible, as above supposed and stated, it is contended by the counsel for the

defendant, that *Fillebrown* cannot be held accountable to the plaintiff for the same property, and thus be twice chargeable for its amount. In answer to this argument, and for the purpose of destroying its force and effect, it was contended at the trial, as is stated in the report, that those three creditors, by their conduct and delay, had released and waived all claim of damages against *Fillebrown*, for his neglect to satisfy their executions out of the property attached, as far as it would have satisfied them. But the jury, to whom this question of implied release or waiver was submitted, have by their verdict negatived the idea of any such release or waiver. And now, on the principles of law assumed, why do not the facts, thus stated, constitute a legal and decisive defence? In the case of *Rich & al. v. Bell*, 16 *Mass.* 294, the facts were these. *Bell*, a deputy sheriff, attached certain personal property of *Gulliver*, at the suits of *Washburn* and twelve other creditors. On the same day, several other creditors of *Gulliver*, the last of whom were *Rich & al.* commenced their actions, and *Bell* attached the same property in each suit. Between the time of the attachment of *Washburn* and others, and the time when the last attachments were made, an agreement was entered into between *Washburn* and others and *Gulliver*, as to the disposition of the property attached; and before the return day, all the attaching creditors, except *Rich & al.* agreed that the property should be sold at auction, and *Bell* sold it accordingly. *Rich & al.* contended that such proceedings on the part of those creditors and *Bell*, amounted to a dissolution of their prior attachments, and left the attachment of *Rich & al.* in full force; and that so *Bell* was responsible to them in damages to the amount of their demand. The court admitted, that the conduct of the officer was contrary to law, and that he was liable in damages; but they observed that if he had kept the goods and sold them upon execution, the plaintiffs would literally have gotten nothing; and merely nominal damages were allowed. This case goes the length of deciding that, in the case before us, the Bank could not, at most, be entitled to recover any thing beyond nominal damages. There is one particular in which the two cases differ. In *Rich &*

al. v. Bell, the conduct of *Bell*, which subjected him to nominal damages, was expressly assented to by the prior attaching creditors; and of course, he could never have been liable in damages to them; whereas, in the case at bar, the prior attaching creditors were not assenting to and approving the neglect of *Fillebrown*; nor have they ever released or waived their claim on him for damages for the consequences of it; and upon the foregoing facts, and according to the assumed principles on which we have thus far proceeded, he is to be considered as standing responsible to them in damages. Whether the foregoing distinction, and the other facts which remain to be examined, will relieve him from even nominal damages, will be a subject of inquiry in the course of this opinion.

It has been said by the counsel for the plaintiff, that the question of waiver, before mentioned, was a question of law, and should have been decided by the court. If there was proof of such waiver, it was of a circumstantial character, and we think the jury were the proper tribunal to draw inferences from any facts in relation to the point; but if we entertained any doubt as to the merits of this objection, it would not change our course of proceeding, or lead us to set aside the verdict on that account; inasmuch as, in our opinion, no facts exist in the case which would have authorised the jury or would now authorise the court to infer a release or waiver of the right of action of the first three attaching creditors against *Fillebrown*, if they had any such right. Again it has been urged that, as the demands of those three creditors were not against the firm, but only against two individual members of the firm, the property of *Varney* could not legally have been seized on either of those executions, but the same was liable to be seized on the execution of the Bank, because that ran against all three of the individual members of the firm; that of course the priority of the attachment of the creditors of *Isaac Wendall* and *Ira Fish* could not interfere with or impair the plaintiff's subsequent attachment, in respect to the property which belonged to *Varney*; and so, in this respect, the instruction of the presiding Judge was erroneous. On the other hand, it has been contended that, as the firm was deeply insolvent,

the bank had no right, in virtue of their execution, to seize one particle of the property of the firm ; in reply to which it is said by the counsel for the plaintiff, that for the same reason the three first attaching creditors had no right, by virtue of their executions against two of the firm, to seize one particle of the property of the firm : and that the consequence is that *Fillebrown's* neglect to sell the goods attached upon those executions, did not render him liable in damages to those creditors, and that in this view of the subject also the instruction of the presiding Judge was incorrect. If the objection above mentioned is good against the plaintiff's execution, it is equally so against the executions of the three first attaching creditors ; for neither of those executions, nor the plaintiff's was against the firm. If the officer, *Fillebrown*, had no legal authority by virtue of the execution of the plaintiff to seize and dispose of the property of the firm, he surely was guilty of no malfeasance or neglect of duty, and is not responsible in damages ; and this presents a sufficient defence against the action ; because it appears that at the time the plaintiff's action was commenced and the attachment was made, the firm was deeply insolvent. It is a well settled principle of law that a creditor of one of the members of a copartnership can claim only his just share, after all the partnership debts are paid. 2 *Johns.* 280 ; *Goodwin v. Richardson & al.* 11 *Mass.* 469 ; *Upham v. Nash*, 9 *Mass.* 490. In *Fox v. Hanbury*, *Cowp.* 445, Lord *Mansfield* says, " no person deriving under a partner can be in a better condition than the partner himself ;" and he cites the opinion of Lord *Hardwicke* in *Skip v. Harwood.* " If a creditor of one partner take out execution against the partnership effects, he can only have the undivided share of his debtor, and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner." And the same doctrine is laid down 4 *Vesey*, 396, where the court say, " the right of the separate creditor under the execution, depends upon the interest in the joint stock." In the matter of *Smith*, 16 *Johns.* 102, the court say, " where an execution is issued for the separate debt of one partner, it has been the constant practice to take the share which such partner has in

the partnership property ; but it has been settled, at least since the case of *Fox v. Hanbury, Cowp.* 445, that the sheriff can sell only the actual interest which such partner has in the partnership property, after the accounts are settled, or subject to the partnership debts. The sheriff therefore does not seize the partnership effects themselves, for the other partner has a right to retain them for payment of the partnership debts." In *Moody v. Paine, 2 Johns. ch.* 548, the chancellor refused an injunction to stay execution till an account was taken; saying that as the sheriff could sell only the interest of the one partner, subject to the rights of the partnership creditors, there would be no harm in suffering the separate creditor to go on at law; for if any sacrifice should be made by reason of the uncertainty of that interest, it could only affect the separate creditor. Lord *Eldon* in the case of *Watson v. Taylor, 2 Ves. & Beame,* 299, 300, went further and said, that " if courts of law have followed courts of equity, in giving execution against partnership effects, I desire it to be understood that they do not appear to me to adhere to the principle, when they suppose that the interest (of one partner) can be sold, before it is ascertained what is the subject of sale and purchase." In *Chapman v. Koops,* 3 *Bos. & Pul.* 288, it is stated by the court that by law the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership, and will thereby become a tenant in common with the other partners; but the officer cannot interfere with the property or effects themselves. *Church v. Knox,* 2 *Conn.* 516 ; *Cram v. French,* 1 *Wend.* 311 ; *Dunham v. Murdock,* 2 *Wend.* 554 ; *Gilmore v. N. A. Land Co.* 1 *Peters,* 460. But the levy under the execution transfers no joint property, but merely gives a right to an account. The joint property must be delivered from the joint debts ; and if the joint estate be insolvent, the separate creditor cannot reap the fruits of his judgment. *Taylor v. Fields,* 4 *Ves.* 639. *S. C.* 15. *Ves.* 559, in note; *Gow on Partnership,* 224, 225. " If the sheriff be called upon to discharge his duty, he is bound to seize and sell whatever interest the individual partner may have in the joint property ; if he do not possess any

interest, the sheriff must return *nulla bona*." *Gow* 226. In the above cited case of *Taylor v. Fields*, the sheriff had seized all the partnership effects under an execution against one of the partners; and, on being indemnified by the joint creditors, gave up the partnership effects; and the creditor of the separate partner, brought an action against the sheriff for a false return. On a bill filed, it appearing afterwards, on an account taken of the interest of the separate partner, that there was no balance due him, after payment of the partnership debts, a perpetual injunction was granted, to restrain the suit against the sheriff. In the case at bar, the insolvency of the firm proves, that the plaintiff's debtors had no interest in the property of the firm liable to the bank's execution.

In the case of *Lyndon v. Gorham & trustee*, 1 *Gallison* 367, *Story J.* says, "If upon the whole it appears that the judgment debtor had only a nominal interest, I do not think that a greater interest can be conveyed under the execution; and, if the partnership be insolvent, that any interest can be conveyed." On this principle what could *Fillebrown* have sold on the plaintiff's execution? What interest could have passed by the sale? How could the plaintiff have been in any degree benefitted by the sale? And why, in such circumstances, should he be considered as having acted contrary to his official duty? In *Fisk v. Herrick & trustee*, 6 *Mass.* 271, the court say, "Before either partner can claim rightfully to his own use or for the payment of his debts, any of the partnership effects, the partnership must be solvent, and he must not be a debtor to it." As in that case it did not appear that it was solvent, the court would not adjudge *Willet* and *Bullard* as trustees of *Herrick*, one of the partners, merely because they were indebted to the firm. This case shows that the mere insolvency of a partnership is enough to defeat the claims of the creditors of one of the firm, though the creditors of the firm, have commenced no action, or in any manner asserted their claims. In *Pierce v. Jackson*, 6 *Mass.* 242, the facts were that an officer, who was the defendant, attached certain personal property in a suit against the firm of *Kentor v. Von Horten*. Afterwards, on the same day, he at-

tached the same property in an action against one of the firm; and afterwards on the same day he attached the same in another action against the firm. Judgment was recovered in all the actions, and executions were duly issued and delivered to the defendant within thirty days. The property was sold on the execution in the first suit; and after satisfying that execution, a balance was remaining in his hands, which he applied towards satisfying the execution against one of the firm. The court decided that the surplus, according to the settled principles of law, in such cases, should be applied towards satisfying the last execution; but as it appeared that the last judgment was fraudulent, they ordered a nonsuit. "It seems, therefore," the court observed in the last action, "very clear, that chattels which cannot lawfully be seized on execution, cannot lawfully be attached; and as the right to seize chattels on execution remains as at common law, so must the right to attach by original writ depend on the common law, and therefore, the right of attachment, given to creditors, can have no influence on this question." In *Rice v. Austin*, 17 *Mass.* 197, it appeared that the defendant, as sheriff, had attached certain timber, which, he contended, was the property of *Lindsay*, and not of the plaintiff; but if not wholly *Lindsay's*, still he contended that it belonged to the plaintiff and *Lindsay* as copartners. The court observed, "It does not follow necessarily that a creditor of *Lindsay* might lawfully take partnership property; that must depend upon the solvency of the company; and upon the question whether any surplus remained for the separate partners, after payment, of his debts to the company, and the debts of the company to the world." In that case it appeared that *Rice* was a large creditor of the firm, and that it was insolvent. Yet it does not appear that he had, or, indeed could have brought any action on his demand against the company. In *Phillips & al. v. Bridge*, 11 *Mass.* 242, the plaintiffs claimed damages for an alleged neglect of one of the defendant's deputies, in not satisfying an execution against *Jones*, one of the firm of *Jones* and *Noyes*, out of certain property attached. The same had been previously attached in a suit against the firm. The court said the defendant ought not

to be held to pay damages beyond the value of the property, after deducting the amount of the debt of the company.

From a review of the foregoing decisions, it seems to have been considered as a circumstance of no importance whether the creditors of the firm, where it was insolvent, had recovered judgment and were enforcing the collection of their demands; or had ever commenced actions for the purpose; or, if they had, in what stage those actions were, at the time of the decision; and in several of them, the claim of a creditor of one or more individual members of the firm, was resisted and disallowed, because it did not appear whether the firm was solvent or not. Such being the principles of law applicable to the present cause, merely in the view which we have thus far taken of it, we might close our opinion here, without an examination of the other grounds of defence on which the counsel for the defendant have relied. But it may be more satisfactory to the parties that we should express our opinion on all the points presented in the argument, and we therefore proceed.

It appears that *Fiske & Billings*, on the 2d of *May*, 1828, commenced an action against *Fish*, *Varney* and *Isaac Wendall*, and attached the same property which had been before attached in the suit of the bank against them; that at *June* term following, they recovered judgment in that action, for $15,995,06, for a debt justly due from the firm to the said *Fiske & Billings;* and that the goods so attached were afterwards sold by them at private sale, by the consent of *Fillebrown*, and the proceeds of the sale were by the consent of the said firm, appropriated in part payment of the debt so due to *Fiske & Billings*. This part of the defence is placed on the ground that the plaintiff's attachment, though prior in point of time, could not have, and did not have any legal operation as against *Fiske & Billings*, inasmuch as they were creditors of the firm, and that the debt due them must be paid out of the partnership property, as far as that property would go. This general principle of law is admitted to be correct; but it is contended by the plaintiff's counsel that *Fiske & Billings* could not avail themselves of the benefit of the principle in the manner in which they proceeded;

that the property should have been sold at auction on execution, and not voluntarily surrendered by *Fillebrown* into their possession and placed under their control. It cannot be denied, that if *Fiske & Billings* had placed their execution in the hands of another officer and he had demanded the property of *Fillebrown*, received it, and sold it on the execution, *Fillebrown* would have been justified in having given up the property for the purpose; and, we apprehend, would have been answerable in damages had he refused so to do. Why then should *Fillebrown* be considered as having violated his duty in placing the property in the hands of *Fiske & Billings* for the purpose of sale and legal appropriation; or why should they lose the benefit of the principle of law which entitled them to the property, merely by selling it themselves at private sale by the express consent of the owners of the property, and also of *Fillebrown?* He proceeded on the presumed or well known fact, that the debt due to *Fiske & Billings* was a partnership debt. It was such a debt. But on this point we will advance no further; having, in the preceding part of this opinion, anticipated most of the principles and authorities, which would otherwise, be properly applicable here.

We will now proceed to notice and examine some objections which have been urged against this branch of the defence. We do not consider the other judgment which was recovered by *Fiske & Billings*, at *June* term, 1828, against *Fish* only, as of any importance. It was for almost the same sum as that which was recovered against the three, composing the firm. Only that judgment is relied on. The reason of its existence was explained at the trial; no fraud was proved respecting it; certainly none was found by the jury; and on no other ground can a judgment be collaterally examined. At any rate, the case finds that the whole amount of the judgment relied on, was due from the firm. It has been objected with some confidence that the judgment last mentioned is to be considered as void, in consequence of the addition of the sums of $6000 and $500, to the sums that were due when the judgment was recovered and therein included; the above sums not being then due, nor till

some months after. They were incorporated, however, by the express consent of the parties to the judgment. As between them, the transaction was perfectly fair and honest. In support of the objection the case of *Clark v. Foxcroft*, 7 *Greenl.* 348, has been cited. It is true that in certain cases, such as that and those there mentioned, the introduction of a new cause of action, or the increase of the demand beyond its amount when the action was commenced, will operate to destroy an attachment and let in subsequent attachments; but the objection and the principle are not applicable here. The plaintiff's attachment, though an ineffectual one, was prior to that of *Fiske & Billings*. They did not claim a right to the property attached, by priority of attachment, but by priority of title, because their demand was against the firm. Besides, for the reasons already assigned, we are satisfied that the rights of *Fiske & Billings*, in respect to the appropriation of the property attached, would have been the same, if their demand had not passed *in rem judicatam*.

The next objection which has been urged has reference to the admission of the affidavit of Mr. *Rogers*, as to the facts to which the above named *Fiske* would testify, if present; or in other words, the objection is, that *Fiske* was not a competent witness, but should have been excluded on the ground of interest. We might at once dispose of this objection by saying that the testimony is of no importance, and that the defence is established by facts, proved by the records and other witnesses against whom no objection was made. On this principle, we should not grant a new trial, even if we were satisfied that the testimony was inadmissible. But we are of opinion that the objection is not well founded. The principle of law on the subject of incompetency of witnesses on the ground of interest is stated in these words in 2 *Stark. Evid.* 744. "The interest to disqualify must be some legal, certain and immediate interest, however minute, in the result of the cause, or in the record, as an instrument of evidence, acquired without fraud." Now as *Fiske & Billings* have in their hands the proceeds of the goods attached, and which they claim a right to hold, nothing can be more

clear than the position, that if *Fillebrown*, or the firm, should commence an action against them to draw the money out of their hands, the verdict and judgment in the present action, would not be legal evidence on the part of *Fiske & Billings*, to sustain the defence. On this ground *Fiske* could not have been inadmissible on account of having any interest in the record. No direct and certain advantage could result to him by reason of a decision of the cause in favor of the defendant. 2 *Stark.* 746. It materially differs from the cases of *Schillinger v. McCann*, 6 *Greenl.* 364, and *Pingree v. Warren*, *ib.* 457. In those cases, a decision of the cause in favor of the party calling the witness, would have secured to him a certain advantage, or shielded him from a certain loss. But beyond this, it appears by the report, as before observed, that the property attached was sold and appropriated in payment of the debt due from the firm to *Fiske & Billings* by the express consent of *Fillebrown* and the firm. On what principle, then, should either of them be permitted to recover the money back? Could *Fillebrown* maintain an action for the money? He placed the property in the hands and under the control of *Fiske & Billings*, and would the law imply a promise on their part to pay to him the proceeds of the sale, to indemnify him for doing an act, if it was unlawful and a violation of his official duty, and from the consequences of such act? 5 *Mass.* 385; *ib.* 541. 4 *Mass.* 370. Could the firm maintain any action after they had assented to the receipt of the proceeds of the lumber by *Fiske & Billings*, and an appropriation of such proceeds in payment of a debt they owed to *Fiske & Billings?* A recovery of judgment by the plaintiffs in such an action would seem to be a legal anomaly. Besides, an action brought either by the company or by *Fillebrown*, might be effectually resisted by showing, in the defence, that the proceeds of the lumber had been appropriated in exact accordance with legal principles, as well as the agreement of all concerned. Could any other creditor of the company, or of any one or more of the members of the company maintain a trustee process against *Fiske & Billings?* Certainly not. A disclosure, showing the nature and amount of their

claim originally against the company, and of their right to the proceeds of the lumber in their hands, and the insolvency of the company, would at once present a legal ground on which they must be discharged. *Judgment on the verdict.*

Weston J. being related to *Fillebrown*, the defendant in interest, did not sit in this cause.

Emerson *vs.* Taylor.

The mode of ascertaining the side lines of water lots, from the upland to low-water-mark, under the Colonial Ordinance of 1641, where they have not been otherwise settled by the parties, is, to draw a base line from one corner of each lot to the other, at the margin of the upland, and run a line from each of these corners, at right angles with such base line, to low-water-mark. If the line of the shore is straight, the side lines of the lots, thus drawn to low-water-mark, will be identical; but if by reason of the curvature of the shore, they either diverge from, or conflict with, each other, the land inclosed by both lines, or excluded, as the case may be, is to be equally divided between the adjoining proprietors.

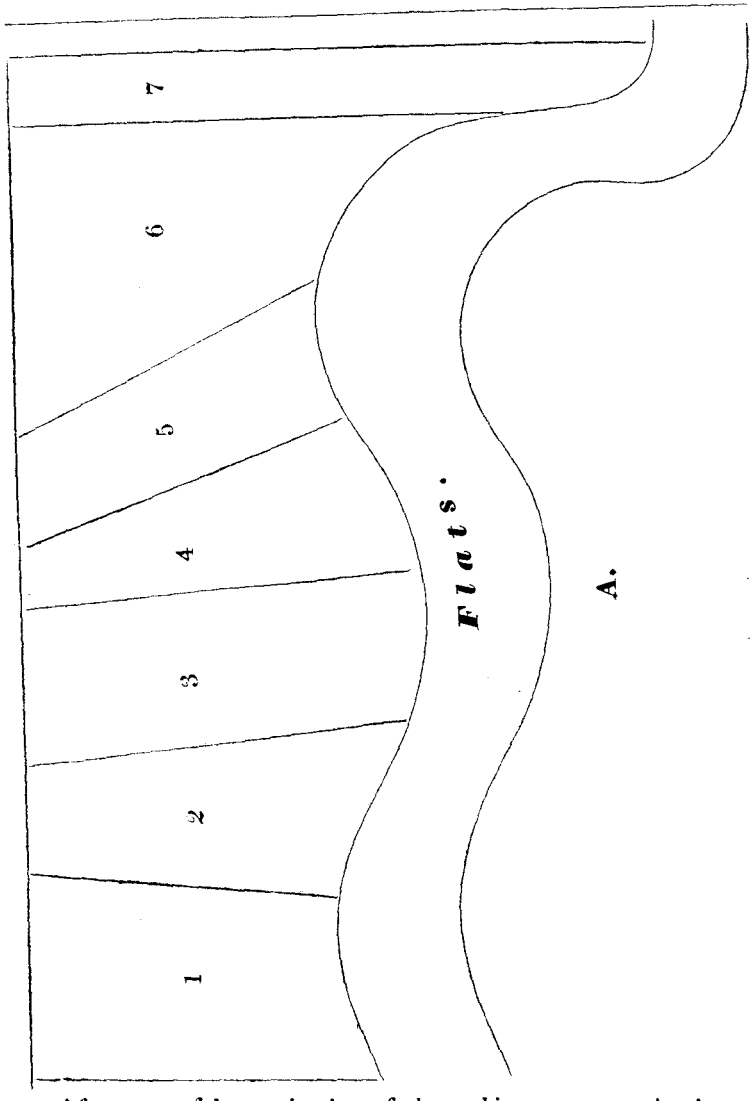
In this case, which was an action of trespass *quare clausum fregit*, the only question was, in what manner the side lines of the lots of land fronting on tide waters, were to be extended from the upland to low-water-mark, under the Colonial Ordinance of 1641. The facts being agreed, it was submitted in vacation without argument, by *Gilman* for the plaintiff, and *Abbot* for the defendant.

The opinion of the Court was delivered at this term by

Mellen C. J.

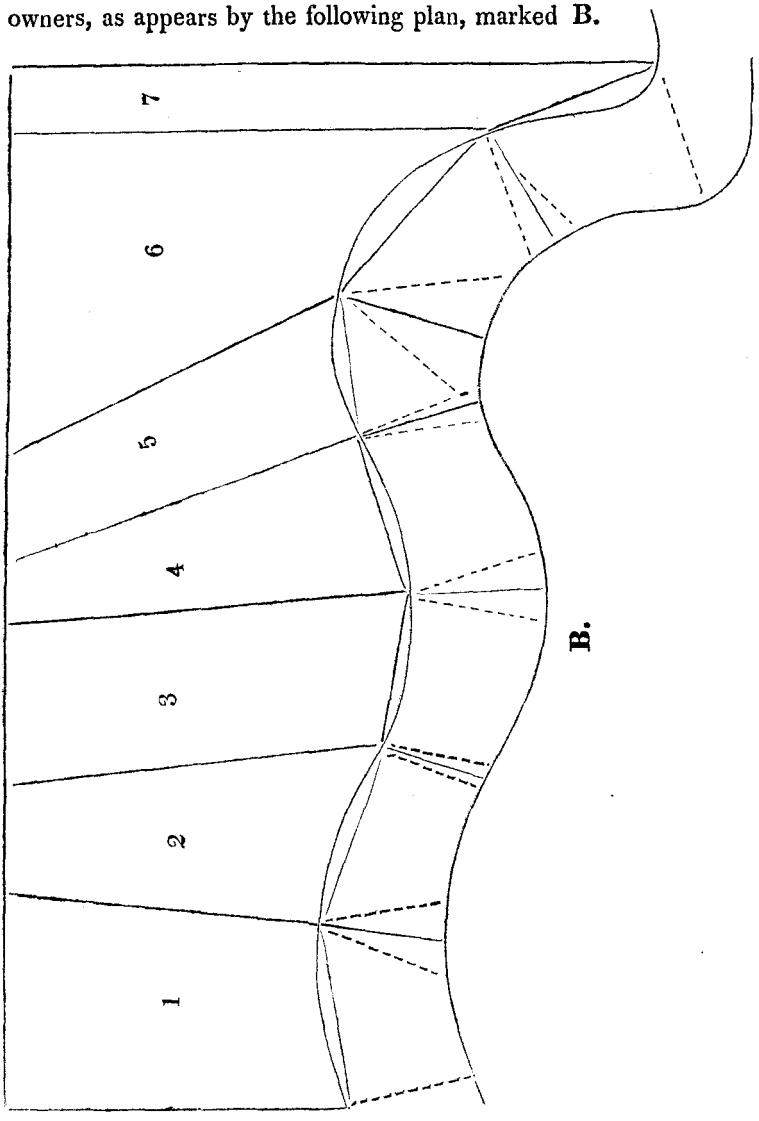
By the plan, which is made a part of the case, it appears that the upland part of the *locus in quo*, described in the second count, (a *nolle prosequi* having been entered as to the first count) is boun-

ded on the south easterly side by a lot of the defendant's; and that the course of the side lines of both lots is northeasterly to *Kenduskeag* stream, and making an angle with the same of nearly forty-five degrees. The margin of the stream is straight where the upland of the lots adjoins it. The question submitted is, in what direction the side lines of the plaintiff's flats are to run from the termination of the side lines of the upland. The flats in controversy where the alleged trespass was committed, are claimed by both parties; each claiming them as appurtenant to his upland lot, in virtue of the Colonial Ordinance of 1641, or rather of the principle of that ordinance, as a part of our common law. The language of the ordinance is "that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water-mark, where the sea doth not ebb above a hundred rods, and not more, wheresoever it ebbs further." The above expression "to the low-water-mark" seems evidently to imply to the low-water-mark in the nearest direction and without any regard to the course of the side lines of the upland to which the flats are adjoining and appurtenant; and the court appear to have adopted this principle in the case of *Rust v. The Boston Mill Corporation*, 6 *Pick.* 158, to which our attention has been called. Such a construction seems more consistent than any other with the respective rights of contiguous owners of upland; and in some cases, where the upland adjoins a cove, and the contiguous lots are so laid out or bounded, as that their side lines strike the cove, as some of them necessarily must, obliquely, the above rule must be applied as the general rule of construction; otherwise the extension of the side lines of one of the upland lots in a straight direction, might, in some cases, deprive an adjoining lot of all benefit of flats; and, according to the following plan marked A, it would cut off from lot No. 6 most of the benefits of the flats adjoining it.



After a careful examination of the subject, we perceive but one construction, or application of the principle of the ordinance which will do justice to all concerned. The mode of apylying the principle is this. Draw a base line from the two corners of each lot, where they strike the shore; and from those two corners, extend parallel lines to low-water-mark, at right angles with the base

line. If the line of the shore be straight, as in the case before us, there will be no interference in running the parallel lines. If the flats lie in a cove, of a regular or irregular curvature, there will be an interference in running such lines, and the loss occasioned by it must be equally borne or gain enjoyed equally by the contiguous owners, as appears by the following plan, marked **B.**



By the foregoing plan it will be noticed, that the parallel lines, running at right angles with the base lines are merely dotted; while the base lines and the true division lines between the flats belonging to the respective upland lots are distinctly drawn. It will also be seen that each of the lots 1, 2, 5, 6, have their appurtenant flats converging from the upland to low-water-mark, in consequence of the recess and curvature of its margin; while the lots 3 and 4 have their appurtenant flats wider at low-water-mark than where they join the upland, in consequence of the projection of each lot into the stream. On the same principle where there is an extended projection of upland of any form, or an island, belonging to different owners, each one's lot being bounded on the sea, or the tide water in which the island is situated, the surplus width of the flats at low-water-mark, arising from the form of the upland, must be divided among the contiguous owners of such upland, and the mode of division and the result are to be ascertained by drawing base and parallel lines in the manner before mentioned, and then making an equal division of the surplus. By this process justice will be done and all interference of lines and titles prevented.

We are not aware of any cases, where, in apportioning appurtenant flats among contiguous owners of upland, the foregoing principles and mode of proceeding would not be properly applicable as the rule of decision. Still we do not undertake to affirm that there may not be some peculiarity in the form of the upland to which flats are appurtenant, and some peculiarity of manner in which the upland may be divided among contiguous owners, the effect of which we have not anticipated, which would vary the principle. Should any such cases hereafter present themselves, requiring the application of a different principle, such new principle must of course be applied.

We have said that such is the true construction as to the effect of the principle of the ordinance and such the mode of its application, in ascertaining the extent and form of the flats adjoining the upland of different owners, holding the same in severalty. We do not mean to be understood as deciding that where a township or other tract of land belongs to one or more proprietors, to which flats are appurtenant by virtue of the principle of the ordinance, such proprietor or proprietors may not lawfully sell and convey the upland and the adjoining flats by such courses and monuments and in such form and to such extent as he or they may think proper. This may undoubtedly be done; or the flats may be conveyed in any form or by any courses without the upland. Our decision is to be considered as applying to those cases, and to those only, where the rights of contiguous owners of the flats depend on the principle of the Colonial Ordinance, as is the fact in the case under consideration. The result of our examination is the opinion that the action is maintained. Accordingly a default must be entered, and

Judgment for plaintiff.

SAWYER *vs.* SHAW *& al.*

A. and *B.* made a contract for the sale of a chaise, by which it was agreed that *B.* should give his notes for the price, payable in twelve months, and in the mean time should keep possession of the chaise, and use it at his pleasure; but that the property should remain in *A.* till the notes were paid. *B.* accordingly gave his notes and received the chaise; which he used as his own, and afterwards sold, before the year expired, to *C.* who had in fact no knowledge of the terms of the contract. After the expiration of the year, and after *C.* had used the chaise some months, with the knowledge of *A.* and had subsequently sold it, *A.* brought an action of trover against him for the chaise; and it was held that the action might well be maintained; there being on the part of *A.* no fraudulent delay or acquiescence.

THIS action, which was trover for a chaise, was tried before the

Chief Justice, who reported the following facts. The plaintiff, being the original owner of the chaise, entered into a contract *July* 22, 1829, with one *Hanscom*, for the sale of it to him for one hundred and sixty-eight dollars, for which *Hanscom* gave him two promissory notes, each for a moiety of the price, one payable in six and the other in twelve months; it being agreed in writing between them that *Hanscom* should take possession of the chaise and use it as his own, the property still remaining in the plaintiff till both the notes were paid; and that if the plaintiff should take it back for nonpayment, *Hanscom* should pay for the use of it, and the plaintiff should refund any part of the price he might have received. *Hanscom* accordingly gave a receipt for the chaise, stating the agreement, and used the chaise as his own; saying, to one witness, that he "had a year to try it in." On the 6th of *November* following, he sold it to the defendants, who publicly used it for a short time in *Bangor*, where the plaintiff and defendants lived. In *December* of the same year, one of the defendants went to the westward with the chaise; and in the spring following sold it. The defendants had no notice of any claim of the plaintiff upon the chaise, prior to their purchase, nor while they kept it; nor until the middle of *December*, 1830, when the plaintiff demanded it of them. *Hanscom* left *Bangor* in *January*, 1830, and was absent a short time from the State; but returned in the summer following, soon after which he became insolvent.

Upon this evidence the Chief Justice instructed the jury that the action was maintained, and directed a verdict for the plaintiff for the value of the property. To which opinion the defendants filed exceptions.

Gilman and *Allen*, in support of the exceptions, contended, first, that the possession, both in law and in fact was in *Hanscom*, whose sale to the defendants was valid, and was sanctioned by the long acquiescence of the plaintiff; *Hussey v. Thornton*, 4 *Mass.* 405; *Buffinton v. Gerrish*, 15 *Mass.* 158.—Second, that the plaintiff, by delay, not having made demand till after *Hanscom* failed, nor till several months after the last note had become payable, had waived

his lien on the chaise, and consented to resort to the notes alone; all which should have been left to the jury. Having stood by and seen the property sold to another, he ought not to be permitted to set up his own title against such sale. *Wyman v. Dorr*, 3 *Greenl.* 183; *Ward v. McAulay* 4 *D. & E.* 498; *Gordon v. Harper*, 7 *D. & E.* 9; *Smith v. Plummer*, 15 *East.* 607; *Ayer v. Bartlett*, 6 *Pick.* 71; 9 *Pick.* 156.

Kent and *Rogers*, for the plaintiff, cited *Edwards v. Harden*, 2 *D. & E.* 596; *Holbrook v. Baker*, 5 *Greenl.* 311. *Patten v. Clarke*, 5 *Pick.* 5.

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

Sawyer was once the undisputed owner of the chaise in question, and unless he has parted with his right to reclaim it, he is entitled to judgment on the verdict. The receipt given by *Hanscom*, in plain terms negatives the idea of an absolute sale, and it would seem, of any sale at the time the receipt and promissory notes were signed. But, at any rate, the property was not to vest in *Hanscom* until both notes were paid. *Sawyer* had a right at any time, after the first note should become due, if not then paid, to take back the chaise; and the parties seem to agree that he had no such right before that time. If taken back, *Hanscom* was to pay the plaintiff a reasonable sum for the use of it. Neither of the notes has been paid. When, then, could the property have passed? According to the terms of the contract it never did pass to *Hanscom;* and he, having no property in the chaise, could not convey any to the defendants, according to well settled principles. *Staples v. Bradbury*, 8 *Green.* 181.

But it is contended that as the defendants are *bona fide* purchasers, without notice, they are not answerable to the plaintiff, because he has by his conduct led them into their present situation, and waived all claim to the property; or, at least, that the question of waiver, or implied fraud should have been left to the jury. This objection renders it necessary for us to be particular as to dates and

to some other facts. The contract, respecting the property was made between the plaintiff and *Hanscom*, *July* 22, 1829. At that time, and for a year afterwards, *Hanscom* was solvent, and, for any thing appearing to the contrary, of unsuspected responsibility. The case finds that in the summer of 1830, he became insolvent. *Hanscom* stated that he had a year, in which to try the chaise. In this transaction, can the plaintiff be considered as acting, in any manner fraudulently? Did he thereby enable *Hanscom* to hold out a false character and credit? Such might, perhaps, have been the construction, had *Hanscom* then been in insolvent circumstances, and the plaintiff been privy to the fact. Again; it appears that on the 6th of *November*, 1829, long before the plaintiff could have had a right to reclaim and take back the chaise, *Hanscom* undertook to make the sale to the defendants. Surely the plaintiff had no right to interfere with the property till *Hanscom* had violated his contract by non payment of the first note; at least, no fraudulent intent could legally be imputed to him for omitting to exercise such a right, if he had it, in consequence of the sale made by *Hanscom*. What delay was there after the sale, or evidence of waiver? The case finds that in *December*, one of the defendants went, with the chaise, to the westward; but it appears that this was before the first note became due, and a right to reclaim the property accrued. After the defendants bought the chaise, it was publicly used by them in *Bangor*, for a short time; which was before one of the defendants went to the westward with it, where he sold it in the following spring, and it was never brought back again to *Bangor*. In all these facts is there any proof of fraudulent intent or delay on the part of the plaintiff? The exception does not show any thing more than that *Hanscom*, a man in good circumstances, having in his possession, on trial, the plaintiff's chaise, for which he may be considered as having made a conditional bargain, sold it to the defendants and they openly used it in *Bangor*, a short time afterwards; all which events took place before the plaintiff, by the terms of his contract, had any right to reclaim the chaise. It does not appear that the chaise was ever used a moment in *Bangor*, after *December*.

No false credit was given to *Hanscom;* he needed none; he had true credit, and needed no other. On these facts, if the question of imputed fraud, or waiver of claim on the part of the plaintiff, had been submitted to the jury, they would not have justified a verdict in favor of the defendant. Fraud is never to be presumed. It might, perhaps, in all such cases, be best to submit all such circumstances to the jury, to prevent any possible objection. It is stated that on the foregoing evidence the Judge directed the jury to find for the plaintiff; but at the argument, he stated that the evidence was all before them and submitted to their consideration in the usual manner. The delay to commence the action or demand the property for more than a year after the sale to the defendants, operated as a deception on no one, and can have no effect on the decision of the cause. Upon the whole, we see no propriety or use in disturbing the verdict; because, on the facts before us, we perceive nothing which was sufficient to entitle the defendant to a verdict. There must be *Judgment for plaintiff.*

STEWARD *vs.* RIGGS, *& al.*

A bond being in suit, and the writ in the hands of the officer, but not served, the obligor went to the attorney of the obligee, to pay him the money. The attorney cast the amount of the debt due, and wrote a receipt on the back of the bond, which was delivered to or taken up by the obligor, who handed over the money, at the same time, to the attorney. While the latter was counting the money he discovered and remarked that the costs had been accidentally omitted, which, however, the obligor refused to pay, and went away with the bond, the attorney refusing to receive the money. Hereupon it was held that the bond was not discharged.

The change of the indorser of a writ, before service, does not affect its character as a legal writ from the time of its date.

THIS case, which was debt on a gaol bond, came up by excep-

tions filed by the plaintiff to the opinion of *Whitman C. J.* in the Court below.

It appeared that after the writ was made and placed in the hands of an officer for service, Mr. *Fisk*, the surety in the bond, came to the office of Mr. *Williamson*, the plaintiff's attorney, and proposed payment. The latter accordingly cast the amount of the debt, for which he wrote and signed a receipt, on the back of the bond. *Fisk* handed the money to the attorney or laid it on the table near him, and took up the bond, or it was handed to him by *Williamson*; the manner of this transaction not being distinctly recollected by the witness. While the one was reading the receipt, and the other was counting the money, *Williamson* recollected and remarked that there was a mistake, the money not being sufficient; for that there was a writ, and probably a service, to be paid for; and that he should not receive the money unless the costs were paid. *Fisk* refused to pay any expenses, and went away, taking with him the bond; *Williamson* at the same time refusing to receive the money, which he threw into a chair near *Fisk*, and informing him that the action would be entered, if the costs were not paid. Shortly afterwards, the attorney perceiving that his testimony might be material in the cause, called on the officer and erased his own name from the writ, as indorser; directing the officer to procure another indorser to the writ, and serve it; which was done. The money left by *Fisk* was produced in court and again offered to him, but not accepted.

Upon these facts, *Whitman C. J.* was of opinion that the action could not be maintained; and nonsuited the plaintiff, who filed extions to his opinion.

Williamson, in support of the exceptions, cited *Fitch v. Sutton*, 5 *East.* 231; *Tobey v. Barker*, 5 *Johns.* 68; 1 *Dane's Abr.* 442, *sec.* 52; 6 *Dane's Abr.* 146, *sec.* 7; *Lewis v. Gamage*, 1 *Pick.* 350; *Kellogg v. Gilbert*, 10 *Johns.* 222; *Thoms v. Powell*, 7 *East.* 536; 12 *Mass.* 414.

T. McGaw, for the defendants, cited *Caldwell v. Leavitt*, 13 *Mass.* 422.

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

In our view, the decision of this cause must depend upon the peculiar circumstances in which *Williamson* and *Fisk* met and proceeded in their arrangements for the payment of the sum due on the bond and the settlement of the concern; and also in which they separated. The sum indorsed on the bond was equal to the amount claimed as due thereon; but not sufficient for the payment of that, and also of the price of the writ which had been made some time before. We are of opinion, that the change of the indorser had no tendency to change its character, as a legal writ from the time of its date; and that the same was a proper charge against the defendants; and had they made a tender, to prevent the service of the writ and prosecution of the action, they must have tendered the cost of the writ, to render the tender effectual. The object of *Fisk*, however, was not a tender, but payment. Do the facts before us prove a payment and settlement of the demand or not? While *Fisk* was counting his money, *Williamson*, the attorney of the plaintiff, was writing the receipt indorsed on the bond; and as *Fisk* laid down the money or handed it to *Williamson*, he took the bond, or *Williamson* handed it to him, (it does not appear which;) and while he was reading the indorsement, and *Williamson* was counting the money, he mentioned that he had forgotten to add the cost of the writ and then claimed the payment for it. *Fisk* refused to pay for it and retained the bond, and *Williamson* refused to receive the money. In this stage of the business the parties at once separated. One was examining the receipt to see that all was right; and *Williamson*, as he had a right to do, was counting the money to ascertain its amount and then discovered his mistake and requested to have it rectified. From these facts it appears that the business was not completed nor the mutual rights of the parties changed by the transactions above stated. For these reasons, without any particular examination of authorities adduced on either side, our opinion is that the exceptions are sustained. The verdict is set aside, and a new trial is to be had at the bar of this Court.

PIERCE *vs.* KIMBALL.

To constitute a statute a public act, it is not necessary that it should be equally applicable to all parts of the State. It is sufficient if it extends to all persons within the territorial limits described in the statute.

It is within the constitutional powers of the legislature to pass laws regulating certain branches of trade or manufactures in particular districts only; as well as to establish local tribunals.

Therefore the Statute of *March* 9, 1832, which provides for the survey of lumber in the county of *Penobscot* in a particular manner, and for the appointment of a Surveyor general for that county, by the Governor and Council, forbiding the sale or purchase of lumber in that county not surveyed and marked by him or his deputies according to the peculiar provisions of that statute, is not an unconstitutional act.

THIS was a *qui tam* action, to recover a penalty under the Statute of *March* 9, 1832, (Private Statutes *ch.* 283.) regulating the survey of lumber in the county of *Penobscot*, for surveying a quantity of lumber, the defendant not being the surveyor general nor one of his deputies mentioned in that act. In a case stated by the parties, it was agreed that the defendant was duly chosen by the inhabitants of *Bangor*, as one of their surveyors of lumber, under the general statute of 1821, and that as such he surveyed the lumber in question. And it was further agreed that if the act of 1832 was constitutional, and if the defendant, being a surveyor chosen by the town, was liable to its penalties, judgment should be rendered for the plaintiff, upon default.

Allen and *Kent*, for the defendant, argued that the act of 1832 was unconstitutional. It repeals a general law as to one county only; and enacts penalties and imposes obligations on the people of that county, unknown in other parts of the State. It is not a rule for all, binding on all. Laws affecting the rights and duties of the people should be uniform and universal in their character and application. It is this character which distinguishes a republic from despotic government. A different principle would enable a corrupt administration to coerce an obnoxious town or class of people, by the most flagitious oppression. *Portland Bank v. Apthorp*, 12

Mass. 252; *Lunt's case*, 6 *Greenl.* 412; *Lewis v. Webb*, 3 *Greenl.* 336; *Holden v. James*, 11 *Mass.* 396; *Picquet's case*, 5 *Pick.* 65; *Stoughton v. Baker*, 4 *Mass.* 522; *Little v. Frost*, 3 *Mass.* 106.

J. McGaw, for the plaintiff.

The opinion of the Court was delivered at a subsequent term, by

MELLEN C. J. For the maintenance of this action the plaintiff relies on the sixth section of the act passed on the ninth day of *March*, 1832, entitled, "An Act regulating the survey of lumber in the county of *Penobscot*." That part of the section on which the action is founded, is in these words:—"And if any person, not being the Surveyor general or one of his deputies, shall take an account of, or survey any of the aforesaid descriptions of lumber, sold or purchased as aforesaid, he shall forfeit not less than two, nor more than ten dollars for every ton of timber and every thousand feet of said other timber which he shall survey or take an account of." The constitutionality of the act, and more especially of the above provision, taken in connexion with certain other parts of the act, is denied by the defendant; and on the assumed ground of unconstitutionality, the defence has been placed. The first section provides that the Governor with advice of Council, may appoint some suitable person to be Surveyor general of lumber in the county of *Penobscot*, who shall reside at *Bangor*, and appoint not less than ten deputies. The second and third sections require a division of lumber into four classes, and prescribe the mode of surveying. The fourth directs the mode of marking the several kinds; and requires that all lumber shall be received and sold according to such marks, and prohibits all persons from selling or purchasing any such lumber, within said county, unless surveyed and marked as aforesaid, excepting such as is purchased for home consumption. The sixth section contains, in addition to the above quoted clause on which the present section is founded, the following provision, viz. "that if any person shall sell or purchase any of the aforesaid descriptions of lumber, not surveyed and marked as this act pro-

vides, he shall forfeit one dollar for every ton of timber or every thousand feet of said other lumber sold and purchased as aforesaid." The eleventh section declares "that all acts and parts of acts, inconsistent with the provisions of this act, be and the same hereby are repealed." Our constitution, part 3d, *art.* 4, *sec.* 1, declares that the Legislature shall have "full power to make and establish all reasonable laws and regulations for the defence and benefit of the people of this state; not repugnant to this Constitution, nor that of the United States." One objection urged against the act in question is that it is an unreasonable law, that it was not made for the benefit of the people at large, but only for the county of *Penobscot*, and the regulation of the peculiar interests of that county; and of course, is partial in its character and operation. That if it is a beneficial law, its benefits ought not to be confined to a small designated portion of the State; and, on the contrary, if it is restrictive in its operation, subjecting the citizens of the county of *Penobscot*, to burdens which the other counties in the State are not obliged to bear, that then it is an unjust and unconstitutional law. It is true that public acts are usually general in their character and operation, and equally applicable in all parts of the State. There are other acts which are considered as public acts, of which all persons are bound to take notice upon their peril, and yet they are local, because the violation of them is and must be local. Thus in the case of *Burnham v. Webster*, 5 *Mass.* 266, which was an action of debt for taking fish near the shore in *Scarborough*, within certain limits prescribed by Statute, contrary to its prohibitions, *Parsons C. J.* says, "We are all of opinion that the statute referred to is a public statute: it is obligatory upon all the citizens, and they must notice it at their peril. Indeed all the laws regulating the taking of fish are made for the public benefit, to preserve the fish, and are public statutes. The violation of all such statutes must necessarily be confined to those ponds, rivers, streams and other places to which the statute prohibitions apply; but the prohibitions themselves are general or universal, extending to all who shall dare to transgress, wherever residing. In the case of *Commonwealth v.*

Worcester, 3 *Pick.* 462, the court say, "surely the power of the legislature to pass a local law cannot be questioned. It is not only the right, but the duty of that branch of the government so to vary the provisions of law, as to meet, so far as is practicable, the peculiar exigencies of every portion of the community." So in *Wales v. Belcher*, 3 *Pick.* 508, the court adjudged the police court of *Boston* as constitutionally established; though by the act establishing it, the powers of justices of the peace of the county of *Suffolk* were taken away and transferred to that court. The Municipal Court and the *Boston* Court of Common Pleas, were also established by local laws, while all other parts of the Commonwealth were under the jurisdiction of courts differently organized and possessing different powers. So, in this State, a similar principle has been acted upon in the establishment of the Municipal Court in *Portland;* a court clothed with a special jurisdiction, and exercising all those judicial powers which justices of the peace in that town formerly exercised; but which powers they are now prohibited from exercising under a penalty, in the same manner as the surveyors of lumber, chosen by towns in the county of *Penobscot*, are prohibited by the act of 1832, from surveying and marking lumber within the limits of that county. So towns have authority, by the general law of 1821, to elect inspectors of lime; yet the same act authorises the Governor, with advice of Council, to appoint inspectors in the towns of *Thomaston*, *Camden* and *Warren;* and those towns are deprived of the power of choosing such officers. Is the act unconstitutional on the ground that it is not only local in its operation, but in restraint of trade in the county of *Penobscot*, while the inhabitants of all the other counties in the State, and all persons transacting the business of trade in those counties, in the various species of lumber, are free from similar restraints? In reply to this question it may be said that the only variance between the survey required by the general law of 1821, and the act of 1832 is, that by the latter law, a certain classification of the different kinds of lumber is to be made in the survey; and the several classes are to be distinguished by the marks of the surveyor; but the same qual-

ity of timber is required by both laws to entitle it to a survey for exportation. There is more form in distinguishing the varieties composing a large lot of timber; but the quality of the aggregate must be the same in both cases, to answer the requisitions of both statutes. In this respect, then, there is no restraint of trade; the only change has reference to the person or persons empowered to make the survey. The fees to be paid are the same. By a general law of Massachusetts, of *March* 8, 1785, it is declared to be an indictable offence to sell any diseased, corrupted, contagious or unwholesome provisions, punishable by fine, imprisonment or pillory; and by a local act, passed *June* 20, 1799, it is enacted, "that if any person shall offer for sale in the town of *Boston*, or have in his possession any tainted or putrid salted meat or pickled fish, he shall forfeit two dollars per barrel." By the same act, the *Boston* board of health were specially empowered to require vessels to perform quarantine, under a severe penalty. Is not this last statute, at least in the last named provision, in restraint of trade, though the preservation of health was the motive in passing it? By the act of 1821, one moiety of all fines and penalties was to belong to the town where an offence should be committed; by the act of 1832, such moiety is to go to the county of *Penobseot*. This furnishes no sound objection to the last law; for it can have no effect as to vested rights; they are not vested in the town till recovery of judgment for such penalties. By the act of 1821, such penalties are to be recovered by suit, or by a civil action; by the act of 1832, they may be recovered by a civil action or by indictment. Neither does this furnish any valid objection; for the provision is as general as the prohibitions, which, as has been before observed, extend to all persons, of whatever place they may be inhabitants. Had those prohibitions and penalties extended to no other persons than the inhabitants of the county of *Penobscot*, the case would seem different in principle, and perhaps liable to immovable objections. From the view we have thus taken of the act in question, it is by no means apparent that it was intended to confer on the inhabitants of the county of *Penobscot* any peculiar privileges, or subject them to any

peculiar penalties, privations or disabilities. Nothing appears which indicates that the law was not intended as a public benefit, of which all the citizens of the State, as well as others, might equally participate; and that there were circumstances, rendering the provisions of the act, in that section of the State, where such immense quantities of lumber are annually manufactured and sold for exportation, of peculiar advantage to all connected in so extensive a concern.

We have had several occasions for observing or considering the effect of Resolves, passed for the express purpose of granting some especial privilege to certain individuals, to which, by the standing laws of the State, they were not entitled; as appears in the cases of *Holden v. James, ad'r.* and *Lewis v. Webb*, cited by the counsel for the defendant; and also in *Durham v. Lewiston*, 4 *Greenl.* 140; in all of which cases the Legislature was pronounced to have exceeded its constitutional powers. In the above case of *Holden v. James, adm'r.* a learned opinion was delivered by *Jackson J.* in which the subject of such legislation is luminously considered. He observes, "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages, which are denied to all others under like circumstances; or that any one should be subjected to losses, damages, suits or actions, from which all others, in like circumstances are exempted." The legislatures of *Massachusetts* and of this State, have repeatedly recognized the distinction between such resolves, granting personal privileges or exemptions to certain individuals by name, and laws of a local character of the kind before mentioned in this opinion. The former are considered as unconstitutional; the latter are not so considered.

But it has been urged that if such local legislation as that which is manifested in the act in question, is to be sanctioned, it will lead to dangerous consequences, and may be used for purposes of oppression or partizan management. The answer to this objection is, that the great political interests of the people are secured by express

constitutional provisions. Our rulers must be elected in certain specified modes, which consequently, must be uniform and general. The term of office is subject to distinctly prescribed limitations; and the security of life, liberty, reputation and property, depends on principles and sanctions to be found in our constitution; and when an act of the Legislature violates these or jeopards the unquestioned rights of the citizens, a court of law is bound to declare such an act a nullity, and decline carrying it into execution. All laws, however, enacted by the Legislature, are presumed to be constitutional. The act under consideration does not, certainly with clearness, appear to be otherwise. We conclude with the language of *Marshall* Chief Justice, in the case of *Dartmouth College v. Woodward.*— "On more than one occasion, this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that in no doubtful case, would it pronounce a legislative act to be contrary to the constitution." The action therefore is maintained. A default is to be entered and judgment thereon, for twenty-one dollars damages and costs.

TREAT *plaintiff in review, vs.* INGALLS.

The *Stat.* 1831, *ch.* 502, *sec.* 2, granting reviews as of right in all actions in the Supreme Judicial Court, where a verdict has been rendered for the defendant in the court below, and on appeal the plaintiff has prevailed, is to be applied only to such actions as were then pending in this Court, or might afterwards be commenced.

THIS was a writ of review, sued out as of right, under *Stat.* 1831, *ch.* 502; in a cause in which *Treat* was the original defendant, in whose favor a verdict had been rendered in the Court of Common Pleas; but, on appeal, *Ingalls*, the original plaintiff, had obtained a verdict in this Court, at *October* term, 1830. The

counsel for the defendant in review now moved that the present action be dismissed, as not authorised by the statute, judgment having been rendered in the original suit before the statute was enacted.

W. D. Williamson, for the plaintiff in review.

Kent, for the defendant in review.

WESTON J. delivered the opinion of the Court.

The statute upon which this writ of review was sued out, permits reviews as of right in certain cases, and upon certain restrictions. The first section authorizes a review, where a verdict may be found for the plaintiff in the Common Pleas, and on appeal, for the defendant; or for the plaintiff for a less sum than twenty dollars, in all actions thereafter to be commenced. The second section provides, that in all actions in the Supreme Judicial Court, where a verdict has been, or may be rendered in favor of the defendant in the Court of Common Pleas, and on appeal a verdict has been, or may be found for the plaintiff, the defendant shall be entitled to a review of said action. A review in favor of the plaintiff, is limited to actions to be commenced, after the passage of the act. A review on the part of the defendant, has no such limitation. Why this distinction was made in favor of defendants, it is not easy to perceive. If it was introduced to embrace a particular case, this design was probably not made known to the legislature; as it is not to be presumed they would favor such an object in a general law; more especially as the Supreme Judicial Court had before full power to grant reviews, wherever they would tend to the furtherance of justice. But from whatever cause the distinction originated, there is no reason for extending it beyond what the statute plainly requires. Prior to the passage of the act, the suit now sought to be reviewed, after two trials in different courts, had finally terminated, and judgment had been rendered, in the court of appellate jurisdiction. It was no longer pending in any court. Laws are made to operate prospectively. Where they introduce new rules and principles, they are intended to apply to the future, not to the past.

Judgments may be subject to be revised, according to laws existing at the time of their rendition. This is a fixed and settled qualification of rights vested under them. But with this exception, there can be no higher title to any right or interest whatever, than what arises from a regular judgment at law. We feel constrained therefore, to come to the conclusion, that by actions in the Supreme Judicial Court, must be understood such as were there pending, when the act passed, and such as might afterwards be commenced. It results that the writ cannot be maintained as of right; and it is accordingly dismissed.

LOMBARD *vs.* RUGGLES.

The equitable claim of a tenant, to the value of his improvements or betterments, made on lands held by possession only, arising under the statutes of 1821, chapters 47 and 60, may be conveyed by parol, accompanied by an actual transfer of the possession to the purchaser; it being, not an interest in the land itself, but merely an equitable right to compensation for the improvements.

THIS was an action of *assumpsit*, against the owner of a parcel of land, founded on *Stat.* 1821, *ch.* 62, for the value of improvements made thereon, by the plaintiff and those under whom he claimed; the defendant having entered and ousted the plaintiff from the possession. It came up by exceptions taken in the court below to the opinion of *Whitman C. J.* who had nonsuited the plaintiff.

The facts were these. One *William Hill* entered into possession of a certain lot of land, of which *Ruggles* the defendant was owner in fee; and continued thereon, making improvements, for four or five years; after which he sold his improvements, by deed, to one *Perry*, who continued in possession of the land two years, at the expiration of which he sold his right in the premises by bar-

gain, without writing, to the plaintiff. The plaintiff thereupon entered and made improvements on the land, and continued in possession until the defendant, without his consent, entered and ousted him.

Godfrey, for the defendant. The fee was originally in *Ruggles*, who was disseised by *Hill*, who conveyed by deed to *Perry*. By this conveyance *Perry* acquired a freehold, and his title was good against all persons but *Ruggles*. *Higby v. Rice*, 5 *Mass.* 344. This freehold never having passed from *Perry*, the possession of the plaintiff was a new disseisin of *Ruggles*. The interest which *Perry* acquired was an interest in land, which, by the statute of frauds, cannot be conveyed but by deed. *McMillan v. Eastman*, 4 *Mass.* 372. The legislature has treated the claim to betterments in the light of an equity of redemption, by requiring the sheriff, having sold it on execution, to convey the title by a deed. *Stat.* 1821, *ch.* 60. *Thompson v. Gregory*, 4 *Johns.* 81. Before the statute was passed, giving these equitable claims, a wrongful possession was regarded as an interest in lands. *Howard v. Easton*, 7 *Johns.* 205.

J. Appleton argued in support of the exceptions, citing *Lower v. Winters*, 7 *Cowen*, 263; *Goodwin v. Gilbert*, 9 *Mass.* 510; 11 *Mass.* 533; *Tinkham v. Arnold*, 3 *Greenl.* 122; 1 *Johns. Ch.* 131; *Clement v. Durgin*, 5 *Greenl.* 14; *Doty v. Gorham*, 5 *Pick.* 487; *Marcy v. Darling*, 8 *Pick.* 283; 6 *Greenl.* 452; *Davenport v. Mason*, 15 *Mass.* 92; *Bellington v. Welch*, 5 *Binn.* 129; *Ricker v. Kelley*, 1 *Greenl.* 117; *Gouverneur v. Lynch*, 2 *Paige*, 300; *Pritchard v. Brown*, 4 *N. Hamp.* 397; 4 *Amer. Jurist*, 312.

The opinion of the Court was delivered at a subsequent term, by

MELLEN C. J. In the first section of *ch.* 47, of the revised statutes, it is provided "that when any action has been, or may be hereafter commenced against any person for the recovery of any lands or tenements holden by such person, by virtue of a possession and improvement, and which the tenant, or person under whom he claims has had in actual possession for the term of six years or more

before the commencement of the action, the jury which tries the same, if they find a verdict for the demandant, shall, if the tenant so request, also inquire, and by their verdict ascertain the increased value of the premises by virtue of the buildings or improvements made by such tenant or those under whom he may claim ;" and the section goes on and prescribes the manner in which he is to avail himself of such estimated value. The 5th section of the act of 1821, *ch.* 62, provides the mode in which payment for such buildings or improvements is to be obtained, when the owner of the land is in possession, and, of course, no action is necessary to be brought by him. The provision is this: "that if any person shall make such entry into any lands, tenements or hereditaments, which the tenant or those under whom he claims, have had in actual possession for the term of six years or more before such entry, and withhold from such tenant the possession thereof, such tenant shall have right to recover of him, so entering, in an action for money laid out and expended, the increased value of the premises by virtue of the buildings and improvements, made by such tenant, or those under whom he claims." On this section the present action is founded. The 19th section of *ch.* 60 of the revised statutes, provides "that the right, title or interest of any person, owned, holden or claimed in virtue of a possession and improvement, as expressed in an act for the settlement of certain equitable claims arising in real actions, shall be liable to be attached and sold on execution." The facts stated in the exception bring the plaintiff's case expressly within the language of *ch.* 62, inasmuch as the plaintiff and those under whom he claims, had been in possession more than six years next before the defendant entered upon and took exclusive possession of the lot of land in question, without the plaintiff's consent. The sale from *Hill* to *Perry* of his possessory right, that is, of the benefits of the improvements made by him, was by deed. The sale of the same from *Perry* to the plaintiff, was by parol, followed by an immediate transmutation of the possession. Is the plaintiff's case within the true intent and meaning and reason of the foregoing sections of chapters 47 and 62? If so, the nonsuit ought to be set

aside. Both statutes profess to favor, sanction and protect the equitable claims of tenants to a compensation for the increased value of lands belonging to others, occasioned by the improvements made by such tenants, or those under whom they claim. Legal titles or legal claims were not the objects of legislative solicitude, nor in contemplation when those acts were passed. They were evidently intended, not in any degree to take from the owner of land any of his legal rights to the land, or in the slightest manner impair the perfection of his title: but merely to provide a mode for doing what the legislature deemed justice to the tenant, by subjecting the owner of the land to the payment of what a jury should pronounce to be the sum due in equity from him to the tenant, for the increased value of the land, arising from his labor and expenditures. For these reasons, the provisions of the acts before mentioned ought to receive a liberal construction, in order that the intentions of the legislature may be accomplished, and the contemplated benefits be realized by those for whom they were professedly designed.

No person is entitled to compensation for the improvements mentioned in the statutes, unless when sued for the land in a real action, in which case the amount of such compensation is to be estimated and settled by the jury on trial, or when the owner enters upon him and dispossesses him, as in the present case; in which case he may recover his compensation in an action of *assumpsit*. Hence it is plain that *Perry* cannot maintain any claim for the value of improvements made by *Hill* or by himself, for neither has possession or the right of possession, or been wrongfully dispossessed.

Thus stands the case in an equitable point of view. The plaintiff certainly claims under *Perry*, or did claim and hold under him, when he was dispossessed by the defendant, and neither of the acts points out how the claim shall be sanctioned or proved. It is first said by the counsel for the defendant that when *Perry* entered under the deed from *Hill*, he became seised: but it was a seisin by wrong; or, in other words, it was a continued disseisin of *Ruggles* the true owner. It is then asked, has the fee thus gained by the wrongful seisin, thus acquired, passed from *Perry* to any one?

Admit that it has not; but it is a fact that when the parol contract was made with the plaintiff, *Perry* abandoned the premises. If no estate passed to the plaintiff, it is perfectly clear that when *Perry* abandoned or left the premises, his disseisin was at an end. Surely no authority is necessary to establish this as a correct position; still we will merely cite *Small v. Proctor*, 15 *Mass.* 499. But besides the answer we have now given, it may be added that the present action involves no controversy as to the fee of the land, for that is admitted to be in the defendant. Nor does the act of 1821, *ch.* 47, contemplate any such idea. When the value of the improvements are estimated in the trial of a real action, as before mentioned, according to the first section of said act, if the owner elects to abandon the land to the tenant at the price estimated by the jury, no judgment is to be entered on the verdict, which is in favor of the demandant, but the proceeding is considered in the nature of a statute purchase at the estimated price, and judgment is to be entered for the demandant to recover that sum. If the demandant does not elect to abandon as abovementioned, he shall have judgment on the verdict, but no execution shall issue thereon, unless within one year from the rendition thereof, he shall have paid into the clerk's office, or the person appointed by the court, the sum which the jury have assessed for buildings or improvements, with the interest thereof. Thus we see that in a real action, where the demandant in his writ demands the fee simple, he recovers it, and his judgment on the verdict for such an estate as he demands; that is for the whole and perfect title. The statute provision as to compensation for all improvements, is a mere money concern in the result; though originating in the form of a real action for the recovery of the premises on which the improvements have been made. We pass on to the next objection, founded, according to the argument, upon the second section of the statute of frauds, *ch.* 53, which declares "that no leases, estates or interests either of freehold or term of years, or any uncertain interest of, in, to or out of any mesuages, lands, tenements or hereditaments shall at any time be assigned, granted or surrendered, unless it be by

some deed or note in writing." To show that the sale from *Perry* to the plaintiff is within the statute, the case of *Thompson v. Gregory*, 4 *Johns.* 81, and *Howard v. Eastern*, 7 *Johns.* 205, have been cited. The former was the case of a parol contract with *Rensselaer*, the original proprietor, authorising *Gregory* to erect the dam complained of; the right to the place where it was erected having been reserved to *Rensselaer*. The court say, "the right in question could not pass by parol. It was an incorporeal hereditament. It was not the land itself, but a right annexed to it, and could only pass by grant." The latter was the case of a promise on the part of the defendant to pay the plaintiff a certain sum, in consideration that the plaintiff had agreed and promised to sell and deliver up to him the possession and improvements made by the plaintiff on a certain piece of land. The court say, "here was an agreement to sell and deliver possession as well as improvements on land; and possession must be considered as an interest in land. It is *prima facie* evidence of title, and no title is complete without it." In the case before us, *Hill* sold nothing but his improvements; that is, his right to compensation for his improvements; and *Perry* sold nothing to the plaintiff but his right in the premises; that is, the right to compensation which he purchased of *Perry;* for it does not appear by the exception that *Perry* made any improvements himself. The case therefore, differs from both of the cases cited. It is not one where any thing is claimed under *Perry* as a part of the reality, or growing out of it, or depending on any title; but one plaintiff's dispossession by the defendant. The case of *Frear v. Hardenberg*, 5 *Johns.* 272, was assumpsit to recover compensation for improvements made on the defendant's land. One ground of defence was, that the promise of the defendant to pay for them was within the statute of frauds. *Spencer J.* says, "the contract does not go to take away from the promissor the land or any interest in, or concerning the same. The statute could have in view to avoid such agreements in relation to lands as rested in parol, "only where some interest was to be acquired in the land itself." In *Lower v. Winters*, 7 *Cowen*, 263, the Court say, "it has been repeatedly held

by this Court that a parol promise to pay for improvements on land, is not within the statute of frauds. Improvements upon land, distinct from the title or possession are not an interest in land within the meaning of the statute. In *Howard v. Eastern*, 7 *Johns.* 205, the contract was for the sale of the possession and improvements; this, (the court remarked) "was held to be within the statute"—observing that possession must be considered an interest in land, and *prima facie* evidence of title. See also *Benedict v. Beebee*, 11 *Johns.* 145. Thus stands the case upon the authority of decisions in New York. The question presented in this cause has never received a solemn decision in *Massachusetts*, or this State. It may have been agitated and disposed of at *nisi prius*, and the opinion of the presiding Judge been acquiesced in. Some memorandum in writing may have been considered necessary, before our separation from *Massachusetts;* but since that time several new provisions and principles have been introduced into our own statutes. The 5th section of *ch.* 62, which we have quoted at large, is one of them. We are therefore to consider and decide the question before us, in reference to our own legislation upon the subject. Viewing it as never having undergone careful consideration or received a formal decision, it becomes us to examine it with particular attention. The estate, right, title or interest which is the subject of the present inquiry is not a fee simple, a freehold estate or a term for years; nor is it an estate at will; for the owner of the land may at any time within twenty years maintain a writ of entry against the possessor without any entry or notice to depart from the premises; which notice is necessary in the case of a tenant at will. Is it then an "uncertain interest of, in, to or out of any messuages, lands or tenements"? It is clear it is not such an interest of, in or to the land; for the whole title is in the defendant, as we have before remarked. Neither is it an interest out of the land, because it has no necessary connexion with the title to the land, and does not depend on the title. It may exist in perfection independently of the land. In proof of this position, let us suppose that the plaintiff ten years ago, took possession of the land mentioned in the exception, and made

all the improvements himself, and continued such possession for seven years, and that then the defendant entered upon him and dispossessed him against his consent. In such a case no one would dispute the plaintiff's right to recover compensation for his improvements. Let us suppose further that the defendant, a year after his entry and dispossession of the plaintiff, sold and conveyed the land to *John Doe*, who entered into possession under his deed, still the plaintiff's right to recover of the defendant the value of the improvements would remain the same; for the statute *ch.* 62, gives the remedy by action against a person "so entering." This proves that the right in question does not grow "out of" the land, and that it does not depend on the title. It is no answer to this reasoning to say that the possession of *Perry* was a species of title to the land, in virtue of which he might have maintained an action of trespass or even a writ of entry against a stranger for an ouster, because he might have maintained either of said actions on a possession of one year as well as of six years. Besides, the right and power to maintain those actions, is not the right given by statute to recover compensation for improvements which we are examining, and the precise character of which we are endeavoring to ascertain and establish. In this view of the subject, we are satisfied that the statute of frauds is not applicable to the case under consideration. It may be proper here to observe that the principles advanced in this opinion and the reasoning we have pursued are applicable to those cases, and those only, where a succeeding occupant enters into possession of lands under a contract of sale made with the preceding occupant. There must be a transfer of the right to compensation by the former possessor to him who succeeds him in the possession and improvement of the land. Therefore if the plaintiff had made no bargain as to improvements with *Perry*, but he had abandoned the land, and the plaintiff had immediately entered into possession as a mere stranger, he could not, under the provisions of the statute, connect his possession and improvements with those of *Perry*, so as to constitute a possession and improvement for six years, and thus entitle himself to recover compensation for improvements. A person, by holding

possession of another's land, without authority or permission, and not under any contract, for the term of six years or more, and increasing the value of it by buildings and improvements, thereby acquires a statute right and title, founded on the principles of equity, to a reasonable compensation in money; and he acquires nothing more. The section of the act first cited, prescribes the mode in which he is to obtain such compensation, when the owner of the land has commenced a real action to recover possession. The section next cited prescribes how such compensation shall be obtained, when the owner, instead of commencing an action, has made an entry, without any suit, upon the land, and dispossessed the tenant, as was the case in the instance before us. We have expressed the above distinction before, but here repeat it for the purpose of further illustration. This action is the remedy prescribed in the latter case. In both cases the law has distinctly provided a right to demand and obtain a sum of money of the owner of the land, or rather, of the person owning the land at the time when the right to make and enforce the demand accrues. The law recognizes the tenant, who is entitled to compensation, merely as a creditor, but not as having a particle of title to, or interest in the land. Had the legislature considered him as having a title to, or interest in the land, would they not have required that he should have entered on record, when sued for the land, an abandonment of such title or interest to the owner, on receiving compensation for his improvements; or in some other form have released his interest in such cases, and also when, having been dispossessed by the owner, he has commenced an action of *assumpsit* for his compensation, and has recovered and received it? Yet no provision of the kind is made, as there is when the owner elects to abandon the premises demanded at the estimated value, before he is entitled to judgment for the amount of such value in money. But the law has gone one step further, and allows a tenant, when sued in a real action, as before mentioned, to connect his own possession and improvements with those of the person or persons, under whom he claims, and thus, in his own name, obtain an estimate in legal form, of the value of all improvements made on the

land, whether wholly by those under whom he claims, or by them and himself also, according to the facts of the case. And a tenant who has been dispossessed by the owner of the land, as *Lombard* was in the instance before us, may in his action of *assumpsit* against such dispossessing owner, avail himself of the same connexion of improvements made by those under whom he claims, with those made by himself, and in his own name, recover the estimated value of all such improvements. Here the statutes, in aid of the tenant, and to render the equitable system as convenient and effectual as possible, have changed a principle of the common law, which does not allow of the assignment or transfer of a mere right of action, and permitted the tenant, who has succeeded to the rights of those under whom he claims, to claim and recover payment for all improvements, in his own name, and for his own use; or at least, in those cases where he makes his claim in the trial of a real action, he is not to be removed from the possession until the estimated value of all the improvements shall have been paid by the demandant; which, in effect, amounts to the same thing.

The construction we have thus given seems to be in unison, in point of principle, with the provision in the first section of the act of 1829, *ch.* 431, which deserves particular notice. The legislature, in speaking of a tenant's right to compensation for his improvements, in chapter 62, call it "the estate, right, title or interest" which the person in possession has. It being a newly created right or interest, and of a very peculiar character, a variety of expressions or terms were employed in its description; but in its nature, it is merely personal property, or a right of action to recover a sum of money only, and that nature has not been changed. Neither is it changed by the provision that it may be attached on mesne process and sold on execution in the same manner as an equity of redemption. Should a law be passed requiring a sheriff in all cases of the sale of chattels, to make a deed of conveyance of the same to the purchaser, surely this could not convert such chattels into real property. The statute of 1829, above cited, provides that the right of action which a person has by virtue of a bond or contract in writing

to a conveyance of real estate upon conditions by him to be performed, may be attached on mesne process and sold on execution; and in the above section, the right, thus subjected to attachment and sale, is described as "the estate, right, title and interest" which the obligee has; yet it is purely a personal right, and has no connexion with the reality.

The only remaining inquiry is whether there has been a legal and sufficient transfer or assignment by *Hill* to *Perry*, of his claim for compensation; and this is not denied; and, in the next place, whether there has been a legal and sufficient transfer or assignment from *Perry* to the plaintiff, of all claims for improvements. What then is necessary to constitute such a transfer or assignment? In the present case it is not denied that the plaintiff paid a valuable consideration to *Perry* for his right, or claim for compensation for improvements. It is now well settled that an assignment of a debt needs not to be in writing. See *Vose v. Handy*, 2 *Greenl.* 322, and the cases there cited. By that case it appears that a delivery over the evidence of the claim or demand of the assignor, upon a valuable consideration, to the assignee, constitutes a valid and sufficient assignment. In this case, *Perry's* possession of the land at the time of the contract was the only visible evidence of his claim, and this was delivered up to the plaintiff, who immediately entered into possession. We do not, however, mean to decide that any actual or symbolical delivery of proof of the right or any thing else, was necessary to render the contract of sale complete. The statute requires none. If the legislature should pass a law authorising any person whose character has been slandered, or who has been assaulted and beaten, to transfer and assign his right of action to recover damages, and that the assignee might maintain an action in his own name for the recovery of such damages, surely no proof would be necessary to maintain such an action by the assignee, but proof of the wrong committed, and of the contract by which the transfer or assignment was made.

On the whole, as the acts have not required that in the transmission from one person to another, of his claims for compensation, the

evidence of the contract and conveyance should be in writing; as in its nature, and according to the several provisions of the statutes, it is considered as a mere right of action against the owner of the land at the time such right accrued, for the recovery, in certain prescribed modes, of a reasonable compensation in money, for the improvements made; we are of opinion that such transfer or assignment may be legally made verbally, as well as in writing; and that the statute of frauds has no influence upon the question. The exception is therefore sustained. Accordingly the nonsuit is set aside and a new trial is to be had at the bar of this Court.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF WASHINGTON, JUNE TERM, 1832.

Memorandum.—The Chief Justice was not present at this term.

The President, &c. of WILLIAMS COLLEGE *vs.* BALCH.

Where a deputy sheriff has collected money on execution, which he has neglected to pay over, the limitation of four years, applied by *stat.* 1821, *ch.* 62, to all actions against sheriffs for the misconduct of their deputies, commences with the return day of the execution.

Therefore where the amount of an execution had been collected, and the execution returnable, more than four years, but within that period a demand had been made upon the deputy for the money, and an action brought against the sheriff, to recover the same with interest at thirty *per cent.* under *stat.* 1821, *ch.* 92, it was held that the action was barred by the statute of limitations.

THIS was an action of the case against the late sheriff of this county, to recover a sum of money, collected by *Simeon Bradbury*, one of his deputies, on an execution in favor of the plaintiffs, together with interest thereon at the rate of thirty *per cent.* The execution issued *Oct.* 30, 1826, and was returnable *Jan.* 30, 1827; but had never been returned. The money was received by the

deputy *Nov.* 21, 1826, and was demanded of him *Feb.* 19, 1830. The present action was commenced *Feb.* 12, 1831. The question was whether the suit was commenced "within four years next after the cause of action," within the meaning of *Stat.* 1821, *ch.* 62, *sec.* 16; and a default was entered, subject to the opinion of the Court upon this point.

Fessenden, Deblois & Fessenden, for the plaintiffs, submitted a written argument in the last vacation, in which they relied on the statute as raising a distinct and substantive cause of action, upon the fact of the nonpayment of the money upon demand. The officer, they contended, was not bound to have the money at court upon the return day of the execution; nor to carry it to the creditor. It was his duty merely to keep it till demanded. *Wakefield v. Lithgow*, 3 *Mass.* 249; *Wilder v. Bailey, ib.* 295; *Barnard v. Ward*, 9 *Mass.* 269. The present cause of action may exist before the return day of the execution; and it has no connexion with an action for not making a return. The latter omission may be justifiable by the casual loss or destruction of the precept, and yet the officer be liable to the present suit. This action arises only upon demand actually made. To say that it is merged in the action for not returning the execution, is to say that it was merged three years before it existed; and goes virtually to repeal the wholesome restraints enacted by the statute on which this action is founded.

Allen, for the defendant, cited *Weld v. Bartlett*, 10 *Mass.* 470; *Young v. Hosmer*, 11 *Mass.* 89; *Miller v. Adams*, 16 *Mass.* 456; *Mather v. Green*, 17 *Mass.* 60.

The opinion of the Court was delivered at this term, as drawn up by

MELLEN C. J. This action is founded on the 3d *sec.* of *Stat.* 1821, *ch.* 92, which is in these words; "That if any sheriff or his deputy shall unreasonably neglect or refuse to pay to any person, any money, received by him upon execution, to the use of such person, upon demand thereof being made, he shall forfeit and pay

to such person five times the lawful interest of such money, so long as he shall unreasonably detain the same, after such demand is made." The defence is placed upon the 16th *sec.* of *Stat.* 1821, *ch.* 62, which is in these words; "That all actions against sheriffs for the misconduct and negligence of their deputies, shall be commenced and sued within four years, next after the cause of action." In this case the action was not commenced till more than four years after the return day of the execution, on which it was received; but the money was demanded of *Bradbury*, the deputy, within the four years; and the suit was brought about one year after the demand. The execution has never been returned to the clerk's office. The general question, and indeed the principal one in the case is, what construction should be given to the last quoted section; or, in other words, when the cause of the plaintiffs' action accrued; or what is to be considered, in such cases, as constituting the cause of action. It is a question not easily answered in such a manner as to give full effect to the language of the section, and at the same time, secure to the sheriff the protection and immunity, which seem plainly to have been intended by the legislature. Was it the design of those who enacted the law, that when a deputy had collected a sum of money on execution, the creditor might, by suffering it to lie in his hands undemanded for ten, fifteen or eighteen years, continue the sheriff's liability during all that time, and by demanding the money at the end of that period, continue that liability four years longer? If so, it is inquired, of what use to the sheriff is the limitation of the statute before mentioned? Was not the limitation imposed to prevent delay on the part of the creditor, and not sanction it in the way contended for by the plaintiffs? Was it intended that the sheriff should be thus placed at the mercy of the creditor, and subjected to his control? It is true that before a demand, the deputy might go to the creditor and pay over the money collected; still, by law, he is not obliged to do it; and the sheriff has no power to compel him so to do. What construction must we give to the words "cause of action," as used in the before quoted section? The same words are chiefly employed in the general statute of lim-

itations. In the 3d section it is enacted that actions upon the case for words shall be commenced within two years "next after the words spoken, and not after." That actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within three years "next after the cause of such actions or suits, and not after." In the above mentioned cases, no question can arise as to the time when the cause of action accrues. The section further provides that all actions on the case, (except for slander,) actions of account, trespass, debt, detinue and replevin and actions of trespass *quare clausum fregit*, shall be commenced within six years, "next after the cause of such actions or suits and not after." In the before mentioned actions of trespass, trespass *quare clausum fregit*, replevin and detinue also, no doubt can exist as to the time when the cause of action accrues. In actions of account, case in *assumpsit*, and debt, the time when the cause of action accrues, depends on the nature and terms of the contract between the parties, as where by those terms an account is to be rendered, a sum of money is to be paid, or an act done at some future day. In such cases also, it is easy to determine when a cause of action accrues. In cases of trover, where the property came lawfully into the defendant's possession, and there has been no unlawful appropriation of it, no cause of action exists before demand and refusal; for till then no rights are violated or wrong done. So in actions on the case for torts, the cause of action accrues, generally, when the tort is committed; though in some cases of concealment of it by the wrong doer, not until the wrong and injury have been discovered. Now in all these cases, the cause of action exists when a person has a right to demand of another a sum of money as due to him; or damages for an injury done to him, or property belonging to him; subject only to the exception above mentioned. The view thus taken of the provisions of the general statute of limitations, may aid us in ascertaining the meaning of the words "cause of action," as used in the particular limitation of actions against sheriffs. In all the cases before mentioned (except those of concealment by the defendant, above stated) a cause of action accrues when the wrong complained of is com-

mitted; and in all cases of express contract, the cause of action accrues at the time the contract is made, unless by the terms of it, a future day of payment or performance is appointed; in both which cases, the right to demand payment or performance and the cause of action, accrue at one and the same time; and such also is the case in relation to implied contracts. In the case under consideration, the time when the right to demand the money collected, and the time when the cause of action accrued, ought, in justice, to be considered also as one and the same time; and the question is whether the legislature intended to separate them; and whether by the words "next after the cause of action," they did not intend, next after the creditor had a perfect right to demand of the deputy, the money collected on execution. We think they did; and we confess, that in the construction of this particular statute limitation, we do not perceive how we can arrive at any other conclusion, without depriving sheriffs of the protection which the limitation was expressly designed to afford them. In the case at bar, the creditor's attorney, on inquiry, might have ascertained that the execution was not duly returned; he might then have made a demand on the deputy for the contents of the execution. This he neglected to do for three years, or nearly that time; and after such demand, neglected to commence the action until after the expiration of four years from the return day of the execution. On that day we think, in this case, and in the construction of this statute provision, the cause of action must be considered as having accrued; and of course the action is barred. Accordingly the default must be taken off, and a nonsuit entered.

GLEASON *vs.* DREW.

A. sold a boat to *B.* who paid part of the price, and gave his promissory note for the residue, taking a bill of sale of the boat. Afterwards, being unable, when called upon, to pay the balance due, *B.* gave up the bill of sale to *A.*, under an agreement that on payment of the remainder of the price originally agreed, the boat should be reconveyed or restored to him. *A.* having no convenient place to keep the boat, which was half a mile from the place of this transaction, left it in the care of *B.* with authority to sell it, subject to the lien of *A.* Hereupon it was held, that the transaction might be regarded either as a resale of the boat to *A.* and thereby a payment of the note;—or as a mortgage of the boat for the balance of the price;—and that in either case *A.* might well maintain replevin against an officer who took it as the property of *B.*

It seems that a mortgage of personal property is not a contract of sale, within the third section of the statute of frauds.

THIS was replevin of a boat. Plea, property in one *Wilder*, and not in the plaintiffs; and issue on the plaintiff's property. At the trial it appeared that in the year 1829 the plaintiff, being then the owner of the boat, sold it to one *Harrington*, giving him a bill of sale, for eighty dollars; of which thirty were paid down by the purchaser, who gave his note for the remaining fifty, ten of which were soon afterwards paid. In the following autumn the plaintiff called for the balance due on the note, which *Harrington* was unable to pay; and a verbal arrangement was thereupon made, pursuant to which he gave up the bill of sale to the plaintiff, who agreed that upon payment of the remaining forty dollars the boat should be reconveyed or restored to *Harrington*. At this time no formal delivery of the boat was made to the plaintiff, it being about half a mile from the parties, and in the possession of *Harrington*, who had used it ever since the original purchase. Neither did the plaintiff refund the money he had received, or deliver up the note to *Harrington*; but requested him to keep the boat safely, the plaintiff having no convenient place for that purpose; which he accordingly did; occasionally using it himself. At the same time the plaintiff authorised him to sell the boat, subject to the plaintiff's

lien. He accordingly commenced a contract of sale of it to *Wilder*, who took it upon trial for two or three days, during which the defendant attached it as the property of *Harrington*.

Upon proof of these facts the defendant submitted to a default, subject to the opinion of the court upon the question whether the action was maintainable.

Allen and *Weston*, for the defendant, contended that it was not; first, because the transaction between the parties was inoperative as a conveyance, by reason of the statute of frauds; and here was no redelivery of the boat to the plaintiff; 2 *Stark. Ev.* 609; *Damon v. Osborn*, 1 *Pick.* 476; *Chapman v. Searle*, 3 *Pick.* 38; *Whitwell v. Wyer*, 11 *Mass.* 6; *Jackson v. Coverts*, 5 *Wend.* 119; *Brown on sales*, 309, 446; *Cooper v. Elston*, 7 *D. & E.* 10; *Rondo v. Wyatt*, 2 *H. Bl.* 63;—and secondly, because replevin would not lie, for want of possession or the right of possession in the plaintiff. *Wyman v. Dorr*, 3 *Greenl.* 183; *Ward v. Macauley*, 4 *D. & E.* 498; *Hussey v. Thornton*, 4 *Mass.* 405; *Buffinton v. Gerrish*, 15 *Mass.* 158; *Ayer v. Bartlett*, 9 *Pick.* 71, 156.

Hobbs, for the plaintiff, cited *Ward v. Sumner*, 5 *Pick.* 59; *Gibbs v. Chase*, 10 *Mass.* 125; 4 *Cranch* 48; 7 *Johns.* 308; *Taggard v. Loring*, 16 *Mass.* 339; *Haskell v. Greely*, 3 *Greenl.* 425; *Holbrook v. Baker*, 5 *Greenl.* 309; *Holmes v. Crane*, 2 *Pick.* 607; *Elmore v. Stone*, 1 *Taunt.* 458; *Badlam v. Tucker*, 1 *Pick.* 389; *Reed v. Jewett*, 5 *Greenl.* 96.

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

The boat in question, once the property of the plaintiff, was sold and transferred by him to *Harrington*. Before it was taken by the officer, the defendant, was the sale rescinded, or was a lien created upon it, in favor of the plaintiff as mortgagee? It is not pretended that in what was subsequently done, there was any fraud or want of good faith, either in the plaintiff or *Harrington*. Half the

purchase money, viz. forty dollars, was paid. The plaintiff wanted the residue. *Harrington* was unable to pay it. He thereupon gave up the bill of sale, he had received of the plaintiff, under an agreement that it should be reconveyed to him, upon paying the remaining forty dollars. The plaintiff had no convenient place to keep the boat, and did not take her into his own hands, but engaged the defendant, who had a convenient place, to keep her for him. He was further authorised to sell her; but subject to the plaintiff's rights. The contract of sale between the plaintiff and *Harrington*, was vacated and rescinded by mutual consent; and the evidence of it given up, before the right of any third person had intervened. The intention of the parties manifestly was, to restore the plaintiff to his original title. The plaintiff was not to hold under *Harrington*; but the purchase of the latter was relinquished and given up; reserving a right to repurchase, upon favorable terms. In this there was nothing colorable or collusive; nothing done to defeat or defraud creditors.

But if the same formalities are necessary to rescind a contract for the sale of personal property, exceeding thirty dollars in value, which are required in making it, did they exist in this case? The plaintiff held the note of *Harrington*, which does not appear to have been given up. But by this transaction it was paid, the plaintiff resuming the property for which it was given, and the defendant undertaking to keep it for him. Upon these facts, the plaintiff never could have recovered the note, from which *Harrington* was virtually discharged, and against which he had and has a good defence. By rescinding the first sale, or by the resale, if it is so to be regarded, he paid his own debt, whether he received back the evidence of it or not; and this payment, in a case not infected with fraud, was a sufficient consideration, not executory but executed, for the resale. Here then payment was made. There does not seem to be any good reason, why this did not revest the property in the plaintiff, as between the parties; more especially as *Harrington* agreed to keep the boat, as the agent of the plaintiff. *Tuxworth v. Moore*, 9 *Pick.* 347. If *Harrington* had afterwards con-

verted the property to his own use, we do not see but he must have been liable to the plaintiff, in an action of trover. Such are the views which may be taken of the case, regarding it as a resale, requiring the formalities prescribed by the statute of frauds. But we do not place our decision entirely upon this ground.

What took place between the parties after the first sale, may be regarded in substance as a mortgage for the residue of the consideration. We are not satisfied that a mortgage of personal property, the validity of which is now well settled, is a contract of sale, within the meaning of the third section of the statute of frauds, *Stat.* 1821, *ch.* 53. That manifestly contemplates an absolute sale, where the vendor is to receive payment, and the vendee the goods purchased. But the mortgagee is not intended or expected to pay any thing. His lien is created, to secure what he is to receive. Nor is he to take possession, unless his security requires it. That is retained by the mortgagor; and herein a mortgage differs from a pledge. As this is a contract then, in which neither payment nor delivery is expected, we are not prepared to say that it comes within the statute. Upon the whole case, we are of opinion that the plaintiff is in justice, and by the agreement between him and *Harrington*, legally entitled to hold the boat, for which he has never been paid. If it is a sale, contemplated by the statute of frauds, payment was virtually and substantially made. If not, the statute is not in the way of the plaintiff's recovery.

Judgment for plaintiff.

SHIRLEY *vs.* TODD.

In an action by the indorsee of a dishonored bill or draft, against the acceptor, the declarations of the indorser, made while the interest was in him, are admissible in evidence for the defendant.

In such action *it seems*, the defendant may avail himself of his demands against the indorser, accruing prior to the transfer of the bill, by filing them in offset under *Stat.* 1821, *ch.* 59, *sec.* 19, so far as may be material to his defence.

THIS was an action of *assumpsit* by *Mason Shirley*, the indorsee of an order or bill of exchange drawn *Sept.* 18, 1826, by one *Lesner*, on the defendant, in favor of one *Moses Shirley*, accepted generally by the defendant, and indorsed by the payee to the plaintiff. No time of payment was mentioned. At the trial before *Whitman C. J.* in the Court below, it appeared that the order was not indorsed to the plaintiff till *September* 1829 ; previous to which time it had been held by the payee. The defendant offered to show, in bar of the action, his book account, existing at the time the order was drawn, against *Moses Shirley* the payee, in which the order was placed to his credit ; a balance of forty or fifty dollars still remaining on the book, due from him to the defendant. He also offered to prove the declarations of *Moses Shirley*, made at the time of drawing the order, that he wished it drawn on *Todd* to whom he was indebted. This evidence was objected to by the plaintiff, but the Judge admitted it. It also appeared that the defendant owed *Lesner* the amount of the draft, at the time it was accepted. The Judge instructed the jury that the evidence, if believed by them, constituted a bar to this action ; and they found for the defendant. Whereupon the plaintiff filed a bill of exceptions.

Chandler, for the plaintiff, objected to the admissibility of the book account as a defence against the bill ; first, because it was not filed in offset, as the statute in such cases requires ; and secondly, because it was not within the reason of the rule which allows the maker to set up against the indorsee of a dishonored note or bill,

any equitable defence he might make against it in the hands of the original payee; this rule applying only to demands connected with the original transaction. But in the case at bar the demand set up in defence is a distinct matter, existing long before the creation of the bill. *Ayer v. Hutchins*, 4 *Mass.* 371; *Thurston v. McKown*, 6 *Mass.* 428; *Holland v. Makepeace*, 8 *Mass.* 418, *Tucker v. Smith*, 4 *Greenl.* 415; *Knapp v. Lee*, 3 *Pick.* 453; *Sargent v. Southgate*, 5 *Pick.* 312; *Grew v. Burditt*, 9 *Pick.* 265.

Downes, for the defendant, cited *Peabody v. Peters*, 5 *Pick.* 3; *Crocker v. Leach*, 10 *Mass.* 52.

WESTON J. delivered the opinion of the Court.

We are satisfied that the declarations of *Moses Shirley*, the payee of the order, while the interest was in him, are admissible in evidence. No time was limited in the order, within which it was to be paid. It was then payable presently; and not being indorsed until three years after its date, the defendant is entitled to the same defence, as against the original payee. *Ayer v Hutchins*, 4 *Mass.* 371. To him the plaintiff has succeeded, and by his admissions, while he was the holder, the plaintiff is bound. *Peabody v. Peters*, 5 *Pick.* 3, and *Sergeant v. Southgate*, 5 *Pick.* 312, were actions upon negotiable notes, brought by the plaintiffs as indorsees; but in both the declarations of the payees before the indorsment, were received. Before this order was indorsed, the defendant was not indebted to the holder, he having demands against the payee, by which it was overbalanced. Neither then is he indebted to the plaintiff, against whom he has the same defence. But it is insisted that in order to avail himself of it, he should have filed his account in offset. In *Holland v. Makepeace*, 8 *Mass.* 418, *Sedgwick J.* by whom the opinion of the court was delivered, was of opinion that an account could be filed only between the original parties. And this seems to be taken for granted in *Peabody v. Peters*. But in the latter case, *Parker C. J.* maintains, with great strength of reasoning, that if such be the law, the defendant may avail himself of his offset, without filing it. There might be great

convenience in giving notice of offset, according to the English practice; but it is not required to be done before the entry of the action. In the subsequent case of *Sergent v. Southgate*, the learned Chief Justice reviews the authorities upon this question, in connexion with the law merchant, and arrives at the conclusion that an account may be filed in offset against the indorsee of a dishonored note or bill, he standing in the place of the original party. Whether the former or the latter opinion best accords with the law, we are relieved from the necessity of deciding; for such a connexion is shown between the order and the account, as proves satisfactorily, that the one was to go in payment of the other. And where this is made to appear, no account in offset is necessary; as has been repeatedly decided. The order was drawn to pay the account. And this must have the same effect, as if the articles charged in the account, were subsequently delivered to pay the order. There can be no difference in law or justice. The exceptions are overruled, and the *Judgment affirmed.*

Lowell *vs.* Reding.

Where one of two joint promisees in a negotiable note, having it in his possession, was requested by the other to sell it and apply the proceeds to their common benefit, and he sold it accordingly; but the other refused to indorse it, being called upon for that purpose; after which the seller indorsed it in their joint names;—it was held that the purchaser could not maintain an action on the note as indorsee, the authority of the seller being revoked by the refusal.

This was an action of *assumpsit*, by the indorsee of a promissory note, made by the defendant, and payable to *Moses Rines* and *Levi Taylor*, or their order; and it came up by exceptions taken by the plaintiff to the opinion of *Whitman C. J.* who ordered a nonsuit in the court below. The question was, whether the note

had been legally transferred to the plaintiff. It appeared that *Rines* and *Taylor* had formerly become the sureties of one *Austin* in a promissory note which he gave for a yoke of oxen; that the oxen were put into the hands of *Rines* for indemnity against his suretyship; that *Austin* afterwards died, and the oxen became the property of *Rines* and *Taylor*, to pay the note; one of which oxen *Rines* sold to the defendant, *Reding*, taking therefor the note sued in the present action; which note was always kept by *Rines*. When *Rines* was afterwards called upon to pay an execution issued against him and *Taylor* for *Austin's* debt, he applied to *Taylor* for contribution; but the latter, being unable to assist him, requested him to sell *Reding's* note, and apply the proceeds to pay his part of the execution, as far as they would go. *Rines* informed *Reding* of this, and told him that the note was his for this purpose; to which *Reding* made no objection, but promised *Rines* to pay the note to him. Afterwards, being again called upon for payment by the officer who held the execution, *Rines* sold the note to the plaintiff. They both then applied to *Taylor* to place his name on the back of the note, which he promised to do; but afterwards, on the same day, refused. While the parties were together, *Reding* joined them, and said that he had paid the note to *Taylor*; adding that he was about to indorse the amount on a note he held against *Taylor;* who thereupon again refused to indorse it to the plaintiff. Subsequently, on the same day, *Rines*, who paid the full amount of the execution, indorsed the note to the plaintiff, in his own name and that of *Taylor*, acting as the attorney of the latter.

Upon this evidence, *Whitman C. J.* was of opinion that *Rines* had not sufficient authority to indorse the note in *Taylor's* name, to the plaintiff; whom he therefore nonsuited.

The question was briefly spoken to, by *Greenleaf*, for the plaintiff, and *Downes*, for the defendant; and the opinion of the Court was delivered as follows, by

Parris J. The case finds that the oxen, for which the note declared on was given, were the property of *Rines* and *Taylor*.—

This must have been well understood by the former, for he took the note payable to *Taylor* as well as himself. Both were, therefore, equally interested in the property, and neither could transfer it without special authority from the other. *Rines* undertook to sell it, and, by indorsement, to transfer *Taylor's* interest to the purchaser; and the question is, was he authorized so to do?

As owners of this property they were not partners, and consequently could not bind each other as such. They were owners in common, each having an equal interest and equal rights, and neither having the power to divest the other of his property by transfer, unless specially authorized.

The defendant promised to pay them or their order; and the plaintiff, claiming as indorsee, must show that the payees have ordered the amount due on the note to be paid to him. There was nothing in the appearance of the note indicating a partnership, or that the property could be legally transferred in any other manner than by the joint order or indorsement of the payees. *Carvick v. Vickery, Doug.* 653.

But it is argued that *Rines* had a power coupled with an interest, and that such a power is not revocable. It is true he had been previously directed by *Taylor* to sell the note, and apply the proceeds towards paying the execution against them both; but *Rines* did not thereby assume to relieve *Taylor* from the execution. It still remained good against him, and for aught that appears, he was then liable to pay its full amount, and continued so liable up to the time when he was requested to indorse the note, for it is not found that *Rines* had then paid any part of the execution. It does not, therefore, appear that he became the owner of *Taylor's* interest in the note, either by paying or promissing to pay any thing for it, or by relieving or promising to relieve *Taylor* from his liability on the execution.

If *Rines* was clothed with any power as agent, it was determinable at the will of his principal. It might be a power to transfer the interest, as a chose in action, without endorsement. Whether it was or was not sufficient for that purpose we are not called upon to

decide. It might have been sufficient to authorise *Rines* to make use of *Taylor's* name, and if executed before revocation might have been binding on *Taylor.* Such, however, neither *Rines* nor the plaintiff considered it, for they both resorted to *Taylor* to procure his endorsement, and it was not until after he had refused that *Rines* pretended to act in his name.

If *Rines* was authorised to endorse the note for *Taylor* and if the plaintiff so understood it, why did they call on *Taylor* to do it? Why did not the agent endorse the note in behalf of his principal? The inference is that he did not consider himself authorised; and if he was, his authority ceased on the revocation by *Taylor*, and whatever the agent attempted to do subsequently in *Taylor's* name was clearly unauthorised.

We are of opinion that the decision of the court below "that *Rines* had not authority to endorse the note at the time of the endorsement" was correct, and the exceptions are accordingly overruled.

EMERSON *vs. The inhabitants of the County of* WASHINGTON.

By the clause in the Act of separation, exempting the lands of *Massachusetts* from taxation while the title remains in the Commonwealth, is intended the legal and not the equitable title to such lands.

If a grantee accepts a deed without covenants, he cannot recover back the consideration money, unless there has been fraud, circumvention, or purposed concealment.

Where a county road had been laid out through a township owned by *Massachusetts*, and a tax illegally ordered and assessed thereon, to defray the expense of opening and making the road, and agents were appointed, pursuant to the statute, who contracted with a person to receive the money from the county treasurer and expend it in making the road; but the contractor, anticipating the ultimate receipt of the money, made the road at his own expense; after which the land

was sold at auction by the sheriff, for nonpayment of the tax, and struck off to the contractor, who received a deed accordingly;—it was held that on discovery of the failure of title, the contractor had no remedy against the county; the Court of Sessions having exceeded its jurisdiction in assessing the tax, and the contractor having exceeded his instructions in making the road before the receipt of the funds specially appropriated for that purpose.

THIS was a special action of the case, in *assumpsit*, for the labor, materials and money expended in making a certain road laid out by the Court of Sessions for the county, through the township No. 9, in the fourth range north of *Bingham's Penobscot* purchase, being part of a road leading from the north line of *Baring* to *Lewey's* island, and thence to the *Baskahegan* carrying-place; with a count for the purchase-money paid for the same township, at a sheriff's sale made under the order of the Court of Sessions for the nonpayment of a tax assessed thereon for making the same road, the assessment being alleged to be illegal and void, the land belonging to the Commonwealth of Massachusetts.

At the trial, which was before *Weston J.* it was proved that at the time of the location of the road, which was in *August*, 1829, part of the township No. 9, had been contracted for with the land agent of *Massachusetts*, it being the Commonwealth's land, by the late Lieut. Governor *Robbins;* but the contract on his part had not been fully performed, though still in force. The legal title to the land remained in the Commonwealth till *Sept.* 30, 1831, when it was conveyed to *James M. Robbins*, assignee of the administratrix of the original contractor. The road not being opened, the Court of Sessions, in due form of law, at *December* term, 1830, assessed a tax of one thousand and fifty dollars, being six cents to the acre, on the whole township, and appointed the plaintiff an agent to receive the money from the county treasurer, and expend it in making the road. The plaintiff made the road, in anticipation of the receipt of the money; after which, the tax not being paid, the whole township was legally advertised by the sheriff, and sold by him at public auction; and was struck off to the plaintiff, he being the highest bidder, and a deed given accordingly.

The residue of the township, not included in the contract with Mr. *Robbins*, consisted of a tract of a mile square, said to have been conveyed to *Ebenezer March*; through which a part of the road was laid. Mr. *Robbins*, always after making the contract, exercised the customary acts of ownership over the land, and was actively engaged in advancing the settlement. At the time of the location he consulted with the committee respecting the best mode of locating the road, and expressed no dissent to the location; observing that he should try to sell part of the land to defray the expense of making the road. The evidence of his conduct and declarations, being objected to by the plaintiff, was admitted subject to the opinion of the court. In answer to the defendant's question whether Mr. *Robbins* had not assented to the location of the road, Mr. *Downes*, his agent, testified that Mr. *Robbins* once remarked to him that he did not see how a road could be legally laid out through the township, the fee being in the Commonwealth, but that he should make the road, as his agent advised. He afterwards expressed this intention to Mr. *Vance*, to whose testimony the plaintiff objected. The plaintiff afterwards, being advised that his title was unsound, demanded of the chairman of the county commissioners, and of the county treasurer, a confirmation of the title or repayment of the consideration-money.

Upon this evidence a verdict was taken for the plaintiff by consent, for $1053,50, subject to the opinion of the court. The defendants also moved that the writ be abated for want of legal service, it being served by the sheriff, and not by a coroner; which motion was also referred to the decision of all the Judges.

Greenleaf, for the defendants, maintained the legality of the tax, on the ground that the case was not within the provisions of the Act of separation; and also that the equitable title was in Mr. *Robbins*, whose devisee would have been entitled to take it under a general devise of all the real estate of the testator; *Newland on Contr.* 42, 43; *Craig v. Leslie*, 3 *Wheat.* 563. But he argued that if the assessment was illegal, the plaintiff had no remedy against the county, the whole proceedings having been *coram non judice; Joy v. Ox-*

ford, 3 *Greenl.* 131; *Calais v. Dyer*, 7 *Greenl.* 155; and the act of the plaintiff in making the road being officious.

Allen, for the plaintiff, contended that no valid assessment could be made upon the land while the legal title remained in the Commonwealth, it being protected by the Act of separation. But the tax being ordered and made by the legally authorized agents of the county, the plaintiff was justified in reposing confidence in their proceedings. *Brown v. Somerset*, 11 *Mass.* 221; *Hampden v. Franklin*, 16 *Mass.* 76. The taking of the deed is no extinguishment of the plaintiff's claim, for it conveyed nothing. But if it is, yet the title has failed, and he therefore has a right to recover the consideration-money. *Joy v. Oxford*, 3 *Greenl.* 134. The plaintiff was not bound to look into the proceedings; he might well presume them correct. The loss ought to be borne by the county, whose agents have produced it. It was not a case where they had no jurisdiction. The location of the road was legal; and the plaintiff was not a trespasser in proceeding to open it. When this was done and accepted, the county was bound to pay him for making it. The tax only was illegal. But this was merely a mode of reimbursing the county for the expense of opening and making the road; in no wise affecting the liability of the county to discharge its own contracts. *Hayden v. Madison*, 7 *Greenl.* 76; *Abbot v. Hermon*, *ib.* 118; 7 *Pick.* 181; 8 *Pick.* 178.

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

This case presents several questions. One of them in respect to the service of the writ, and the others to the merits of the action; and some of these appear to be of a novel character. For the present we pass over the question as to the legality of the service, and proceed at once to the examination of the others.

The road or highway, a part of which, and the expense of making it, are the subjects of our consideration in this suit, was laid out by the Court of Sessions of the county of *Washington*, in virtue of the 23d section of *ch.* 118 of the revised statutes, which provides "that

all highways laid out, or hereafter to be laid out through any tracts of land in this State, not comprehended within the bounds of any incorporated town or plantation aforesaid, shall be made passable and convenient for travelling and kept in good repair, by the owners or proprietors of the said tract of land, township or plantation, unless in the judgment of the Court of Sessions for the county in which such lands lie, it may be deemed unreasonable; in which case the same shall be done at the expense of the county, or partly at the expense of the county, and partly at the expense of the proprietors, as the said court shall order." No objection has been made to the legality of the location; and by the report of the Judge it appears that the tract of land or township in question, at the time of the location of the road, and of the assessment of the tax to defray the expense of making it, belonged to the Commonwealth of Massachusetts; though a part of said township had been contracted for, a deed of which was to be given on payment of the purchase money; but, the payment not having been made, no deed of conveyance had been given by the Commonwealth. Our first inquiry then is whether the assessment was legal or a nullity, according to the foregoing facts. The first condition in the first section of the "act relating to the separation of the District of Maine from Massachusetts proper, and forming the same into a separate and independent state," (which condition and the eight following are incorporated in, and are a part of the constitution of this State) contains the following provision; "And the lands within the said district, which shall belong to the said Commonwealth, shall be free from taxation, while the title to the said lands remains in the Commonwealth." It is contended by the counsel for the defendants, that the above expression "free from taxation," should and ought to be limited to that annual taxation which is the mode of raising monies for the support of government and defraying county, town and parochial expenses; and that such must be presumed to have been the understanding and intention of all concerned. But in answer to this objection it is obvious to remark that the language is general and unlimited; and that had so important a restriction been contemplated, one giving such an

extensive power of taxation to this State, it would have been expressed in plain terms, and not left to the office of construction, which is often doubtful and dangerous in its application. We cannot permit ourselves to impose such a restriction on language which has, by being incorporated in our constitution, become the language of Maine as well as Massachusetts. And we think that the other expression "so long as the title to the said land remains in the Commonwealth," was intended to mean the legal title, and not the equitable; for it might be perfectly useless to assess and sell lands belonging to the Commonwealth, to which an individual had such an equitable and conditional title as exists in the case before us; the condition might never be performed; and, if performed, no legal or equitable process could compel Massachusetts to execute a deed, conveying the fee. We are therefore of opinion that the tax in question was illegally assessed, and that therefore it is void, and, of course, nothing passed by the officer's sale to the plaintiff. The action is predicated on this principle, and thus far the ground he has assumed has been maintained.

Our next inquiry is, whether the action can be sustained against the county; and if so, then on what principles of law. It is said that the decision in *Joy v. The county of Oxford*, is an authority in point. Upon examination it will readily be perceived that the case before us differs in some important particulars from that. In the first place *Joy* was not a purchaser, as *Emerson* was, but one of the proprietors of the township who was assessed. In the next place, the money for which the lands had been sold, was actually paid into the county treasury. In the next place, *Joy* was considered as having been compelled to pay the tax, or lose his land; and that when the payment was made under such circumstances, he was allowed to recover the money back again. The only point in which the two cases agree, is that in both the assessment and sale were illegal and void. *Joy* had no connection with *Abbot's* contract for making the road. He claimed nothing, except as a proprietor whose rights had been invaded by the Court of Sessions, and by means of whose wrongful acts, the plaintiff had been compelled to pay a sum of mo-

ney into the treasury of the county, where it was held without right. In this action the plaintiff claims to recover on one of two grounds; namely, either as a purchaser of the land sold, and entitled to recover back the money paid, on the principle of the failure of consideration, no title having passed; or else for his services performed in making the road in question. The right to recover on either of these grounds is denied; and especially against the county of *Washington*. The deed given by the officer contains no "covenant of warranty of title or seisin of the land," as it is stated in the report; and it does not appear that it contains any covenants whatever. It seems to be a well settled principle, that if a grantee receives and accepts a deed, containing no covenants, he cannot recover back the consideration on failure of title, unless there has been fraud, circumvention or purposed concealment. This is recognised and declared to be the law, in the case of *Joyce v. Ryan, ex'r.* 4 *Greenl.* 101. Numerous authorities might be cited to the same point, if necessary. Besides, if the deed does contain any implied covenants, or any express ones as to the legality of the assessment, still, an action of assumpsit would not be the remedy for the recovery of damages for the loss of the title, but an action of covenant broken. It is said by the counsel for the plaintiff that the officer was not bound to give a deed containing covenants. This is true; nor is any grantor obliged to enter into any covenants with his grantee; but it is equally true, that no man is bound to purchase and receive a deed without covenants on which he may claim damages upon failure of title. This argument, therefore, cannot be considered as a meritorious one. Parties are at liberty to make their contracts as they please, provided they are lawful. As the plaintiff cannot recover on the ground of his having paid the consideration named in the deed, and the loss of his expected title, the next question is whether he can recover for his services in making the road, upon an implied assumpsit. The answer to this question must depend upon the circumstances attending the transaction. It is not pretended that the plaintiff has ever actually paid any money into the county treasury; has he in legal contemplation done it, by making the road at his own expense,

in anticipation of the payment of the tax over to him by the treasurer? By the terms of the plaintiff's agency he was to expend the money in making the road, after he had received it from the treasurer. The Court of Sessions, certainly, never intended that the county should ever be made liable for the expense of making the road, but that it should be made by the expenditure of the tax collected from the owner or owners of the township. Such was the express order of the Court; and the sale was predicated on the non-compliance with that order. Under these circumstances is a promise of payment by the county implied? The general rule of law is plain that where there is an express promise, there is no implied one. If the court are to be considered as the agents of the county, as they certainly are to some purposes, such as are mentioned in the case of *The county of Hampshire v. The county of Franklin*, then their contract with, and direction to the plaintiff, was to make the road with the money collected from the owner of the township. How then can the law imply a promise by the county, expressly contradictory to the explicit instructions given by the court? There does not appear to be a single fact in the case from which such an implication can arise; and, on the contrary, such an implication would be directly against law. It seems a solecism to say that the law will ever imply a promise against law. The 23d *sec.* of *ch.* 118, part of which we quoted in the begining of this opinion, declares how the expense of making such a road as the one in question shall be borne; and the Court of Sessions when they located the road, ordered that it should be borne by the owners of the plantation. Such is the law in all similar cases, unless a different order is passed by the Court, subjecting the county to bear all or a portion of the expense. The case of *Brown v. The county of Somerset*, cited by the counsel for the plaintiff, was founded on certain orders drawn on the county treasurer by the committee appointed to make a road through certain unincorporated lands in that county, and which the treasurer refused to pay. The case is barren of facts; but as the orders were drawn on the treasurer, the presumption is that the assessment was legal and that the tax had been collected

and paid into the treasury. However this may be, the cause was decided on points having no connexion with the question of liability on the part of the county, except of a formal character, touching the power of the committee under their appointment by the Court of Common Pleas, instead of the Court of Sessions. We have thus far examined the cause, principally in reference to the inquiry, whether the plaintiff has a right of action against any one; the remaining inquiry has respect to the question of the liability of the county to the payment of damages to the plaintiff; and as to this point, we have in some measure anticipated it in our preceding examination. As has been before observed, there are certain subjects in relation to the financial concerns of a county, as to which the Court of Sessions are to be considered as the agents of the county, and empowered to bind the county by their official acts, in the lawful exercise of their powers. These are correctly stated by the court in the case of *The county of Hampshire v. The county of Franklin*. In the same manner, selectmen and overseers of the poor have certain powers in respect to the prudential concerns of their town, by the exercise of which they may bind the town; but in all these cases, the court, or such officers must act within the limits of their jurisdiction. If the Court of Sessions, while such court existed, had laid out a road without the limits of their county, it would have been a perfect nullity; so if assessors should assess the polls and estate of persons within the limits of another town. In the case of *Joy v. The county of Oxford*, before mentioned, this court decided that the assessment was perfectly void; *Joy's* property not being liable to the assessment. So we have already decided that the assessment in the case before us is a perfect nullity, because the lands taxed were not by law liable to taxation. The Court of Sessions acted beyond the limits of their jurisdiction. Why then should the county be bound by their act? By the first section of the act of 1826, *ch.* 337, it is declared that assessors shall not be made responsible for the assessment of any tax which by law they are required to assess, but the liability shall rest solely with the town; and the assessors shall be responsible only for their own per-

sonal faithfulness and integrity. The spirit of this provision is, that those who occasion the wrong should be answerable for its consequences. In the present case, the act of the Court of Sessions has occasioned the wrong and the damage, and why should the county be held responsible for it? Whether the character of the act of assessment was such as to protect the court from responsibility, is a question as to which, in this cause, we are not called on to intimate an opinion; though we have no idea such an action could be maintained. It is said that the county has accepted the road by the public use of it. There is no evidence in the case which shows any use by the county, more than by the towns in the county and the plantation No. 9. No inference can be drawn from this alleged user. The cases of *Hayden v. Madison*, and *Abbot v. Hermon* are not applicable to the case at bar. In the former there was evidence of an acceptance of the road on the part of the town, though the road was not completed; or at least, of a waiver of objections on account of its non completion; and in the latter case there was a similar waiver of a similar objection, by an appropriation of the school house, under the authority of the school committee. The admission of the evidence of the conduct and declarations of *Edward H. Robbins*, is a matter of no importance; nor would the testimony of *Robbins*, had he been living and on the stand, to the same facts, have been in the least degree influential in the cause. The admission of those declarations, therefore, if it was improper, would furnish no ground for setting aside the verdict, had it been returned in favor of the defendants; but as the jury found for the plaintiff, the verdict must be set aside and a nonsuit entered, for the reasons we have mentioned. Our decision of the cause on its merits, renders it unnecessary to examine the question as to the regularity of the service of the writ. *Plaintiff nonsuit.*

EMERSON *vs. The inhabitants of the county of* WASHINGTON.

The Court of Sessions, in appointing a committee to enter into a contract for opening and making a road laid out by their order, and the committee, in making such contract, do not act as the private agents of the county, but as public officers, exercising their authority in carrying into effect a public law, for the public good.

For the expense of making such a road the county is not liable; the only remedy being by warrant of distress against the towns through which the road runs, according to the statute.

THIS action was *assumpsit*, upon a special contract for the making of a county road through *Baileyville* and the plantation numbered seventeen; the writ containing also the common counts. It was served by the Sheriff of the county, instead of a coroner; for which cause the defendant moved the court to quash it; but the motion was overruled by *Weston J.* before whom the cause was tried, in order first to examine the merits.

At the trial, the following facts were proved. A certain highway having been legally laid out by the Court of Sessions, from the north line of *Baring*, to *Lewey's* island, through the town of *Baileyville* and plantation No. 17, and thence from the north line of the State lands to the *Baskahegan* carrying place; and twelve months, which had been allowed for opening the road through *Baileyville* and the plantation, having elapsed, and the road not yet being opened; the Court of Sessions advertised for proposals to open and make the road. The lowest offer being made by the plaintiff, the court appointed a committee composed of *George Downes*, *Reuben Lowell* and *Samuel Kelley*, Esquires, "to enter into any contract or contracts for opening, laying open, and making passable the same road as a public highway for the public use and convenience," through that town and plantation, "in manner and form as the law in such cases directs." Warrants being accordingly issued to the committee, they entered into a written contract with the plain-

tiff to open and make the road, being the length of about fifteen miles, for two dollars and forty-eight cents per rod, "said *Emerson* to receive his pay for making said road as soon as the same can be realized by any of the modes which the law provides for raising money for defraying the expenses in such cases, by warrant of distress or other means, after the faithful completion of his contract." The plaintiff at the same time gave a bond to the county treasurer, in the penal sum of twenty thousand dollars, conditioned for the faithful performance of his part of the contract; and made the road accordingly, which the committee approved and accepted, *November* 16, 1831, by written indorsement, under their hands, on the back of the contract. All these transactions were returned by the committee, together with their warrant, to the road commissioners for this county, who were successors to the Court of Sessions, by whom they were duly approved and placed on file. At the same time, which was at *December* term 1831, the plaintiff appeared before the commissioners, stating that he wanted his pay for making the road, the expense of which was $10,743 36, and requested them to issue warrants of distress forthwith, against the town and plantation, to raise the money. The commissioners declined making an order for the issuing of warrants forthwith, but ordered them to be issued in sixty days, the plaintiff not assenting to the delay. At the end of this period, the clerk issued warrants against the goods and chattels of the inhabitants of *Baileyville*, and also against those of the inhabitants of the plantation, adopting this form without special order, and upon his own views of the meaning of the statute; which warrants, being immediately delivered to an officer for service, were in due time returned not satisfied, the officer certifying that after diligent search for goods and chattels belonging to the inhabitants he could find none, either in the town or the plantation. And it was proved that the inhabitants, after the order for issuing the warrants, moved their cattle and hay out of the limits of the town and plantation, to prevent them from being taken by distress; and that probably there was no personal property there, which was distrainable. The plaintiff thereupon demanded the

payment of his bill of the county treasurer, and gave notice to the chairman of the commissioners that he should look to the county for indemnity.

Upon these facts a verdict was taken for the plaintiff, by consent, subject to the opinion of the court upon the question whether the action was maintained upon competent evidence; and if so, for what sum the defendants were liable; the verdict to be amended, or set aside and a nonsuit entered, according to the opinion of the court; unless they should sustain the motion to abate the writ for want of a sufficient service.

Allen argued for the plaintiff, citing *Hampden v. Franklin*, 16 *Mass.* 76; *Hayden v. Madison*, 7 *Greenl.* 76; *Abbot v. School District in Hermon*, *ib.* 118; *Hayward v. Leonard*, 7 *Pick.* 181; *Smith v. Lowell*, 8 *Pick.* 178; *Brown v. Somerset*, 11 *Mass.* 221.

Greenleaf, for the defendants.

Mellen C. J. delivered the opinion of the Court at the *May* term 1832, in *Cumberland.*

The road or highway, the location of which has been the cause of the present action, is a part of the same road which was under our consideration in the other action between these parties in which we have given our opinion; being that part which runs through the town of *Baileyville* and plantation number seventeen. No question is made as to the legality of the location through the whole route and extent of the road, or the correctness of the proceedings of the Court of Sessions in the allowance of time for the opening and making the road through the said town and plantation; or in the appointment and proceedings of the committee for the completion of the road. The committee were appointed by the court in virtue of the 12th *sec.* of *ch.* 118 of the revised statutes, which provides that "if any town shall neglect their duty in that respect" (that is, in opening and making the road passable) "the court, on application therefor, shall appoint a committee of three disinterested freeholders in the same county, to enter into any contract or con-

tracts for making such new highway passable as aforesaid; the expense of which shall be immediately afterwards defrayed by the delinquent town, and in default thereof, the said court shall issue a warrant of distress against such town." By the 22d section of the same statute, plantations, like No. 17, are vested with similar powers and are under similar obligations in relation to making and repairing highways, as towns are; and similar proceedings shall be had against them, as may be had against towns. The plaintiff having, under his contract with the committee, made and completed the road in question, to their acceptance, and the expense incurred in so doing, not having been collected by the statute process of distress against the town and plantation, or in any manner reimbursed to the plaintiff, the only question of any importance is, whether, in consequence of the proceedings had by the Court of Sessions and the committee, under their appointment, have rendered the county liable to the plaintiff in damages for all or any portion of the expenses by him incurred in opening and making the road.

When a road has been duly laid out and established by the Court of Sessions, and has not been opened and made within the time appointed, according to the above quoted provision, it is made the duty of the court to appoint a committee, as the proper and effectual mode of accomplishing the object in view in the location of the road. In performing this duty the court are not acting as the agents of the county, but as public officers, exercising their authority in carrying into effect a public law for the public good. The legislature have deemed it more proper that contracts for opening and making new roads passable should be made through the agency of a committee, than by a court in its public sessions. The act contemplates that the person or persons who contract to accomplish the object, are not to receive the stipulated compensation until it shall have been accomplished; and then it is to be collected of the town or plantation through which it passes, by the sheriff in virtue of a warrant of distress. There is a manifest distinction between roads laid out by the Court of Sessions under the 23d section of the act before mentioned, through lands, townships or plantations not taxa-

ble, and those laid out in or through towns or plantations which are taxable, so far as respects the powers of the court in the two cases. In the former case, they may order a part or the whole of the expense of opening and making the road passable, to be paid by the county, if they consider it unreasonable that the owners of the township or plantation should be charged with it; but in the latter case, the court have no such discretion, nor any discretion. They can issue warrants of distress only against the towns or plantations in which the roads lie. It would seem to be a singular principle of law, that from the performance of certain official acts of the Court of Sessions, which they were bound to perform, a promise should be implied on the part of the county to pay the expense of opening and making the road, on the ground that the Court were the agents of the county, when the court could not by any order or official act, in express language, create such a liability on the part of the county. It is a familiar principle, that the law does not imply a promise in those cases where an express contract has been made touching the same subject. This leads us to the consideration of the special agreement which was entered into by the plaintiff with the committee; the language of which is perfectly plain and intelligible. By the terms of the appointment of the plaintiff by the committee, he must have at once seen and understood what were to be his rights and the mode of obtaining the stipulated compensation. The expressions as to this point are these: "and said *Emerson* to receive his pay for making said road, as soon as the same can be realized by any of the modes which the law provides for raising money for defraying the expenses in such cases, by warrant of distress or other means, after the faithful completion of his contract." The bond which was given by the plaintiff for the faithful performance of the contract, is an express assent to all the conditions and terms of it. But it is contended by the counsel for the plaintiff, that the law implies a promise on the part of the county, because the bond was given to the county treasurer, and because he could have recovered on the bond, damages for the use of the county, if the plaintiff had not made the road according to the

terms of the contract. Here the same answer may be given which has been once given already, namely, the law will not imply from an act done by the court or their committee, a promise or obligation on the part of the county, when an express promise made by either of them could not impose such an obligation on the county. Besides, the bond was taken to secure the accomplishment of the proposed object. To whom should it have been given? It was not intended to secure any beneficial interests to the county, but for public purposes, and to secure a public object, as a part of the act of the court towards completing the road. But it has been further contended by the counsel that the refusal of the county commissioners (who are the successors of the Court of Sessions) to issue warrants of distress until after the expiration of sixty days, next after the road was completed and accepted, and the warrants were applied for, entitled the plaintiff to his action against the county; inasmuch as such refusal was a desertion of the special contract made with the committee and a violation of the plaintiff's rights under the contract, in consequence of which the warrants of distress have proved wholly unavailing. In reply to this objection we would observe that the county commissioners had a legal right, in their discretion, to postpone issuing warrants for sixty days, or they had not. If they had a legal right so to do, then, on that account the plaintiff has no ground of complaint or any new rights in consequence of their decision; and if they had no right to grant the delay in denial of his application, are the inhabitants of the county to be answerable for this illegal proceeding of the commissioners, and in an action of *assumpsit* too? If the Court of Sessions or the county commissioners cannot by any lawful act, in the discharge of their duty, subject the county to the payment of the expense in question, or by any express contract, when transcending their jurisdiction, will the law imply a promise on the part of the county, as the legitimate consequence of an illegal act of such court or commissioners? We think not. The remedy on which the plaintiff must have relied, when he contracted with the committee, is still at his command, and, we should suppose it may be rendered an effectual one, if he

should resort to it. He made the contract understandingly, and should he not realize all the advantages he anticipated from it, it is no fault of the law. Our opinion is that the action cannot be maintained. The verdict must be set aside and a nonsuit entered. This decision on the merits, renders the question as to the legality of the service of the writ, of no importance; and the examination as to the proper form of the warrants and the admissibility of the clerk as a witness, unnecessary now. *Plaintiff nonsuit.*

CARLE *vs.* WHITE.

In an action by the payee against the drawer of a bill not accepted, the declarations of the drawee, made at the time of presenting the bill, that he had no funds of the drawer in his hands, are not admissible in evidence; the drawee, in such case, not being the agent of the drawer.

THIS action was *assumpsit*, on an order for fifteen hundred feet of boards, drawn by the defendant, on one *Estes*, in favor of the plaintiff, and not accepted. At the trial in the court below, to excuse the want of notice to the defendant of the dishonor of the draft, the plaintiff offered to prove the declarations of *Estes*, made at the time when it was presented to him for acceptance, that he had no funds of the defendant's in his hands. To the admission of this evidence the defendant objected; and it was rejected and the plaintiff nonsuited by *Whitman*, *C. J.* before whom the cause was tried. Whereupon the plaintiff filed a bill of exceptions, pursuant to the statute.

Chandler, for the plaintiff.

Greenleaf, for the defendant.

PARRIS J. delivered the opinion of the court.

It is an implied condition in every bill, whether inland or foreign, that until it has been presented to the drawee for acceptance or payment, and notice of refusal been given to the drawer, he is not to be charged. The legal presumption is that the drawer has funds in the hands of the drawee. The holder, by taking the bill, virtually engages to present it and withdraw the funds, and, in case it be dishonored, to give timely notice to the drawer that he may take measures necessary for his own security.

Until the case of *Bickerdike v. Bollman*, 1. T. R. 405, it was a general rule strictly adhered to, that, without such notice, the drawer would in no event be liable. Since that case, the rule has been relaxed, and want of notice has been excused where the drawer had no effects, nor any ground to expect any in the hands of the drawee from the time the bill was drawn until it became payable, and where he had no other valid foundation to expect payment by the drawee. But as this is an exception to a general rule, it is incumbent on him, who would bring his case within the exception, to prove the facts necessary for that purpose. The drawer remains secure from any action on his dishonored bill until it is proved that he had seasonable notice of the dishonor, or that such notice was unnecessary by reason of his having no funds in the hands of the drawee. It is not sufficient for the holder to say to the drawer, you had no effects in the drawee's hands wherewith to meet your bill, and therefore, you are not entitled to notice of its dishonor. The allegation must be proved by him, who makes it or it avails him nothing. 2 *Stark. Ev.* 261, *note* 1. Like every other fact, it must be established by competent proof and the best the nature of the case admits of. In this case the plaintiff relies upon the declarations of the drawee made at the time the order was presented, that when the order was drawn, and from thence until the time of its presentment and dishonor he had not in his hands any funds of the drawer, and had not received from him any consideration for the acceptance or payment of said order; and he contends that proof of this declaration is such evidence as will excuse him from giving notice to the drawer; and 2 *Stark. Ev.* 262, is cited as authority for this position.

Starkie does say that the declarations of the drawee, when the bill is presented, as to want of effects of the drawer in his hands, is evidence of the fact, because he is for that purpose the agent of the drawer; but a subsequent declaration is not admissible, and he refers to *Prideaux v. Collier*, 2 *Stark. cases*, 57, as the authority on which he relies.

It is difficult to perceive how that case can be considered as supporting *Starkie's* text. The action was on a bill of exchange by the indorsee against the drawer. Before the bill became due, application was made by the holder to the drawees, and the answer was that the drawer then had no effects in their hands; but as the bill would not be due until the next day, it was probable that the drawer would be in and provide effects before that time. On the next day, when the bill became due, the drawer, in a conversation with the holder, said that he hoped the bill would be paid, that he would see what he could do, and would endeavor to provide effects, and would see the holder again. The bill was not presented to the drawees on the day it became due, but was on the day following, and the witness was about to state what passed between the drawees and himself on that occasion. But Lord *Ellenborough* held that he could not, as "what passed between the drawee and holder after the bill had become due was not evidence, since he was no longer to be considered as the agent of the indorser." It is not easy to understand what is meant by the concluding part of the sentence; but the turning point of the case was not whether the drawees had funds, but whether the necessity of a presentment on the day the bill became due was superseded by what the drawer said to the holder on that day; and whether what took place on the day previous to the maturity of the bill amounted to a presentment and refusal to accept. And if, as the court decided, it did not, unquestionably what took place between the holder and drawees on the day after the bill became due could not affect the drawer. Lord *Ellenborough*, therefore, nonsuited the plaintiff, at the same time saying, "the evidence shows that it was not likely that the drawees would accept the bill, but it was possible that they might change

their minds. The drawer is liable upon the default of the drawee, of which he must have notice, that default is a condition precedent; and it does not appear in this case that there was a default on the part of the drawee." It is not said that the drawee is the agent of the drawer; and it is manifest that the declarations of the drawees made on the first application of the holder were admitted as evidence tending to prove that they refused to accept the bill, and for that purpose were clearly admissible; and that the subsequent declarations were rejected because a refusal to accept and pay on the presentment of the bill the day after it became due could not prejudice the drawer, and proof of the fact would consequently be irrelevant.

It was said by *Abbott, C. J.* in *Hill v. Heap, Dowl. & Ryl. N. P. cas.* 57, that the conduct of the drawer formed no excuse for the nonpresentment for payment in *Prideaux v. Collier*, and that such was the decision of Lord *Ellenborough* in that case. *Starkie*, in his treatise on evidence, before cited, gives as the reason why the mere declaration of the drawee is evidence; because he is for that purpose the agent of the drawer; that is, he is the agent for the purpose of declaring that he has no funds in his hands. What constituted him the agent? Not entrusting him with funds, for he has none; not requesting him to perform a service, and a compliance on his part, for he refuses. If a person requests another to do a particular act and the latter does it, he may, in doing that act, be considered as the agent of the former, but if he refuse to do it, he refuses not as agent, but refuses to become the agent. The act of refusal is his own. Follow out the consequences of this doctrine of agency of the drawee and the effect of his declarations and to what will it lead? Where the fact of agency has been proved, the act of the agent co-extensive with the authority, is the act of the principal, whose mere instrument he is; and then, whatever the agent says, within the scope of his authority, the principal says; and evidence may be given of such acts and declarations as if they had been actually done and made by the principal himself; and it makes no difference whether the declarations be true or false, for they

are as binding upon the principal as if they had been actually made by him. 2 *Stark. Ev.* 59.

A merchant, having ample funds in the hands of his correspondent, draws upon him, with confident expectation that his draft will be duly honored. On presentment the bills are dishonored, the drawee declaring that he had no funds of the drawer in his hands. Now if "the declarations of the drawee as to the want of effects of the drawer in his hands is evidence of the fact, because he is for that purpose the agent of the drawer," in what situation is the latter placed? Can it be that he is so bound by this declaration as not to be entitled to notice of the dishonor of his bills; and that his liability to the holder is so fixed by this falsehood that the latter may lie by securely, without giving notice, until the drawee has become worthless, and the drawer remediless? Such consequences must follow, if the drawee, in asserting the want of effects, acts as the agent of the drawer.

But the drawee has no such power. Whatever declarations he makes on the presentment of the bill, he makes as his own, and not as the instrument of another, and, of course, it will not be evidence. He may be a witness to prove the fact, but his mere assertion, not under oath, cannot be proof. 2 *Stark. Ev.* 59.

Lord *Ellenborough*, who sat at *nisi prius*, in the trial of *Prideaux v. Collier*, says, in giving an opinion in *Legge v. Thorpe*, 12 *East.* 176, "it has often happened to me to be obliged to take an account between the parties, in order to see whether there were any and what funds, or more properly speaking whether the drawer had probable funds left in the drawee's hands to answer the bill." But if the drawee is to be considered the agent of the drawer, and his declarations the declarations of the drawer, there could be no necessity for taking an account between the drawer and drawee to ascertain whether there were any funds, as proof of the denial by the latter would be sufficient, without notice, to fix the liability of the former.

It is believed that no case is to be found where such evidence has been received. In *Bickerdike v. Bollman*, the fact of want of

funds was agreed. *Buller J.* says, "if it be proved, on the part of the plaintiff, that from the time the bill was drawn, till the time it became due, the drawer never had any effects of the drawee in his hands, I think notice to the drawer is not necessary, for he must know whether he had effects in the hands of the drawer or not, and if he had none, he had no right to draw upon him and to expect payment from him." In *Rogers v. Stephens*, 2 *T. R.* 713, Lord *Kenyon* says, "it is true, generally speaking, that notice of non-payment should be given to the drawer, in order that he may withdraw his effects out of the hands of the drawee; but it has been long established that the want of effects in the hands of the person on whom the bill is drawn discharges the holder of the bill from the common formalities; because the drawer must know that he had no right to draw on the drawee.—To be sure it would not be a sufficient excuse for the drawee to say that he had no effects belonging to the drawer in his hands; but in this case it was proved that in point of fact, he had none." In *Walwyn v. St. Quintin*, 2 *Esp. cas.* 515, the plaintiff relied on the testimony of *Deane*, the drawee, to prove want of drawer's effects in his hands. In *Legge v. Thorpe*, before cited, *Wyatt*, the drawee, was used as a witness to prove want of effects; and in no case is there to be found an intimation that the declarations of the drawee were received. It was said by the court in *Forbes v. Eldridge*, 9 *Mass.* 497, that the "question of agency is not applicable to the case. The acceptor does not act as the agent of the drawer of a bill of exchange. He accepts on his own terms and to suit his own convenience. Indeed we do not find a *dictum* in the books, showing that the acceptor is to be considered as the agent of the drawer." If the acceptor be not agent, much less can the drawee be such who refuses to accept. The drawee is a competent witness to prove that he had no effects in his hands when the bill was drawn, and it is a sound principle, that the sayings and declarations of one, who is a competent witness in a cause, are not to be admitted in evidence to charge another; upon the general ground, that they are but hearsay evidence, and are not the best evidence, which the nature of the case affords. *Baker v. Briggs*, 8 *Pick.* 122.

This is a general principle, to which there may be some exceptions, such as that mentioned by *Starkie*, that an admission by the owner is sometimes evidence against one who claims title through him." 2 *Stark. Ev.* 48—and similar cases. *Pocock v. Billings*, *Ry. & Moody*, 127 ; *Hale v. Smith*, 6 *Greenl.* 416. But the case at bar is not that of an admission by an owner, or a declaration by a person interested, against himself; but of the declaration of a person in his own favor.

We think the decision of the court below was correct, and the exceptions are accordingly overruled and the nonsuit confirmed.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF HANCOCK, JUNE TERM, 1832.

Memorandum.—Weston J. was not present during this term.

DRESSER *vs.* WITHERLE *& al.*

Where the sum justly due to the plaintiff was more than a hundred dollars, but the defendant tendered and brought into the court below a lesser sum; and a verdict was entered, *pro forma*, in his favor, and the plaintiff brought the cause up by appeal; after which the plaintiff took out of court the money tendered; and on trial in this court the jury found the sum tendered insufficient, and rendered a verdict for the plaintiff for the deficiency, being less than a hundred dollars;—it was held that the case was not within the *Stat.* 1829, *ch.* 444, *sec.* 1, regulating appeals; and that the defendant was not entitled to a separate judgment for his costs.

Where money is tendered and brought into court, and the plaintiff takes it out, but proceeds for more; and the jury find the sum tendered insufficient; their proper course is to return a verdict for the whole sum due, without regard to the sum deposited with the clerk, which latter sum the court will deduct, and render judgment for the residue.

IN this action, which was *assumpsit*, the defendants brought into the court below, at *April* term 1831, the sum of eighty-two dollars. In order to bring up the cause to this court, a verdict was taken, *pro forma*, for the defendant, and the plaintiff appealed. In *May*

following the plaintiff took from the clerk the money tendered, and in this court proceeded for a greater sum; and upon trial at this term the jury returned a verdict for the plaintiff for $96 44, being the balance due to him, after deducting the amount tendered and taken out of court. Whereupon the defendants moved the court for a separate judgment for their costs, pursuant to *stat.* 1829, *ch.* 444, *sec.* 1; the plaintiff, on his own appeal, having recovered less than a hundred dollars.

W. Abbot, for the plaintiff.

H. Williams, for the defendants.

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

As the sum tendered and deposited in court and the amount of the verdict added together exceed one hundred dollars, the plaintiff was originally entitled to a decision of his cause in this court without the peril of costs after the appeal, according to the provisions of the first section of the act of 1829, *ch.* 444. As the jury have found that the sum tendered was insufficient, the more proper course would have been for them to have returned a verdict for $178 44, and have left it for the court to deduct the amount deposited in court, and rendered judgment for the balance. The question is whether the course of proceeding adopted, and the circumstance of the receipt of the money from the clerk a day or two after the appeal was entered and the court had adjourned, entitle the defendants to their costs since the appeal, the verdict being for a sum less than $100; and we are all satisfied that they do not. The record shows us at once the reason why the verdict was not for the whole of the plaintiff's demand; and in this respect the case differs from *Baker v. Appleton*, 4 *Greenl.* 66. If we should allow costs to the defendants we should appear to pay more respect to form than to substance in the decision. We do not consider the receipt of the money from the clerk as any waiver of the plaintiff's rights as to cost, or in any way affecting the interests of the defendants as to the money deposited. *Motion denied.*

HODGDON *vs.* FOSTER.

Since the statute of 1831, *ch.* 514, abolishing special pleading, the general issue, with a brief statement of soil and freehold, in an action of trespass *quare clausum fregit*, brought before a justice of the peace, is sufficient to bar any further proceedings before him, except the taking of a recognizance to prosecute the plea in the Court of Common Pleas; this statute having virtually repealed so much of *stat.* 1821, *ch.* 76, *sec.* 10, as requires that in such cases the title to the *locus in quo* should be specially pleaded.

The question raised in this cause appears in the opinion of the court, which was delivered by

MELLEN C. J. The general question presented in this case is whether the same is regularly before us. It is an action of trespass *quare clausum fregit*, commenced before a justice of the peace. The defendant there pleaded the general issue, and filed a brief statement, alleging, in a summary manner, that the close described was the soil and freehold of a certain person, under whom he justified. This was done according to the directions of the act of 1831, for abolishing special pleading. The defendant thereupon recognised to enter the action at the next Court of Common Pleas, in the manner by law provided, when and where the same was entered, and by order of the presiding judge was dismissed; and thereupon an appeal to this court was claimed, which was denied, on the ground that the proceedings before the justice were irregular, and also for the purpose of having the question settled, whether the provisions of the abovementioned act of 1831 are to be construed as applicable to such an action as the one before us; and whether a special plea in bar is not as necessary now in such a case, as it was before the act of 1831 was passed. The case of *Low v. Ross*, 3 *Greenl.* 256, was commenced before a justice as this was, and a plea of soil and freehold was filed in the form universally used before the act of 1831; and the action was entered by the defendant at the next Court of Common Pleas, according to his recognizance, where an

issue was joined; but on the opening of the cause, the action was dismissed, because no issue had been joined before the justice. The plaintiff claimed an appeal which was refused; but this court sustained the appeal, inasmuch as no replication was necessary before the justice, he having no jurisdiction of the cause, and as an issue had been regularly joined. The cause is regularly before this court, therefore, if it was regularly before the Court of Common Pleas; because both parties have appeared and pleaded. And we are of opinion that the cause was regularly removed to that court from the justice's court, because we are satisfied that the act of 1831 was intended as a repeal of so much of the former act as required a special plea in bar before the justice; and that the general issue, accompanied by a brief statement of the title relied on by the defendant, must be considered as a legal and sufficient substitute for a plea in bar. It was not necessary for the plaintiff to have joined the general issue until after the entry of the action in the Court of Common Pleas; nor was it the most proper course; but still it is an unimportant circumstance, which has had no effect on the rights of the parties. *We accordingly sustain the repeal.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF WALDO, JULY TERM, 1832.

PAGE *vs. The Inhabitants of* FRANKFORT.

A collector of taxes, who had sold the lands of a delinquent nonresident pursuant to law, was sued by the purchaser, on the covenant in his deed that the taxes were legally assessed, whereas in truth they were not, for which cause he had lost the land; and judgment having been rendered against the collector, the execution was satisfied by extent upon his land. Soon afterwards the town voted to indemnify the collector; and after the lapse of a year, he repurchased the land. In an action against the town on the vote of indemnity, to which the statute of limitations was pleaded, it was held that the damage was sustained by the extent, and that the statute began to run from the passage of the vote, and not from the expiration of the right of redemption.

It was also held, that though the vote was entered on the town records, and was attested by the clerk, yet it was still within the operation of the statute.

Whether a vote by a town to indemnify a collector of taxes for damage which he had previously sustained in consequence of an illegal assessment of taxes, is supported by a sufficient consideration, and constitutes a binding contract,—*quære.*

THIS action, which was *assumpsit*, was commenced Feb. 17, 1830. The plaintiff declared that he was duly chosen collector of taxes for the town of *Frankfort*, for the year 1798; that the taxes for that year were assessed and committed to him for collection;

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that in the legal course of collection he sold the lands of certain delinquent nonresidents to one *Stubbs*, at public vendue, *Jan.* 6, 1800; that he gave a deed thereof to *Stubbs*, *Jan.* 21, 1800, inserting, at the request of the defendants, through the assessors, a covenant that the taxes were legally assessed and the lands legally sold; but that in fact the assessment proved to have been illegal; for which cause the proprietors entered and ousted *Stubbs* from the lands; that *Stubbs* thereupon sued the plaintiff upon the covenants in his deed, and had judgment against him for the illegality of the assessment, in this court at *June* term, 1823; [see *Stubbs v. Page*, 2 *Greenl.* 378,] amounting to $356 98, and extended his execution on the plaintiff's lands in full satisfaction thereof, *July*, 21, 1823; that on the 8th of *Sept.* 1823, the town of *Frankfort* promised and voted "to indemnify the plaintiff for the amount of the execution obtained against him by *Stubbs*, and for the money-expense incurred by the plaintiff in maintaining the lawsuit in which said execution was obtained;" and that a similar promise was made *Jan.* 29, 1824; but that the plaintiff had not been indemnified; but on the contrary was obliged, in order to redeem his land, which he did on the 12th of *Sept.* 1825, to pay three hundred dollars.

The defendants pleaded the general issue, and the statute of limitations; and the cause being referred to a commissioner by consent of parties, to ascertain and report a statement of facts, he made a report containing the principal facts alleged in the declaration. The evidence of the promise stated to have been made *Jan.* 29, 1824, consisted in a petition of the selectmen of *Frankfort* to the legislature, reciting the circumstances of the case, and the vote of the preceding *September*, and praying for authority to the town to raise and assess money for the purpose of indemnifying the plaintiff; upon which a resolve of the above date was passed accordingly.

Greenleaf argued for the plaintiff, that as the promise was merely for indemnity, no action would lie till he had sustained actual damage; and this was not till he was obliged to pay money to relieve his land; or, at the earliest, till the title passed out of him, and became absolute in *Stubbs*, at the expiration of a year from the extent.

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If the statute of limitations began to run from either of these dates, the action was commenced within six years.

It was the duty of the town, by its assessors, to deliver to the collector bills of taxes legally raised and assessed; and it may be considered as being under an implied contract to that effect. And corporations are bound by implied *assumpsit* in all cases of duties imposed by law, or of benefits conferred. 2 *Kent's Com.* 243, 235; *Bank of Columbia v. Patterson*, 7 *Cranch.* 299; 1 *Pick.* 297; 14 *Johns.* 118; 8 *Pick.* 178; 7 *Greenl.* 76, 118. The express promise was therefore upon good and sufficient consideration. *Nelson v. Milford*, 7 *Pick.* 18.

But if the statute began to run from the vote of *Sept.* 8, 1823, yet the action is saved;—first, because the promise, being on the records of the town, is proved by evidence of as high a nature as is necessary in the conveyance of real estate; which may be granted by vote alone; and thus is equivalent to a promise under seal;—and secondly, because the transactions of the meeting, being attested by the town clerk, the promise is duly witnessed, and so not within the statute.

W. Crosby argued for the defendants, and cited *Norton v. Mansfield*, 16 *Mass.* 48; *Dillingham v. Snow*, 5 *Mass.* 547. He also read an argument by *Sprague*, who was attending his duties as Senator in Congress from this State, and who argued that the vote was without sufficient consideration, and was not binding, and cited *Comstock v. Smith*, 7 *Johns.* 87; *Bosden v. Thinne*, *Yelv.* 41, *note* 1; 3 *Bos. & Pul.* 252, *note*; *Haliburton v. Frankfort*, 14 *Mass.* 214; *Stetson v. Kempton*, 13 *Mass.* 272; *Mills v. Wyman*, 3 *Pick.* 207; *Bussey v. Gilmore*, 3 *Greenl.* 191.

Mellen C. J. delivered the opinion of the court at an adjourned session in *Cumberland*, in *August* following.

This case presents two questions for consideration. First, did the vote of indemnity, passed *September* 8*th*, 1823, constitute a legal contract with the plaintiff, rendering the defendants liable to him for the amount of an indemnity against *Stubbs's* judgment and the

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expenses incurred in defending his action? If so, then, secondly, is the plaintiff's action barred by the statute of limitations? Admitting for the present, that the first question is entitled to an affirmative answer, we will proceed to the examination of the second.

By the report of the commissioner it appears, that *Stubbs* recovered his judgment at *June* term, 1823, and that on the 21st of *July* following he caused his execution to be satisfied in full, by a levy on the real estate of the plaintiff. It further appears that the present action was commenced on the 17th of *February*, 1830, which was more than six years next after the completion of the levy, though less than six years next after the right of redemption expired; and less than five years after *Stubbs* received $300 of the plaintiff, and, in consideration thereof, released the premises to him. On these facts, the inquiry is, when did the plaintiff's right of action against the defendants accrue? Certainly not till the vote was passed, on the 8th of *September*, next following the levy. If it accrued then, the action is barred; for it cannot be contended that a promise, made by a town is not barred, in the same circumstances in which a promise made by an individual would be. Towns can make express contracts, only by vote; still, the contract is but a simple contract, and is governed by those principles, which govern all such contracts, in regard to the statute of limitations. It is urged by the counsel for the plaintiff that his right of action did not accrue until the payment of the $300, and the release of the title by *Stubbs;* but as this was after the right of redemption had expired, the transaction can be considered only as a purchase, and not as a redemption; for the judgment, satisfied by the levy, amounted to $356, 98. It is next urged that the right of action did not accrue till the expiration of one year next after the levy; but the answer to this argument is, that the plaintiff's title to the premises levied upon was by the levy, devested and transferred to *Stubbs*, subject to the right of redemption, which right was never exercised; so that the execution was completely satisfied by, and at the time of the levy. At that time he was damnified to the amount of the execution; and even if he had redeemed the land the day before the right of re-

demption expired, by paying the amount of the execution and costs, such payment would be only substitution money for land, but would not increase or diminish the amount of his loss or his indemnity. Whatever cause of action he had, grounded on the vote of *September* 8, 1823, accrued on that day; because, prior to that day, namely, on the day of the levy, the damage was sustained, to indemnify him against which, the vote was passed.

In this view of the cause, it is evident that the action cannot be maintained. We have omitted the consideration of the first question above stated, because our opinion on the second, disposes of the cause. Some of the objections which have been urged by the defendant's counsel as to the first question, seem to present doubts and difficulties; but we do not mean to intimate any opinion concerning them, or what might be our judgment, provided the action were not barred. A nonsuit must be entered.

RAWSON *vs.* PORTER.

Where a suit, in which property was attached, was settled before entry, by compromise, and the plaintiff's attorney charged as part of the costs to be paid by the debtor, a commission of two and a half *per cent.* often charged in similar cases, which the debtor at first objected to as unreasonable, but finally paid;—it was held that he could not recover it back, it being voluntarily paid, in pursuance of a lawful contract, and without fraud or oppression.

THIS was an action for money had and received, and was tried before *Parris J.* upon the general issue.

It appeared that the defendant, who was a counsellor and attorney of this court, had received sundry demands against the plaintiff, from his creditors, for collection, with directions to secure them by mortgage or responsible sureties; that he made a writ and caused the plaintiff's goods to be attached; that an agreement was made

a few days afterwards for a compromise of the action, by new notes, with a mortgage and a surety, the costs to be paid by the debtor; in the execution of which agreement, the attorney taxed as part of the costs, a commission of two and a half *per cent.* on the amount of the debt. The debtor was unwilling to pay this sum; and the attorney offered to remit it, if the debtor would pay the debt in money instead of new securities; or to wait, which he preferred to do, and write to his clients for instructions. But Dr. *Huse*, the debtor's friend, who had become responsible to the officer for the goods attached, objected to the delay, and advised him to pay the amount and obtain the release of his goods; which was at last agreed to, and *Huse's* note given to the attorney, for the amount, which was paid when it fell due, without objection from the debtor. The present action was brought to recover back the sum thus paid. It further appeared that the reasonableness of the charge under the existing circumstances, was much discussed between the attorney and the debtor, the latter denying and the former maintaining it; and there was evidence showing that a commission of three *per cent.* was usually deducted by attornies in this county from all monies collected for persons living out of the county, and remitted to the creditor; but that where the demand was compromised in some other mode, this charge was often required to be paid by the debtor.

Upon this evidence the Judge directed a verdict to be returned for the plaintiff, subject to the opinion of the Court upon the general question whether the plaintiff was entitled to retain it.

J. Thayer, for the plaintiff, cited *Cowp.* 805—807; 2 *Burr.* 924, 930; *Cro. Jac.* 103; *W. Jones* 165; *Cro. El.* 123; 1 *Esp.* 5; *Smith v. Bromley*, *Doug.* 671; *Ashley v. Reynolds* 2 *Stra.* 915; 1 *Dane's Abr.* 176; *Larell v. Miller*, 15 *Mass.* 207; 2 *Esp.* 548; *Bull. N. P.* 132; *Worcester v. Eaton*, 11 *Mass.* 368; *Bond v. Hayes*, 12 *Mass.* 34; *Boardman v. Rowe*, 13 *Mass.* 104; *Marriot v. Hampton*, 2 *Esp.* 546; *Cowp.* 204; 1 *Dane's Abr.* 180, 181, 185; 4 *Johns*, 245.

Abbot and *Porter*, for the defendant, cited *Wallis v. Wallis*, 4 *Mass.* 135; *Homes v. Aery*, 12 *Mass.* 137; *Bilbie v. Lumley*,

2 *East.* 469; 1 *Campb.* 136; *Brisbane v. Dacres*, 5 *Taunt.* 143; *Lowry v. Bourdieu, Doug.* 471; *Brown v. McKinally*, 1 *Esp.* 279; *Knibbs v. Hall*, 1 *Esp.* 84; *Hall v. Shultz*, 4 *Johns*, 240; *Gilpatrick v. Sayward*, 5 *Greenl.* 465; *Morris v. Tarin*, 1 *Dall.* 147; *Cartwright v. Rowley*, 2 *Esp.* 723.

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

This case presents the single question whether upon the facts reported, the action is maintainable. Under the instructions of the Judge, the jury returned their verdict for the plaintiff, for the purpose of having that question decided. Where illegal fees are demanded and received by an officer, whose fees are by law established, he is liable to a penalty. The defendant is not an officer of that description, but a counsellor at law; and the money which he demanded and received of the plaintiff, and for which the present action is brought, was received as commissions on the collection of a sum of money for certain creditors of the plaintiff. Commissions of this description are not the subject of any statutory provisions; they are neither limited nor established by any law; and in this respect they resemble commissions charged by merchants in the transactions of business between them. Still, individuals, having no official character, may be guilty of extortion in their dealings, and thereby subject themselves to legal liability to reimburse the amount extorted. On this principle the present action is prosecuted.

In our law books we find numerous decisions relating to such actions. Thus where a custom-house officer seized certain goods as forfeited, which were not seizable, and demanded and received money of the owner to release them, the owner recovered the money back again, as having been paid by coercion. In that case, the defendant did not demand and receive the sum as fees, but as a compensation for giving up a possession which he had no right to hold. *Irving v. Wilson & al.* 4 *T. R.* 485. So where a creditor of a bankrupt demanded £40 for signing his certificate, and his sister paid it, she was allowed to recover it back again, as

having been oppressively extorted from her. 1 *Esp.* 5. *Smith v. Bromley, Dougl.* 696, *note.* So where the plaintiff pawned plate, and the pawnee demanded £10 as usury, which the plaintiff paid in order to get his goods back again. In an action for money had and received he recovered it, as having been paid by compulsion. *Astley v. Reynolds*, 2 *Strange*, 915. See also 1 *Dane's Abr.* 180, 181. The above case in *Strange*, was relied upon by Lord *Mansfield*, in deciding *Smith v. Bromley.* But Lord *Kenyon*, seems to have disregarded it in the decision of *Knibbs v. Hall*, 1 *Esp.* 84. In that case *Hall* was indebted to the plaintiff for rent. The plaintiff had demanded twenty-five guineas per year,—the defendant contended that he had taken the premises at twenty guineas per year. This sum was refused by the plaintiff, who threatened to distrain for the twenty-five guineas; and to avoid the distress, the defendant paid at the rate of twenty-five guineas, and proposed to offset the surplus against the plaintiff's claim, as having been paid by compulsion. Lord *Kenyon* decided that this was not a case of compulsion, as the defendant might by a replevin have defended himself against a distress; and that, therefore, after a voluntary payment so made, he should not be allowed to dispute its legality. In the case of *Clark v. Shee & Johnson*, *Cowp.* 200, Lord *Mansfield*, in speaking of his decision of *Smith v. Bromley*, says, "the transaction is against the express prohibitions of the act of parliament, and both are parties to it; but not equally guilty; for the bankrupt is an oppressed party, and therefore the action will lie." Thus it appears, that in all the foregoing cases with one exception, the money reclaimed had been paid in satisfaction of an illegal demand. Other similar cases might be cited. On the same principle money which has been extorted by fraud, imposition and deceit may be recovered back. *Bliss & al. v. Thompson*, 4 *Mass.* 488. On the contrary, where money has been voluntarily and understandingly paid, in pursuance of a lawful contract, made *bona fide*, it cannot be recovered back, although paid without any consideration, unless there was some mistake, fraud or imposition. *Gates v. Winslow*, 1 *Mass.* 65; *Wallis, ex'r. v. Wallis*, 4 *Mass*, 135; *Brown v. McKinnally*, 1

Esp. 279; *Marriot v. Hampton*, 2 *Esp.* 546. In *Cartwright v. Rowley*, *ib.* 723, Lord *Kenyon* says, "the money cannot be recovered back, it was paid by the plaintiff voluntarily; nor can money be recovered back again in this form of action, unless there are circumstances to show that the plaintiff paid it through mistake, or in consequence of coercion." Several other cases have been cited, establishing the same doctrine. These seem to be the general prinples of law upon the subject under consideration. Let us now apply the principles to the facts of the present case. In the first place, it is evident that there was nothing resembling deceit or imposition on the part of the defendant. He stated frankly the nature of the charge which he made against the plaintiff and the grounds on which he placed his claim to the commission of two and a half *per cent.* In the next place, the plaintiff's goods were legally attached, and of course were lawfully placed out of his control; and neither the creditors nor the defendant their attorney, were under any obligation to settle the action, by taking any other security than that of the property attached. The plaintiff had no claim for a restoration of the property, but by a payment of the debt or adjustment of the action; nor had the defendant any legal right to charge or tax the commissions against the plaintiff. It was decided in the case of *Dunlap v. Curtis*, 10 *Mass.* 210, that a sheriff was not liable to the statute penalty by taking and receiving of a defendant more than legal fees; because he had no power to demand them. The money was paid by the plaintiff after consultation and discussion; that measure being deemed most advisable in the then existing circumstances. Were those circumstances such as, in legal contemplation, to render the payment a voluntary one, or a payment by compulsion? The defendant asserted that he thought he ought to have the sum he charged. The plaintiff was unwilling to pay it; but in the situation of the property, *Huse*, the friend of the plaintiff, advised him to pay it. The defendant offered to write to his clients to know if they would consent to have the commissions charged to them, but the plaintiff objected to the measure on account of the delay it would occasion. The defendant offered to give up the charge of commissions if the plaintiff would pay the debt, instead of

giving security for its future payment, but the plaintiff preferred paying the sum charged, rather than have any delay, as *Huse* the receipter for the property, objected. The defendant urged that the plaintiff, by giving security and having a day of payment, would be the person benefitted, and therefore ought to pay the commissions, rather than the attaching creditors. The defendant was desirous of delay, that he might consult his clients for the purpose before named, but the plaintiff still objected. Thereupon a note was given for the costs and security for the debt, and the action was settled. The note for the costs was paid when it became due. The evidence reported in relation to the practice, in such cases, as the present, so far as known by the several deponents, is not considered by the court as having any important influence in the decision of the cause. On a view of the evidence, it appears that the charge was made against the plaintiff and the propriety of it urged on the ground of its justice and fairness in the then existing circumstances. The plaintiff was asking indulgence of his creditors; their attorney, at a distance from them, was authorised to grant it on having the debt secured; but no instructions had been given on the subject of those commissions usually chargeable to the creditors; he wished to learn their ideas as to paying those commissions in such a case as was then presented to their consideration, the debt not being paid, but only secured. The plaintiff acted under no influence exerted over him by the defendant; he reasoned for himself, and listened to the advice of *Huse*. If that advice led him to the conclusion he formed, the defendant is not answerable for its correctness. The plaintiff was unwilling that any delay should take place, and he was willing to prevent it by assenting to the terms proposed by the defendant. He gave no intimation at the time of any intention to reclaim the money as paid by compulsion or unjustly extorted. He was under no obligation to pay it. Had he permitted the action to proceed to judgment, the sum claimed would not have been taxed against him. He voluntarily paid it, for the indulgence he obtained. We do not perceive any fraud, imposition, deceit, compulsion, oppression or extortion, on the part of the defendant; nor any cir-

cumstance which can justify the plaintiff in deserting the compromise which he made, and reaping the benefit of such desertion.

The verdict is set aside and a new trial granted.

ELLENWOOD *& al vs.* DICKEY *& al.*

An execution debtor being within the prison limits, under a statute bond, his friends entered into a collateral agreement for payment of the demand; whereupon the creditors gave him a receipt, not under seal, in full satisfaction of the judgment and execution. In an action afterwards brought upon the bond, this discharge was held a sufficient bar, though the creditor had not been able to derive any benefit from the agreement.

THIS action, which came up by exceptions taken to the opinion of *Ruggles J.* before whom it was tried in the court below, was an action of debt brought by *Asa & Matthew Ellenwood* against *John Dickey* as principal, and *Reuben & Robert Dickey* as sureties, on a bond given by the former for the debtor's liberties, conditioned for his remaining a true prisoner till lawfully discharged, and to surrender himself to the gaol keeper and go into close confinement, as is required by law. Several matters were pleaded in bar, presenting the principal question whether the debtor was lawfully discharged of the execution of the bond.

It appeared that *John Dickey* having duly notified his creditors, and being about to take the poor debtor's oath, just before the expiration of the nine months from the date of the bond, when he should have gone into close gaol, the defendants and *Asa Ellenwood* met, and agreed on a settlement of the execution; in pursuance of which, *Reuben & Robert Dickey*, gave the plaintiffs a written license to enter on a certain lot of land and take thence sufficient white pine timber to make "eight thousand feet of boards," at any time within one year; which *Asa* accepted in satisfaction of

the demand; and thereupon gave to *John Dickey*, a receipt signed with his own name, in full discharge of the execution. No further regard was paid to the bond, nor any proceedings had under it. The plaintiffs, though previously requested, had never examined the timber on the lot; but acted upon the representations made by the *Dickeys*, respecting it; which afterwards turned out to be essentially erroneous. The facts to this point were argued to the jury as evidence of fraud, but this was negatived by the verdict. It did not appear that the plaintiffs had ever cut timber on the lot, or derived any benefit from the agreement; but on the contrary, some witnesses were of opinion that the timber was not worth the hauling. The only evidence of *Matthew's* assent to the arrangement, was his having previously said that *Asa* might settle the claim as he pleased. The execution issued on a judgment for costs only, and there had been no notice or claim of any lien on the part of the attorney.

Hereupon the counsel for the plaintiff, contended that here was no legal discharge, either of the execution or the bond; and that the latter could not be discharged without payment of the former. That the boards mentioned in the agreement or license, were to be taken as "merchantable" boards. That if there was not the stipulated quantity of such timber on the lot at the time of the contract, it was void; and lastly that the attorney had such lien for his fees and disbursements as rendered the settlement void without proof of his consent.

But the judge instructed the jury, that though the agreement and receipt did not operate as a satisfaction or discharge of the original judgment, yet if they found that it was entered into with a view to a discharge of the execution debtor from imprisonment, and prevent the necessity of his surrendering himself to the gaoler, or taking the poor debtor's oath, and it was intended by the parties to have that effect; and if the transaction was attended with no circumstances of fraud or misrepresentation on the part of the defendants, whatever they did having been done in good faith; then the debtor did not commit a breach of the bond in not surrendering himself to the

gaoler, whether the timber on the lot was of the description mentioned in the writing, or not. But that if they found that the defendants, or either of them, knowingly and intentionally misrepresented the quality or quantity of the timber growing on the lot, the plaintiffs relying on their account of it, and not on their own view, or on information otherwise obtained, and were thereby induced to accept the agreement, and give the discharge, it was a fraud on the plaintiffs, and the discharge thus obtained would be no bar to their recovering.

He further instructed them that the contract was not to be interpreted as a stipulation that there was sufficient timber on the lot to make eight thousand feet of merchantable boards, technically so called; but that if the timber when sawed, would make that quantity of any boards of a readily marketable quality, it would satisfy the terms of the contract. And he ruled, that no supposed lien of the attorney could be set up, without previous notice, to prevent the operation of the discharge.

To which opinions and directions the plaintiffs excepted; the jury having found for the defendants.

J. Williamson, in support of the exceptions, contended, first, that the discharge was inoperative, being made by one creditor only, and not by both, it not appearing that they were copartners, 5 *Bac. Abr.* tit. *Release G; Fitch v. Farnham*, 14 *Johns.* 172. Secondly, that there could be no valid discharge of the bond but such as would be a good discharge of the judgment also; but here was no satisfaction; and one contract cannot be extinguished by another from which the party derived no benefit. *Johnson v. Johnson*, 11 *Mass.* 361; 5 *Johns.* 68; 1 *Bac. Abr.* 43. Thirdly, that the agreement was void by reason of the total absence of the thing which constituted its essence, viz. the quantity and kind of timber contracted for. *Chipm. on contr.* 32.

Johnson, on the other side, was stopped by the court, whose opinion was delivered by

Weston J. After the discharge of the execution against *John Dickey*, the defendants were excused by the plaintiffs, who had a

right so to do, from fulfilling the condition of the gaol bond; and the discharge was made with the express understanding, that it should have this effect. The new agreement was a sufficient consideration for the discharge. If that had been fraudulently obtained, it would not have protected the defendants; but this the jury have negatived. Whether the plaintiffs can realize the satisfaction they expected; or whether the agreement has been, or could be, fulfilled on the part of the defendants, are not questions, which properly arise in this action; except as evidence of fraud, upon which the jury have passed. *Exceptions overruled.*

SMITH *vs.* HAYNES.

An agreement "to sell" land, binds the party to execute a proper deed of conveyance.

Where, under an agreement for the sale of land, the purchaser had made partial payments, but the other party had no title to the land, but held only a contract for a title to be afterwards completed by the owner; it was held that this fact, being well known to the purchaser at the time of making the contract, furnished no ground to recover back the money paid, the contract not being rescinded.

THIS was an action of *assumpsit* for the recovery of twenty-four dollars for money advanced to the defendant, and thirty dollars for labor performed for him; and it came before this court upon exceptions filed by the plaintiff to the opinion of *Ruggles* J. before whom it was tried in the court below.

It appeared on the trial that the money was paid and the services performed by the plaintiff in part payment for a lot of land and in part fulfilment of a written agreement, made *Aug.* 25, 1830, between him and the defendant; by which, "in consideration of $400 paid by said *Smith*, the said *Haynes* doth agree to sell unto said *Smith* a certain parcel or lot of land situate," &c. "upon these conditions,

viz. fifty dollars to be paid in thirty days, and fifty dollars in *January* next, and fifty dollars in *June* following, and the remainder in three annual instalments from *September* next." It was in evidence that on the 8th or 10th day of *September*, 1830, the plaintiff demanded of the defendant a deed of the land, or security therefor; and that they conversed about a settlement; in the course of which the defendant asked if the plaintiff would be ready in ten days to make payment, and the plaintiff replied that he was then ready; whereupon the defendant said he would give him a deed in ten days, upon his paying the money. The plaintiff offered to prove that the whole intentions of the parties were not expressed in the written agreement; and that it was further agreed that the defendant should give the plaintiff a good and sufficient deed of the land, upon the payment of fifty dollars. But the judge rejected this evidence. It also appeared that at the time of making the agreement, the defendant had no legal title to the land; but had bargained for it with the owner, and was to have a conveyance, upon the payment of a stipulated sum; and that this fact was known to the plaintiff at the time of contracting with the defendant, and before the aforesaid partial payments were made.

Upon this evidence the plaintiff's counsel contended that the agreement was not such as to compel the defendant to give a good and sufficient deed of the premises, and therefore was void for want of mutuality; and that if it were otherwise, yet that as the defendant had no title to the land, and therefore could convey none to the plaintiff, the latter was entitled to recover back what he had advanced.

But the judge instructed the jury that the plaintiff, having complied with the terms of the agreement on his part, would have a remedy in damages against the defendant, if he failed to convey to him a title to the land; that the plaintiff could not recover back the money he had advanced, under the agreement, unless it was rescinded, or unless, at the time of making it, he confided in the defendant's title, and was ignorant of his want of any; or unless the defendant had, by his own neglect or otherwise, to acquire title thereto from the legal owner; but that if, at the time of making the con-

tract, and before making any partial payments under it, the plaintiff knew that the defendant had no title, but only a contract for a title to the land, this want of title would not enable the plaintiff to recover in this action. The jury thereupon found for the defendant; and the plaintiff filed exceptions to the directions given them by the judge.

Johnson, for the plaintiff, maintained the points taken at the trial; and argued further that the agreement, such as it was, had been rescinded by the new verbal agreement made in *Sept.* 1830; which last, not being in writing, though good as a waiver of the former, yet was void by the statute of frauds, as an agreement to convey lands; and that on either of these grounds the action was maintainable. *Lattimore v. Harson*, 14 *Johns.* 330; *Munroe v. Perkins*, 9 *Pick.* 298; *Porter v. Noyes*, 2 *Greenl.* 22.

J. Williamson, for the defendant.

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

It appears on the exceptions in this case, that the sums charged in the account annexed to the writ were paid to the defendant, and the services therein mentioned, were performed for him by the plaintiff in part satisfaction of a debt due from him to the defendant, for a lot of land which he had agreed to sell to the plaintiff, as mentioned in the agreement set forth in the exceptions. Why then should the plaintiff recover the amount back again? The bargain has not been rescinded, nor is there any reason for concluding that the defendant will not convey to the plaintiff the land contracted for, so soon as the consideration shall have all been paid according to the terms of the contract. But it is said that the defendant had no title to the land which he agreed to sell; still he had made a bargain with the owner for the land and was to have a deed of it as soon as he should pay a certain sum for it. All this was well known to the plaintiff when he contracted with the defendant. There was no deception or misunderstanding. The plaintiff however, contends that by the terms of the defendant's contract, he is under no obligation to convey any title to the land, even after all the consideration

shall have been paid; that he only agreed to sell the land. It is true the agreement is not drawn with much legal precision; on the contrary, there is much looseness of expression. A reasonable construction, however, must be given to all contracts. Whether the agreement binds the defendant to give a warranty deed, need not now be decided; but it must be construed to be an agreement to make a conveyance of the land. At any rate, the plaintiff was satisfied with the contract and he must go on and fulfil his own, and thus entitle himself to his deed. It is admitted that the parol, explanatory evidence which was offered, was properly rejected. On the whole, we overrule the exceptions.

Judgment for the defendant.

COLE *vs.* MCGLATHRY.

It is no answer to a plea of the statute of limitations, that the action is founded on a breach of trust, not discovered till within six years. In order to take a case out of the statute on this ground, there must be proof of actual fraud and concealment by the party to be charged.

THIS case was *assumpsit* for goods sold, and was tried before *Whitman C. J.* in the court below, upon the plea of the statute of limitations, to which the plaintiff replied by alleging fraud in the defendant.

The plaintiff proved that in the year 1812, he delivered the defendant goods to the value of a hundred dollars, which the defendant promised to pay to certain persons who held notes to a larger amount against the plaintiff, which he had given for his farm; that in 1828, their agent asked the plaintiff why he did not pay for his land; and on computing the sum due, the plaintiff was surprised to find that the hundred dollars had not been paid by the defendant.

That thereupon he called on the defendant, who admitted that he received the goods, and had agreed to pay the amount in part satisfaction of the sum due on the plaintiff's notes; but affirmed that he had long since paid it to *Archibald Jones*, Esq. who formerly held the notes, as agent for the creditors. That about two years ago the defendant repeated the same in the presence of Mr. *Jones*, who, being called as a witness, swore positively that no money was ever paid to him by the defendant, for such purpose. And that the plaintiff was old, infirm and illiterate, dwelling about five miles from the village in *Frankfort*, where his notes had been deposited, and which, for the last fifteen or twenty years he had seldom visited, except on public occasions.

This evidence the Chief Justice deemed insufficient to avoid the bar, and therefore nonsuited the plaintiff, who filed exceptions to his opinion.

Sprague, for the plaintiff, furnished a written argument, in which he relied on *Johnston v. Humphreys*, 14 *Serg. & Rawle*, 394.

W. Crosby, for the defendant, cited *Bree v. Holbeck*, *Doug.* 656; *First Mass. Turnp. Corp. v. Field*, 3 *Mass.* 201; *Wells v. Fish*, 3 *Pick.* 74; *Farnham v. Brooks*, 9 *Pick.* 246; *Bishop v. Little*, 3 *Greenl.* 405.

Weston J. delivered the opinion of the Court.

The cause of action in this case, accrued more than six years prior to its commencement. The defendant relies upon the statute of limitations. No admission of indebtedness, or promise on his part to pay within six years, is proved. The plaintiff insists that by reason of the fraud of the defendant, the statute does not attach. The fraud set up, consists in a violation of his engagement, which might with equal reason be relied upon in all cases. Had not the plaintiff slumbered upon his rights, and confided in the defendant, beyond the bounds of ordinary prudence, he had, at an earlier period, a sufficient and effectual remedy. The defendant, in not fulfilling his promise, was guilty of a breach of moral and legal du-

ty; and so is every debtor, who does not pay at the stipulated time. In order to take a case out of the statute upon this ground, there must be proof of actual fraud and concealment, by the party to be charged. The cases of *Bree v. Holbrook*, and of the *First Mass. Turnpike v. Field & als.*, cited in the argument, establish and qualify this exception to the statute. The principle underwent a very elaborate discussion in *Farnham v. Brooks*, 9 *Pick.* 212, and the court distinctly state that the operation of the statute is unaffected, if the party upon whom the fraud is practised had full means of detecting it. If the defendant, failing to pay as he agreed, was guilty of fraud, the plaintiff had the power of detection. Indeed but for gross negligence on his part, it must have been discovered. But the facts do not present a case of fraud, within the principle of the exception, upon which the plaintiff relies. The only wrong imputable to the defendant, was an omission to pay, until long after the statute had attached. Then indeed to former delinquency, he added falsehood, according to the testimony of Mr. *Jones*; but that made his case no better; and his protection being before complete under the statute, it made it in legal contemplation, no worse. It could not have the effect to revive the debt. *Nonsuit confirmed.*

LOCKE *vs.* HALL.

G. & M. being partners in trade, and owing certain debts, took *C.* into partnership with them, constituting a new firm, under the style of *G. M. & Co.* The new firm received a transfer of all the effects, and the partners verbally agreed among themselves that it should pay all the debts of the old firm. The new firm afterwards become insolvent, its stock was attached by *L.* a creditor of *G. & M.* in a suit against them; and was afterwards attached by the same officer, in the suits of other creditors against *G. M. & Co.* In an action brought by *L.* against the sheriff, for neglect to levy his execution on the goods, and for giving priority to the subsequent attachments against the new firm, *it was held*, that the goods were first liable to the creditors of the new firm;—that no creditor of the old

firm could avail himself of the engagement of the new firm to pay its debts till he knew and assented to it;—and that his remedy on such agreement was to be sought only in an action against the new firm.

THE facts in this case, which came before the court upon a case stated by the parties, will be found in sufficient detail in the opinion of the Court.

H. O. Alden, for the plaintiff, maintained his right to priority of satisfaction from the priority of contract, it being against the old company; from priority of attachment; and from the express agreement of the parties among themselves that the new company should pay the debts of the old. *Gow on Partn.* 343—346; 4 *D. & E.* 720.

Allyn, for the defendant, cited *Pierce v. Jackson*, 6 *Mass.* 242; *Phillips v. Bridge*, 11 *Mass.* 242.

MELLEN C. J. delivered the opinion of the court at an adjourned session in *Cumberland*, in *August* following.

This is a special action on the case against the sheriff of *Waldo*, for an alleged neglect of *Isaac Allard*, one of his deputies, in not selling on execution certain personal property by him attached in the plaintiff's suit against the firm of *Gilbert & Mitchell*. The attachment was made on the 5th of *June* 1829; judgment recovered at *November* term following; and the execution was placed in the hands of *Allard* for service within thirty days after judgment. Having orders not to arrest the body of either of the defendants, he returned the execution in due season, in no part satisfied. Whether this action can be maintained, depends on the following facts. On the sixth of *August* 1828, *Sewall Gilbert* and *Samuel A. Mitchell*, having before that time formed a copartnership under the firm of *Gilbert & Mitchell*, became indebted to the plaintiff in the sum for which said judgment was recovered. In the month of *September* 1828, *William A. Chandler* became a member of the copartnership; and they assumed the name of *Gilbert, Mitchell & Company*. At the time this new partnership was formed, there

was a parol agreement entered into, that the existing stock, goods and debts of *Gilbert & Mitchell*, should become the property of *Gilbert, Mitchell & Company*; and that said firm should pay the existing debts due from *Gilbert & Mitchell*, as well as its own debts which might be subsequently contracted. The consideration of the above agreement on the part of *Chandler* was, that he should be equally interested with *Gilbert & Mitchell* in the property and business of the second firm. It seems that this second firm failed in business, in *June*, 1829; but there is no fact in the case tending to show that, when the second partnership was formed, all the parties were not solvent and unembarrassed; of course, we must consider that they were; and had a right to make the above mentioned contract and disposition of the property of *Gilbert & Mitchell* to the second firm, though they were indebted to the plaintiff; 1 *Mad.* 589; 15 *Ves.* 558; and such a contract need not be made in writing. *Gow on Part.* 277; 11 *Ves.* 3. After the second partnership was formed, it became indebted to *Morrill & al.* who caused the same goods to be attached, on the same day but after the plaintiff's attachment. They recovered judgment at *July* term, 1829; and their execution also was placed in the hands of *Allard*, for service, within thirty days after judgment; who sold all the attached property thereon to satisfy the same. Until after the attachments were made, no notice was given by the second firm of their before mentioned agreement to pay the debts of the first. The plaintiff claims a right to maintain this action in virtue of the above agreement; and insists that, as his attachment was prior to that of *Morrill* and others, the property attached should have been applied by *Allard* in satisfaction of his execution. The answer is, that the property, when attached, had belonged to the second firm, and the plaintiff's writ and execution were against the first firm; and it was intended to be, because, the contract of the second firm was not known by the plaintiff when the suit was commenced; and it does not appear that it was known either by the plaintiff or *Allard*, while the execution against *Gilbert & Mitchell* was in his hands. In case of the insolvency of a firm, the debts due from it must be

first paid, before any of the property belonging to it can be legally applied in satisfaction of debts due from any one or more of the partners. This is an established principle. Hence the plaintiff wishes to avail himself of the engagement of the second firm. On the facts before us, was he entitled so to do? It is true that the second firm took and continued in open possession of the property transferred by the first, which perfected the transfer and vested the property in the second firm. *Gow.* 298; *Exparte Ruffin*, 6 *Ves.* 119; *Exparte Williams*, 11 *Ves.* 3. Yet, as before observed, the agreement as to the payment of the debts of the first firm was not known to the plaintiff, and, of course, he never could have assented to the substitution of the second firm as his debtors, which was necessary to authorize him to claim against that firm. Thus "where *A*, a trader, being indebted to several persons, entered into partnership with *B*, and brought his stock in trade into the partnership, and by the articles of copartnership, it was agreed that the joint trade should pay the creditors of *A*, named in the subjoined schedule, it was held that a separate creditor of *A*, named in the schedule, whose assent, before the bankruptcy, to the agreement between the parties, could not be shown, did not by the articles become a creditor of *A* and *B*. *Gow.* 311, and cases there cited. In principle, the case above put, seems to be exactly similar to the case at bar. But, had the plaintiff assented, we apprehend he should have made his claim and brought his action against the second firm, and shaped his declaration accordingly. *Exparte Peel*, 6 *Ves.* 604. The judgment and execution would then have given information to the officer as to priority of right, on whom to call and whose property to seize. If the parol promise was binding on the second firm, such would have been the proper course, had the transfer of promise been known. If the promise was not binding, then the legal priority belonged to *Morrill* and others as creditors of the firm which they had credited. In these circumstances it would seem injustice to hold the defendant liable in damages, by considering *Allard* as a wrong doer. We think that *Allard* was justified in obeying, if not bound to obey his precept, and govern himself accordingly in

the disposal of the property. It does not appear that he was conusant or ever informed as to any particular facts respecting the change and ownership of the property, and no indemnity appears to have been given to him. On the whole, our opinion is that in the circumstances in which he stood, he conducted properly in selling the goods upon the execution of *Morrill & al.* against the firm of *Gilbert, Mitchell & Company*, to whom the property belonged, and applying the proceeds of the sale in satisfaction of that execution; and that as there was no surplus, he was correct in returning the plaintiff's execution in no part satisfied. On these principles, according to the agreement of the parties, a nonsuit must be entered, with costs for defendant.

DOCKHAM *vs.* PARKER *& al.*

Where a farm was rented for a year, for two tons of hay and certain other produce, to be delivered from the farm to the landlord; it was held that he was not entitled to take the hay, till it was either delivered to him by the tenant, or severed and set apart for his use.

The tenant in that case having died before the hay was cut, and his widow and administratrix having completed the business of the farm for that season, it was held that the produce belonged to the husband's estate, if there was no new contract between the widow and the landlord.

THIS was an action of trespass brought by *Abigail Dockham*, for taking three tons of hay; and it came up by exceptions taken by the defendants, to the opinion of *Whitman C. J.* before whom it was tried in the court below.

It appeared that the defendants, in *May*, 1831, made a parol lease of their farm to the plaintiff's husband for one year, he agreeing to deliver to them from the farm, two tons of English hay, and a quantity of potatos, for the rent. The witness present at the

making of the contract understood, though it was not expressly said, that the defendants were to hold all the produce of the farm as security, unless the tenant obtained good personal security for the payment. Soon afterwards, and before the hay was cut, the husband died; and the plaintiff continued to occupy the farm, and cut the hay. About haying time one *Lord* inquired of the defendant, *Parker*, if he could safely cut some of the salt hay on the farm, under the plaintiff; to which *Parker* replied that he might, for the defendants had leased the place to Mr. *Dockham*, and expected to receive their pay. The defendants proved that when the estate of her husband was appraised, the plaintiff, as administratrix, showed the appraisers about six tons of hay in the barn, as part of the assets, of which the hay now in controversy was a part; but the appraisers took no account of it, telling her it belonged half to her and half to the defendants. She, however, claimed the whole as belonging to her husband's estate. The taking of the hay by the defendants was also proved, as alleged in the writ.

Upon this evidence the Chief Justice left it to the jury to say whether the plaintiff, after the decease of her husband, remained on the farm by the consent of the defendants, and as their tenant at will; and if they should so find, he instructed them that she was not bound by the contract with her husband, but was the legal owner of all the produce which she might gather from the farm, before the termination of such tenancy at will; and that in such case the defendants had no right to take away any part of the produce, without her consent. Under these instructions they found for the plaintiff.

Stevens, for the plaintiff, and *Kelley*, for the defendants, submitted the cause without argument.

Weston J. delivered the opinion of the Court.

The two tons of hay, which the defendants were to receive of the husband of the plaintiff, for the rent of the place upon which it was cut, not being severed and set apart for the defendants, or delivered to them, rested in contract between the parties, and the hay cut be-

longed to the estate, if there was no new contract between the plaintiff and the defendants, after the decease of the husband. *Bennett v. Platt*, 9 *Pick.* 558. The witness to the first bargain, received an impression, although no such thing was expressly said, that the defendants were to have a lien upon the whole produce of the farm, until their rent was paid; or they were furnished with other personal security. The jury have not settled the fact, whether the parties did so agree. But the defendants might waive their lien, and from what *Parker*, one of them, said to a witness, who inquired to know whether he could safely cut hay under the plaintiff, there is reason to believe that they waived, or did not insist upon their lien, if they were ever entitled to any, under the original contract. Or if the jury were satisfied, under the instructions of the Chief Justice of the Common Pleas, that the defendants recognized the plaintiff as their tenant at will, before the hay was cut, after it was cut, it would be her property; and the jury therefore were correctly instructed as to her right, if they should so find the fact. The testimony to warrant this finding, may not be entirely satisfactory; but upon the fact assumed, the law was properly given to the jury. *Judgment affirmed.*

HARDING & *ux.* *vs.* ALDEN.

A libel for divorce in this State, for the cause of adultery, may be tried in the county where the injured party lived at the time of the adultery, within the meaning of *Stat.* 1821, *ch.* 71, *sec.* 1.

If the husband has forfeited his marital rights by misbehavior, and has deserted his wife, they are capable of having different domicils, in view of the law regulating divorces.

A divorce may be decreed in this State, where the husband has left his wife, established his domicil in another State, and there committed adultery.

If a married woman, domiciled in another State, having been deserted by her husband, establishes her residence in this State, she thereby becomes entitled to the benefit and protection of its laws, and her rights as a married woman will be recognized.

It is not necessary, as a foundation of jurisdiction, unless made so by positive statute, that the fact of adultery should have been committed within the State in whose tribunals a decree of divorce is sought for that cause.

Where a husband deserted his wife in this State, and went into North Carolina, and she removed to Rhode Island; after which he committed adultery in North Carolina; for which cause she was divorced from the bonds of matrimony by the Supreme Judicial Court of Rhode Island, he having been personally cited to appear, but refusing so to do;—it was held that the divorce was valid; and that the wife was entitled to dower in the lands held by the husband in this State during the coverture, in the same manner as if they had both continued to reside here, and the divorce had here been decreed.

A decree of divorce does not seem to fall within the rule laid down in *Bissell v. Briggs*, 9 *Mass.* 462, that a judgment, rendered against one not within the State, nor bound by its laws, nor amenable to its jurisdiction, is not entitled to credit against the defendant in any other State than that in which it was rendered. Divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, should be recognized, in the absence of all fraud, as operative and binding every where.

But this exception applies to the decree, only so far as it dissolves the marriage. If it proceeds farther to order the payment of money by the husband, such order would fall within the limitations laid down in *Bissell v. Briggs.*

THIS was an action of dower, which was submitted to the court upon a case agreed by the parties. It was conceded that the demandants were entitled to judgment, if the wife had been legal-

ly divorced from her former husband, to whom she was married *May* 24, 1809, in Massachusetts, where they then dwelt; after which they resided in this county; from which the husband departed, deserting his wife, and took up a residence in North Carolina, where he married another. The wife then left this State, and resided with her friends at *Providence*, in Rhode Island; in the Supreme Judicial Court of which State she filed her libel for divorce, at *September* term 1827; alleging the marriage, and that her husband had deserted her and her child more than five years, and become a resident in North Carolina, where he had married another woman, with whom he had lived in adultery for nearly three years; and praying for a divorce *a vinculo matrimonii.* Whereupon, in the language of the record, "citation was issued to the said A. (the husband) which was duly served on him in person, and returned to this Court;" and the cause was continued to *March* term 1828, "further notice having been given by order of this court;" at which term, "the petition being called and heard, and the allegations therein set forth being fully proved to the satisfaction of this court," the divorce prayed for was decreed, and the household furniture and other articles in the wife's possession were assigned to her as alimony, and she was "restored to all her legal rights resulting from this decree." The husband was never an inhabitant of Rhode Island. After the decree of divorce, the present demandants were married in Rhode Island, in which State they have ever since resided.

Allyn, for the demandants, contended that the divorce, being properly decreed according to the laws of the State of the party's domicil, was binding every where, and entitled to full effect, as well as the contract of marriage; both on principles of general law, and by force of the *Stat. U. S. May* 26, 1790, giving effect to judgments of the courts of other States, when properly authenticated. *Davol v. Howland*, 14 *Mass.* 219; *Barber v. Root*, 10 *Mass.* 260; 5 *Dane's Abr.* 214; *Bissell v. Briggs*, 9 *Mass.* 462; *Hall v. Williams*, 6 *Pick.* 232; *Mills v. Duryee*, 7 *Cranch* 481.

W. Abbot, for the tenant, briefly spoke to the case at this term, and afterwards furnished a written argument to the following effect:

1st. The courts of this State will not take cognizance of a libel for a divorce under circumstances similar to those in this case. *Hopkins v. Hopkins*, 3 *Mass.* 158; *Carter v. Carter*, 6 *Mass.* 263; *Mix v. Mix*, 1 *Johns. Ch.* 204; *ib.* 389.

2d. There is no principle of law more reasonable in itself, and none more firmly established by authority, than that a judgment rendered in a foreign or sister State against a person not within its jurisdiction is void. Such is the law in England. *Buchanan v. Rucker*, 9 *East.* 192, and such also is the law of Massachusetts, *Bissell v. Briggs*, 9 *Mass.* 462. The language of *Parsons C. J.* is this; "Whenever a record of a judgment of any court of any State is produced, as conclusive evidence, the jurisdiction of the court rendering it is open to inquiry; and if it should appear, that the court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment," and further, "if a court of any State should render judgment against a man not within the State, nor bound by its laws, nor amenable to the jurisdiction of its courts, if that judgment should be produced in any other State against the defendant, the jurisdiction of the court might be inquired into, and if a want of jurisdiction appeared, no credit would be given to the judgment." "In order to entitle the judgment rendered in any court of the United States to the full faith mentioned in the federal constitution, the court must have had jurisdiction not only of the cause but of the parties. In the case of *Hall v. Williams*, 6 *Pick.* 232, the doctrine laid down in *Bissell v. Briggs* is fully recognized. *Parker, C. J.* says "if the record does not shew any service of process, or any appearance in the suit, we think, he, (the defendant) may be allowed to avoid the effect of the judgment, by shewing he was not within the jurisdiction of the court, which rendered it; for it is manifestly against first principles, that a man should be condemned criminally or civilly without an opportunity to be heard in his defense." By service of process, must be understood, a service of the writ or process upon the defendant

within the limits of the State; because neither the laws of a State nor the process of its courts operate *extra territoriam.* And the same learned Judge in the same case says, if there is no jurisdiction over his person, a judgment cannot follow him beyond the territories of the State, and if it does, he may treat it as a nullity, and the courts here will so treat it.

These principles, so equitable and just, and indeed so essential to the safety of person and property and to the due administration of justice, have been adopted in many, and probably in all the United States. *Shurber v. Blackbourne*, 1 *New Hamp. Rep.* 246; *Aldrich v. Kenney*, 4 *Conn. Rep.* 380; *Benton v. Burgot*, 10 *Sarg. & Rawle*, 242; *Shumway v. Stillman*, 4 *Cowen*, 292; *Curtis v. Gibbs*, *Pen. Rep.* 405; *Rogers v. Colman*, *Hardin*, 413.

It is understood that the court of Rhode Island ordered notice of the libel to be served upon the husband, who is described to be an inhabitant of North Carolina, and who it is agreed, was never an inhabitant of Rhode Island, but he did not appear nor answer to the libel. He was therefore not within the jurisdiction of the courts of Rhode Island nor amenable to its orders, and according to the principle above established, he might treat the decree of divorce as a nullity, at least in all other places except the State of Rhode Island, and it is confidently believed that this court will so treat it. But, if it may be considered a nullity and treated as such by the husband, a party to the process, and who probably had notice, yet not such as he was legally bound to regard, with much more reason may it be so deemed by the tenant, who was not a party, had no notice, and, if he had, could not have been permitted to contest the facts alleged in the libel.

Will it be said that the principle above stated is not applicable to the case of divorce? Where, it may be asked, will be found any authority for a distinction? The case of *Barber v. Root*, cited by the counsel of the demandants, will be found to contain principles favorable to the tenant. *Barber* and his wife, though married in Massachusetts resided together in Vermont, as man and wife, in a manner that proves a permanent domicil there, before the suit

was commenced; and if a foreign divorce operate, in any case, beyond the limits of the State in which it is decreed, it must in that case, since the court of Vermont and that only had jurisdiction of the parties. And *Sewall J.* says, the laws of Vermont, which authorize the Supreme Court of that State to proceed in suits of divorce instituted in favor of persons resident for a time, but having no settled domicil within the State against persons domiciled in other States, who are not and never have been amenable to the sovereignty of Vermont, upon allegations of offences not pretended to have been committed within the State; in short where no jurisdiction of the parties, nor of the subject matter can be suggested or supposed, are not to be justified by principles of comity which have been known to prevail in the intercourse of civilized States.

Frances Harding had not acquired a domicil in Rhode Island at the time the divorce was decreed. At the time her husband left her, she had an established domicil in Massachusetts, as it then was, and she was incapable of changing it, except by following her husband. 1 *Johns.* 424; *Jackson v. Jackson*, 5 *Vez. Jr.* 787; 13 *Johns.* 208; *Borden v. Fitch*, 15 *Johns.* 121, are cited to shew that the principle above asserted is applicable to divorces.

3d. A divorce procured in another State by parties submitting to the jurisdiction is not binding upon the courts of the native State of the parties, where the marriage was solemnized.

In support of this position 1 *Dow*, 117, cited in 13 *Johns.* 208, is referred to, where it appears in England that a divorce, when the marriage took place there, cannot be dissolved but by act of parliament, and that they will disregard a decree obtained in a foreign country; and so was the decision of *Lolly's* case by the twelve Judges of England. See also 1 *Johns.* above cited and 14 *Mass.* 227; 2 *Kent's Com.* 81, *Lecture* 27, on the law concerning divorce.

4th. A widow has a right of dower in all such lands, &c., of which the husband was seized in fee at any time during the marriage. *Frances Harding* claims dower in this case under the *Stat.* 1821, *ch.* 71, and the following clause of the 5th *sec.* "And when the divorce shall be for the cause of adultery committed by the

husband; in addition to her dower to be assigned to her in the lands of her husband, in the same manner, as if such husband was naturally dead, &c." The lands in which she claims dower had been alienated long before the divorce, and could not therefore, at that time, with any propriety be denominated the lands of her husband. They were in fact the lands of the tenant. It may be said that the words, in the same manner, &c. shew that the woman divorced was intended to have all the rights of the widow. But the latter words were introduced merely to point out the manner in which the dower was to be assigned. This construction is aided by recurring to the law of Massachusetts, as it stood before the revolution. The language in that act is, "all such lands, &c. as her husband was seized of during the marriage." *Mass. Laws, vol. 2, appendix* 961. The language of the *Mass. Stat.* 1785, *ch.* 69, *sec.* 5, of which ours is a transcript, could not have been so materially changed without an intention in the legislature to alter the law. It may be said that the case of *Davol v. Howland*, 14 *Mass.* 219, has settled the question. Whether this court will be disposed to re-examine that case, which stands alone, cannot be anticipated. The consequences which the court seem to apprehend in that case may easily be avoided or controlled by the court granting the divorce. If the husband, after the adultery, or after the application for a divorce, should convey his real estate, it will probably be for an equivalent; and it will be in the power of the court to make such a decree with regard to alimony, as shall control any fraudulent intentions on the part of the husband.

But this case may be distinguished from that of *Davol v. Howland.* It may be fairly gathered from that case, that the husband had conveyed the lands claimed by deed. Here the property was taken from him by the levy of executions. By the *stat.* 1821, ch. 60, sec. 27, which provides for the levying of executions on real estate, the conclusion is in these words, "saving always *to widows* their dower in all lands taken from their husbands by execution." Perhaps this saving clause may not have been necessary to protect the dower of a widow, but it shows clearly, that the legislature did

not mean to extend the clause to any other person than the widow. *Expressio unius est exclusio alterius.*

The opinion of the Court was read at an adjourned session in *Cumberland*, in *August* following, as drawn up by

WESTON J. The contract of marriage is of universal obligation; and by the law and practice of all civilized nations, a marriage valid by the law of the place, where it is entered into, is binding every where. *Huberus, de conflictu legum*, sec. 8, holds, that if parties domiciled in one jurisdiction, go into another, and enter into the contract of marriage, in a form and manner, and under circumstances, forbidden by the law of their domicil, and with a view to evade that law, such marriage would not there be recognised as valid. And this doctrine is supported by the opinion of *Lord Mansfield*, in *Robinson v. Bland*, 2 *Burr.* 1077. But the law has been otherwise settled in England. Thus marriages in Scotland, by parties who repair thither to evade the laws of England, where they were domiciled, are nevertheless held binding by the courts of their domicil. And the English rule has been adopted in Massachusetts. *Medway v. Needham*, 16 *Mass.* 157, *Putnam v. Putnam & al.* 8 *Pick.* 433. It is confessedly against the general principles of law, in relation to other contracts; and this exception is allowed, to avoid the injurious consequences, which would attach to the innocent from a different rule, as well as the unfavorable effect, it would have upon public morals.

With regard to the law of divorce, there is less uniformity. In general the policy of the law, in Christian countries, has been against it, except for adultery. For this cause divorces are allowed by some judicial tribunal, clothed with competent authority, in almost every State in the Union. In some of the states this authority is limited by statute. Thus in New York, it is allowed only if the parties, at the time of the offence, be inhabitants of the state; or if the marriage had taken place in that state, and the party injured be resident there, at the time of the adultery committed.

The statute of Massachusetts, and of Maine, contains no such

limitation, but directs that all questions of divorce and alimony should be heard and tried in the county, where the parties live. But from the construction and practice, which has obtained under this statute, this may be understood to mean, where the party injured lives, at the time of the adultery. The case of *Richardson v. Richardson*, 2 *Mass.* 153, was placed upon the ground, that an attempt was made to evade the statute; but it was there intimated that the decision was not to be understood to apply to a case, where the party charged with adultery, shall have left his or her domicil. In *Hopkins v. Hopkins*, 3 *Mass.* 158, the chief justice expressly states, that all the court decided was, that if the parties live in another state, and one of them commits adultery there, and the injured party removes into Massachusetts, and libels for a divorce, that such libel could not there be sustained. *Carter v. Carter*, 6 *Mass.* 263, presented such a case, and the libel was dismissed. Under the pauper laws, and upon general principles, the wife is regarded as having the domicil of her husband; but this results from his marital rights, and the duties of the wife. If the husband has forfeited those rights by misbehavior, and has left and deserted the wife, they may have different domicils, in the view of the law regulating divorces. The statute assumes that the guilty party may be out of the state, and makes provision in that case. And in *Hopkins v. Hopkins* the court say, that the statute applies, where such party has changed his domicil, and the adultery is there committed. This may be, and generally is, the husband; and yet for the purpose of sustaining a libel, the former domicil of the wife is regarded as continuing. Divorces have repeatedly been decreed in this state, where the husband has left his wife, established his domicil in another state, and there committed adultery, by a new marriage or otherwise. There seems to be no good reason, why she should be limited to the county, in which she resides, at the time when her husband may have left her. She may find it convenient, and even necessary, to change her residence; and it would better accord with the statute that she should libel, where she lives at the time of the adultery. And if a married woman, domiciled in another State,

having been left or abandoned by her husband, finds it convenient to establish her residence in this state, she thereby becomes entitled to the benefit and protection of our laws. Her relation as a married woman, and her rights thence resulting, would be recognized. And if her husband subsequently committed adultery in another State, why should the court here, upon a verification of the facts, after such notice as they might order, refuse to liberate her from a husband, who had proved himself unworthy to sustain the relation? Upon this point however we reserve ourselves, until a case, so circumstanced, may present itself in our own State.

But if the laws of any State, authorize divorces in such cases, we perceive nothing in them, which violates the comity due to other States, or which offends public morals. It has never been held necessary, that the offence should be committed, within the jurisdiction making the decree; as it is in the administration of criminal justice. If we refuse to give full faith and credit, to the decree of the Supreme Judicial Court of Rhode Island, because the party libelled had his domicil in another State, and was not within their jurisdiction, we refuse to accord to the decrees of that court the efficacy we claim for our own, when liable to the same objection.

In the case before us, it is agreed that the party injured was at the time an inhabitant of Rhode Island, residing in *Providence*, and this fact is recited in the decree. It appears that by order of court a citation was served upon the defendant in person; and that a continuance was twice granted, to give him an opportunity to appear in defence. This shows a due regard to that principle of justice, which gives to the party accused, the right to be heard. The decree was rendered by the highest judicial tribunal in that State. As it belongs to that tribunal to declare, authoritatively and definitively, what the law of the State is, we are bound to infer that by that law, the bonds of matrimony, previously existing, between the libellant and her former husband, were thereby dissolved; and that such is the effect of the decree, within the State of Rhode Island. As the law is understood in England, an English marriage cannot be dissolved by a foreign tribunal; and the reason given is, that a mar-

riage is indissoluble in England, except by act of parliament; and that in these cases, the *lex loci contractus* is to govern. *Tovey v. Lindsay*, 1 *Dow's Rep.* 117. That was upon an appeal from Scotland, where the law had been otherwise settled.

The marriage dissolved, for the cause of adultery, by the decree in question, was solemnized in Massachusetts, which, as well as our own State, allows divorces for this cause; so that the divorce insisted on is for a cause, in accordance with the law of both States. Had it been otherwise, it would not follow, that the divorce might not have been valid, under the constitution and laws of the United States. By the federal constitution it is provided, art. 4, sec. 1, that "full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of every other State. And the Congress may, by penal laws, prescribe the manner, in which such acts, records and proceedings shall be proved, and the effect thereof." In pursuance of this provision, the act of Congress, of *May* 26, 1790, has declared that the records and judicial proceedings of other States, authenticated in the manner prescribed, "shall have such faith and credit, given to them in every court within the United States, as they have by law or usage, in the courts of the States, from whence the said records are, or shall be taken."

In *Mills v. Duryee*, 7 *Cranch*, 481, and in *Hampton v. McConnel*, 3 *Wheaton*, 234, the Supreme Court of the United States have given a literal construction to the act of Congress, and have declared, that the judgments and decrees of a judicial tribunal in one State, shall have equal force and effect in every State. The efficacy of the act of Congress to this extent, has been qualified by judicial construction, in several of the States; and in Massachusetts, by the case of *Bissel v. Briggs*, 9 *Mass.* 416, and by *Hall v. Williams*, 6 *Pick.* 232; the one prior, and the other subsequent to the decisions of the Supreme Court of the United States, before cited. The latter case reaffirms the position taken in *Bissel v. Briggs*, and relies upon part of the opinion of Mr. Justice *Story* in *Mills v. Duryee* to sustain them. The qualification insisted upon is, that if a judgment be rendered in a State against a man not within that

State, nor bound by its laws, nor amenable to its jurisdiction, and that judgment should be produced in any other State against the defendant, it would be entitled to no credit. Chief Justice *Parsons*, who gave this opinion in *Bissel v. Briggs*, concedes that such judgment would bind any property the defendant might have, within the State rendering the judgment, taken under process of foreign attachment. In this case the injured party, then an inhabitant of Rhode Island, sought to be liberated from the claims of the husband upon her, arising from the conjugal relation, which he had forfeited. It was his interest in her, his right to exact from her the performance of duties, upon which the decree operated. She was within the jurisdiction. By the condition implied in the marriage contract, that neither party should commit adultery, she was entitled to be thus relieved. She being under the protection of the laws of the State, where she resided, the highest tribunal there, judicially declared and settled her right, after due notice, and ample opportunity, afforded to the guilty party, to defend himself against her charge.

Under these circumstances, it does not appear to us to fall within the qualification of the rule, established by the Supreme Court of the United States, set up in the cases cited from Massachusetts, even if it is to be sustained to the extent there stated, which has not yet been decided by the court, to whom it ultimately belongs to settle the question.

A divorce for the cause of adultery, does not violate or impair the contract of marriage. This was intimated by Chief Justice *Marshall* and by Justice *Story* in the case of *Dartmouth College v. Woodward*, 4 *Wheaton*, 518. The law of Rhode Island, authorizing the divorce, was not therefore restrained or limited, by any paramount law. It was then lawful there, and qualified the party liberated, to enter anew into the marriage relation. Most of the reasons, which led to the adoption of the rule, that a marriage valid by the law of the place where solemnized, should be valid every where, the protection of innocent parties, and the purity of public morals, require that divorces lawfully pronounced in one jurisdiction, and the new relations thereupon formed, should be recognized as

operative and binding every where. To this may be excepted cases of fraud and collusion, which, when pleaded and verified, vacate all judgments and decrees. And of this class, are decrees, obtained in fraud of the law of the domicil of the parties. *Jackson v. Jackson*, 1 *Johns.* 424, and *Hanover v. Turner*, 14 *Mass.* 227, were decided upon this ground.

There would be great inconvenience in holding that a divorce decreed in the State, where the injured party resided, might not be held valid through the Union, where the right of citizenship is common, where the party accused had established his domicil in another State, and there committed adultery. And this is the only objection to the efficacy of the decree in question; it being insisted that the court had no jurisdiction over the absent party. As has been before intimated, it would apply with equal force to many divorces decreed in this State. It would require that the wife, abandoned and dishonored, should seek the new domicil of the guilty husband, *animo manendi*, before she could claim the benefit of the law, to be relieved from his control.

In giving effect here to the divorce decreed in Rhode Island, we would wish to be understood, that the grounds upon which we place our decision, is limited to the dissolution of the marriage. In the libel, alimony was prayed for; and certain personal property, then in the possession of the wife, was decreed to her. Had the court awarded her a gross sum, or a weekly or an annual allowance, to be paid by the husband, and the courts of this or any other State had been resorted to to enforce it, a different question would be presented, falling within the distinctions, which have been supposed to qualify the decisions of the Supreme Court of the United States.

If then the divorce, decreed in Rhode Island, is valid here, the remaining question is, whether the wife was thereupon entitled to draw in any estate of inheritance, of which the husband was seized, during the coverture. The statute allows it, in the lands of the husband, where a divorce is decreed for the cause of adultery, committed by the husband, to be assigned in the same manner, as if he were dead. The language is general, and is not limited to divorces

decreed within the State. But it is insisted, that her right must be restricted to such lands, as the husband had not aliened. And this construction is attempted to be supported, by a reference to a change of language, in a former revision of the laws of Massachusetts, upon the subject of divorce. But if her right was to be thus restricted, we apprehend more explicit language to this effect, would have been used. By the lands of the husband, must be understood all the lands, in which she had an inchoate right of dower, prior to the divorce. And thus the law was settled in *Davol v. Howland*, 14 *Mass.* 219. The levies on the lands of the husband by his creditors, vested such lands in them, subject to the right of dower in the wife. That right did not arise from the saving in the statute, authorizing such levies. And if there might be room for doubt, if we looked only to the saving, there is none under the general law, upon which her right depended. *Judgment for the demandants.*

A

DIGEST

OF

GREENLEAF'S REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE,

FROM THE YEAR 1820, TO THE YEAR 1832, INCLUSIVE.

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1835.

JUDGES

OF THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE,

DURING THE PERIOD OF THESE DECISIONS.

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

The Hon. WILLIAM PITT PREBLE, resigned June 18, 1828.

The Hon. NATHAN WESTON Jr. L. L. D. } *Justices.*

The Hon. ALBION K. PARRIS, appointed June 25, 1828.

Attorney General, ERASTUS FOOTE, ESQUIRE.

ADVERTISEMENT.

In the preparation of this Digest all the marginal abstracts of the cases have been revised and corrected, and every point brought out which was either decided, or expressly doubted by the Court; as well as some of the more important questions which were raised at the bar, but not mentioned in the judgment. To have enlarged the work by the addition of the *obiter dicta*, it was thought would not add to its value, and might lead to uncertainty and confusion.

That the Digest will give universal satisfaction, is not to be expected, since there is no standard of acknowledged authority, by which it could have been constructed. My object has been so to arrange the materials, as that any point sought for might readily be found by gentlemen of the bar in Maine, for whose use, chiefly, it was prepared, and with whose professional habits I have been long and intimately acquainted. The point decided is, with very few exceptions, stated only in one place; but references to it are made under other heads, where it was supposed that some might expect to find it. References are also made, at the end of many of the titles,

to other places where something analogous may be found; not, however, so connected with the principal title as to call for its insertion in that place. This method was understood to be more acceptable to the profession than to repeat the same matter under different heads, and thus double the size and expense of the work. In some few instances, where the same point has been several times before the Court, it may seem, at first view, sufficient to have stated it once only, referring to the several cases; but it will be found that in these cases the point was regarded by the Court in different lights, and received, in its progress, different degrees of assent, each of which it was deemed important to exhibit, as belonging to the history of the opinion. S. G.

April 3, 1835.

ERRATA.

The following errors have been discovered in the preceding volumes.

Vol 3,—p. 16, 17, for 1825 read 1815.
p. 33, l. 2, from bot. for 5 Mass. r. 4 Mass.
p. 136 to l. 3, from bot. add, "*who had fallen into distress in Greene.*"
p. 147, l. 6, fr. bot. for *drawees* r. *payees.*
p. 153, l. 14, for drawer r. *drawee.*
p. 307, l. 6, fr. bot. for deft. read *plf.*
p. 357, At the end of *Boothbay v. Wiscasset*—add this *Note.*—This case was brought up by the plf. by appeal from the judgt. of C. C. P. and in this Court the verdict was for less than 100 dollars; but by adding interest upon it, the plf. was entitled to judgment for more than that sum; and judgment was entered for him accordingly, with costs as well since as before the appeal. The deft. moved for his costs since the appeal, under Stat. 1822, ch. 193, sec. 4, but they were not allowed.
p. 369, l. 1, read *by* the plf.
Vol. 4—p. 273, l. 17, dele *New.*
p. 304, l. 7, from bot. for 458 read 485.
p. 347, l. 29, for *case* r. *doctrine.*
Vol. 5.—p. 240, l. 4, fr. bot. for office r. officer.
p. 261, (Stearns v. Burnham,) at the end of 1st. paragraph, add "*The note was made and endorsed in Salem.*
p. 301, l. 4, from bot. for vendor r. vendee.
p. iii, for 1829 read 1828.
p. 409, line *ult.* for 3 Greenl. r. 2 Greenl.
p. 446, line 2 from bot. for first r. second.
Vol. 7,— p. 25, Gilman v. Wells, 1st. line of abstract, read *not* within.
p. 168, 169, for *tenant* r. *deft.*
Vol. 9,—p. 100, l. 17, for 1832, r. 1833.
p. 114, last line, for repeal r. *appeal.*

A

TABLE

OF THE CASES CONTAINED IN THIS

DIGEST.

DIGEST

OF

GREENLEAF'S REPORTS.

ABATEMENT.

I. Of the causes of Abatement.
II. Of the manner of showing them.

I. *Of the causes of Abatement.*

1. If pending a real action brought by husband and wife in her right, the wife die, the husband cannot proceed in that suit for his estate by the curtesy, by *Stat.* 1822, *ch.* 186, but the writ abates. *Ryder & ux. v. Robinson*, ii. 127.

2. In a writ of entry counting on a disseisin by the tenant, the objection that the disseisin was committed by his grantor, under whose deed he entered, should be taken in abatement. *Porter v. Cole*, iv. 20.

3. Where all the trustees in a foreign attachment live in one county, and the defendant in another, and the action is brought in the latter county, the writ is abateable, within *Stat.* 1821, *ch.* 61; notwithstanding the defendant was regularly summoned in the action, and the plaintiff had discontinued as to all the trustees. And in such case costs will be awarded to the defendant. *Greenwood v. Fales*, vi. 405.

4. The death of one of several joint plaintiffs, in an action of trespass *quare clausum fregit*, does not abate the writ. *Haven v. Brown*, vii. 421.

II. *Of the manner of showing them.*

1. The want of an indorser to an original writ may be taken advantage of in abatement, either by plea or motion; but it cannot avail the defendant after pleading in chief. *Clapp v. Balch*, iii. 216.

[See Pleading, II.]

ABSENT DEFENDANTS.

1 The *Stat.* 1797, *ch.* 50. [*Stat.* 1821, *ch.* 59, *sec.* 7.] authorizing judgment in certain cases against an absent defendant at the *second* term, does not apply to a process of foreign attachment; but in such process if the principal be absent, the cause *shall* be continued till the *third* term, by *Stat.* 1794, *ch.* 65, *sec.* 2. [*Stat.* 1821, *ch.* 61, *sec.* 3.] *Spratt v. Webb*, i. 325.

2. The mode of service of process against an absent defendant, provided by *Stat.* 1821, *ch.* 59, *sec.* 3, by leaving a copy with his attorney, is not to be restricted to those cases only in which the defendant has property in this State; but extends to all cases where the process is by original summons. *Nelson v. Omaley*, vi. 218.

ACTION.

I. Of the remedy by action.
II. Of the parties to actions.
III. Of actions local and transitory.

I. *Of the remedy by action.*

1. Where goods in the custody of a third person were sold by the owner, and a bill of parcels was made, charging the goods to the purchaser, and crediting his note for the balance due, and an order was drawn on the person having custody of the goods, directing him to deliver them to the purchaser, which he refused to do; in an action on the note, brought by the payee, it was holden that the defendant was not driven to seek his remedy on the order, but that

the amount to which he would have been entitled had he pursued his remedy in that mode, might properly be allowed to him by way of defence to the action. *Aldrich v. Fox*, i. 316.

2. The remedy against the indorser of a writ in case of the avoidance of the principal, under *Stat.* 1784, *ch.* 28, [*Stat.* 1821, *ch.* 59, *sec.* 8.] is by *scire facias*, and not by action of debt. *Reid v. Blaney*, ii. 128.

3. Debt does not lie upon a conditional or collateral undertaking. *Ib.*

4. If a promissory note be made to the agent or treasurer of a private association by his name, with the addition of his agency or office, he may have an action in his own name on the note, the addition of his character being but *descriptio personæ*. *Clap v. Day*, ii. 305.

5. Where money in a bag has been deposited merely for safe keeping, no action lies for it, till after a special demand. *Hosmer v. Clarke*, ii. 308.

6. And if the party depositing the money be dead, the usual public notice given by the administrator, of his appointment, calling on all persons indebted to make payment, is not a sufficient demand for that purpose. *Ib.*

7. Where a statute gave to a corporation the right to "demand and recover" certain tolls on the passage of logs through a river, and to stop and detain such logs till the toll should be paid;—it was held that the corporation might maintain an action for the toll; the right to detain being only a cumulative remedy. *Bearcamp river Company v. Woodman*, ii. 404.

8. Where divers persons subscribed to a parish fund, giving each one his separate note to the treasurer for the amount subscribed, under an agreement that if any subscriber removed and remained out of town three years his note should be given up;—it was held that a subscriber who had thus removed and remained out of town, was entitled not only to receive his note, but to recover back any monies paid in part of the principal sum subscribed. *Holden v. The First Parish in Otisfield*, ii. 394.

9. A sum of prize money, claimed by several owners, having

been deposited with an agent, to be kept until it should be "legally determined" to which of them it belonged; it was holden that no action would lie against the stakeholder, until the question of property was first settled among the claimants by a judgment of law. *Ulmer v. Paine*, i. 84.

10. The ancient doctrine, that a civil injury is merged in a felony, being founded upon the feudal principle of forfeiture, and upon the paramount claims of the king, as well upon the nature of the punishment, which went to the life of the offender; may be considered as inapplicable here. *Boody v. Keating*, iv. 164.

11. Before conviction of the felon, no civil action lies at the suit of the party injured, for goods stolen. *Foster v. Tucker*, iii. 458.

12. After conviction, he may have an action of *trover* but not *assumpsit*. *Ib. Boody v. Keating*, iv. 164.

13. A surety has no right of action against the principal debtor, till he has paid or assumed the debt. *Clark v. Foxcroft*, vii. 348.

14. Where a suit, in which property was attached, was settled before entry, by compromise, and the plaintiff's attorney charged as part of the costs to be paid by the debtor, a commission of two and a half *per cent.* often charged in similar cases, which the debtor at first objected to as unreasonable, but finally paid;—it was held that he could not recover it back, it being voluntarily paid, in pursuance of a lawful contract, and without fraud or oppression. *Rawson v. Porter*, ix. 119.

15. Where one, appointed on the part of the United States to superintend the execution of a contract for the building of certain public vessels, through misconstruction of its terms, required the performance of more than was in fact required by the contract;—it was held that he was not personally liable for such excess. *Webster & al. v. Drinkwater*, v. 319.

16. A farm being purchased, and sureties given for part of the purchase-money, the deed was made, by consent, to the sureties only, for their indemnity against the note they had signed. Afterwards they refused to give up the deed to the real purchaser, on being discharged of their suretyship, without the payment of fifty dollars to each of them; which the purchaser paid, the farm being

of considerable value, without making any objection to the amount. It was held that he could not recover back the money thus paid.—*Gilpatrick v. Sayward*, v. 465.

17. If arbitrators erroneously refuse to consider a particular demand laid before them, on the mistaken ground that it is not within the submission; the bond and award are no bar to a subsequent action upon the demand thus rejected. *Bixby v. Whitney*, v. 192.

18. Upon the death of the defendant in replevin, the suit abates, the administrator not being authorised to come in and defend.—*Merritt v. Lumbert*, viii. 128.

19. 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. *Ib.*

20. 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. *Bradbury v. Taylor*, viii. 130.

21. 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.—*Small v. Connor*, viii. 165.

22. If a grantee accepts a deed without covenants, he cannot recover back the consideration money, unless there has been fraud, circumvention, or purposed concealment. *Emerson v. Co. Washington*, ix. 88.

II. *Of the parties to actions.*

1. Where several persons were appointed proprietors' agents, and received funds to erect a meeting-house, some of whom squandered the money entrusted to them; and afterwards they all joined in an action against the proprietors for services performed and monies expended; it was holden that one of them was barred of his separate action for the money by him paid, it having been brought into the general balance recovered in the joint action against the proprietors. *Scammon v. Proprietors Saco M. H.*, i. 262.

2. If one of two joint promissors have neither domicil nor property in this State, a separate action may be maintained here against the other. *Dennett v. Chick*, ii. 191.

3. A judgment in another State against one of two joint promissors, without satisfaction, is no bar to an action in this State against the other, upon the original contract. *Ib.*

4. Rights accruing to towns in their parochial and others in their municipal capacity, may well be vindicated in the same action.—*Alna v. Plummer*, iii. 88.

5. Where a payment has been made by several, from a joint fund, they may join in an action for reimbursement. *Jewett v. Cornforth*, iii. 107.

6. If the goods of one of several joint debtors be taken in execution and wasted, the remedy should be sought by the owner of the goods alone, and not by all the debtors jointly. *Ulmer v. Cunningham*, ii. 117.

7. So if the officer extorsively demand and receive of one of the debtors illegal fees. *Ib.*

8. Referees need not join in an action brought to recover compensation for their services. *Semble.—Butman v. Abbot*, ii. 361.

9. An action by a referee to recover compensation for his services cannot be maintained against the parties to the submission jointly, but must be brought against the person or persons making the demand. *Ib.*

10. A dormant partner, or subcontractor, subsequently admitted to participate in the benefit of a contract, without the privity of the party sought to be charged, need not be joined as plaintiff in an ac-

tion brought to recover payment for the goods delivered or labor done. *Barstow v. Gray*, iii. 409.

11. Where certain of the heirs at law of an intestate, entitled to different proportions of the personal property, joined with the administrator in a submission of their claims to an arbitrator, who awarded a gross sum against the administrator, which he further proceeded to apportion among the heirs; it was held that they all might well join in an action on the award. *Stetson v. Healey*, vii. 452.

III. *Of actions local and transitory.*

1. A local action must be brought in that county which claims and exercises jurisdiction over the place which gives rise to such action:—Nor is it competent for a defendant, merely with a view to avoid the jurisdiction on the principle that the action is local, to shew that *de jure* the line of the County ought to be established in a different place from that in which it is actually established and known. *Hathorne v. Haines*, i. 238.

2. An action of debt on a foreign judgment, where the plaintiff is not a citizen of this State, may be brought in any county in the State. *Mitchell v. Osgood*, iv. 124.

[See Amendment. Assumpsit, II. Bastardy, I. Bills of Exchange, V. Dower, IV. Fryeburg Canal. Marriage and Divorce, III. Principal and Surety, III. Pleading, II. Tenants in common. Ways, II. V.]

ACTION ON THE CASE.

I. For deceit.
II. For malicious prosecution.
III. For misfeasance.
IV. For nuisance.
V. For seduction.

I. *Action on the case for deceit.*

1. Whether, if a judgment debtor, after the extent of an execution on his land, and before registry, sell the land to an innocent purchaser, whereby the extent is avoided, the creditor may have an action of the case against the debtor for the fraud,—*quære. Gorham v Blazo*, ii. 232.

2. Whether an action will lie against a vendor for false and fraudulent representations respecting the ownership and character of the thing sold, where the conveyance was by deed with express covenants upon those points;—*quære. Sherwood v. Marwick*, v. 295.

II. *Action on the case for malicious prosecution.*

1. Where the Assessors of a town did not insert, in the warrant for calling the annual town-meeting, notice of the time and place of their intended session to receive evidence of the qualifications of voters; according to the letter of *Stat.* 1821, *ch.* 115, *sec.* 14; but posted such notice at the same time and place, near to the copy of the warrant, but on a separate paper; for which omission they were indicted, and acquitted:—in a subsequent action by one of them against the complainant, for malicious prosecution, it was held that the omission in the warrant was sufficient proof of probable cause for the prosecution, if the complainant did not know of the separate notice; but that if he did, it was not. *Tompson v. Mussey*, iii. 305.

2. Whether the opinion of the public prosecuting officer, in favor of the legality of the prosecution, is evidence of probable cause;—*quære. Ib.*

3. Where the holder of a promissory note not negotiable, had reasonable ground to believe that he was legally authorized to commence a suit upon it in the name of the promissee, in which the defendant prevailed, this was held sufficient proof of probable cause for the suit, to protect him against a subsequent action by the defendant, for malicious prosecution. *Rogers v. Haines*, iii. 362.

4. Where a judgment creditor had been absent from this State several years, having entered the army during the last war; and was slain in battle in 1814; and his attorney, not knowing this fact,

afterwards sold and assigned the judgment to another person, alike ignorant of the death, and who commenced an action of debt on the judgment, believing that there was good cause to maintain it, and probably led into that belief by the conversation and belief of the attorney ;—it was held, in a suit by the debtor against the assignee for malicious prosecution, that these circumstances were sufficient proof of probable cause. *Plummer v. Noble*, vi. 285.

5. Where one was arrested upon a writ sued out for a pretended and groundless cause of action, with a view to compel the party to do certain things; but not succeeding, the plaintiff suppressed the writ;—it was held that the remedy of the party injured was not by an action of trespass *vi et armis* ; but by an action of the case for malicious prosecution. *Plummer v. Dennett*, vi. 421.

6. The essential foundation of an action of the case for malicious prosecution, is that the plaintiff has been prosecuted without probable cause. *Ulmer v. Leland*, i. 135.

7. Probable cause, in general, may be understood to be such conduct on the part of the accused, as may induce the Court to infer that the prosecution was undertaken from public motives. *Ib.*

8. Whether the circumstances relied on to prove the existence of probable cause be true or not, is a fact to be found by the jury : —but whether, if found to be true, they amount to probable cause, is a question of law. *Ib.*

9. If one purchase land of which his grantor is disseised, and this is known to the purchaser ; this is probable cause for prosecuting him *criminaliter* for buying a disputed title; though other lands, which the grantor might lawfully convey, are described in the same deed. *Varrell v. Holmes*, iv. 168.

10. In an action for a malicious prosecution, the want of probable cause is a material allegation ; the omission of which is not cured by a verdict for the plaintiff, nor supplied by an allegation that the prosecution was unjust. *Gibson v. Waterhouse*, iv. 226.

III. *Action on the case for misfeasance.*

An action against the moderator of a parish meeting, for refusing the plaintiff's vote, is maintainable without proof of malice or intent to oppress. *Osgood v. Bradley*, vii. 411.

IV. *Action on the case for nuisance.*

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. *Simpson v. Seavy*, viii. 138.

V. *Action on the case for seduction.*

1. Case, and not trespass, is the proper form of remedy, for a father, for the offence of debauching his daughter, where the injury was done in the house of another. *Clough v. Tenney*, v. 446.

[See Arbitrament and Award, III. Costs, III. Damages, II. Parent and child. Parish, IV. VII. Tenants in common. Watercourse. Ways, IV.]

ACTION OF DEBT.

1. Debt lies on a recognizance taken pursuant to *Stat.* 1782, *ch.* 21, as well before as after the three years mentioned in the statute. *Cutts v. King*, i. 158.

[See Action, I. III. Assumpsit, I. Escape. Pleading, VII.]

ACTIONS ON STATUTES.

1. The penalty not exceeding sixteen dollars per month, provided by *Stat.* 1821, *ch.* 51, *sec.* 11, for not filing a will in the probate office, is incurred, and may be sued for at the end of every month, within a year next preceding the commencement of the action. *Moore v. Smith*, v. 490.

2. In an action on *Stat.* 1821, *ch.* 161, *sec.* 1, the want of the owner's consent forms a constituent part of the offence, which must be alleged in the declaration, and proved at the trial. *Little v. Thompson*, ii. 228.

3. In debt on *Stat.* 1821, *ch.* 168, for the unlawful taking of logs out of a river, &c. it is not necessary to allege that the defendant

knew the plaintiff to be the true owner of the logs. *Frost & al. v. Rowse & al.* ii. 130.

4. In debt for a penalty given by statute, the wrong-doers may be sued either jointly or severally; but the plaintiff can have but one satisfaction. *Ib.*

5. The purchaser of a log illegally taken from a river, without the consent of the owner, against the provisions of *Stat.* 1821, *ch.* 168, having at the same time full knowledge of the unlawful manner in which it was obtained, is liable to the penalty of that statute. *Howes v. Shed*, iii. 202.

[See Poor, VII.]

ACTION REAL.

I. Of real actions in general.
II. Of real actions under the statutes.
III. Of the evidence in real actions.

I. *Of real actions in general.*

1. The right of the tenant to an easement in the land, is no objection to the demandant's recovery in a writ of entry. *Blake v. Clark*, vi. 436.

2. In a writ of entry, if the land be described by the number of the lot as marked on a certain existing plan, it is sufficient, whether the plan be matter of record or not. *Prop'rs. of Ken. Purchase v. Lowell*, ii. 149.

II. *Of real actions under the statutes.*

1. Where the possessor of a parcel of land entered into a written contract with the true proprietor, for the purchase of the land at a stipulated price, which he never paid; and afterwards conveyed all his right in the land to a third person, without notice of the contract with the proprietor; it was holden that the grantee, after six years, in an action by the proprietor, was entitled to the increas-

ed value of the premises by reason of the improvements made by himself, under *Stat.* 1807, *ch.* 75, [*Stat.* 1821, *ch.* 47,] but not to the benefit of those made by his grantor. *Ken. Prop'rs. v. Kavanagh*, i. 348.

2. After the demandant has abandoned to the tenant the land demanded, at the value estimated by the jury, the tenant can no longer be considered as holding it by virtue of a possession and improvement, under *Stat.* 1807, *ch.* 75, [*Stat.* 1821, *ch.* 47.] *Ken. Prop'rs. v. Davis*, i. 309.

3. Such abandonment has the effect of a conveyance of the estate to the tenant, on condition of his paying the estimated value within the periods provided by law. i. *Ib.*

4. And if the tenant do not pay the value within the limited periods, he is considered as yielding to the demandant all his title and claim, both to the soil and his improvements thereon; and he cannot have them again estimated in a *scire facias* brought to revive the original judgment. *Ib.*

5. An offer made by the tenant in a real action under *Stat.* 1821, *ch.* 47, *sec.* 4, cannot afterwards be withdrawn by him, it being in its nature an admission on his part, of the value of the estate. *Proprietors of the Kennebec Purchase v. Davis*, ii. 352.

6. Where such an offer was made in the Court below, and the demandant proceeded to trial, and the jury having estimated the land lower, and the improvements at a higher sum than the tenant offered, the demandant appealed to this Court;—it was holden that the proceedings below being nullified by the appeal, the demandants' right to accept the offer still continued, and might be exercised in this Court. *Ib.*

7. But whether he may accept such offer after proceeding to verdict in a final trial, *quære*. *Ib.*

8. Where, in a writ of entry, the tenant prayed for an appraisement of the land, under the provisions of *Stat.* 1821, *ch.* 47, and after verdict for the demandant he abandoned the land to the tenant at the price found by the jury, for which sum judgment was thereupon rendered for the demandant, and the tenant appealed therefrom to this Court, but failed to enter and prosecute his ap-

peal; upon complaint of the demandant, the judgment of the Court below, for the value of the land in money, was affirmed in this Court, with interest, and single costs. *Knox. v. Lermond*, iii. 377.

9. Where, in a real action, judgment is to be entered for the demandant for the value of the land "at the price estimated by the jury," under *Stat.* 1821, *ch.* 47, *sec.* 1, if the entry of judgment on the verdict has been delayed at the request of the tenant, interest will be added to the price so estimated by the jury, from the time of finding the verdict, and judgment be rendered for the amount thus ascertained. *Winthrop v. Curtis*, iv. 297.

10. The equitable claims of a tenant in possession under the betterment act, are not affected by a judgment in a petition for partition, even though he has appeared as respondent, and pleaded to the process. *Baylies & als. v. Bussey*, v. 153.

11. Where an administrator had recovered judgment in that capacity, and had obtained satisfaction by extent on lands at their full value, including the improvements made by the debtor; and afterwards the heirs of the intestate brought a writ of entry against the same debtor for the lands;—it was held that the tenant, having once had the value of his improvements, by including them in the extent, was not entitled to have them estimated again in this action. *Webber v. Webber*, vi. 127.

12. A tenant in common, who has ousted his co-tenant, is intitled, in a writ of entry against him, to have a moiety of the increased value of the premises by reason of his improvements ascertained by the jury, under the Statutes of Massachusetts of 1807, *ch.* 75, and 1819, *ch.* 269, [*Stat.* 1821, *ch.* 47,] *Bracket v. Norcross*, i. 89.

13. An offer to purchase of the true owner, made by the tenant in possession of land not his own, does not prejudice his right to the benefit of the act for the settlement of certain equitable claims arising in real actions; if such offer has not ripened into a contract between them. *Blanchard v. Chapman*, vii. 122.

14. It belongs to the Court and not to the Jury, to decide whether, upon any given state of facts, the tenant in a real action has a right to the appraised value of his improvements. *Ib.*

15. In a writ of entry for wild land, it was held that proof that the tenant had been once on the land three or four years before,

claiming it as his own, looking for the lines, and offering to sell it to a stranger, and that at another time he had spoken of the land as his own, did not amount to such evidence of possession and *ouster* as is required by *Stat.* 1826, *ch.* 344. *Thompson v. Knight*, vii. 439.

III. *Of the evidence in real actions.*

1. The tenant in a writ of entry shall not be admitted, under the general issue, to shew a title in any person other than the demandant, unless he can derive title from such person to himself by legal conveyance or operation of law. *Shapleigh v. Pilsbury*, i. 271.

2. In an action brought by a mortgagee, against a stranger, to recover possession of the lands mortgaged, the fact that the demandant had assigned his interest to a third person, cannot be given in evidence under the general issue, but must be specially pleaded in bar. *Howard v. Chadbourne*, v. 15.

3. In a writ of entry it is competent for the tenant, under the general issue, to disprove the seisin of the demandant, as alleged in the writ, by showing that his grantor had, previous to the time stated in the writ, conveyed the title to a third person; even though the tenant does not claim under such grantee. But the tenant, under the general issue, will not be permitted to show that the demandant himself, since the commencement of his seisin declared upon, has conveyed the land to a stranger, unless he claims under such stranger. *Stanley v. Perley*, v. 369.

4. The husband of the tenant in a real action, having entered under the title of *J. C.* who was the true owner, afterwards conveyed the premises to the demandant in fee, and then died: the tenant pleaded that she was not tenant of the freehold, but was merely tenant at will to *J. C.*; whose title was traversed by the demandant; and it was held that the plea was maintained by proof of the better title of *J. C.* without any evidence of actual attornment.—*Ware v. Wadleigh*, vii. 74.

5. One tenant in common sent an agent to demand possession from his co-tenant; but the latter refused to admit the demandant to enter, or to suffer the agent to occupy in his behalf; and once

denied the demandant's title; and ever afterwards retained exclusive possession of the premises. This was held sufficient evidence of an *ouster*, to support a writ of entry for a moiety of the land.—*Bracket v. Norcross*, i. 89.

[Vid. Abatement, I. Tenants in common. Attachment, II. Costs, II. Evidence, II. *b*. Execution, IX. Mortgage, I. II. Parish, V. Pleading, IV. Tenants in common. Usury.]

ADULTERY.

[See Marriage and Divorce, II. III.]

AGENT.

I. The creation and extent of his authority.
II. How his authority is to be executed.
III. Of subsequent ratification.
IV. His remedy against his principal.
V. The remedy of the principal against the agent.
VI. Remedies of other persons, against principal and agent.

I. *The creation and extent of his authority.*

1. An agent having discretionary power to adjust and collect an unliquidated demand, settled it by taking a negotiable note payable to his principal, which he afterwards pledged as collateral security for a debt of his own. It was held that his authority did not extend so far as to justify the pledge; and that the pledgee, after demand and refusal, was liable in trover for the note. Held also, that any payments to the agent, made before notice of the termination of his authority, were good. *Jones v. Farley*, vi. 226.

2. The contract created by a sale of goods by a factor, is between the buyer and owner, and not between the buyer and factor; and

it makes no difference, in this respect, whether the factor acts under a *del credere* commission or not. *Titcomb v. Seaver & tr.* iv. 542.

3. Therefore, where one, who bought goods on credit, of a factor *del credere*, was summoned as his trustee in a foreign attachment, it was held that, after notice, he could not be charged as the trustee of the factor, for any thing beyond the amount of the lien of the latter for his commissions. *Ib.*

4. 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. *Parsons v. Webb*, viii. 38.

5. 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. *Hathorn v. Curtis*, viii. 356.

6. 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. *Thomas v. Harding*, viii. 417.

7. 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. *Ib.*

8. 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.

9. 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. *Adams v. Gould*, viii. 438.

[Vid. Action, I. II. Contract, VII. Conveyance, IV. Dower, II. Estoppel, II. Evidence, XIII. Executors, &c. II. IX. Guaranty, I. Land agent. Shipping, II. IV. Ways, II.]

II. *How his authority is to be executed.*

1. Where a contract is entered into, or a deed executed, in behalf of the government, by a duly authorized public agent, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract or deed of the government, and not of the agent. *Stinchfield v. Little*, i. 231.

2. But the agent or attorney of a private person or coporation, in order to bind the principal or constituent and make the instrument his deed, must set to it the name and seal of the principal or constituent, and not merely his own. *Ib.*

3. If the agent describe himself in the deed or contract as acting for, or in behalf, or as attorney of the principal, or as a committee to contract for, or as trustee of a corporation, &c., if he do not bind his principal, but set his own name and seal, such expressions are but *designatio personæ*, the deed is his own, and he is personally bound. *Ib.*

4. A deed executed by an attorney, to be valid, must be made in the name of his principal. *Elwell v. Shaw*, i. 339.

5. If one acting as attorney for another, but having no sufficient

authority, make a deed in the name of his principal who is not bound thereby,—it does not follow that the agent is bound by the deed, unless it contain apt words for that purpose. *Stetson v. Patten*, ii. 358.

6. Under a power to execute a release of title to lands, a deed purporting to "grant, sell, and quitclaim" is a substantial execution of the authority. *Hill v. Dyer*, iii. 441.

III. *Of subsequent ratification.*

1. A parol ratification is not sufficient to give validity to a deed made by an agent not having authority under seal to bind his prinpal. *Stetson v. Patten*, ii. 358.

2. If an attorney, whose authority is by parol, execute a bond in the name of his principal, and afterwards he be regularly constituted by letter of attorney bearing date prior to the bond, this is a subsequent ratification, and gives validity to the bond. *Milliken v. Coombs*, i. 343.

3. Implied ratifications extend only to such acts of the agent as are known to the principal at the time. *Thorndike v. Godfrey*, iii. 429.

4. Where a note was indorsed and delivered to one person, for the use of another who was absent, the indorsee paying no consideration for the transfer; and an action was commenced against the maker, the indorsee being still absent and having no knowledge of the facts;—but after his return he supported the suit, and claimed the note as his own;—it was holden that this subsequent assent was a ratification of the prior transactions; and that the objection that the plaintiff had no interest in the note, at the commencement of the suit, could not be sustained. *Marr v. Plummer*, iii. 73.

5. A proprietors' committee having in their behalf entered into a submission of demands to referees, under the statute, representing themselves as duly authorized so to do, and the proprietors having been heard upon the merits before the referees, making no objection to the submission;—upon error brought by them to reverse a judgment rendered upon the award, the Court presumed that the

committee had due authority, though the want of it was assigned for error. *Fryeburg Canal v. Frye*, v. 38.

IV. *His remedy against his principal.*

1. If goods be consigned to a factor to sell, generally, and he sell them on credit, to a merchant in good standing, who becomes insolvent before the day of payment arrives,—it is the loss of the principal, and not of the factor:—and this though the factor had taken the note for the price, payable to himself. *Greely v. Bartlett*, i. 172.

2. If the principal draw on his factor before sale of the goods, and the factor, to raise funds to meet his acceptance of such bills, sell the goods of his principal on credit, and take the note of the purchaser payable to himself, which note he indorses and sells for money, and the maker becoming insolvent before its maturity, the factor pays the note to the indorsee; he may recover this money in an action against the principal. *Ib.*

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

was sufficient diligence, both on the part of the factors, and of the consignor;—that the latter was justly charged with the whole sum by his factors;—and might well recover back from his co-tenant the moiety he had paid over to him. *Rogers v. White*, vi. 193.

V. *The remedy of the principal against the agent.*

1. Where goods were left with a factor for sale, and he had sold them, or might by common diligence have so done, but had rendered no account, nor made any remittance, nor advised any one of his proceedings;—it was held that he was not chargeable on a count for goods sold and delivered alone,—but should be declared against as factor, for the proceeds of sale. *Selden v. Beale*, iii. 178.

VI. *Remedies of other persons against principal and agent.*

1. Where one residing in a foreign country authorized an agent here to sell lands and give deeds in his name, such power became *de facto* extinct at the decease of the principal;—and a deed made in his name by the attorney, after the death of the principal, but before intelligence of it arrived here, was holden to be merely void and an action lies against the attorney to recover back the money paid. *Harper & als. v. Little*, ii. 14.

2. Nor is the attorney estopped by such deed from claiming the land as heir, the deed being not his own, for want of apt words to bind him. *Ib.*

3. If one assume to act as attorney without authority and make a deed in another's name, which is void, the deed is not therefore the deed of the attorney, but the remedy against him is by a special action on the case. *Ib.*

4. If an agent purchase goods on his own credit, without disclosing his principal, to whose use, however, the goods are in fact applied,—the principal, being afterwards discovered, is liable to the seller for the price of the goods. *Upton v. Gray*, ii. 373.

5. The doctrine that a principal is answerable for the fraud of his agent or factor, does not apply to special agents. *Sherwood v. Marwick*, v. 295.

6. If an agent, in making a contract, does not disclose his agency

till the rights of the other party are vested, he is personally liable. *Keen v. Sprague*, iii. 77.

ALIEN.

[See Poor, I. *b. c.* II.]

AMENDMENT.

1. In *assumpsit* against two or more, the plaintiff cannot amend by striking out the name of one of the defendants. *Redington v. Farrar & al.* v. 379.

2. In a writ of entry the Court refused leave to amend by striking out the name of one of the demandants which had been improvidently inserted. *Treat & al. v. McMahon*, ii. 120.

3. Where the Sheriff was sued for the neglect of *Enoch* W. his deputy, whose name was not *Enoch*, but *Ebenezer*, it was held that the correction of the mistake by amendment did not introduce a new cause of action, and was therefore allowable. *Green v. Lowell*, iii. 373.

4. The amendment of an officer's return of an extent, after it has been recorded, will not, it seems, relate back to the time of its registry; but will take effect only from the time of the amendment. *Means v. Osgood*, vii. 146.

5. In trespass *quare clausum*, the plaintiffs were permitted to amend their writ, which charged the defendant for an injury to their own property, by setting forth that they sued as deacons and overseers of a society of Shakers. *Anderson v. Brock*, iii. 243.

6. After a bill in equity is brought to redeem mortgaged premises, the Court will not permit the officer, who executed the writ of *habere facias* under which the mortgagee entered, to amend his return, by stating an earlier day of service, for the purpose of foreclosure. *Freeman v. Paul*, iii. 260.

7. If the clerk omit to affix the seal of the Court to an execution,

it may be amended, even after the execution has been extended on lands and the extent recorded. *Sawyer v. Baker*, iii. 29.

8. Whether a writ of trespass for treading down the grass, brought by the owner of land in the possession of a tenant at will, can be amended by alleging a usurpation of the fee;—*quære*. *Campbell v. Procter*, vi. 12.

9. Where judgment for costs was entered against an administrator respondent in an appeal from a decree of the Judge of Probate, without mention of his office, and debt was brought to recover the sum *de bonis propriis*; the Court ordered the record to be amended, on terms, to stand as a judgment against the goods of the deceased in his hands. *Crofton v. Ilsley*, vi. 48.

10. An officer was permitted to amend his return of an extent, by inserting notice to the debtor and his absence from the county, after the execution was recorded and returned, and pending an action for the land. *Buck v. Hardy*, vi. 162.

11. The total omission, or the smallness of the *ad damnum* in a writ, cannot properly be considered as merely a circumstantial error, within the *Stat.* 1821, *ch.* 59, *sec.* 16, after the rendition of judgment. But until judgment it may be so considered. And therefore where no damages had been laid in the writ, the plaintiff, after verdict and before judgment, may have leave to amend by inserting a sufficient sum. *Mc Lellan v. Crofton*, vi. 307.

12. An error in the taxation of costs, by the omission of an item, may be corrected, after the issuing of execution, if there is any thing in the case to amend by; it being the misprison of the clerk. *Wright v. Wright*, vi. 415.

[See Execution, IV. Militia, II. Practice, I. Sheriff, IV. *a.* Verdict, II.]

ANDROSCOGGIN BRIDGE AND BOOMS.

1. The private statute of Massachusetts of Feb. 26, 1796, incorporating the proprietors of Androscoggin bridge, gives them no right to erect a toll house on the side of the bridge; nor does it

transfer to the proprietors any thing more than an easement in the land over which it authorizes them to build a bridge. *Thompson & als. v. Prop. Andr. Bridge*, v. 62.

2. Under the statute incorporating the proprietors of the side-booms in Androscoggin river, and the acts in addition thereto, it is the duty of the proprietors frequently to examine their piers and booms, to ascertain whether they are firm and sound, and capable of securing the property contained in them; and the corporation is responsible for all losses occasioned by the want of ordinary care. *Weld v. Prop'rs. Side-booms*, vi. 93.

3. Under the private act of *March* 15, 1805, *sec.* 4, incorporating the proprietors of side-booms in Androscoggin river, the corporation is entitled to toll for such logs as have been actually stopped, rafted and properly secured for the owner, though the booms were, at the same time, defective, and insufficient to secure other logs of the same owner, then in the booms, and which consequently were lost. *Prop'rs. of Side-booms v. Weld*, vi. 105.

4. The *proviso* in the private act of *March* 15, 1805, incorporating the Proprietors of the side-booms in Androscoggin river, with the right of toll, and in the additional act of *Feb.* 29, 1812, "that the fees aforesaid shall, at all times hereafter, be subject to the revision and alteration of the legislature," is not satisfied by a single act of revision of the tolls therein established; but is a subsisting and perpetual reservation of the right to increase or reduce the fees from time to time, at the pleasure of the legislature. *Side-booms v. Haskell*, vii. 474.

5. Therefore, where, by a subsequent statute, the fees were increased above the rate first established, but without any new reservation of the power of revision, it was held that the legislature still had the power of reducing them at its pleasure. *Ib.*

6. The provision in the private act of *March* 21, 1829, that the same corporation shall not be entitled to receive toll till the logs in their booms are surveyed by a surveyor appointed by the selectmen of *Brunswick* or *Topsham*, is constitutional; and it is the duty of the corporation, and not of the owner of the logs, to cause such survey to be made. *Ib.*

APPEAL.

I. In what cases an appeal lies.

II. Of the recognizance for the prosecution of an appeal.

I. *In what cases an appeal lies.*

1. In all criminal prosecutions, an appeal lies from the sentence of a Justice of the peace, who tries without a Jury, to the Circuit Court of Common Pleas, where a trial by Jury may be had; by necessary construction of the Constitution of *Maine*, *art.* 1, *sec.* 6. —*Johnson's case*, i. 230.

2. The summary mode of relief provided by *Stat.* 1817, *ch.* 185, *sec.* 5, does not extend to cases where the error complained of appears of record, as in a judgment rendered upon demurrer; but applies only to cases where an appeal lay before the making of the statute, and where, the error not appearing of record, the remedy was by exceptions under the statute of *Westminster*, 2. [13 *Ed.* 1, *cap.* 31.] *Sayward v. Emery*, i. 231.

3. No appeal lies from an order of the Court of Common Pleas directing the plaintiff to become nonsuit. The remedy for the party aggrieved, is by exceptions pursuant to *Stat.* 1822, *ch.* 193.—*Feyler v. Feyler*, ii. 310.

4. The statute of 1823, *ch.* 233, saving the right of appeal in criminal cases from the sentence of the Court of Common Pleas, without specially mentioning any condition, does not constructively repeal the prior statute, which requires a recognizance with sufficient sureties to be given for the prosecution of such appeal. *Dennison's case*, iv. 541.

5. An action of trespass *quare clausum fregit*, originally brought before a Justice of the peace and tried upon review in the Court of Common Pleas, upon the plea of soil and freehold, may be brought by appeal into this Court, though no plea of soil and freehold was filed before the magistrate, the defendant having been accidentally defaulted. *Murray v. Ulmer*, v. 126.

6. An appeal does not lie from a judgment of the Court of Com-

mon Pleas on a complaint against the kindred of a pauper under *Stat.* 1821, *ch.* 122, *sec.* 5. *Pierce ex parte*, v. 324.

7. In a complaint for flowing lands, under *Stat.* 1821, *ch.* 45, no appeal lies from the judgment of the Court below, unless the respondent in his plea, either denies the title of the complainant to the lands flowed, or claims the right to flow them without the payment of damages, or for an agreed composition. *Cowell v. Great Falls Man. Co.* vi. 282.

II. *Of the recognizance for the prosecution of an appeal.*

1. A recognizance to appear and prosecute an appeal made to a higher Court, and abide the order of said Court thereon, and not depart without license, is not forfeited by a default at a subsequent term in the Court appealed to, the appeal having been duly entered at the first term, and the process continued. *The State v. Richardson*, ii. 115.

2. It is not necessary that the party appealing should personally enter into recognizance for the prosecution of the appeal. If it be done by sureties, it is as if done "with sureties," within the meaning of *Stat.* 1822, *ch.* 193, *sec.* 4. *Vallance v. Sawyer*, iv. 62.

3. Recognizances for the prosecution of appeals in civil actions are not within the *Stat.* 1821, *ch.* 50, giving remedies in equity; but in case of a forfeiture, judgment must go for the whole penalty. [Altered by *Stat.* 1831, *ch.* 497.] *Paul v. Nowell*, vi. 239.

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

[See Constitutional law, V. Costs, I. II. III. IV. Nonsuit. Practice, V.]

APPRENTICE.

[See Master and Servant.]

AQUATIC RIGHTS.

[See Conveyance, II. IV. X. Watercourse.]

ARBITRAMENT AND AWARD.

I. Of the submission.
II. Of the authority and duty of the arbitrators.
III. Of the form and effect of the award.
IV. Of the remedy upon an award.

I. *Of the submission.*

1. In order to give jurisdiction to referees, appointed pursuant to *Stat.* 1821, *ch.* 77, it is necessary that the demand made by the claimant be signed by him. The want of his signature will be error. *Woodsum v. Sawyer*, ix. 15.

2. 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. *Walker v. Sanborn*, viii. 288.

3. 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. *Smith v. Thorndike*, viii. 119.

4. A submission, once made a rule of Court, is no longer countermandable by either party. *Cumberland v. North Yarmouth*, iv. 459.

5. Where two parties executed a bond, submitting to arbitration "all debts, dues and demands heretofore subsisting between them;" and on the same day one of them gave the other a promissory note payable in specific articles at a remote day;—it was held that the note was not within the terms of the submission, it being, by intendment of law, given after the execution of the bond. *Bixby v. Whitney*, v. 192.

6. Though the power of referees, appointed under *Stat.* 1821, *ch.* 78, does not extend to cases in which the title to real estate comes in question, yet a claim of damages occasioned by the making of a canal, not being of that character, is within the scope of their authority. *Fryeburg Canal v. Frye*, v. 38.

II. *Of the authority and duty of the arbitrators.*

1. Whether referees may lawfully examine the parties themselves before them,—*quære*. *Patten v. Hunnewell*, viii. 19.

2. Whether arbitrators, not constituted under the statute, or by rule of Court, can award costs, without express authority,—*quære*. *Dolbier v. Wing*, iii. 421.

3. Arbitrators at common law have no authority to award costs, unless it is expressly given to them. *Gordon v. Tucker*, vi. 247.

4. After an arbitrator has made and published his award, he cannot re-examine the merits of the case, even to correct an error, without consent of the parties. *Woodbury v. Northy*, iii. 85.

5. It is no valid objection to a report of referees, that one of them had formed a previous opinion upon the case submitted to them, if his mind appears to have been still open to conviction, and no imputation of unfairness rests upon him. *Graves v. Fisher & al.* v. 69.

6. If a report made by three referees be recommitted, and one of them neglect or refuse to sit again; the other two are competent to make a new award similar to the former, with additional costs. *Peterson v. Loring*, i. 64.

7. After the recommitment of a report, it is not competent for two of the referees, in the absence of the third, to revise the essential merits of the case. *Cumberland v. North Yarmouth*, iv. 459.

8. After referees have once undertaken the execution of the trust confided to them, and their report is recommitted, if they or one of them should refuse to re-examine the subject, the Court may enforce obedience to the order of recommitment, by *mandamus*, or attachment. *Ib.*

III. *Of the form and effect of the award.*

1. Where a submission is of divers subjects distinctly enumerated, if it appears from the whole award that all the matters submitted have been adjudicated upon by the arbitrators, it is sufficient, though each particular is not specified in the award. *Dolbier v. Wing*, iii. 421.

2. An award good in part and bad in part, may be sustained for that which is good; unless the bad part is manifestly intended as the consideration, in whole or in part, of that which is good; in which case the whole is void. *Clement v. Durgin*, i. 300. *Gordon v. Tucker*, vi. 427.

3. An award by arbitrators, written on the back of the arbitration bond, stating that they had "met according to appointment on the within business," was held to be an award "of and concerning the premises," and therefore good. *Dolbier v. Wing*, iii. 421.

4. An award of arbitrators at common law, is not examinable, except on the ground of corruption, gross partiality, or evident excess of power. *North Yarmouth v. Cumberland*, vi. 21.

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

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

7. J. T. and other individuals, named only as such, gave bond to R. G. submitting to arbitrators "his claim for damages occasioned to his land by the erection and continuance of the dam across *Saco* river at Union falls." The arbitrators, reciting that they had viewed the premises, awarded that J. T. "and other proprietors of the Union Falls-mills," should pay to R. G. a certain sum, and costs. It was held that here were sufficient indications that the award was between the parties to the bond;—that the award was of itself a bar to any farther claim for damages, and operated to secure to the obligors the right to flow the land in future, without farther payment of damages to the obligee; and that therefore it was mutual and final. *Gordon v. Tucker*, vi. 247.

8. Submissions and awards, like other contracts, are to be expounded by the intent of the parties and arbitrators. *Ib.*

IV. *Of the remedy upon an award.*

1. Where a demand against the estate of a deceased testator was submitted to referees, who made an award in favor of the creditor; after which the executor found among the testator's papers a receipt from the creditor to him, dated a short time previous to his decease, but subsequent to the origin of the debt, and being in full of all demands;—in *assumpsit* on the award it was holden that the executor might shew this receipt in bar of the action. *Parsons v. Hall*, iii. 60.

2. Reports of referees, whether made under a rule of court, or under a submission before a justice, pursuant to the statute, may be recommitted by the Court at their discretion, as well for the revision of the whole case, as for the amendment of matters of form.—*Ib.* *Cumberland v. North Yarmouth*, iv. 459.

3. 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. *Walker v. Sanborn*, viii. 288.

4. 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. *Ib.*

5. 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. *Ib.*

6. Where an action is submitted to referees, by a rule of this Court, with an agreement that the report may be made in any county, the prevailing party, for whose benefit this stipulation is inserted, is not bound to offer the report in the county where the Court is holden next after the making of the report; but may present it in any other where a term commences earlier than in that in which the action is pending. *Dole v. Hayden*, i. 152.

[See Action, I. II. Attachment, IV. Evidence, XII. *a.* Exceptions. Poor, III. Practice, X.]

ARREST.

[See Constitutional law, III. Sheriff, II. *b.*]

ASSIGNMENT.

I. Of the form, requisites and execution of an assignment.

II. Of notice, and the assent of creditors.

III. Of the rights of the parties and others, as affected by an assignment.

I. *Of the form, requisites and execution of an assignment.*

1. Where two were joint mortgagors of a piece of land, to secure the payment of a joint debt, and one of them to protect the other against his liability for the payment of both moieties of the debt, delivered to him certain notes of hand not negotiable, to be collected, and the proceeds to be paid over to the mortgagee, to which delivery and appropriation the promissor in the notes was assenting;—it

was held that the party so depositing and appropriating such notes could not afterwards lawfully receive payment of them from the promissor, nor release the latter from his liability to pay them to the holder. *Clark v. Rogers*, ii. 143.

2. In this State the assignment of a mortgage must be by deed. *Vose v. Handy*, ii. 322.

3. A bond may be assigned by delivery only, for a full and valuable consideration. *Ib.*

4. Where the secretary of a corporation received an order for money, payable to himself, in his private capacity, the amount of which, when paid, was designed to be applied to the payment of a debt due from the drawer to the corporation; and he afterwards passed it over to the treasurer for that purpose, of which the acceptor had notice;—it was holden that this was a sufficient assignment; and that a subsequent discharge from the original payee could not avail the acceptor. *Swett v. Green*, iv. 384.

5. Where an order is drawn for payment of the whole of a particular fund, it is an equitable assignment of that fund to the payee; and after notice to the drawee it binds the fund in his hands. *Robbins v. Bacon*, iii. 346.

6. It is not against the policy or rules of the law, that an insolvent debtor should assign all his property to secure a part of his creditors. *Brinley v. Spring*, vii. 241.

7. Nor that the assignment should be by way of mortgage, with a stipulation that the mortgagor shall retain possession of the property, changing that which is personal by manufacturing and selling; and that such possession shall continue for a length of time beyond the day when the money becomes due;—provided such possession is not inconsistent with the security of the mortgagee; and there be not mingled in the contract any intention to delay or defraud other creditors, or to withhold the property from them beyond what may be necessary for the mortgagee's protection. *Ib.*

8. The length of time for which such possession is to continue, may be so great as to afford evidence, *per se*, of fraudulent intent. —*Ib.*

9. Where a general assignment of property, for the benefit of all

the creditors of an insolvent debtor, was made *May* 25, and a further instrument was executed *June* 2, giving priority to a large amount of debts due to the United States; it was held that the assignment still took effect from the first date, unaffected by any events intervening between that and the second agreement. *Fox v. Adams & al.* v. 245.

10. An assignment in trust for the benefit of creditors is not vitiated by a condition that the creditors shall accept the provision made for them in full of their respective demands. *Semble. Ib.*

11. The time limited in such assignment for creditors to become parties to it, may be so short or so long as to justify a presumption of fraud, and thus defeat its operation. *Ib.*

12. Where a mercantile house in *Boston*, being engaged in extensive business and in foreign commerce, having many creditors, and being indebted in nearly four hundred thousand dollars, stopped payment, and made an assignment of their property for the benefit of such creditors only as should become parties to it within seventy days; the Court were strongly inclined to the opinion that the shortness of the time constituted a sufficient objection to the validity of the assignment against such creditors as had not assented thereto. *Fox v. Adams & al.* v. 245.

13. Where the payee of a promissory note lodged it, with other demands, in the office of an attorney for collection, and afterwards drew an order on the attorney, directing him to pay to a third person the amount which might be collected on the demands left with him; which the attorney accepted to pay such sums as he should receive after obtaining what might be due to himself;—this was held to be no assignment of the note in question; and therefore a subsequent payment to the promisee was held good. *Thayer v. Havener*, vi. 212.

14. *S.* being the owner of a farm called the *Hall*-farm, consisting of the lot No. 60, and being indebted to *W*, mortgaged to him the lot No. 66 in the same town, without any other description, the parties supposing it to be a mortgage of the *Hall*-farm. Afterwards *S.* sold the *Hall*-farm to *M*, taking as part of the consideration, *M's* obligation to "cancel the mortgage given by *S.* to *W.* of the *Hall*-

farm;" which obligation he assigned to *W*, the mortgagee. In a suit brought on this obligation, by *W*. in the name of *S*. he declared, first, for money had and received; and in two other counts on the promise to cancel a mortgage, first as on the *Hall*-farm, called by mistake lot No. 66; and secondly as on lot No. 66, called by mistake the *Hall*-farm. *Schillinger v. McCann*, vi. 364.

15. Hereupon it was held, that the written promise was not applicable to either of the special counts, the plaintiff not being at liberty in this respect to contradict his deed :—*Ib.*

16. But that the transfer of the contract to the mortgagee was an assignment of all the indebtedness of the promissor arising out of its subject matter; so that the assignee, in an action for money had and received in the name of the original promissee, might recover to his own use the money thus left in the hands of the promissor. *Ib.*

17. An insolvent debtor having made an assignment of his effects, in trust for the payment of such of his creditors as should assent to it within a certain reasonable time; it was held to be no good objection to its validity, that it contained, on the list of preferred creditors, one who was only a surety, and who had not yet been damnified but was named as a creditor to the amount of his liabilities :— *Canal Bank v. Cox*, vi. 395.

18. Nor, that it contained an exception from the general conveyance of his property, in these words;—" saving only his necessary and proper household furniture, family apparel, and means of paying his small debts under fifty dollars, and ordinary family expenses;" the excepted property being thus left open to attachment, as it was before; it never having passed to the assignees :— *Ib.*

19. Nor, that it provided for the previous payment of the expenses and commissions of the assignees, before any distribution to creditors :— *Ib.*

20. Nor, that it contained a provision for the discharge of the debtor's sureties as well as of the debtor himself. *Ib.*

II. *Of notice, and the assent of creditors.*

1. The assent of preferred creditors to an assignment for the payment of debts may well be presumed, their claims being fully pro-

vided for; that of other creditors must be expressed. *Copeland v. Weld*, viii. 411.

2. 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*. *Ib.*

3. Whether a verbal assent to such assignment is sufficient;—*quære*. *Ib.*

4. 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*. *Ib.*

5. 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. *Davenport v. Woodbridge*, viii. 17.

6. After the assignment of a chose in action, no subsequent act or declaration of the assignor can modify or control it. *Hackett v. Martin*, viii. 77.

7. 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. *Ib.*

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

9. The creditor of an insolvent debtor, becoming party to a general assignment of his effects in trust for the payment of his debts, which contained a clause of general release of all demands, may lawfully qualify his assent to the assignment, by limiting his signature to a certain class of his demands, excepting others from its operation. *Deering v. Cox*, vi. 404.

10. 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. *Lithgow v. Evans*, viii. 330.

11. 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. *Ib.*

III. *Of the rights of the parties and others, as affected by an assignment.*

1. Where an insolvent debtor makes a general assignment of his effects, in trust for such of his creditors as should, within a certain time, become parties and release their demands; a dissenting creditor, who attaches the property in the hands of the assignees by a foreign attachment, is entitled to payment in preference to those who executed the assignment subsequent to such attachment; notwithstanding the covenant of the assignees to pay, *pro rata*, all the creditors who might become parties to the assignment. *Jewett v. Barnard & tr.* vi. 381. *Copeland v. Weld*, viii. 411.

2. Where goods were so assigned, which the assignee 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. *Copeland v. Weld*, viii. 411.

3. 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. *Ib.*

4. Such an assignment, by an insolvent debtor in another jurisdiction, will not be permitted to operate upon property in this State, so as to defeat the attachment of a creditor residing here. *Fox v. Adams & al.* v. 245.

5. Where a creditor for goods sold and delivered became the surety of another in a promissory note not negotiable, payable to his debtor, which note was assigned by delivery; and being afterwards

required by the assignee to pay the note, referred him to the other promissor as the real debtor, but said nothing of the debt due to himself, as a subsisting claim in offset;—it was held that this was a waiver of such claim, as against the assignee, and that the latter was entitled to recover of the surety the whole amount of the note. *Merrill v. Merrill*, iii. 463.

6. If a promissory note not negotiable be assigned before it is due, and notice thereof be given to the maker, who afterwards pays the money to the promissee; in an action subsequently brought in the name of the promissee, for the benefit of the assignee, it is a good defence that the assignment was void, having been made without valuable consideration. *Dunning v. Sayward*, i. 366.

7. And this, though the defendant had previously been summoned as the trustee of the promissor in a foreign attachment, and disclosing the mere fact of the assignment had been discharged. *Ib.*

[See Bills of Exchange, &c. II. Evidence, XII. *a.* Execution, VII. License. Mortgage, III. VI. Principal and Surety, III. Sheriff, II. *c.* Trustee process, II.]

ASSUMPSIT.

I. Of the causes for which it lies.

II. Of the parties by and against whom it may be brought.

III. When it does not lie.

IV. Of the defence in this action.

I. *Of the causes for which it lies.*

1. A promise to pay a sum of money "whenever I shall receive or realize the above sum from" a certain fund, is a promise to pay so much of the principal sum as may be realized from the fund specified, though it fall short of the whole amount due. *Aldrich v. Fox*, i. 316.

2. Where upon a settlement of mutual accounts a promissory note was given for the balance supposed to be due, but by a mis-

take in the computation of the accounts the note was made for twenty dollars more than in truth was due, it was held that the debtor might recover this sum against the creditor, although the note still remained unpaid. *Dole v. Hayden*, i. 152.

3. *Assumpsit*, as well as debt, lies for tolls. *Bearcamp River Company v. Woodman*, ii. 404.

4. A promissory note given by the maker and accepted by the payee in satisfaction of a book debt due from a third person, and with his consent, is a discharge of such debt; and the liability thus incurred by the maker of the note, forms a good ground of action against the party relieved, to recover the amount of the debt, though the note has not been paid. *McLellan v. Crofton*, vi. 307.

5. Where the children of one deceased, entered into an agreement, under seal, for a division of the estate, designating, in general terms, in what part of the land each one's portion was to be assigned, but referring to a future survey, plan, and division-deed for the completion of the partition; and thereupon the parties entered each into his several portion thus designated, and continued in the quiet and exclusive possession more than thirty years, but no such survey, plan, or deed was ever made; and afterwards a will was discovered and duly proved, by which their father had devised all the land to one of them in fee; it was holden that, this possession by the others being founded in mistake, the law raised an implied promise in each of them to pay to the devisee a reasonable rent for the portion of land so occupied. *Jordan v. Jordan*, iv. 175.

6. Where the Court of Sessions taxed lands in a plantation for the repair of a road laid out by the State, and not by the Court, their proceedings were holden merely void;—and the lands having been sold by the county treasurer for non payment of the tax, and redeemed by the owner, it was held that he might recover back the money so paid, in an action for money had and received against the county. *Joy v. Oxford*, iii. 131.

7. Where a note, payable in twelve months, was given as the consideration for a written engagement of the payee to convey certain goods to the maker at a future day, and the payee forthwith indorsed and sold the note for its amount in money, after which the original contract was rescinded;—it was held that the maker of the

note might recover the amount of the payee, though the twelve months had not elapsed. *Chapman & al. v. Shaw*, v. 59.

8. A judgment for nominal damages against an officer, in an action for not returning an execution, is no bar to a subsequent action for money had and received, to recover the amount by him collected on the execution. *Varrill v. Heald*, ii. 91.

9. Where money has been paid under such duress or necessity as may give it the character of a payment by compulsion—such as money paid to liberate a raft of lumber detained in order to exact an illegal toll—it may be recovered back. *Chase v. Dwinal*, vii. 134.

10. Where a recognizance had been taken in too large a sum by the fraud of the conusee, and satisfaction had by an extent on the land of the conusor, it was 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 excess, in an action for money had and received. *Morton v. Chandler*, viii. 9.

II. *Of the parties, by and against whom it may be brought.*

1. Where one, being liable to two or more in a joint personal action, settles the dispute with one of them so far as that one is concerned ; the cause of action is thereby changed from joint to several ; and the party becomes liable to each of the others for their separate damages. *Holland v. Weld*, iv. 255.

2. *Assumpsit* lies against an attorney at law, for negligence in transacting the business of his profession ; and this cause of action survives against his administrator. *Stimpson v. Sprague*, vi. 470.

3. An attorney at law, who has collected debts due to his client, is not liable to an action for the money, till it has been demanded of him. *Obiter dictum. Staples v. Staples & tr.* iv. 532.

4. One tenant in common may have *assumpsit* against his cotenant, who has sold the common property, and received all the money. *Gardiner Man. Co. v. Heald*, v. 381.

5. Where one was employed as the agent of certain others, to purchase for them a piece of land, and take the conveyance to himself, concealing his principals; and a third person, at the request of the principals, became surety for the agent in a promissory note for the purchase money; which note the surety paid;—it was held that the surety alone might have *assumpsit* against the principals, for the money thus paid. *Smith v. Sayward & als.* v. 504.

6. Held also, that this was an original undertaking, and not within the statute of frauds. *Ib.*

7. Held also, that the benefit accruing to the principals was a sufficient consideration to support the promise. *Ib.*

8. Where an attorney had collected monies for the treasurer of a town in that capacity, it was holden that he was liable for the amount, in an action for money had and received, at the suit of the town; and that in such action he could not set off any demand of his own against the treasurer in his private capacity. *Newcastle v. Bellard*, iii. 369.

9. An attorney at law is liable to an action for money collected by him, in the same manner as any other agent, and without a special demand; and the statute of limitations begins to run from the time he receives the money. *Coffin v. Coffin*, vii. 298.

III. *When it does not lie.*

1. The law will not imply a promise, against the protestation of him who is attempted to be charged with it. *Jewett v. Somerset*, i. 125.

2. If the lands of a deceased person, which have been sold under licence for the payment of his debts, are taken from the purchaser by an elder and better title; he cannot maintain against the executor an action of *assumpsit* for the consideration money; but must resort only to such covenants as are contained in his deed.—*Joyce v. Ryan*, iv. 101.

3. Where one contracted to give to another a deed of land, upon his punctually paying certain sums of money by instalments, some of which were paid, and the rest neglected; whereupon the owner of the land sold it to a stranger; it was holden that the party who

had paid part of the money could not recover it back; the non-performance of the contract not having been caused by the fault of the other party, nor the contract, on his part, waived or rescinded. *Rounds v. Baxter*, iv. 454.

4. No action lies to recover the amount of monies subscribed in aid of the establishment of an academy; it not appearing that any monies had been expended by the trustees, or any other act done as a consideration, or upon the faith of the promise. *Foxcroft Academy v. Favor*, iv. 382.

5. The party committing a tort, cannot be charged as on an implied contract, the tort being waived, unless some benefit has actually accrued to him. *Webster & al. v. Drinkwater*, v. 319.

6. Where one devised lands and bequeathed personal estate to his son, whom he made executor of his will, therein directing him to make certain annual payments to his mother during her life time; and the son, after the death of the testator, assumed the trust, and entered into the lands, and made the annual payments, and then died, leaving minor children who entered into the lands by their guardian;—it was holden that the children were not liable in *assumpsit* during their minority, for the yearly payments accruing after the decease of their father. *Haskell v. Haskell & als.* ii. 156. [*Walker v. Walker*, 2 *Conn.* 196, 299.]

7. Where one conveyed lands by deed, reserving to himself the use of part of the premises, and half the profits of the residue for life, and the grantee entered, and fulfilled the terms of the reservation, and then died insolvent, leaving children who were minors, and whose guardian entered into the land;—but neglected to perform the terms of the reservation;—it was held that *assumpsit* does not lie against them for the particular reservations in the deed, nor for the use and occupation of the land. *Drinkwater v. Gray & als.* ii. 163.

8. *Assumpsit* will not lie against a judgment debtor for the use and occupation of land set off on execution against him, where he contests the regularity of the proceedings unless an express contract be proved. *Wyman v. Hook*, ii. 337.

9. Where the promissor in a note payable in specific articles per-

formed 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. *Joy v. Foss*, viii. 455.

10. If a judgment debtor, whose land has been taken by extent, pays part of the debt in order to redeem the land, but fails to pay the residue, whereby the land is lost, he cannot recover back the money thus paid. *Morton v. Chandler*, vi. 142.

IV. *Of the defence in this action.*

1. In an action upon a promissory note given for the purchase-money of land conveyed by deed with the usual covenants of seisin and warranty, the action being between the original parties, it is not competent for the defendant to set up, by way of defence, a partial or total failure of title, or a want of title in the grantor at the time of the conveyance. *Lloyd v. Jewell*, i. 352. [*Knapp. v. Lee*, 3 *Pick.* 452. 2 *Kent's Comm.* 472.]

2. And where the deed contained an express condition that upon the breach of any covenant therein the damages might be payable by cash to the amount received in money, and the residue by delivering up such of the grantee's notes for the consideration as should remain unpaid; in an action upon one of such notes, some having been paid and others still due, the defendant was not permitted to shew a breach in the covenant of seisin as to parcel of the land, to the value of the note declared on. *Ib.*

3. In an action on a promissory note given for the price of land conveyed by the plaintiff to the defendant by deed of release and quit-claim without covenants, it is not a good defence that the plaintiff represented his title to be in fee-simple, when in truth it was but an estate for life or for years; nothing short of a total failure of title being in such case a sufficient defence to the action. *Howard v. Witham & al.* ii. 390.

4. An equitable claim, against an insolvent estate, though never presented to the commissioners, may still be shewn by way of set-off

to an action of *assumpsit* brought by the administrator. *Lyman v. Estes*, i. 182. [*Sewall v. Sparrow*, 16 *Mass.* 24.]

[See Amendment. Assignment, I. Contract, IV. VII. XII. XIV. Pleading, V.]

ATTACHMENT.

I. Of the situation of the property, as affecting its liability to be attached.

II. Of the manner of attachment, and the lien thereby created.

III. Of the effect of notice of a prior conveyance.

IV. Of the dissolution of an attachment.

I. *Of the situation of the property, as affecting its liability to be attached.*

1. A chattel mortgaged, is not liable to be attached or seized in execution for the debt of the mortgagor, the money due to the mortgagee not having been paid, nor legally tendered. *Holbrook v. Baker*, v. 309.

2. Property lawfully in the possession of a deputy sheriff by attachment, cannot be taken out of his possession by another deputy of the same sheriff, under another writ. *Strout & al. v. Bradbury & al.* v. 331.

3. Where a farm was leased at will, with an agreement that the hay, deposited in the barn, should remain the property of the lessor, or be held by him as security till the rent should be paid; but no actual delivery of it was made to the lessor; the hay was held liable to attachment for the debts of the tenant. *Bailey v. Fillebrown*, ix. 12.

II. *Of the manner of attachment, and the lien thereby created.*

1. An actual entry, by the officer, on real estate, seems not to be

necessary to constitute a valid attachment. *Crosby v. Allyn*, v. 453.

2. An attachment of "all the debtor's right, title and interest in any real estate in the town of B," is a good attachment of his tenancy in common in a particular tract in that town. *Ib.*

3. The lien created by attachment of a tenancy in common follows the estate, if it be changed from common to several property pending the attachment. *Ib.*

4. The lien created by attachment of the articles enumerated in *Stat.* 1821, *ch.* 60, *sec.* 34, is not dissolved by taking the security there mentioned; and therefore a subsequent sale of such articles by the debtor, even without notice, gives the vendee no rights against the attaching creditor. *Woodman v. Trafton*, vii. 178.

5. In real actions, no lien can be created by attachment of property. *Holmes v. Fernald*, vii. 232.

6. Where the parties, pending an action of *assumpsit* between them, made a settlement of all their accounts, by which a balance was found due to the plaintiff, for which judgment was entered in his favor, by consent; and the settlement included some demands for which the writ contained no proper counts, and some which were not payable till after the action was commenced;—it was held that the lien created by the attachment was thereby dissolved *in toto*, so far as the rights of subsequent attaching creditors were concerned. *Clark v. Foxcroft*, vii. 348.

7. If land be attached on mesne process, and afterwards the creditor have notice of a prior conveyance made by the debtor, yet such notice does not impair or affect the lien created by the attachment. *Kent v. Plummer*, vii. 464.

III. *Of the effect of notice of a prior conveyance.*

1. Though an attorney of record may have had knowledge of a prior conveyance of land attached in the suit in which he is retained, this does not affect the attachment, if his client had no such knowledge. *Lawrence v. Tucker*, vii. 195.

2. If land be conveyed to *A.* whose deed is not recorded; and he gives bond to *B.* to convey the same land to him upon certain conditions; and in the meantime *B.* enters into and occupies the

land, with the consent of *A*; such occupancy is implied notice of title, and will protect the land against an attachment by the creditor of *A's* grantor. *Kent v. Plummer*, vii. 464.

IV. *Of the dissolution of an attachment.*

1. The submission of an action, and all demands existing between the parties, to the determination of referees, dissolves any attachment of property made in that action; and this, whether other demands are in fact exhibited to the referees or not. *Mooney & ux. v. Kavanagh & al.* iv. 277.

2. A foreign attachment is dissolved upon the death of the debtor and the issuing of a commission of insolvency upon his estate.—*Martin v. Abbot*, i. 333. [*Stanwood v. Scovell & tr.* 4 *Pick.* 422.]

3. Proof of the issuing of a commission of insolvency is the only competent evidence of the insolvency of a deceased defendant, so as to dissolve an attachment of his estate. *Maxwell v. Pike*, ii. 8.

[See Assignment, III. Conveyance, IV. VII. VIII. Mortgage, IV. Partnership, III. Sale, II. Sheriff, II. *c.*]

AUCTIONEER.

[See License.]

BAIL.

1. Where the principal in a bail-bond, after it was signed by the surety, and in his absence, but before delivery, erased the name of the Sheriff as obligee, and inserted that of the constable who served the precept, and this in the presence and at the suggestion of the constable; it was holden that this did not avoid the bond as to the surety. *Hale v. Russ*, i. 334.

2. Such an alteration, in a bail-bond, seems to be immaterial.—*Ib.*

3. The consent of the surety in such case may well be presu-

med, his intention of becoming bail not being affected, and the alteration being only in matter of form. *Ib.*

4. A surrender of the principal debtor, to the officer holding the writ of execution against him, is a discharge of the bail-bond. *Ryan v. Watson*, ii. 382.

5. In *Stat.* 1821, *ch.* 67, requiring the insertion of the names of bail in the margin of the execution, applies to bail taken by the gaoler, after commitment on mesne process, as well as to bail taken by the officer who served the writ. *Holmes v. Chadbourne & al.* iv. 10.

6. When a debtor, committed on mesne process, is enlarged on bond before the return day, the condition may either be for his appearance at Court, or for his remaining within the debtor's limits. *Ib.*

[See Poor Debtors, II. Sheriff, IV. *a.*]

BAILMENT.

1. 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*. *Barker v. Roberts*, viii. 101.

2. 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. *Fisher v. Bartlett*, viii. 122.

3. If the attachment was merely nominal, *quære* whether any consideration existed for the undertaking of the supposed bailee.—*Ib.* [See Action, I. Lien.]

BALDWIN.

1. In the private statute of 1815, *ch.* 115, *sec.* 6, which requires the trustees of the ministerial fund in *Baldwin* to apply the interest of the fund to the support of the gospel ministry in *Baldwin*, "in such way and manner as the inhabitants thereof, in legal town meeting, shall direct;" the word "town" is to be construed in a limited sense, as referring to its parochial character only, in which capacity alone it was interested in the fund. And on the division of the town into several parishes, this power to designate the application of the money remains in the first parish. *Richardson v. Brown*, vi. 355.

2. If not so construed, it would be unconstitutional, as impairing the obligation of a contract. *Ib.*

BANGOR, SETTLERS IN.

[See Conveyance, X. *c.* Settlers.]

BASTARDY.

I. Of the complaint and accusation.
II. Of the bond and proceedings.
III. Of the judgment.

I. *Of the complaint and accusation.*

1. Prosecutions under the bastardy act of 1821, *ch.* 72, are not local. *Dennett v. Kneeland*, vi. 460.

2. It is essential, to a prosecution under *Stat.* 1821, *ch.* 72, that the mother of an illegitimate child accuse the putative father during her travail, and before delivery. *Ib.*

3. But it is not essential that this fact be alleged in her complaint, since this may be made before the event has happened. *Ib.*

4. 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. *Tillson v. Bowley*, viii. 163.

5. 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. *Ib.*

6. 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. *Ib.*

II. *Of the bond and proceedings.*

1. In prosecutions under the statutes respecting the support and maintenance of bastard children, the complainant must file a declaration in the Court of Common Pleas, stating that she has been delivered of a bastard child—which was begotten of her body by the person accused—the time and place when and where it was begotten, with as much precision as the case will admit—that being put upon the discovery of the truth during the time of her travail, she accused the respondent of being the father of the child, and that she has continued constant in such accusation. To such declaration the plea to the merits is not guilty. *Foster v. Beaty*, i. 304.

2. A bond given in a prosecution under the bastardy act, conditioned that the accused shall appear and abide the order of Court, obliges him to the payment of such money as the Court shall order for the maintenance of the child, as well as to the giving of a new bond for the performance of such order. *Taylor v. Hughes*, iii. 433.

III. *Of the judgment.*

1. Under the *Stat.* 1785, *ch.* 66, [*Stat.* 1821, *ch.* 72,] for the support and maintenance of bastard children, a bond is not necessary to give jurisdiction to the Court of Common Pleas, if the defendant appear either in person or by attorney. *Mariner v. Dyer*, ii. 165.

2. And the Court may render a judgment of filiation upon de-

fault, the provision for a trial by jury being for the defendant's benefit, which he may waive. *Ib.*

3. An order on the putative father to pay a sum weekly till the further order of Court is warranted by the statute. *Ib.*

4. So also is a judgment for costs, such having been the uniform practice under the statute. *Ib.*

[See Poor, I. *a.* Review, I. Town, III. *d.*]

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Of their form, construction and effect.
II Of their transfer, by indorsement or otherwise.
III. Of their acceptance.
IV. Of demand and notice.
V. Of the liabilities of the parties and their remedies.
VI. Of the damages and interest.

I. *Of their form, construction and effect.*

1. 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 may be controlled or explained by the agreement of the parties, or by proof of usages or circumstances, inconsistent with such presumption. *Varner v. Nobleborough*, ii. 121. *Descadillas v. Harris*, viii. 298.

2. 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. *Descadillas v. Harris*, viii. 298.

3. A supercargo cannot, in virtue of that capacity, bind his principals as acceptors of a bill of exchange drawn by himself, without

express authority from them to that effect, communicated to, and relied upon at the time, by the party who received the bill. *Scott v. McLellan & al.* ii. 199.

4. A note, or other engagement which may be enforced at law, whether negotiable or not, given to a third person by the appointment and direction of the creditor, is a discharge of the debtor from an existing simple contract debt. *Wise v. Hilton*, iv. 435.

5. A promissory note, liable to be stamped by the act of Congress of *July* 6, 1797, cannot be read in evidence, unless it has been stamped, or the holder has complied with the requisitions of the act of *April* 6, 1802. *Leavitt v. Leavitt*, iv. 161.

6. Nothing but payment of a negotiable note will destroy its negotiability. Nor will this when made by the last indorser, or when made by any prior indorser, if the subsequent indorsements are struck out before it is again put into circulation. *Mead v. Small*, ii. 207.

7. If the place of payment of a note is designated in a memorandum at the bottom; or if to the acceptance of a bill is added a particular place of payment, with the assent of the holder; such memorandum or qualification is part of the contract. *Tuckerman v. Hartwell*, iii. 147.

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

9. Bills of exchange, and negotiable notes, should be paid on demand, if it be made at a reasonable hour, on the day they fall due; and if not then paid, the acceptor or maker may be sued on that day; and the indorser or drawer also, after notice given or duly forwarded. *Greeley & al. v. Thurston*, iv. 479.

II. *Of their transfer, by indorsement or otherwise.*

1. A bill of exchange payable to the order of the drawer, and not indorsed, may be assigned, for a valuable consideration, by delivery only; and for the benefit of the assignee an action lies against the acceptor, in the name of the drawer, as on a bill payable to himself. *Titcomb v. Thomas*, v. 282.

2. The interest of one of several joint assignees of such bill may be transferred to others by delivery of the bill, and payment by them of his share of the money due upon it. *Ib.*

3. Where one of two joint promisees in a negotiable note, having it in his possession, was requested by the other to sell it and apply the proceeds to their common benefit, and he sold it accordingly; but the other refused to indorse it, being called upon for that purpose; after which the seller indorsed it in their joint names;—it was held that the purchaser could not maintain an action on the note as indorsee, the authority of the seller being revoked by the refusal. *Lowell v. Reding*, ix. 85.

4. The payee of a negotiable promissory note, having indorsed it in blank and delivered it in pledge to another, as collateral security for his own debt, has still the right to negotiate it to a third person; who may maintain an action upon it in his own name as indorsee, the lien of the pledgee being discharged before judgment. *Fisher v. Bradford*, vii. 28.

5. 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. *Fuller v. McDonald*, viii. 213.

III. *Of their acceptance.*

If the holder of a bill of exchange, who is entitled to an absolute acceptance, takes a special and conditional one, he cannot resort to the drawer but upon failure of the drawee to pay according to the terms of such limited and conditional acceptance. *Campbell v. Pettengill*, vii. 126.

IV. *Of demand and notice.*

1. Where the promisee in a negotiable note, payable in six months, sold it, having made and signed this indorsement on it—"I guaranty the payment of the within note in six months"—this was holden to be an absolute and original undertaking, by which it was the duty of the guarantor to see that the maker paid the money

within the time specified,—or to take notice of his neglect and pay it himself. *Cobb & al. v. Little*, ii. 261.

2. If the indorser of a note has protected himself from eventual loss by taking collateral security of the maker, it is a waiver of his legal right to require proof of demand on the maker, and notice to himself. *Mead v. Small*, ii. 207.

3. Where the residence of the drawer of a bill of exchange is unknown to the holder, he ought to inquire of the other parties to the bill, if their residence is known to him. *Hill v. Varrell*, iii. 233.

4. If the maker of a promissory note be absent at the time it falls due, the demand of payment should be made at his domicil, if he have any;—otherwise, diligent search for him will be sufficient.—*Whittier v. Graffam*, iii. 82.

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

6. Though there be no funds in the hands of the drawee of a bill of exchange; yet if the bill be drawn under such circumstances as might induce the drawer to entertain a reasonable expectation that the bill would be accepted and paid, he is entitled to notice.—*Campbell v. Pettengill*, vii. 126.

7. Though the payee of a promissory note indorsed it merely to give it currency, knowing, at the same time, the insolvency of the maker; this, it seems, does not excuse the want of a demand, and notice to the indorser. *Groton v. Dallheim*, vi. 476.

8. 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.—*Lord v. Chadbourne*, viii. 198.

9. Parol evidence is admissible to show that the right to demand and notice was waived by the indorser. *Ib. Fuller v. McDonald*, viii. 213.

10. 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. *Ib.*

V. *Of the liabilities of the parties, and their remedies.*

1. Where one borrowed money, for which he engaged to give a note signed by himself and his father, and in the interim gave his own note, for which the joint note was to be substituted; and the joint note was accordingly signed, but was never delivered to the lender, the son being killed while in the act of carrying it to him; and afterwards, the note falling into the father's hands, he destroyed it;—it was held that the father was not liable for the money.—*Leigh v. Horsum*, iv. 28.

2. The right of the maker of a promissory note, negotiated after it was over due, to set up, as a defence against the indorsee, transactions between himself and the payee, before its transfer; is not restricted to equitable grounds of defence only, as, payment, or failure of consideration; but extends to every thing which would have been good in defence against the payee; such as actual fraud between the parties in the original concoction of the security, &c.—*Tucker v. Smith*, iv. 415.

3. Where the declaration on a bill of exchange contains an averment of due notice of the dishonor of the bill, legal notice must be proved. Evidence that the holder had used due diligence to give notice, without effect, will not support the declaration. *Hill v. Varrell*, iii. 233.

4. The indorser of a bill of exchange is not liable for the costs of a suit commenced by the holder against the acceptor; nor for any commissions paid on the collection of part of the money of him. *Ib. Bangor Bank v. Hook*, v. 174.

5. Where the promisee in a joint and several note signed by three, sued one of the makers alone, and had judgment; this was an election to treat it as a several contract respecting them all. And having afterwards sued the other two jointly, setting forth the previous recovery against one alone, the judgment was for this cause arrested. *Bangor Bank v. Treat*, vi. 207.

6. Where a promissory note was given to *A.* but was intended for the use of *B.* to whom it was accordingly indorsed; it was held that the maker was entitled to the same defence, in an action by *B.* as indorsee, which he might have made if the note had been given directly to *B.* *Thorndike v. Godfrey*, iii. 429.

7. In an action by the indorsee of a dishonored bill or draft, against the acceptor, the declarations of the indorser, made while the interest was in him, are admissible in evidence for the defendant. *Shirley v. Todd*, ix. 83.

In such action it seems, the defendant may avail himself of his demands against the indorser, accruing prior to the transfer of the bill, by filing them in offset under *Stat.* 1821, *ch.* 59, *sec.* 19, so far as may be material to his defence. *Ib.*

VI. *Of the damages and interest.*

The damages on a protested bill of exchange are not given as a liquidated arbitrary mulct; but as a compensation to the holder, for the expense of remitting the money to the place where the bill ought to have been paid. And therefore if the holder receive part of the money of the acceptor, this diminishes the damages, *pro rata.* —*Bangor Bank v. Hook*, v. 174.

[See Agent, III. Assignment, I. III. Assumpsit, I. III. IV. Evidence, XII. *a. b.* XIII. Executors, &c. IX. Interest. Land Agent. Limitations, I. IV.]

BOND.

I. Of the validity and construction of bonds.
II. Of the payment and discharge of bonds.
III. Of bonds given for the debtor's liberties.

I. *Of the validity and construction of bonds.*

1. The balance of authorities seems clearly in favor of the proposition that an immaterial alteration, made by the obligee, avoids the bond. *Barrett v. Thorndike*, i. 73.

2. Where one gave bond to a town, conditioned to support its paupers for five years, and to save the town harmless from all damages, costs and expenses which might happen or accrue for or on account of the liability of the town to be called upon to support or provide for poor persons; and after the expiration of the five years, a suit was commenced against the town, for supplies furnished to a pauper by another town, accruing partly before and partly after the expiration of the term; in which suit the defendants prevailed;—it was held that the obligor was liable for his proportional part of the expenses of defending this suit, within the condition of the bond.—*Saco v. Osgood*, v. 237.

II. *Of the payment and discharge of bonds.*

1. A bond being in suit, and the writ in the hands of the officer, but not served, the obligor went to the attorney of the obligee, to pay him the money. The attorney cast the amount of the debt due, and wrote a receipt on the back of the bond, which was delivered to or taken up by the obligor, who handed over the money, at the same time, to the attorney. While the latter was counting the money he discovered and remarked that the costs had been accidentally omitted, which, however, the obligor refused to pay, and went away with the bond, the attorney refusing to receive the money. Hereupon it was held that the bond was not discharged. *Steward v. Riggs & al.* ix. 51.

2. An execution debtor being within the prison limits, under a statute bond, his friends entered into a collateral agreement for payment of the demand; whereupon the creditors gave him a receipt, not under seal, in full satisfaction of the judgment and execution. In an action afterwards brought upon the bond, this discharge was held a sufficient bar, though the creditor had not been able to derive any benefit from the agreement. *Ellingwood & al. v. Dickey & al.* ix. 125.

3. An official bond, being given for official good conduct, is not discharged by a faithful accounting for monies to the amount of the penalty; but stands good as a security for losses and defalcations to that amount. *Potter v. Titcomb*, vii. 302.

III. *Of bonds given for the debtor's liberties.*

The *Stat.* 23, *Hen.* 6, *cap.* 9, against bonds given for ease and favor, is part of the common law of this State. *Winthrop v. Dockendorff & al.* iii. 156.

2. But no bond is within the meaning of this law, unless it is given to the arresting officer, as obligee. *Ib. Kavanagh v. Sanders,* viii. 422.

3. Bonds for ease and favor being those only which are given to purchase an indulgence not authorized by law; a bond given for the debtor's liberties, under *Stat.* 1824, *ch.* 281, is good, though it does not strictly conform to the rules indicated in the statute. *Baker v. Haley & als.* v. 240.

4. Such bond may properly be taken to the officer making the arrest. *Ib.*

5. Where a debtor in execution was liberated from prison, on giving a bond conforming to the provisions of a law for the relief of poor debtors, which was not then in force ;—it was holden that the bond was good at common law ;—and the debtor having regularly taken the poor debtor's oath, in the forms provided by the repealed law, the creditor, in a suit on the bond, had execution awarded in equity, for only a nominal sum, with full costs. *Winthrop v. Dockendorff,* iii. 156.

6. 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. *Kavanagh v. Sanders,* viii. 422.

7. 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. *Ib.*

[See Assignment, I. Bail. Bastardy, II. Chancery, IV. Escape. Interest. Poor debts, II. III. IV. Taxes, II.]

BOOMS.

[See Androscoggin Bridge, &c. Tolls.]

BOWDOINHAM.

[See Constitutional Law, V.]

BRIDGE.

[See Corporation.]

CASES DOUBTED OR DENIED.

CASES COMMENTED ON, LIMITED AND EXPLAINED.

Butler v. Damon, 15 *Mass.* 223.	vi. 392
Campbell v. Phelps, 1 *Pick.* 62.	v. 149
Coffin v. Storer, 5 *Mass.* 252.	iii. 182
Crosby v. Parker, 4 *Mass.* 110.	ii. 319
Davis v. McArthur, 3 *Greenl.* 27.	iv. 82
Dean v. Peel, 5 *East.* 45.	iv. 39
Eastport v. Lubec, 3 *Greenl.* 220.	viii. 202
Elwell v. Shaw, 16 *Mass.* 42.	iii. 339
Flint v. Sheldon, 14 *Mass.* 443.	vi. 37
Fox v. Whitney, 16 *Mass.* 118.	v. 376
Geyer & al. v. Bradford, 4 *Mass.* 324.	v. 119
Goodwin v. Hubbard, 15 *Mass.* 210.	iv. 406
Greenleaf v. Kellogg, 2 *Mass.* 568.	vii. 50
Hackley v. Patrick & al. 3 *Johns.* 528.	vi. 45
Hall v. Williams, 6 *Pick.* 232.	ix. 149
Hampton v. McConnell, 3 *Wheat.* 234.	ix. 149
Haskell v. Walker, 11 *Mass.* 181.	ii. 384
Hobart v. Tilton, 1 *Greenl.* 399.	iv. 143
Holmes v. Chadbourn, 4 *Greenl.* 10.	viii. 423
Hunt v. Whitney, 4 *Mass.* 620.	v. 53
Hussey & al. v. Thornton & al. 4 *Mass.* 405.	iv. 348
Jones v. Fales, 4 *Mass.* 245.	iii. 181
Joy v. Oxford, 3 *Greenl.* 134.	ix. 93
Kavanagh & al. v. Askins, 2 *Greenl.* 397.	iv. 67
Kelleran v. Brown, 4 *Mass.* 443.	viii. 251
Kleine v. Catara, 2 *Gall.* 61.	vi. 25
Laidlaw v. Organ, 2 *Wheat.* 178.	vi. 188
Lassell v. Reed, 6 *Greenl.* 222.	vii. 202
Lewis v. Webb, 3 *Greenl.* 326.	iv. 143
Lincoln & Ken. Bank v. Richardson, 1 *Greenl.* 79.	ii. 329
Lindon v. Hooper, *Cowp.* 414.	vii. 139
Lobdell v. New Bedford, 1 *Mass.* 153.	vii. 445
Loker v. Haynes, 11 *Mass.* 498.	iv. 195
Lowell v. Spring, 6 *Mass.* 398.	vi. 284
Lyman v. Estes, 1 *Greenl.* 182.	ii. 85
Maine Insurance Co. v. Weeks, 7 *Mass.* 438.	vi. 354
May v. Haven, 9 *Mass.* 325.	iv. 466

CERTIORARI.

1. The writ of *certiorari* is grantable only on the petition of those who have a direct and vested legal interest in the subject matter.—*Bath Br. Co. v. Magoun*, viii. 292.

2. 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. *Ib.*

[See Ways, II. III.]

CHANCERY.

I. *Of bills for specific performance.*

1. In a bill in chancery, seeking the specific performance of a written contract, the party sought to be charged may shew by parol, that by reason of fraud, surprise or mistake, it does not truly exhibit what was agreed between the parties. *Bradbury v. White*, iv. 391.

2. 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*. *French v. Sturdivant*, viii. 246.

3. If it may be so brought, the officer is a competent witness for the plaintiff. *Ib.*

4. 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.—*Stearns v. Hubbard*, viii. 320.

II. *Of bills to redeem mortgages.*

1. Where a mortgagee, having entered into the mortgaged premises in presence of two witnesses, pursuant to the statute, afterwards stipulated by a memorandum in writing that he would reconvey the premises whenever the debt should be satisfied out of the rents and profits, or otherwise; the mortgagor, notwithstanding the lapse of more than three years since the entry, may have a bill in equity to redeem. *Quint v. Little*, iv. 495.

2. And if the bill sets forth these facts, a plea in bar, stating only the entry for condition broken, more than three years before the filing of the bill, and that the debt is still unpaid, is a bad plea. —*Ib.*

3. Where the mortgagee, after entry for condition broken, conveyed the premises in fee, in distinct parcels, to two others, it was held that they were properly joined as defendants in a bill to redeem. *Wing v. Davis*, vii. 31.

III. *Of trusts.*

1. The language of the *Stat.* 1821, *ch.* 50, giving to this Court equity jurisdiction in "all cases of trust arising under deeds, wills, or in the settlement of estates," is applicable only to express trusts, arising from the written contracts of the deceased; and not to those implied by law, or growing out of the official character or situation of the executor or administrator. *Given & ux. v. Simpson & al.* v. 303.

2. Where the parties have reduced their contract to writing, the written instrument alone is to be resorted to, for the measure of their liability;—and if the writing amounts to a declaration of trust,

its extent is to be gathered from the writing only, unaffected by parol testimony. *Chadwick v. Perkins*, iii. 399.

IV. *Of relief against penalties and forfeitures.*

1. A statute granting chancery powers to relieve against all penalties and forfeitures, in actions at common law, it seems may be allowed, if such is its general language, to operate upon penalties and forfeitures already incurred at the time of its enactment; without violating the principle that vested rights are not to be disturbed; the party injured having still the right to recover all which, in equity and good conscience, is due to him. *Potter v. Sturdivant*, iv. 154.

2. In a hearing in chancery on a penal bond, the burden of proof is on the plaintiff, to show how much is due in equity and good conscience. *Gowen v. Nowell*, ii. 13.

V. *Of general relief.*

In equity, relief will be given against mere lapse of time, where that is not of the essence of the contract; if the party seeking relief has acted fairly; unless the delay of performance on his part has been so long as to justify the inference that he had abandoned the contract. *Getchell v. Jewett*, iv. 350.

[See Contract, VII. Conveyance VII. *a*. Estate upon condition. Parish, VII.]

VI. *Rules of practice in Chancery.*

I.

Ordered, that the rules and regulations adopted by this Court at York, August Term, 1820, respecting practice in chancery cases, be and the same are hereby repealed as to all future proceedings; and that the following rules and regulations in relation to the proceedings and practice in such cases be, and the same are hereby established.

II.

General outline of practice.

The Court adopt, as the outline of practice, the practice of the Supreme and Circuit Courts of the United States in chancery cases

so far as the same is not repugnant to the constitution and laws of this State, or changed and simplified by the following rules.

III.

Of prolixity and useless averments.

All unnecessary prolixity and repetition in the pleadings, and useless or obsolete averments, shall be avoided; of which class averments as to *combination* and *pretence* may generally be considered.

IV.

Of charges and interrogatories.

All original bills shall contain a full, clear and explicit statement of the plaintiff's case, and conclude with a general interrogatory; but the plaintiff may, when his case requires it, propose specific interrogatories, and may allege, by way of charge, any particular fact, for the purpose of putting it in issue.

V.

Of the manner of the answer.

Upon the *general* interrogatory contained in the bill, the defendant shall be required to answer as fully, directly and particularly, to every material allegation or statement in the bill, as if he had been thereto particularly interrogated.

VI.

Of the Subpœna.

The original process to require the appearance of the defendant, (when the bill is not inserted in an original writ as provided by statute) shall be a *subpœna* in the form following:

STATE OF MAINE.

——— *ss.* To A B of ——— (addition.)

Greeting.

We command you that you appear before our Supreme Judicial Court, next to be holden at ——, within and for said county of ——, on the —— Tuesday of —— next, then and there to answer to a bill of complaint exhibited against you in our said Court, by C D of —— (addition) and to do and receive what our said Court shall then and there consider in this behalf. Hereof fail not, under the pains and penalties of the law in that behalf provided.

Witness P. M. Esq. the —— day of ——, in the year of our Lord 18— Clerk.

The writ shall bear teste of the Chief Justice, or first Justice of this Court, not a party to the suit, and shall be under the seal of the Court, and signed by the clerk. It shall be served by the same officers, and in the same manner, as other original writs of summons are by law to be served.

VII.

Of the return day, and time of entering appearance.

The bill may be filed in the clerk's office in vacation, and a *subpœna* shall thereupon issue of course, upon the application of the plaintiff or his solicitor, returnable at the then next term of the Court. The *subpœna* in such case, shall be served fourteen days at least before the return day. When the bill is filed in term time, the Court will order the *subpœna*, returnable on a certain day in the same term, or at the ensuing term, as the case may require; but the defendant shall never be compelled to appear, nor subject to any penalty for not appearing, unless the *subpœna* be served upon him fourteen days at least before the day on which it is returnable.

VIII.

Of the service of a copy of the bill, and time of making answer in such case.

The plaintiff may in all cases cause the defendant to be served with a copy of the bill, at the same time the *subpœna* is served, and by the same officer; the copy to be delivered to the defendant, or left at the last and usual place of his abode, and to be attested by the clerk, unless the bill is inserted in a writ of attachment or summons; in which case the copy shall be attested by the officer by whom the writ is served; and when such copy of the bill shall have been duly served on the defendant, sixty days or more before the day on which the writ is returnable, the defendant shall be held to demur, plead or answer, on the return day of the writ, unless, for good cause shewn, the Court shall allow further time for the purpose.

IX.

Of the time of answering, pleading, and taking testimony.

When a bill is filed in term time, and a *subpœna* is issued returnable at the ensuing term, the defendant shall file his demurrer, plea or answer in the clerk's office at such time in vacation as the Court shall order, not less than sixty days after service on him of the *sub-*

pœna and of the attested copy of such order at the service of the *subpœna.* And when an answer is so filed, if not excepted to, the plaintiff may file his replication in the clerk's office in the same vacation; and upon giving notice thereof to the defendant, not less than thirty days before the ensuing term, the parties may proceed to take the examination of their witnesses, so that the cause may be heard and determined at the ensuing term, or if the plaintiff shall elect to proceed to a hearing on the bill and answer, he may give notice thereof to the defendant, not less than thirty days before the ensuing term, and the cause shall then be heard and determined accordingly. In the computation of time, as mentioned in these rules, the day on which service is made or notice given, is to be excluded. And all notices herein required to be given by either party to the other, may be given to his solicitor or counsel in writing.

X.

When the bill may be taken pro confesso.

If the defendant, after being duly served with the original process or with the *subpœna,* shall neglect to enter his appearance on the return day thereof; and if it shall appear to the Court, by the return of the officer or otherwise, that he had personal notice of the suit, fourteen days at least before such return day, his default may be recorded, and the bill may be taken *pro confesso.*

XI.

Before whom the answer may be sworn to.

The answer of a defendant may be sworn to before any Justice of the Peace, and shall be returned inclosed and sealed, to the clerk's office, and be by him opened and filed.

XII.

Proof to be by depositions.

All proof shall be by depositions; which, after issue joined on a plea, or after answer and replication are filed, may be taken, certified, opened, filed and used, in the same manner, and under the same regulations, as depositions are which may be taken to be used in trials at common law.

XIII.

Of the trial of facts by a Jury.

Whenever it shall become necessary or proper to have any fact tried or determined by a Jury, the Court will direct an issue for that

purpose to be formed by the parties, containing a distinct affirmative of the points in question, and a denial or traverse thereof; and the issue thus formed and joined will be submitted to a Jury, in the same Court in which the suit may be depending.

XIV.

Of pleas in bar.

A defendant may in all cases, should he elect so to do, avail himself of the subject matter of a plea in bar, by inserting it in and as a part of his answer.

XV.

Of overruling pleas and demurrers.

Demurrers, pleas and answers shall be decided on their own respective merits. Answers are not to be considered as overruling pleas, nor answers or pleas as overruling demurrers.

XVI.

Of Amendments.

Amendments may be made by leave of Court, in any part of the proceedings, or stage of the cause, on such terms as they may judge reasonable and proper.

XVII.

Of depositions in perpetuam.

Depositions *in perpetuam rei memoriam* may be taken for and used in the same manner in the trials of cases in chancery, as in cases in the courts of common law; provided they are taken and recorded in conformity to the statute in such case made and provided.

XVIII.

Of bills of revivor.

In those cases where, according to chancery practice in said Courts, a *bill of revivor* would be necessary, the *original bill* may be amended according to existing facts, if a change has taken place as to the person entitled to prosecute the suit; and if the change taken place relates to the person or persons proper to defend, a suggestion thereof shall be inserted by way of amendment of the bill, and a *subpœna* shall be served as before mentioned, on the person substituted or joined, to appear and answer to the bill.

XIX.

Of supplemental bills.

And when, *according to chancery practice* in said Courts, a *sup-*

plemental bill becomes necessary and proper, the same may be dispensed with; and the new facts shall be inserted by way of amendment of the original bill, at any time before decree; and where new parties are rendered necessary in the defence, a *subpœna* shall be served on them as aforesaid, to answer to the bill.

CHARTER.

[See Corporation.]

COLLECTOR OF TAXES.

[See Town, III. *b*.]

CONDITION.

[See Conveyance, X. *b*.]

CONSIGNMENT.

[See Agent, IV. V.]

CONSTABLE.

If a constable, having given bond for the faithful performance of his duties and trust as to all processes by him served or executed, seize the goods of A. under an execution against B, it is not merely a private trespass, but is a breach of his bond. *Archer v. Noble*, iii. 418.

CONSTITUTIONAL LAW.

I. Of the Act of Separation from Massachusetts.

II. Of the organization of the departments of government.

III. Of the elective franchise.

IV. Of general legislation.

V. Of legislation in particular cases.

VI. Of the compatibility of offices.

I. *Of the Act of Separation from Massachusetts.*

1. Whether the term "grants," &c. mentioned in the 7th of the terms and conditions of the act separating Maine from Massachusetts, can be extended beyond the immediate acts of the legislature, so as to include lands conveyed by the deeds of the committee on Eastern lands—*dubitatur*. *Lapish v. Wells*, vi. 175.

2. By the clause in the Act of Separation, exempting the lands of *Massachusetts* from taxation while the title remains in the Commonwealth, is intended the legal and not the equitable title to such lands. *Emerson v. Co. Washington*, ix. 88.

II. *Of the organization of the departments of government.*

1. The power given to the legislature by the Constitution, *Art.* 4, *sec.* 2, to apportion the number of representatives upon the counties according to the number of inhabitants, having regard to the relative increase of population, has respect only to those fractions, which must necessarily exist in any general apportionment; and is to be exercised by duly estimating the relative increase of population in the several counties; and where the ratio of increase will allow, giving a just and proper effect to these fractions, by covertting a fraction into a total, as a basis of calculation. *App.* iii. 477.

2. The Executive duties of the State, when constitutionally exercised by the President of the Senate, devolve, at the end of the political year when so exercised, on the President of the Senate of the next political year, if the office of Governor continues vacant. vi. *App.* 506.

3. When a quorum of the Senate is constitutionally elected, a convention of the Senate and House of Representatives cannot

legally be formed for the purpose of supplying deficiencies in the Senate, without the concurrence of both these branches of the legislature. vi. *App.* 514.

4. And it belongs to the Senate alone to ascertain who are the constitutional candidates to supply such deficiencies. vi. *App.* 514.

5. Whether such convention may be formed by the House of Representatives and the Senators elected; *quære.* *Ib.*

6. A less number than twenty Senators, if it be a majority of that number, may organize the Senate, and transact any business in the filling of vacancies, &c. which is authorized by the constitution. *App.* vii. 489.

7. While the President of the Senate, in virtue of that office, is clothed with the power of the chief Executive, the office of Governor being vacant, he cannot lawfully preside or vote in the Senate. *Ib.*

8. In order to form a convention for the purpose of filling vacancies in the Senate, it is necessary that both branches of the legislature, being duly organized, should concur, and if vacancies be filled by a convention formed without such previous concurrence on the part of the Senate, the elections so made will be void. *App.* vii. 490.

9. If a Senator is not constitutionally elected, his being afterwards suffered to sit and vote as a Senator does not cure the defect, or give any validity to his election.

III. *Of the elective franchise.*

1. Whether a town, having the right to send a representative, has the power to waive that right by a vote not to send one, so as to bind the minority in such town; *quære.* *App.* vi. 486.

2. 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. *Hobbs v. Getchell,* viii. 187.

3. To qualify a citizen to be an elector of State officers, he must have resided the three preceding months not only in the State, but in the town or plantation where he claims to vote. *App.* vii. 492.

4. Elections of State officers may be as well by printed as by written ballots within the meaning of the constitution. *Ib.*

5. Persons who have received assistance from any town as paupers, or been disposed of in service as such by the overseers of the poor, may still vote for State officers, if otherwise qualified, provided they have not been paupers within three months next preceding the day of election. *App.* vii. 497.

6. A person who supports his family in one town, and resides to transact business in another town, can vote for State officers only in the town where his family has resided for the three months next preceding the election. *Ib.*

7. Ballots for persons who do not possess the constitutional qualifications of a representative cannot be counted as votes, under *Part* 1, *art.* 4, *sec.* 5. of the constitution, so as to prevent a majority of the votes, given for eligible candidates, from constituting a choice. —*Ib.*

8. A ballot containing a less number of names for Senators than is assigned to the Senatorial district in which it is given, is still a constitutional ballot. *Ib.*

IV. *Of general legislation.*

1. The Resolve of *March* 19, 1821, rendering valid a certain class of marriages, so far as it has a bearing upon questions of settlement under the pauper laws for expenses incurred subsequent to its passage, is constitutional. *Lewiston v. N. Yarmouth*, v. 66.

2. All acts of the legislature are presumed to be constitutional; and will not be pronounced otherwise, except where their unconstitutionality is free from just doubt. *Lunt's case*, vi. 412.

3. The legislature has a right to impose reasonable limitations and duties upon the sale of spirituous liquors, and the exercise of certain trades, and public offices, as sheriff, coroner, and the like. And therefore the *Stat.* 1821, *ch.* 133, prohibiting the sale of certain liquors, except in certain modes, and upon license first obtained and duties paid, is not repugnant to the general rights and liberties of the citizen, secured by the constitution. *Ib.*

4. It is within the constitutional powers of the legislature to pass laws regulating certain branches of trade or manufactures in parti-

cular districts only; as well as to establish local tribunals. *Pierce v. Kimball*, ix. 54.

5. Therefore the Statute of *March* 9, 1832, which provides for the survey of lumber in the county of *Penobscot* in a particular manner, and for the appointment of a Surveyor general for that county, by the Governor and Council, forbiding the sale or purchase of lumber in that county not surveyed and marked by him or his deputies according to the peculiar provisions of that statute, is not an unconstitutional act. *Ib.*

V. *Of particular legislation.*

1. The Legislature of this State has no authority, by the Constitution, to pass any act or resolve granting an appeal or a new trial in any cause between private citizens, or dispensing with any general law in favor of a particular case. *Lewis v. Webb*, iii. 326.

2. The right to trial by Jury, secured by the *bill of rights, sec.* 20, is not violated by ordering a nonsuit, where the evidence is wholly adduced by the plaintiff, and not controverted. *Perley v. Little*, iii. 97.

3. The legislature having, in the act, dividing the town of *Bowdoinham* and incorporating a part of it into a new town by the name of *Richmond*, enacted that the latter town should be holden to pay its proportion towards the support of all paupers then on expense in *Bowdoinham;* which it did for two years; after which, on the petition of *Richmond*, another act was passed, exonerating this town from such liability in future; it was held that the latter act was unconstitutional and void, as it impaired the obligation of the contract created by the original act of division and incorporation. *Bowdoinham v. Richmond*, vi. 112.

4. The legislature of this State has no authority, by the constitution, to grant a review of a suit between private citizens. *Durham v. Lewiston* iv. 140.

5. Whether a person whose private property has not been taken from him, and whose rights are only consequentially affected, by a statute creating a corporation for opening a canal, has a right to contest its constitutionality:—*dubitatur*. *Spring v. Russell*, vii. 273.

6. The legislature has the power to judge when the public exigency requires that private property be taken for public uses. And it is within the range of its powers to change the course of a public river, for the public convenience. *Ib.*

VI. *Of the compatibility of offices.*

1. The term "office" implies an authority to exercise some portion of the sovereign power, either in making, administering, or executing the laws. An "employment," does not. The care of the public lands, by preventing trespasses, under the resolve of *Feb.* 6, 1822, being therefore merely an employment, and not "a civil office of profit under this State," it may be exercised by a senator or representative. *App.* iii. 481.

2. The offices of Sheriff, Deputy Sheriff, and Coroner, are incompatible with the office of Justice of the Peace. *App.* iii. 484. *Bamford v. Melvin*, vii. 14.

[See Appeal, I. Baldwin. Disseisin, I. Ferries. Nonsuit. Settlers.]

CONTRACT.

XIII. Of the remedies of the parties to a contract, and herein, of the *lex loci.*

XIV. Of the damages.

I. *Of the making and proof of a contract.*

1. R. agreed to pay for a quantity of hay, provided L. should pronounce it merchantable; and L. pronounced it "a fair lot, say merchantable; not quite so good as I expected; the outside of the bundles some damaged by the weather." Held that R. was not bound. *Crane v. Roberts*, v. 419.

2. R. agreed to cut all the timber from certain lands of W, and transport it to W.'s mill, to be sawed into boards, of which R. was to receive a certain proportion; and further agreed that the ownership of the timber should remain with W. till certain debts of R. were paid, and all parts of the agreement were fulfilled. It was held that this was a valid agreement; and that a sale of part of the logs, after they were taken from the land, to a purchaser having notice of the terms of the contract, conveyed no title against the owner of the land. *Waterston & al. v. Getchell*, v. 435.

3. Where divers persons subscribed to a fund for the support of public worship, promising to pay to the trustees of the parish funds the sums subscribed, on condition that the trustees should manage the fund in a certain manner, and apply the income thereof to the support of a congregational minister, and to the payment of the parish taxes which might be assessed on the subscribers;—it was held that the promise was binding on the subscribers; the acceptance of it on the conditions prescribed, being an engagement on the part of the trustees to perform those conditions. *Parsonage fund v. Ripley*, vi. 442.

4. The subsequent change of the articles of faith adopted by the church, though in some essential particulars, does not absolve the parties from the obligation of such contract. *Ib.*

5. Where, upon the sale of two contiguous parcels of land, at different rates per acre, the agent of the grantor stipulated in writing that if either of the parcels, on being surveyed, should be found deficient in quantity, the purchaser should have compensation for the

deficiency, at the rate at which it was purchased; and one parcel was found to contain less, and the other more than the estimated quantity, but the aggregate value remained about the same;—it was held that the purchaser was still entitled to compensation for the part deficient; and that the seller could not claim any allowance for the excess in the other tract, by way of set-off, not having provided for this contingency, in his contract. *Cool. v. Gardiner*, vi. 124.

6. Where three brothers entered into written articles of agreement not under seal, with a fourth, for the support of their parents, fixing the ratio of contribution by each; and therein providing for a new ratio, in case a fifth brother should be able and liable to pay; which was signed by all the five;—it was held that the fifth, though not named as one of the contracting parties, yet by his signature assented to the terms of the contract, and became liable, if able, to pay his proportion. *Kendall v. Kendall*, vii. 171.

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

8. *A.* and *B.* made a contract for the sale of a chaise, by which it was agreed that *B.* should give his notes for the price, payable in twelve months, and in the mean time should keep possession of the chaise, and use it at his pleasure; but that the property should remain in *A.* till the notes were paid. *B.* accordingly gave his notes and received the chaise; which he used as his own, and afterwards sold, before the year expired, to *C.* who had in fact no knowledge of the terms of the contract. After the expiration of the year, and after *C.* had used the chaise some months, with the knowledge of *A.* and had subsequently sold it, *A.* brought an action of trover against him for the chaise; and it was held that the action might well be maintained; there being on the part of *A.* no fraudulent delay or acquiescence. *Sawyer v. Shaw & al.* ix. 47.

II. *Of the legality and validity of contracts.*

1. One having fraudently obtained goods under pretence of a

purchase, the creditor pursued him for satisfaction; and a compromise was so far effected, as that, for a valuable consideration, the creditor affirmed the sale from himself, and agreed that the debtor might sell the goods to A. Afterwards, the original term of credit having expired, the creditor sued the debtor, and attached the same goods as his property; and in an action of trespass, brought by A against the sheriff for taking these goods, it was held that the terms of the agreement did not estop the creditor from impeaching the sale to A as fraudulent. *Dingly v. Robinson*, v. 127.

2. Where one requested permission to bring an action for his own benefit, in the name of another, against a third person, to recover a debt supposed to be due, promising to indemnify the nominal plaintiff against all damages; such promise was held lawful and binding, being neither against good morals nor public policy, nor within the statute of frauds. *Knight v. Sawin*, vi. 361.

3. A promise by a third person to indemnify an officer for neglecting his duty in the service of a precept, being founded in an illegal consideration, is void. *Hodsdon v. Wilkins*, vii. 113.

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

III. *Of the consideration.*

Whether a vote by a town to indemnify a collector of taxes for damage which he had previously sustained in consequence of an illegal assessment of taxes, is supported by a sufficient consideration, and constitutes a binding contract,—*quære*. *Page v. Frankfort*, ix. 115.

IV. *Of implied contracts.*

1. A promise may be implied on the part of a corporation, from the acts of its agent, whose powers are of a general character.—*Abbot v. Hermon*, vii. 118.

2. Therefore where one built a school house under a contract with persons assuming to act as a district committee, but who had no authority; yet a district school was afterwards kept in it by di-

rection of the school agent; this was held to be an acceptance of the house on the part of the district, binding the inhabitants to pay the reasonable value of the building. *Ib.*

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

V. *Of the time of performance.*

What is reasonable time within which an act is to be performed, when a contract is silent on the subject, is a question of law. *Attwood v. Clark*, ii. 249.

VI. *Of mutual contracts.*

1. Where one seised of an equity of redemption in land, gave a bond to a stranger, conditioned to convey to him a part of the land in fee with general warranty, on the payment of certain notes given by him for the purchase money, and then died insolvent, the original mortgage being still unpaid; it was holden that the legal representative of the obligor might recover the amount of the notes, the remedies being mutual and independent. *Read v. Cummings & al.* ii. 82.

2. *W.* gave his promissory note to a manufacturing corporation, in consideration of the written engagement of *R.* who signed as agent of the corporation, but without authority, to procure the obligation of the treasurer for certificates of two shares of their capital stock. *R.* obtained the obligation of the treasurer to deliver certificates of two shares on payment of the note; and requested *W.* to call at his house and receive them. Hereupon it was held, that *R.* was personally bound by his engagement;—that this was a sufficient consideration for the note, the promises being mutual and independent; that no tender of the treasurer's obligation was necessary, the possession of *R.* being the possession of *W.*;—and that the condition of payment of the note, therein inserted, was proper, and not inconsistent with *R*'s engagement. *Saco Manf. Co. v. Whitney*, vii. 256.

VII. *Of contracts as affected by the statute of frauds.*

1. If there be a parol agreement for a right of way, or other interest in land, and any acts be done in pursuance thereof which are prejudicial to the party performing them, and are in part execution of the contract, the agreement is valid notwithstanding the Statute of frauds. *Ricker v. Kelly*, i. 117. [*Kidder v. Hunt*, 1 *Pick.* 328.]

2. But the doctrine of part performance is not admitted except in Courts of equity. *Freeport v. Bartol*, iii. 340.

3. A sale of timber by parol, to be cut and carried away by the vendee, seems not to be within the statute of frauds. *Erskine v. Plummer*, vii. 447.

4. The want of mutuality of contract is no objection in equity, if it has been signed by the party sought to be charged. *Getchell v. Jewett*, iv. 350.

5. Where an agreement concerning the sale of real estate is contained on two separate papers, neither of which contains in itself any reference to the other, parol evidence is inadmissible to prove their connexion. *Freeport v. Bartol*, iii. 340.

6. Contracts for the sale of pews are within the statute of frauds. —*Ib.*

7. If a contract in writing be signed by the party sought to be charged, it is sufficient to take the case out of the statute of frauds, though it be not signed by the party seeking the remedy. *Barstow v. Gray*, iii. 409.

8. In a declaration upon a contract required by the statute of frauds to be in writing, it is not necessary expressly to allege that the contract was reduced to writing. *Cleaves v. Foss*, iv. 1.

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

10. And it is not necessary that his authority should be in writing. *Alna v. Plummer*, iv. 258.

11. And a memorandum of the sale, entered by his clerk, is

sufficient, if it be made in presence of the parties, and of the auctioneer. *Ib.*

12. It is not necessary, in order to found a decree for specific performance of a contract, that the breach be such as would support a claim for damages at law. *Ib.*

13. It is not necessary, by the statute of frauds, that the consideration for a collateral undertaking should be recited in the note or memorandum signed by the party to be charged. *Levy & als. v. Merrill & al.* iv. 180.

14. The right to flow the lands of another, in order to raise water sufficient to carry a mill, subject to the claim of the owner for damages, is given, by necessary implication, in the statute regulating mills, and therefore needs not to be proved by writing, under the statute of frauds. *Clement v. Durgin*, v. 9.

15. The damages occasioned by such flowing may be waived or relinquished by parol. *Ib.*

16. Where one undertakes to pay the debt of another, and by the same act also pays his own debt, which was the motive of the promise; this is not such an undertaking to pay the debt of another as is within the statute of frauds, and therefore it is not necessary that it should be in writing. *Dearbon v. Parks*, v. 81.

17. Though the consideration of such promise was land, yet the party to whom the debt was to be paid may recover the amount in an action for money had and received. *Ib.*

18. If one promise to pay the debt of another, in consideration that the creditor will "forbear and give further time for the payment" of the debt; this is a sufficient consideration, though no particular time of forbearance be stipulated; the creditor averring that he did thereupon forbear, from such a day till such a day.—*King v. Upton*, iv. 387.

19. The consideration of a collateral undertaking to pay the debt of another needs not to be expressed in writing. *Ib.*

20. Where one, upon giving a deed of release and quitclaim, stipulated by parol that if the deed did not pass and secure the land to the grantee, he would make it good;—this was taken as a promise to convey a legal and perfect title to the land, and therefore as void, by the statute of frauds. *Bishop v. Little*, v. 362.

21. A parol renewal of such promise, within six years, creates no legal obligation. *Ib.*

22. Where R the son of D, bargained with the plaintiff for a yoke of oxen, giving his promissory note payable in six months for the price, under an agreement that the oxen should be his own if the note was paid at its maturity, otherwise the plaintiff should take them back; and the son afterwards exchanged them with a stranger, for other oxen, and then absconded, leaving on the farm of D his father, with whom he had dwelt, the oxen thus obtained; and the note being due and unpaid, the plaintiff called on D for the oxen, who replied—"If you will be easy a fortnight, I will become accountable for the oxen which R had, and bring you the money;" this was held to be an original undertaking of D, and so not within the statute of frauds. *Griffin v. Derby*, v. 476.

23. Where the plaintiff was requested by a third person, by letter, to do certain work, the letter being in these terms:—"Sir, I want you to bring a load of hay and five bushels of corn, and four oxen, and come as soon as possible;' to which the defendant subjoined the following postscript:—"Sir, I will see you have your pay, if you will come and work with your team for Mr. G. as you and he agrees;"—it was held that this was an original, and not a collateral undertaking by the defendant; that the hay and corn were within its terms; that the agreement between the plaintiff and the third person might be proved by any one who knew the fact; and that the presence of the defendant, at the making of such agreement, was not necessary, in order to bind him. *Copeland v. Wadleigh*, vii. 141.

24. It seems that a mortgage of personal property is not a contract of sale, within the third section of the statute of frauds.—*Gleason v. Drew*, ix. 79.

VIII. *Of the alteration of a written contract.*

1. Where the subscribers to a petition for a highway, in which the particular courses between the two *termini* were expressly described, appointed an agent to take charge of the petition, agreeing

to pay for his services and expenses; after which the petition was amended by striking out all the intermediate courses, and praying for the location of a road between the same *termini*, in such manner as the locating committee should deem expedient;—it was held that such alteration absolved from the contract those petitioners whose private interests it might materially and injuriously affect.—*Jewett & al. v. Hodgdon*, iii. 103. [*Irvin v. The Turnpike Co.* 2 *Penn.* 466.]

2. Where a petition for a road was altered after its signature, and one of the petitioners, being sued for his proportion of the expense incurred in prosecuting it, claimed to be absolved from his contract on the ground of the alteration, it is for the Jury to determine whether the alteration was material. *Jewett v. Conforth*, iii. 107.

IX. *Of the construction of contracts.*

1. Where B. and W. lent their names each to the other, as indorsers of accommodation notes, negotiated at a bank, and also had mutual dealings; and a third person contracted to settle the account of B. with W. "if there should be anything due W. from him, as well for any notes W. held of his own,"—"as also for certain notes which are in the bank, which W. is responsible for, by reason of lending or exchanging each other's names as security for the other"; it was held that W. by the terms of this contract, could not claim the amount of his liabilities for B; but only the balance of them, after deducting the amount of B.'s liabilities for him. *Quimby v. Whitney*, v. 53.

2. Where N. contracted for the purchase of an estate from A. and paid him 1200 dollars in part, and D. advanced the residue for him, being 500 dollars, and took the conveyance directly to himself, upon a verbal agreement that he should release the land to N. on payment of the 500 dollars; and then D. died, and his heirs refused to convey;—it was held that to carry into effect the original understanding of the parties, N. might be considered as having advanced the 1200 dollars to enable D. to purchase the estate, for

which the estate of the latter was liable, as for money lent to the testator. *Perkins v. Dunlap*, v. 268.

3. Where the owner of land sold, by deed, all the timber trees standing thereon, and in the same deed gave to the vendee two years within which to take off the timber; it was held that this was a sale of only so much of the timber as the vendee might take off in the two years; and that an entry by him after that period was a trespass. *Pease v. Gibson*, vi. 81.

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

5. Where one conveyed "four clapboard machines and two shingle machines," then being in a certain place in the town of L. "and likewise the patent right for L. and J.—during the term of the patent, which is fourteen years from *Sept.* 3, 1813"—this was held to be a conveyance of a patent right to use both the clapboard and shingle machines. *Judkins v. Earl*, vii. 9.

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

7. An agreement "to sell" land, binds the party to execute a proper deed of conveyance. *Smith v. Haynes*, ix. 128.

8. Where two citizens of this State agreed by a written memorandum, the one to deliver, and the other to receive, at *Philadelphia*, "from one to three thousand bushels of potatoes;" it was holden that the seller had the right to deliver any quantity he chose, within the range of the terms of the contract; and that he was not bound to make his election, till they arrived at the place of delivery, though requested by the other party after the shipment was made. *Small & al. v. Quincy & al.* iv. 497.

9. In such a case parol testimony is inadmissible to prove that it was also agreed, at the time of making the contract, that the quantity intended to be delivered should be designated and made known to the buyer, as soon as the cargo was shipped. *Ib.*

10. A promise to pay a certain sum in the wares of a particular trade, must be understood to mean such articles as are entire, and of the kind and fashion in ordinary use; and not such as are antiquated and unsaleable. *Dennett v. Short*, vii. 150.

11. 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. *Heald v. Cooper*, viii. 32.

12. 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. *Ib.*

13. 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. *Overlock v. Hills*, viii. 383.

14. The principal debtor in a promissory note conveyed to his surety a certain quaintity 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. *Ware v. Otis*, viii. 387.

X. *Of the admission of parol evidence to vary or explain a written contract.*

1. In all written simple contracts, parol evidence of the consideration may be received, in an action between the original parties. *Folsom v. Mussey*, viii. 400.

2. 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. *Ib.*

XI. *Of the rescinding of contracts.*

1. Where, under an agreement for the sale of land, the purchaser had made partial payments, but the other party had no title to the land, but held only a contract for a title to be afterwards completed by the owner; it was held that this fact, being well known to the purchaser at the time of making the contract, furnished no ground to recover back the money paid, the contract not being rescinded. *Smith v. Haynes*, ix. 128.

XII. *Of the waiver of a special contract, or the time fixed for its performance.*

1. *C* and *D* entered into a written contract, by which *C* agreed to pay to *D* $3500 within six months, for one fourth part of a certain ship; and *D* agreed that "when C should pay the full amount of the consideration aforesaid," he should receive a bill of sale of that part of the ship. *C* paid part of the money; the six months elapsed; and then *D* was summoned as the trustee of *C*. In his

disclosure he disclaimed any intention of availing himself of the lapse of the six months to avoid the contract on his part; and stated that he had received *C's* part of the ship's earnings on account of the balance due on the purchase-money; but insisted that he had never waived his right to payment of the whole in six months; that he was under no legal obligation to convey the fourth part to *C;* and that as between *C* and his creditors he should insist on his legal rights:—Yet it was held that the facts disclosed by *D* amounted to a waiver of his right to punctual payment at the time stipulated; and that he was chargeable, as the trustee of *C* for the value of one fourth part of the ship. *Gage v. Coombs*, vii. 394.

2. *S.* & *C. M.* contracted to build certain locks and portions of canal for the *Cumberland* and *Oxford* canal corporation, by *Aug.* 1, 1829, at a stipulated rate of payment; the work to be estimated monthly by the engineer, and three-fourths of the estimated sum to be paid monthly by the corporation; the residue to be retained till the whole should be completed. On the first day of *August*, 1829, the engineer made his monthly report of estimates of work performed, containing the sum of $700 as due to *S.* & *C. M.* for work done; which sum the directors, on the same day, voted and ordered to be paid. Afterwards, on the same day, before payment, and before an order was drawn by the president, in the usual course of business, for the sum thus voted, the corporation was summoned as trustee of *S.* & *C. M.*, who failed to fulfil their contract; which, in three days afterwards, was duly declared broken and abandoned by their non performance. Hereupon it was held that the vote to pay the $700 was a waiver of any advantage resulting to the corporation from the failure of *S.* & *C. M.* to complete the contract; and bound the corporation to pay that sum; and that therefore it was chargeable as their trustee. *Wyer v. Merrill*, vii. 342.

3. If the party, entitled to repudiate a contract because it has not been performed in reasonable time, does any act which amounts to an admission of the existence of the contract, he cannot afterwards elect to treat it as void. *Brinley v. Tibbets*, vii. 70.

4. Thus, where one in possession of land not his own, bargained with the true owner for a title, and gave his promissory notes for the purchase money, the owner stipulating in writing to give a deed

in a reasonable time ; which was not done ; but the purchaser continued in possession, and afterwards sold his interest in the land, his grantee undertaking to procure and deliver up the notes; it was held, in an action brought to recover payment of one of these notes, that the want of a seasonable delivery of the deed was cured by the subsequent conduct of the purchaser ; and that he was bound to pay the notes; having his remedy still, on the contract to deliver the deed. *Ib.*

5. One contracted to build a road for the inhabitants of a town, for a certain sum ; one half of which was to be paid when the work should be completed, and the other half in a year after. He made the largest portion of the road ; having underlet a portion of it, which was not completed ; and the town made the first payment, with knowledge of the facts, and without objection. Afterwards, and before the whole was finished, he sued for the stipulated price, counting upon the special contract, and on a *quantum meruit.* Hereupon it was held—that the payment of the first instalment by the town, was a waiver of the terms of the special contract, and entitled the plaintiff to recover on the *quantum meruit* for as much as was completed. *Hayden v. Madison*, vii. 76.

XIII. *Of the remedies of the parties to a contract ; and herein, of the* lex loci.

1. An agreement made pending a suit, that it shall abide the event of another action, cannot be set up as a bar to such suit, after the determination of the former, if the party afterwards chooses to proceed. *Jewett v. Cornforth*, iii. 107.

2. Where one, being indebted on the books of a lottery ticket vender for tickets in various lotteries, some of which might lawfully be sold and others not, made a remittance of money to be passed to his general credit, exceeding the amount he then owed ; and afterwards made further purchases which were lawful, and which were entered in the same account, it being still open, bringing him again in debt ; and the account was then settled by his note for the balance ;—it was held that the remittance having

been intended to apply to all the charges on book, illegal as well as legal, the parties, as to that part of the transaction were *in pari;* and the law would not lend its aid to the defendant to recover back the amount paid for the tickets illegally sold, by suffering those charges to affect the validity of the note; which was therefore to be regarded as given for the balance of the subsequent and legal charges. *Greenough v. Balch*, vii. 461.

3. The *lex loci* applies only to the interpretation or validity of contracts; and not to the time, mode, or extent of the remedy.—*Judd v. Porter*, vii. 337.

4. Therefore a discharge under the insolvent laws of another State, of which both the parties were citizens, releasing the person from arrest, but not impairing the contract itself, cannot avail to affect any remedy pursued in this State. *Ib.*

XIV. *Of the damages.*

Where a special contract is entered into, for a stipulated price, but is afterwards abandoned; and part of the same services are performed for a *quantum meruit;* it seems that the stipulated price may still be regarded as the agreed value of the whole services to be performed. *Hayden v. Madison*, vii. 76.

[See Action, I. Arbitrament and Award, I. III. Assumpsit, II. III. Bailment. Chancery, I. II. III. V. Constitutional Law, V. Conveyance, X. *c.* Corporation. Damages, I. Estate upon condition. Evidence, VII. *c.* Guaranty, I. II. III. Husband and wife. Infant. Insurance. Partnership, III. Pleading, I. Tender. Town, V. Usage. Ways, II.]

CONVEYANCE.

I. Of the form and execution of a deed of conveyance.

II. Of the description and boundaries of the land conveyed.

III. Of the delivery of the deed.

I. *Of the form and execution of a deed of conveyance.*

1. A deed of land may in this State be considered as any species of conveyance not plainly repugnant to its terms, and necessary to give effect to the intent of the parties. *Emery v. Chase*, v. 232.

2. Where one contracted to build a road for the State through four of its townships, in consideration of a contract made by the State's agents to convey to him 8000 acres of land as soon as the road should be completed, the land to be surveyed and laid off in any of the State's lands through which the road might pass; and afterwards, but before any such survey or conveyance, the party having made the road, sold and conveyed an undivided third part of the 8000 acres;—this was held sufficient to pass the fee; the land being afterwards designated by a survey agreeably to the contract. *Fairbanks v. Williamson*, vii. 96.

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

4. Where a deed, though containing the name of the person who paid the consideration-money, and with whom the covenants were made, did not express the name of any grantee; and the *habendum* was to the grantor and his heirs and assigns forever; and the covenantee had entered and held possession several years, and afterwards conveyed the land in fee; it was held, in a writ of right against his grantee, brought by the heirs of the original grantor, that as nothing seemed to have passed by the deed, it could not operate to qualify the possession of the covenantee; the character of which was therefore purely a question for the Jury. *Paul v. Moody*, vii. 455.

II. *Of the description and boundaries of the land conveyed.*

1. If a deed of land refer to a monument as then existing, which in fact is not yet erected, and immediately afterwards the parties fairly erect such monument with the express view of conforming to the deed, such monument will govern the extent, though not entirely coinciding with the deed. *Ken. Purchase v. Tiffany*, i. 219.

2. *Aliter* if such monument be erected for any other purpose. *Ib.*

3. Where lots have been granted, designated by number, according to a plan referred to, which has resulted from an actual survey, the lines and corners made and fixed by that survey are to be respected, as determining the extent and bounds of the respective lots. *Pike v. Dyke*, ii. 213.

4. In ascertaining the boundaries of the lots of land into which a township may have been laid out, the actual locations by the original surveyor, so far as they can be found, are to be resorted to; and if any variance appears to exist between them and the proprietors' plan, the locations actually made control the plan. *Brown v. Gay*, iii. 126.

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

dence; and this representing them as of equal width, the deficiency was apportioned equally to each lot. *Ib.*

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

7. Where land is conveyed by deed, referring to a plan, between which, and the original survey, there is a difference in the location of lines and monuments; the lines and monuments originally marked as such, are to govern, however they may differ from those represented on the plan. *Ripley v. Berry & al.* v. 24.

8. If a tract of land conveyed is described in the deed as part of of a certain lot, being "all the land which on the 28th day of *February*, 1814, was without fence, on the northerly side" of a certain brook; this description is sufficiently certain. *Webber v. Webber*, vi. 127.

9. Where the plan and the monuments made by the original surveyor of a tract of land do not correspond, the monuments are to be resorted to, in order to ascertain the true location. *Esmond v. Tarbox*, vii. 61.

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

11. When a grant or deed of conveyance of land contains an express reference to a certain plan, such plan, in legal construction, becomes a part of the deed, and is subject to no other explanations by extraneous evidence than if all the particulars of the description had been actually inserted in the body of the grant or deed. *Ken. Purchase v. Tiffany*, i. 219.

12. After the original monuments are gone, and such a period of time has elapsed that no one can be found who remembers to have seen them, or can testify to their location; uniform continued occupancy, by buildings, fences, or other equivalent indications of ownership, is evidence that the land was located according to the original monuments. *Cutts v. King*, v. 482.

13. 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. *Loring v. Norton*, viii. 61. *Scamman & al. v. Sawyer*, iv. 429.

14. 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. *Ib.* [See *post* X. *c.*]

III. *Of the delivery of the deed.*

1. Where the grantor in a deed, after its execution, handed it to the grantee to be put into a trunk which contained their joint papers, they being partners in trade—the key of which trunk was always kept by the grantor, and was returned to him as soon as the deed was deposited therein,—this was holden to be no delivery of the deed. *Chadwick v. Webber*, iii. 141.

2. Where a deed was placed in the hands of referees, to be delivered to the grantee if their report should be accepted by the Court; and one of the referees afterwards, but before the report was returned to Court, and in anticipation of its acceptance, delivered the deed, in presence of the grantor, who did not object; this was held to be a good delivery of the deed, though the grantee afterwards procured the rejection of the report. *Porter v. Cole*, iv. 20.

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

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

5. Where the parties to a deed were both present at the time of its execution, and the grantor was bound by his previous contract to make the deed; yet the grantee having taken it up and carried it away without the consent of the grantor, this was held to be no delivery of the deed. *Woodman v. Coolbroth*, vii. 181.

IV. *What passes as appurtenant to the land conveyed.*

1. Things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, being on the land at the time of its conveyance by deed, do pass with the realty. *Farrar & al. v. Stackpole*, vi. 154.

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

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

4. By the conveyance of a mill, *eo nomine*, no other land passes in fee, except the land under the mill and its overhanging projections. But the term "mill" may include the free use of the head of water existing at the time of its conveyance, or any other easement which has been used with it, and which is necessary to its enjoyment. *Blake v. Clark*, vi. 436.

5. The agent of the owner of a grist-mill having inserted into it his own mill-stones and mill-irons; it was held that they became thereby the property of the owner of the mill, as part of his freehold, so that the agent could not lawfully sever them again; nor could his creditors seize them for his debt, though the mill had been destroyed by a flood, and they alone remained. *Goddard v. Bolster*, vi. 427.

V. *Of conveyances by agents, and by authority of law.*

1. The Twenty Associates, in 1768, at a legal meeting of the proprietors, voted that their clerk should make and execute any deeds which the standing committee should judge necessary, such deeds being approved in writing by at least two of the committee. In 1785, they voted that *Beauchamp*-neck be sold by the standing committee, at public or private sale. At a subsequent meeting of the standing committee, in the same year, the clerk informed them that *W. M.* had offered six shillings per acre, that being the highest offer, which they thereupon voted to accept. At another meeting of the committee, in *December*, 1789, they passed a vote, declaring that *W. M.* had complied with the terms of the contract, and directing the clerk to execute a deed to him "agreeably to the usual forms in like cases practised"; whereupon the clerk, in *September*, 1790, made a deed, reciting all the previous votes, and conveying the land to *W. M.* in his own name, in his capacity of clerk, and under his own seal; which deed was approved by a written indorsement, signed by three of the committee:—this deed, after thirty years' possession of the land by the grantee, was held to be a valid conveyance of the title of the proprietors. *Thorndike v. Barrett*, iii. 380.

2. A vote of proprietors authorising a committee to sell lands, empowers them also to make deeds, in the name of the proprietors. *Decker v. Freeman*, iii. 338.

3. A vote of the proprietors of a township, "that the collector be empowered to give deeds of the land sold for taxes," by implication empowers him also to make sales of the lands of delinquent proprietors, in the mode provided by law. *Farrar & al. v. Eastman & al.* v. 345.

4. It seems unnecessary that deeds made by proprietors' committees, and persons acting *in auter droit*, other than executive officers, should contain recitals of their authority and proceedings in the sale; as their certificates of such proceedings are not in themselves evidence of the facts they recite. *Innman & als. v. Jackson*, iv. 237.

5. Such facts may always be proved *aliunde;* and, in proper cases, may be presumed. *Farrar & al. v. Eastman & al.* v. 345.

6. In the sale of proprietors' lands, by a committee duly authorized for that purpose, it is sufficient if the deed have one seal affixed, though the committee consists of several members, who sign the deed. *Decker v. Freeman & al.* iii. 338.

7. A majority of the committee, appointed under the Resolves of Massachusetts for the sale of Eastern Lands, were competent to execute any of the powers vested in that committee. *Pejepscot Proprietors v. Cushman*, ii. 94.

8. After a sale of lands by auction, by license of Court, it is the duty of the seller to make and tender a deed within a reasonable time. Two days after the sale is a reasonable time for this purpose. And the purchaser is justified in delaying to complete the contract till he has had a reasonable time to take legal advice respecting the formality and validity of the deed tendered. *Cleaves v. Foss*, iv. 1.

VI. *Of conveyances as affected by the statute of frauds.*

The equitable claim of a tenant, to the value of his improvements or betterments, made on lands held by possession only, arising under the statutes of 1821, chapters 47 and 60, may be conveyed by parol, accompanied by an actual transfer of the possession to the purchaser; it being, not an interest in the land itself, but merely an equitable right to compensation for the improvements. *Lombard v. Ruggles*, ix. 62.

VII. *Of fraudulent and voluntary conveyances.*

(a.) *Fraudulent conveyances.*

1. Where one conveyed land to his son, the deed expressing a valuable consideration, but the son verbally engaging to support the grantor during life, as a consideration for the land; and a year afterwards the son, being about to die insolvent, gave a mortgage to the father, conditioned for the support of his father during the residue of his life;—it was held, in an action by the father against one claiming the land by virtue of a sale by the son's administrator, that the mortgage was good, even against the creditors of the son; and that parol proof of the contract was admissible, notwithstanding the deed. *Tyler v. Carlton*, vii. 175.

2. If a creditor, to secure his debt, takes from his debtor an absolute conveyance of land, giving his parol promise to reconvey on payment of his debt; this is not void against other creditors, without proof of actual fraud. *Reed v. Woodman*, iv. 400.

3. And if the debtor, in such case, having paid the debts, instead of taking the reconveyance directly to himself, procures the deed to be given to a third person, between whom and himself there was a corrupt intent to deceive and defraud his creditors; yet a subsequent creditor cannot impeach this conveyance, no estate having passed back to the debtor. *Ib.*

4. Where a farmer made a conveyance of his farm to his son, in consideration of the son's bond to support him during his life, retaining in his own hands personal property to a greater amount than the debts he owed at the time; this conveyance was held good, there being no proof of actual fraud; although some of the personal property was exempt from attachment; and although after his decease, in consequence of the charges of administration, and of the sum allowed by the Judge of Probate to the widow, the estate proved insolvent. *Usher v. Hazeltine*, v. 471.

5. *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 transactions 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. *Gardiner bank v. Wheaton*, viii. 373.

(*b.*) *Voluntary conveyances.*

1. If a conveyance is made by one who is insolvent, even upon a good and sufficient consideration advanced to him, but not *bona fide*, and the purchaser is conusant of and assenting to the fraudulent intent, it is void against creditors. *Howe v. Ward*, iv. 195.

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

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

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

5. *W. S.* devised certain lands to the children of his daughter *M. W.* who were minors, living with their parents; but the will, being defectively executed, and inoperative, was never proved. Afterwards the heirs at law undertook to settle the estate agreeably to the will, without administration; and accordingly *M. W.* with *S. W.* her husband, released all right in the land to the executors, who at the same time conveyed it to the children; a large debt due from *S. W.* to the deceased being also extinguished. It was held that this conveyance was good against the prior creditors of *S. W.* who subsequently extended an execution on his life estate in the land. *Wilson v. Ayer*, vii. 207.

(*c.*) *Who may, or may not, impeach them.*

1. The relation of debtor and creditor among the sureties in a

bond, so as to entitle one of them to impeach a voluntary conveyance made by another, commences at the time of executing the bond; and not at the time when one actually pays more than his proportion of the debt. *Howe v. Ward*, iv. 195.

2. If a creditor, having demands accruing partly before and partly after a conveyance by his debtor, which he would impeach on the ground of fraud, blends them all in one suit, and having recovered judgment, extends his execution on the land; he can come in only in the character of a subsequent creditor. *Reed v. Woodman*, iv. 400. *Usher v. Hazeltine*, v. 471.

3. The party against whom a trespass has been committed, does not thereby become a creditor of the trespasser; nor is he on that account entitled to impeach a conveyance on the ground of fraud, unless the conveyance is subsequent to the rendition of judgment in an action for the trespass. *Meserve v. Dyer*, iv. 52.

VIII. *Of the registry of deeds of conveyance.*

1. If a second purchaser is informed of the existence of a prior title to the land, it is enough to prevent the operation of his deed to defeat such title; without regard to the manner in which such information was obtained. *Porter v. Cole*, iv. 20.

2. In cases of implied notice of a conveyance not recorded, the facts must be of such a nature as to leave no reasonable doubt of the existence of the conveyance. *Lawrence v. Tucker*, vii. 195.

3. M. granted his farm in fee to B. and at the same time took back a conveyance to himself and his two minor sons. The former deed was registered; the latter not; and M. remained in possession as before. It was held that this possession was sufficient notice of the conveyance to M. without registry; and that therefore a creditor of B. who extended his execution on the land, without other notice, took nothing by the extent. *Webster v. Maddox*, vi. 256.

4. The title of an attaching creditor to the land afterwards taken by extent, is not affected by any knowledge which the officer may have had of the existence of a prior conveyance of the same land, made by the debtor to another person; even though such knowledge may have been communicated to the creditor himself, after the attachment, and before the extent. *Stanley v. Perley*, v. 369.

5. 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. *Hewes v. Wiswell*, viii. 94.

6. 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.* *Ib.*

IX. *Of alterations, cancelling and redelivery of the deed.*

1. There is a difference between contracts, or bonds, and deeds of conveyance of land, as to the effect of alterations made in them. *Barrett v. Thorndike*, i. 72.

2. If a grantee voluntarily destroy his title-deed, or fraudulently make an immaterial alteration therein, his title to the land is not thereby impaired. *Ib.*

3. If the grantee, not having recorded his deed, voluntarily and without fraud surrender it to the grantor, this may be effectual, as between the parties, to revest the estate in the grantor, but cannot affect the rights of third persons. *Ib.*

X. *Of the construction of conveyances.*

(a.) Covenants and intentions.

1. The word "give," in a deed of bargain and sale, in this State, does not import a covenant of warranty. *Allen v. Sayward*, v. 227.

2. In giving a construction to the report of commissioners appointed by the Judge of Probate to make partition of an intestate's estate, the plain intent of the commissioners, though it appears only by way of recital, will be carried into effect, if the parties concern-

ed have acquiesced, by a separate enjoyment of the property, corresponding with such intent. *Blake v. Clark*, vi. 436.

3. The covenant usually inserted in a collector's deed—"that the taxes aforesaid were assessed and published, and notice of the intended sale of the said lands given according to law,"—is a stipulation not only that the taxes were in fact assessed, but that the assessment was legally made. *Stubbs v. Page*, ii. 378.

(b.) Reservations, exceptions and conditions.

1. If land be sold with a reservation of the standing trees, the reservation is good, and the trees do not pass to the grantee. *Safford v. Annis*, vii. 168.

2. In the conveyance of a mill-site, falls, and privileges, &c. "exclusive of the grist mill now on said falls, with the right of maintaining the same," this reservation secures to the grantor no title to the soil, but only a right to the use of the mill then standing, so long as it is kept in repair. *Howard v. Wadsworth*, iii. 471.

3. By a grant of land by deed of feoffment, "reserving" to the grantor "the improvement of the one half of the premises, with necessary wood for family use, during his own natural life, and the life of his wife;"—it was held that the estate passed, one moiety to the use of the grantee and his heirs in fee, and the other moiety to the use of the grantor and his wife for their lives, and the life of the survivor of them, with remainder in fee to the grantee and his heirs. *Emery v. Chase*, v. 232.

4. Where one made a deed in fee, reserving to himself a life-estate in a part of the premises, and declaring further that "this deed is made, and to have effect, upon the following conditions"—viz.—the payment of money at divers times to other persons;—it was held that the fee passed immediately, on condition subsequent. *Howard v. Turner*, vi. 106.

5. It seems that a sale of standing trees by parol, though it might bind a subsequent purchaser of the land having notice of the sale, yet without such notice it cannot affect him. *Gardiner Manuf. Co. v. Heald*, v. 381.

(c.) The premises conveyed.

1. Where one owned a tract of land, described in his title-deed

in these words,—"beginning on the westerly side of *Abagadasset* river, where the northerly line of a thirty-two-hundred-acre lot No. 24, strikes said river, and running from thence a W. N. W. course on said northerly line 200 poles; then running a S. S. W. course, at right angles with said northerly line 67 poles; then running an E. S. E. course, parallel with the northerly line aforesaid, about 216 poles more or less, to *Abagadasset* river aforesaid; and from thence northerly on the water's edge, to the northerly line of said tract, No. 24, the first mentioned bounds, being about 100 acres more or less;"—and afterwards made a conveyance in the following terms—"beginning at the northeast corner of a thirty-two-hundred-acre lot, No. 24, thence running a W. N. W. course about 200 poles; thence running southerly 67 poles; thence running E. S. E. about 216 poles; thence northerly 67 poles to the first mentioned bounds, containing about 100 acres more or less;"—it was held that by the latter deed all the land passed which was described in the former; though, by strictly following the courses and distances alone, as given in the latter deed, a strip of land on the bank of the river would be left untouched. *Purinton & al. v. Sedgley & al.* iv. 283. See another case of construction of a particular deed in *Scammon & al. v. Sawyer*, iv. 429.

2. Where the proprietors of a large tract of land had conveyed a parcel to *R. T.* by metes and bounds, and also contracted to sell him an adjoining parcel, which under that contract, he had entered upon and inclosed within fences—and afterwards they conveyed to *W. M.* "all their unappropriated lands" in the same tract, bounding it in part "on land of *R. T.*" whose deed was not then on record;—it was holden that the lands thus possessed by *R. T.* were appropriated," and did not pass to *W. M.* *Thorndike v. Barrett*, ii. 312.

3. Where several particulars are named, descriptive of the land intended to be conveyed in a deed, if some are false or inconsistent, and the true are sufficient to designate the land, those which are false and inconsistent will be rejected. *Vose v. Handy*, ii. 322.

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

teen miles from the nearest point of the river. *Winthrop v. Curtis*, iii. 110.

5. The line of the town of *Dresden* being described, in the act of incorporation, as running a north-north-east course, including the whole of a certain farm, when in truth that course would not include the whole farm;—it was resolved that the line of the farm should prevail, as being the more certain monument, and more evidently intended by the legislature. *Cate v. Thayer*, iii. 71.

6. Where a tract of land was granted fronting on a brook, and extending back by a given course, two miles; it was held that by this description each side line should be two miles in length; and that the rear line must be parallel with the front. *Keith v. Reynolds*, iii. 393.

7. Where a parcel of land is conveyed as being the whole of a certain farm, which is afterwards described in the deed by courses and distances which do not include the whole farm; so much of this description will be rejected, as that the whole may pass. *Ib.*

8. A deed of a mill, dam, and falls, "and a right to the road and landing to haul logs as has been customary," conveys only an easement in the road and landing. *Hasty v. Johnson*, iii. 282.

9. Where one owning land through which a mill stream flowed, granted all that part of it which was situated east and north of the stream; it was held that the boundary was the centre or thread of the water. *Morrison v. Keen*, iii. 474.

10. A "settler," within the description given in the resolve of 1784, received from the Commonwealth a deed of a hundred acres of land, described as being the land on which he lived, but further described by metes and bounds which excluded a large portion of his actual possession. It was held that the general language of the deed could not control the particular description, so as to include the whole of his possession; notwithstanding the declared intent of the legislature to quiet the settlers in their possessions. *Allen v. Littlefield*, vii. 220.

11. Where one held a farm by two several deeds of separate parcels thereof, made by the same grantor at different times; and afterwards made a deed to a third person, using language sufficiently indicating the whole farm, and then adding that the premises were

the same which he purchased by deed of such a date, referring to the latter only of his title deeds;—it was held that the whole farm passed by this conveyance; and that the recital of the source of the grantor's title was superfluous, the description being otherwise sufficient. *Drinkwater v. Sawyer*, vii. 366.

12. The grant of four townships of land in 1799 by the Commonwealth of *Massachusetts* to *Henry Knox*, containing an exception of the lots occupied by settlers, not exceeding one hundred acres to each, certain lots were afterwards laid out to settlers, fronting on the *Penobscot* river, and bounded by monuments erected on the bank, being the lots in their actual occupancy prior to the grant. It was held that the flats fronting these lots were within the fair construction of the exception, and belonged to the settlers as riparian proprietors. *Knox v. Pickering*, vii. 106.

13. The mode of ascertaining the side lines of water lots, from the upland to low-water-mark, under the Colonial Ordinance of 1641, where they have not been otherwise settled by the parties, is, to draw a base line from one corner of each lot to the other, at the margin of the upland, and run a line from each of these corners, at right angles with such base line, to low-water-mark. If the line of the shore is straight, the side lines of the lots, thus drawn to low-water-mark, will be identical; but if by reason of the curvature of the shore, they either diverge from, or conflict with, each other, the land inclosed by both lines, or excluded, as the case may be, is to be equally divided between the adjoining proprietors. *Emerson v. Taylor*, ix. 42.

14. Where one owning a farm, which he held by two deeds, the one conveying to him an undivided third part, and the other the residue, made a mortgage deed of a tract of land, described as being the same land mentioned in his first deed, to which he referred, and as being his whole farm;—it was held that this reference to the first deed must be intended for description of the land only, and not for the quantity of estate or interest conveyed; and that the mortgage extended to the whole farm. *Willard & al. v. Moulton*, iv. 14.

15. Where one being about to purchase a lot of land, agreed with the owner of the adjoining lot that if he completed the pur-

chase he would let him "have thirty feet always to be kept open adjoining his house;" and the house stood ten feet from the line of the lot about to be purchased;—it was holden that the party was entitled to a conveyance of a strip of land thirty feet wide, measuring from the line of the lot, and not from the house, and extending back to the rear of the lot; and to as large an estate in the easement, as the other had it in his power to grant. *Bradbury v. White*, iv. 391.

16. Where one who owned three adjoining parcels of land, each of which was particularly described in the deed by which he held them, made a deed of conveyance commencing in the language of the former deed, as a conveyance of their parcels, but describing only the first parcel, and referring to the deed from his grantor to himself;—it was held that all the three parcels passed by this deed. *Child & ux. v. Fickett*, iv. 471.

17. If a lot be granted fronting on, and bounded by a river, the side lines are to be continued to the main stream, though they thereby cross a point formed by the junction of one of its branches with the principal river. *Graves v. Fisher & al.* v. 60.

18. By the use of the term "about," in describing the length of line in a deed of conveyance, it is understood that exact precision was not intended; but if the place where the monument stood, by which the distance was controlled and determined, cannot be ascertained, the grantee must be limited to the number of rods or feet given. *Cutts v. King*, v. 482.

19. 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. *Lapish v. Bangor Bank*, viii. 85.

20. 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." *Ib.*

21. 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 compliment of a hundred acres each was laid out to them upon the upland. *Ib.*

22. The grant of a saw-mill, "with a convenient privilege to pile logs, boards and other lumber," conveys only an easement in the land used for piling. *Ib. Thompson & al. v. Prop'rs. of Androscoggin bridge.* v. 62.

XI. *Of conveyances by votes of proprietors.*

1. If at a proprietors' meeting a grant of land be made by vote to an individual, by which the estate passes, it is not competent for the proprietors at a subsequent adjournment to resume it. And when the grantee exhibits evidence of the vote on which his title depends, he does not thereby preclude himself from objecting to the admissibility of the doings of the same proprietors at an adjourned meeting, by which they have undertaken to vacate or modify the grant. *Pike v. Dyke*, ii. 213.

[See Actions real, II. Agent, II. III. VI. Assignment, I. Assumpsit, III. Attachment, III. Contract, VII. IX. Execution, V. Grants by the State. Infant. Mills, I. Mortgage, VI. Partition. Pejepscot claim. Proprietors of lands. Sale, I. II. Taxes, III. Trespass. Usury.]

CORONER.

[See Constitutional law, VI. Sheriff, II. *a.*]

CORPORATION.

1. A statute granting corporate powers is inoperative till it is accepted; but when accepted, it becomes a contract. *Lin. & Ken. Bank v. Richardson*, i. 79.

2. If the charter of a banking company be expired, it may be revived, in all its original force, by a subsequent statute. *Ib.*

3. And such subsequent statute merely revives the former corporation ; but does not create a new one. *Ib.*

4. In actions by or against *quasi* corporations, as towns, parishes, &c. which have no corporate funds, each inhabitant or corporator is a party to the suit, because his private property is liable to be taken to satisfy the judgment. *Adams v. Wiscasset Bank*, i. 361.

5. But in the case of corporations, properly so called, as incorporated banking companies, &c. it is otherwise, because no property is liable to be seized except the corporate property. *Ib.*

6. Where a corporation was created with the exclusive right to clear a certain river from obstructions, and to receive certain tolls from the owners of lumber floated down; in an action for such tolls it was held incompetent for the defendant to show that the charter was obtained by fraud; or, that the corporators had not effected its objects, by removing certain specified obstructions. *Bear Camp river Co. v. Woodman*, ii. 404.

7. Where the proprietors of a toll-bridge were authorized by law to commute the toll with any person or corporation; this was held to extend only to such corporations as already had legal capacity to enter into such a contract. *Bussey v. Gilmore*, iii. 191.

8. A charter, authorizing the corporators to erect a toll-bridge, from one point to another across a river, does not give them the right to appropriate another person's land for the purpose of erecting a toll-house at the side of the bridge; nor does it convey to them any thing more than an easement in the land upon which the bridge is constructed. *Thompson & al. v. Androscoggin bridge*, v. 62.

9. 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 all the corporate powers therein granted. *Day v. Stetson*, viii. 365.

10. 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 pro-

visions would afford no protection against a suit at law, brought for the recovery of damages. *Ib.*

[See Agent, II. III. Assignment, I. Contract, IV. Evidence, XII. *a.* Proprietors of lands.]

COSTS.

I. In what cases costs are allowed.
II. By whom costs are recovered.
III. What costs are recovered.
IV. Of costs as affected by the amount of damages, laid or recovered.

I. *In what cases costs are allowed.*

1. If a real action is abated by the death of one of the demandants, the tenant shall not have costs, it being the act of God. *Ryder v. Robinson*, ii. 127.

2. Where several issues are made up and tried in the same cause, some of which are found against the "party prevailing," he is still entitled to his costs upon all the issues, by the provisions of *Stat.* 1821, *ch.* 59. *sec.* 17. *O'Brien v. Dunlap*, v. 281.

3. If judgment is arrested for one bad count, the defendant is entitled to his costs on all the issues, as the party prevailing. *Gibson v. Waterhouse*, v. 19.

4. Upon an appeal from the 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. *Ware v. Ware*, viii. 42.

5. 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 State v. Webster*, viii. 105.

II. *By whom costs are recovered.*

1. Where the tenant in a real action makes an offer to the demandant of the value of the land, in the Court below, pursuant to *Stat.* 1821, *ch.* 47, which is not accepted at the time of the offer, but is accepted at a future term, or in this Court after appeal; the demandant is entitled to costs only up to the time of the offer, and the tenant will be allowed his costs subsequent to that time. *Pro'prs. Ken. purchase v. Davis*, ii. 352.

2. Where judgment was rendered in the Court below on a verdict for the plaintiff, from which the defendant appealed, and in this Court a verdict was again returned for the plaintiff, but for a lesser sum than before; and the judgment here was delayed by the defendant's motion for a new trial, till the interest on the verdict increased the amount of the judgment to a larger sum than it was rendered for in the Court below;—yet it was held that the defendant was entitled to his costs since the appeal, under *Stat.* 1826, *ch.* 347, *sec.* 4, he having obtained a reduction of the damages by his appeal. *Brown v. Attwood*, vii. 356.

3. Where a trustee was summoned to appear out of his county, and made his disclosure before a magistrate of his own county, charging himself as trustee of the goods of the principal, which disclosure was transmitted to the Court, without his personal attendance;—it was held that the only costs he was entitled to retain, out of the effects in his hands, under *Stat.* 1828, *ch.* 382, were his constructive travel of forty miles, three days' attendance, an attorney's fee, and the fee paid to the magistrate before whom the disclosure was made. *Ib.*

4. Where the sum justly due to the plaintiff was more than a hundred dollars, but the defendant tendered and brought into the Court below a lesser sum; and a verdict was entered, *pro forma*, in his favor, and the plaintiff brought the cause up by appeal; after which the plaintiff took out of Court the money tendered; and on trial in this Court the jury found the sum tendered insufficient, and rendered a verdict for the plaintiff for the deficiency, being less than a hundred dollars;—it was held that the case was not within the *Stat.* 1829, *ch.* 444, *sec.* 1, regulating appeals; and that the

defendant was not entitled to a separate judgment for his costs. *Dresser v. Witherle & al.* ix. iii.

III. *What costs are recovered.*

1. Where the plaintiff sued trespass and false imprisonment in the Circuit Court of Common Pleas, and judgment being against him there, he appealed to the Supreme Judicial Court, where he had a verdict for thirty dollars only, yet it was holden that he had "reasonable cause for such appeal," under *Stat.* 1817, *ch.* 185, and was therefore entitled to full costs. *Turner v. Carsley*, i. 15.

2. So, where the action was trespass *quare clausum fregit*, and in this Court, upon appeal by the plaintiff, he had a verdict and judgment for only six dollars; it was holden that he had reasonable cause for the appeal. *Lunt v. Knight*, i. 17.

3. If in replevin, a verdict be found for the defendant as to a small part of the goods, of less value than twenty dollars, yet he is entitled to full costs. *Harding v. Harris*, ii. 162.

4. On an appeal from a judgment of the Court of Common Pleas upon an issue of law, single costs only are recoverable; such issues not being within the provisions of *Stat.* 1822, *ch.* 193, *sec.* 4. *Alley v. Carlisle*, ii. 386.

5. If in *assumpsit* the defendant files his account in offset, in consequence of which the plaintiff's damages are reduced below twenty dollars, the plaintiff is still entitled to full costs; this case not being within the intent of *Stat.* 1821, *ch.* 59, *sec.* 30. *Hathorne v. Cate*, v. 74.

6. If an action of *assumpsit*, in which the *ad damnum* exceeds seventy dollars, be brought into the Supreme Judicial Court by a fictitious demurrer, and upon trial the plaintiff recover less than twenty dollars; the plaintiff shall have judgment for his costs to the amount of one quarter of the damage recovered, under *Stat.* 1807, *ch.* 123. And the defendant shall have a separate judgment for his costs on the appeal under *Stat.* 1817, *ch.* 185. And in such case of fictitious demurrer the Court will not certify "that there was reasonable cause for such appeal." *Boston v. York*, i. 406.

7. 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. *Williams v. Veazie*, viii. 106.

8. 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. *Simpson v. Seavey*, viii. 138.

IV. *Of costs as affected by the amount of damages laid or recovered.*

1. If the plaintiff in review succeeds in correcting an error in the former verdict against him when he was original defendant, he is entitled to a judgment for the costs of the review, as the party prevailing, under *Stat.* 1821, *ch.* 59, *sec.* 17, though the accumulation of interest may have rendered the last verdict larger than the first. *Kavanagh &. al. v. Askins*, ii. 397.

2. If in the Common Pleas there be verdict and judgment for the defendant, from which the plaintiff appeals, and in this Court recovers less than a hundred dollars, he can have only his costs in the Court below, and the defendant recovers his costs since the appeal. *Leighton v. Boody*, iii. 42.

3. If the defendant appeal from a judgment of the Court of Common Pleas in any of the cases mentioned in *Stat.* 1822, *ch.* 193, *sec.* 4, and suffer judgment in this Court by default, he must pay double costs, the debt or damages recovered in the Court below not being reduced. *Meserve v. Elwell*, iii. 43.

4. Where a count in trespass *quare clausum fregit*, and a count *de bonis asportatis*, were joined in one writ, and in the Court below judgment was rendered upon a verdict for the defendant, from which the plaintiff appealed to this Court, in which a verdict was returned for the defendant upon the first count, and for the plaintiffs upon the second, and their damages assessed at less than a hundred dollars;—it was holden that this was not an action of trespass *quare clausum fregit*, within the meaning of *Stat.* 1822, *ch.* 193, *sec.* 4; and that the defendant was entitled to his costs accruing since the appeal. *Snow v. Hall*, iii. 94.

5. Where the plaintiff appealed from the judgment of the Court of Common Pleas, and in this Court had a verdict for less than 100 dollars, and the judgment thereon was delayed by the defendant's motion for a new trial, until the interest on the verdict increased the amount for which judgment was to be rendered to more than 100 dollars;—it was holden that the plaintiff, and not the defendant, was entitled to costs on the appeal, under *Stat.* 1822, *ch.* 193, *sec.* 4. *Boothbay v. Wiscasset*, iii. 354.

6. Where the verdict, on a trial in this Court, is for a greater sum than was given in the Court below, the Court, on a hearing as to costs, will not go out of the record to ascertain whether the damages, though apparently increased, are in truth diminished as to the principal sum in dispute, and the apparent increase occasioned only by the accumulation of interest. *Baker v. Appleton*, iv. 66.

7. The *Stat.* 1829, *ch.* 444, *sec.* 1, inflicting, in certain cases, an addition of twenty-five *per cent.* to the costs recovered against a defendant appellant, does not apply to cases brought up by demurrer to the plea, with the usual reservation of leave to waive the pleadings in this Court. *Anonymous*, vii. 161.

[See Arbitrament and Award, II. Pleading, V. Replevin. Review, IV.]

COUNSELLORS AND ATTORNIES.

1. The authority of an attorney who has obtained a judgment for his client, continues in force until such judgment is satisfied.—*Gray v. Wass*, i. 256.

2. And if the execution is extended on land, the judgment is not satisfied till the debtor's right of redemption is gone: And therefore payment of the money to the attorney, within a year after the extent, is a good bar to a writ of entry afterwards brought by the creditor against the debtor, for the land. *Ib.*

[See Assumpsit, II. Attachment, III. Rules of Court. Evidence, XII. *a.* Lien. Trustee process, I. Writ.]

COUNTY COMMISSIONERS.

[See Ways, II.]

COURT.

[For what belongs to the Court to determine, as a question of law; and the general powers of the Court:—See Contract, V. Fraud. New Trial. Nonsuit. Practice, IV. Ways, IV.]

COURT OF COMMON PLEAS.

1. The right to issue a *capias* is incident to the jurisdiction of the Court of Common Pleas in all cases of contempt. *Mariner v. Dyer*, ii. 165.

2. The Court of Common Pleas has no jurisdiction of an offence created by statute, unless it is expressly made cognizable in that Court. *Parcher's case*, ii. 321.

[See Replevin. Review, II.]

COURT OF SESSIONS.

1. The Justices of the Sessions, in fixing the prison limits, perform a ministerial office only; in which any peculiar benefit thereby consequentially derived to one of them, does not disqualify him to act. *Codman v. Lowell*, iii. 52.

2. The authority given by *Stat.* 1796, *ch.* 58, *sec.* 3, [*Stat.* 1821, *ch.* 118, *sec.* 24,] to the Courts of Sessions to make assessments for the opening and repairing of highways in townships not incorporated, relates only to highways laid out by the order of such Courts. *Joy v. Oxford*, iii. 131.

[See Ferries. Poor debtors, I. Ways, II.]

COVENANT.

I. Of the performance and breach of covenants.

II. Of the liability of heirs on the covenants of their ancestor.

I. *Of the performance and breach of covenants.*

1. If there be a contract for the sale of lands, and the bargainor agree to "make a warrantee-deed, free and clear of all incumbrances," this agreement is not satisfied by the making of a deed with covenants of general warranty and freedom from incumbrances, unless the grantor had the absolute, entire and unincumbered estate in the land at the time of the conveyance. *Porter v. Noyes*, ii. 22.

2. And if the bargainee consent to accept a deed not knowing that the land is incumbered, he is not bound by such consent, but may afterwards refuse, on discovering the incumbrance. *Ib.*

3. An inchoate right of dower is an existing incumbrance on land; and not a mere possibility or contingency. *Ib.*

4. A covenant in a deed that the land is free from incumbrance, is broken by the existence of a mortgage previously given by the grantor to the grantee.—*Bean v. Mayo & al.* v. 94.

5. But in such case, the condition of the mortgage not being broken, nor the mortgage discharged by the grantee, the damages are but nominal. *Ib.*

6. Where one granted all the growing timber on his land, and covenanted that the vendee should have seven years in which to remove it without being a trespasser; and afterwards sold the land to a stranger, without reserving the trees or giving notice of the grant;—it was held that the sale alone of the land was no breach of the covenant, the vendee of the timber not having been molested. —*Safford v. Annis*, vii. 168.

II. *Of the liability of heirs on the covenants of their ancestor.*

1. It is not necessary, that, in a deed of conveyance, the heirs

of the grantor should be named, in order to give the grantee, after the death of the grantor, the remedy against them on the covenants, which is provided in the *Stat.* 1821, *ch.* 58, *Sec.* 28. *Webber v. Webber*, vi. 127.

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

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

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

4. That his remedy on the covenant of warranty having accrued upon his ouster in *Sept.* 1824, which was after the lapse of the four

years, it should have been pursued against the heirs within one year after it accrued, by the provisions of the statue; which not having done, he had, by his own neglect, lost his remedy on this covenant also: *Ib.*

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

[See Action, I. Conveyance X. *a.* Damages, III. Estoppel, II. Mortgage, I. Release.]

DAMAGES.

I. Of the damages in actions on simple contract.
II. Of the damages in actions on torts.
III. Of the damages in actions of covenant.

I. *Of the damages in actions on simple contract.*

1. Where real estate is sold by auction, and a written memorandum made of the sale by the auctioneer, and a deed tendered to the purchaser, which he refuses; the measure of damages against him is the price at which the land was struck off, with interest; although the title remains as before; the purchaser having his remedy upon the same contract, should the seller refuse to deliver the deed upon a new demand. *Alna v. Plummer*, iv. 258.

2. Where the defendant contracted to carry fifty tons of the plaintiff's hay to a distant port for sale; the hay to be delivered at the ship's side; and after receiving 24 tons on board, declined taking any more because the ship was full;—it was held that it was not necessary for the plaintiff, after this refusal, to tender the residue of the hay at the ship's side, in order to entitle himself to damages;—and that the rule of damages was the difference between what the plaintiff in fact received, or with due diligence and prudence might have obtained for the hay left in his hands, and the price at the port of destination, deducting freight and expenses. *Nourse v. Snow*, vi.208.

3. If the party entitled to the benefit of a contract, can protect himself from a loss arising from the breach thereof, at a trifling expense, or with reasonable exertions, it is his duty to do it. And he can charge the delinquent party with such damages only as, with reasonable endeavors and expense, he could not prevent. *Miller v. Mariner's Church*, vii. 57.

II. *Of the damages in actions on torts.*

1. If an officer, in the service of an execution, conduct irregularly, yet if the goods taken in execution be fairly sold, and the proceeds be applied in payment of the execution on which they were sold, the officer is responsible to the debtor for nominal damages only. *Daggett v. Adams*, i. 198.

2. But if, by the officer's misconduct, the goods were sold under their fair value, he is responsible for the difference between the fair value and the amount of sales. *Ib.*

3. If the property of one person happen accidentally to lodge on the land of another, or in waters of which he has the control as his private property, the latter, in removing it from his premises, is bound to do it with as little injury as possible. *Berry v. Carle*, iii. 269.

4. Where a printer, having contracted to print for his employer a thousand copies of a book, and no more, printed from the same types, while set up at the expense of his employer, five hundred other copies for his own disposal, he was held liable to refund to his employer one third part of the expense of setting up the types, no actual damage having been proved. *Williams v. Gilman*, iii. 276.

5. Where a town clerk inadvertently gave a defendant a false certificate, attested as a copy of record, in order to support his plea of infancy; by reason of which the plaintiff was obliged to obtain a continuance of his cause to the next term, prior to which the debtor died;—it was holden that the town clerk was liable to pay the plaintiff the damages occasioned by the delay and continuance of the action. *Maxwell v. Pike*, ii. 8.

6. In an action against an officer, for not serving and returning

a writ of execution, he may shew the insolvency of the debtor in mitigation of damages, notwithstanding he does not return the precept nor allege that it is lost. *Varril v. Heald*, ii. 91.

7. In such action it is incumbent on the plaintiff to shew that the precept has never been returned. *Ib.*

8. Where a ship master received divers casks of lime on freight consigned to him for sales, which had been duly inspected and branded, and were represented by the owner as good lime, and accordingly sold as such by the master,—but in fact were filled with substances of little or no value,—whereupon he was sued by the vendee, and obliged to respond to him in damages;—it was held that he might recover of the owner of the lime the amount of the judgment recovered against himself, with all costs and expenses necessarily incurred in the defence, he having given the owner immediate notice of the commencement of such suit, and having faithfully and prudently defended it. *Henderson v. Sevey*, ii. 139.

9. In such action against the owner, a copy of the judgment against the master is admissible evidence. *Ib.*

10. In trover for a bond, the condition of which was, that if the plaintiff would remove to the town of P. and dwell there a year, he should have certain lands; and he had not removed thither; the Jury were instructed to estimate the value of the lands, and to deduct therefrom what it would have cost the plaintiff to have performed his part of the condition, and award him the balance in damages;—and held good. *Rogers v. Crombie*, iv. 274.

11. In an action of the case against an officer for not serving an execution, the Jury are to allow the plaintiff such damages only as he has sustained by the breach of duty; unless the neglect was wilful, with a view to injure the plaintiff; in which case they are to allow him his whole debt. *Hodsdon v. Wilkins*, vii. 113.

III. *Of the damages in actions of covenant.*

1. In an action on the covenant of warranty of lands sold, the rule of damages in this State is, the value of the land at the time of the eviction. *Cushman v. Blanchard*, ii. 266.

2. Where a deed conveys no seisin, in law or fact, the measure

of damages is the consideration money and interest thereon. *Stubbs v. Page*, ii. 378.

[See Contract, VII. Costs, IV. Covenant, I. Mills, II. Pleading, VI. Sheriff, IV. *a*. Shipping, III. Trespass, I.]

DAMAGE FEASANT.

[See Distress. Fences, II.]

DEBTOR AND CREDITOR.

[See Assignment. Conveyance, VII. Mortgage, VII. Sale, VI.]

DEED.

1. An indenture, in which several persons are represented as parties of the one part, is the deed of as many persons of that part as execute and deliver it, though it is not signed by them all. *Scott & al. v. Whipple & als.* v. 336.

[See Conveyance, I. III. V. Evidence, IV. Principal and Surety, II.]

DEFAULT.

[See Practice, V. Principal and Surety, II.]

DEFEASANCE.

[See Mortgage, I.]

DEPOSITION.

[See Evidence, XV.]

DEVISE.

1. Where a testator devised lands to his wife, and after her decease to one of his sons, without expressing the nature or duration of the son's title; and bequeathed a legacy to another son "as his proportion of the estate;"—it was holden that the devisee of the remainder, after the death of the wife, took a fee. *Butler v. Little*, iii. 239.

2. A devise of lands to an executor, to be sold for the payment of debts and legacies, with power to give deeds in fee, is a conveyance of the legal estate to him in fee and in trust. *Innman & als. v. Jackson*, iv. 237.

3. Where one devised lands to his son, and his daughter, and two grandsons, (surviving children of a deceased daughter) to be divided between them into three parts, one third to the son, one third to the daughter, and the other third to the two grandsons; and devised other portions to other children in full of their share of his estate; and charged the devisees of the first three parts with the payment of his debts, in equal thirds; and one of the grandsons died in the lifetime of the testator, unmarried;—it was held that the devise to him did not lapse, but survived to his brother. *Anderson v. Parsons & als.* iv. 486.

4. One devised his estate to his son *S.* "provided and on condition he lives to the age of 21 years AND has issue of his body lawfully begotten; but in case he shall die under the age of 21 years and without issue as aforesaid," then to his son *E.* and his heirs. The "and" in the first part of the devise was construed to mean "or," in order to carry into effect the intent of the testator. And hereupon it was held;—that this was an executory devise to *E*;—that *S.* took a fee simple conditional, defeasible only on the subsequent condition of his dying under 21 and without issue;—and that on his arriving at 21 it became an absolute estate in fee simple.—*Sayward v. Sayward*, vii. 210.

5. Real estate devised, is not liable to contribute to the payment of legacies, on a deficiency of personal assets, unless specially charged. *Hayes v. Seaver*, vii. 237.

6. Where one devised to his wife "her full and reasonable dower in all his estate, according to the laws of this State;" it was held that the term "dower" must be taken in its legal acceptation, and be limited exclusively to the realty. *Brackett v. Leighton*, vii. 383.

[See Assumpsit, III. Settlers. Tenants in common.]

DIRECT TAXES.

[See Taxes, IV.]

DISSEISIN.

I. What is or is not a disseisin.
II. Of disseisin by election.
III. Of the effect of a release to the disseisor.
IV. Of the entry to defeat a disseisin.

I. *What is or is not a disseisin.*

1. If the grantee of one who was disseised at the time of the conveyance enter on the land, he is a trespasser; and having gained possession by his own tortious act, he cannot avail himself of his deed to render his continuance in possession lawful. *Hathorne v. Haines*, i. 238.

2. To constitute a disseisin, the possession of the disseisor must have been adverse to the title of the true owner, as well as open, notorious, and exclusive. *Little v. Libby*, ii. 242.

3. An entry on land under a deed recorded, and payment of taxes, is no evidence of a disseisin of the true owner, unless the person who entered has continued openly to occupy and improve it. *Little v. Megquier*, ii. 176.

4. In such a case, though the deed may not convey the legal estate, yet the possession of a part of the land described in it, under a claim of the whole, by the bounds therein expressed, may be considered as possession of the whole, and as a disseisin of the

true owner; and equivalent to an actual and exclusive possession of the whole tract, unless controled by other possession. *Ib.*

5. If a man enter upon land under a deed duly registered, though from one having no legal title to the land, and has a visible possession, occupancy and improvement of only a part of it, such occupation and improvement, unless controled by other facts, is a disseisin of the true owner, as to the whole tract;—because the extent and nature of his claim may be known by inspection of the public registry. *Prop'rs of Ken. Purchase v. Laboree & als.* ii. 273.

6. The *Stat.* 1821, *ch.* 62. *sec.* 6, was enacted to abolish the distinction, existing at common law, between a possession under a deed recorded, and a possession without such title on record; attaching, as against the demandant, the same legal consequences to both. *Ib.*

7. So far as this section is retrospective, and has altered the common law, it is unconstitutional, and cannot be carried into effect, because it would impair vested rights. *Ib.*

8. If the owner of a parcel of land, through inadvertency, or ignorance of the dividing line, includes a part of the adjoining tract within his inclosure; this does not operate a disseisin, so as to prevent the true owner from conveying and passing it by deed. *Brown v. Gay*, iii. 126.

9. Where the acts of ownership, and conduct of a person claiming adversely a title to wild lands, being unknown to the true owner, amount only to successive trespasses, they become, when known and acquiesced in by him who has the right, sufficient to constitute a disseisin. *Robison v. Swett*, iii. 316.

10. Where the tenant of land for a year, held over, and after the expiration of his term paid rent to a stranger, and refused to quit the premises, being called upon by the agent of the lessor for that purpose;—this was held to be not such a disseisin of the lessor as would prevent the operation of his deed conveying the premises to a third person. *Porter v. Hammond*, iii. 188.

11. Where a legal title to hold land is disclosed to the Court, the party shall not be admitted to say that he holds by wrong.—*Tinkham v. Arnold*, iii. 120.

12. The State, by virtue of its prerogative, is always seised of the lands to which it has title; and may therefore convey them by release, notwithstanding the intrusion of strangers upon them. *Hill v. Dyer*, iii. 441.

13. Where two persons entered as tenants in common into lands, under a deed which, being defectively executed, did not pass the estate, their occupancy, being open and actual, operated a disseisin of the grantor; so that a creditor of one of them having extended his execution on a moiety of the land, the original owner could not convey the whole land by deed to the other, to defeat the extent, without first avoiding the disseisin by a re-entry, or by judgment of law. *Gookin v. Whittier*, iv. 16.

14. A mere mistake of the party in possession of land, as it will not constitute a disseisin, so it will not be construed into an abandonment of the possession; especially where it was caused by the owner of the fee. *Ross v. Gould*, v. 204.

15. Where one, having entered into lands not his own, submitted to the title of the true owner, with whom he made a verbal contract for the purchase of the lands; and afterwards mortgaged them to a stranger; it was held that the mortgage was no disseisin of the true owner, the possession not having been changed. *Peters & al. v. Foss*, v. 182.

16. Where the purchaser of a right in equity of redemption, at a sheriff's sale, had demanded possession of the mortgagor, who still remained on the land, and who answered that "if he thought he had a better right to the land than he, the occupant, had, he might get it when the law would give it to him;" and thereupon the purchaser brought a writ of entry against the mortgagor, who pleaded non-tenure in bar;—it was held that this evidence showed a claim of right on the part of the tenant, and disproved his plea;—and that the demandant was therefore entitled to judgment, though the mortgagee had previously entered for condition broken, and the debt was still unpaid. *Brigham v. Welch*, vi. 376.

17. 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. *Dennett v. Crocker*, viii. 239.

18. 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. *Ib.*

II. *Of disseisin by election.*

Whether the owner of land, over which a public highway passes, can be disseised of it, except at his election, *quære*. *Rogers v. Joyce*, iv. 93.

III. *Of the effect of a release to the disseisor.*

If a disseisor takes from the disseisee a naked release of all his interest in the land, no relations arise between them, by which one is placed in subordination to the other; and the disseisin is not thereby purged; nor is the disseissor estopped from denying that the disseisee had any title to the land. *Fox & als. v. Widgery*, iv. 214.

IV. *Of the entry to defeat a disseisin.*

An entry into land, to defeat a disseisin, should be made with that intention; sufficiently indicated either by the act, or by words accompanying it. *Robison v. Swett*, iii. 316.

[See Ouster.]

DISTRESS.

By *Stat.* 1821, *ch.* 128, *sec.* 9, the right to sell beasts taken damage feasant, is given only in cases where the injury was done

to lands "inclosed with a legal and sufficient fence." *Heath v. Ricker & al.* ii. 408.

DOMICIL.

1. One may be considered as "dwelling and having his home" in a certain town, though he has no particular house there, as the place of his fixed abode. *Parsonsfield v. Perkins*, ii. 411.

2. By the words "dwells and has his home," in *Stat.* 1821, *ch.* 122, *sec.* 2, the legislature meant to designate some permanent abode, or residence with an intention to remain, or at least without any intention of removing. *Turner v. Buckfield*, iii. 229.

3. The domicil of a fisherman, who usually lived in his boat in the summer, was in this case holden to be in the place to which he most usually resorted in the winter for board. *Boothbay v. Wiscasset*, iii. 354.

4. An absence of five years was holden not to change the domicil of the party, he having left home to seek temporary employment, and there being no evidence that this purpose had been altered.—*Knox v. Waldoborough*, iii. 455.

5. The domicil of a minor is not changed by absence from the parent's house seven years, at service in different places, there being no evidence of any intention not to return. *Parsonsfield v. Kennebunkport*, iv. 47.

6. The domicil is not affected by the forming of an intention to remove, unless such intention is carried into effect. *Hallowell v. Saco*, v. 143.

7. In a question of domicil, evidence of the party's conduct afterwards as well as before, may be received to ascertain his intention on a particular day. *Richmond v. Vassalborough*, v. 396.

8. It is of no importance, in a question of domicil under *Stat.* 1821, *ch.* 122, whether the occupancy of the house in which the pauper dwelt was by right or by wrong. *Ib.*

9. 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. *Waterborough v. Newfield*, viii. 203.

[See Marriage and Divorce, III. Poor, I. *d.*]

DOWER.

I. Of what, and when a widow may have dower.
II. Of the demand and assignment of dower.
III. How dower may be barred.
IV. Of the remedies for dower, and proceedings therein.

I. *Of what, and when, a widow may have dower.*

1. If a widow waive the provision made for her in the will of her husband, she may have her dower assigned in his real estate ; but can receive no part of his personal estate, if he has disposed of it by will. *Perkins v. Little*, i. 148.

2. Where one seised of a remainder expectant upon an estate for life, mortgaged the premises in fee, and died; and his widow brought an action of dower against the mortgagee; it was held that the latter was estopped to deny the seisin of the husband. *Nason v. Allen*, vi. 243.

3. The wife of a mortgagor, or of one claiming under him, cannot have dower at common law against a mortgagee or his assigns, whose title commenced previous to the marriage. *Carll v. Butman*, vii. 102.

4. If the widow of the grantee of part of a tract of land, mortgaged before the marriage, would have her dower against the mortgagee it can be had only by bill in equity, and upon payment of her just proportion of the sum due on the mortgage. The proportion to be paid by the husband's parcel, is such proportion of the principal

debt, as the value of the parcel conveyed to him bears to the value of the whole tract mortgaged. And of the sum thus found, the widow must pay that proportion which the present value of an annuity for her life, equal to one third of the rents and profits, bears to the value of the whole parcel conveyed to her husband. *Ib.*

II. *Of the demand and assignment of dower.*

1. If the husband aliene to two in severalty, and die, the widow's dower is to be assigned out of each distinct parcel of the land. *Fosdick v. Gooding & al.* i. 30.

2. So if he aliene to one, and the grantee afterwards convey in separate parcels to several. *Ib.*

3. Dower may be demanded and assigned by parol. And authority to demand dower for another may be given in like manner. It is not necessary that it should be demanded on the land. *Baker v. Baker*, iv. 67.

4. An authority to demand dower, implies also the power to assent to, or receive, the assigment of it. *Ib.*

III. *How dower may be barred.*

1. A feme covert cannot bar her right of dower by any release made to the husband during the coverture. *Rowe v. Hamilton*, iii. 63.

IV. *Of the remedies for dower, and proceedings therein.*

1. Tenants in severalty, of distinct parcels of land, cannot be joined in a writ of dower. *Fosdick v. Gooding*, i. 30.

2. In dower, several tenancy must be pleaded in abatement: *non-tenure* may be pleaded in bar, or abatement. *Ib.*

3. In an action of dower, it is not competent for the tenant to shew that the demandant's husband, under whom he claims, was only colorably seised, by virtue of a deed made to defraud the creditors of his grantor. *Kimball v. Kimball*, ii. 226.

4. Where, in a written demand of dower, the land was described as the land which the tenant purchased of the husband, without any other description, this was holden sufficient. *Baker v. Baker*, iv. 67.

5. The wife of a mortgagor is dowable of the equity of redemption; and may enforce her claim by writ of dower at common law, against all persons but the mortgagee. Against him, her remedy is by bill in equity. *Smith v. Eustis*, vii. 41.

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

[See Covenant, I. Devise. Execution, II. Pleading, VIII.]

DURESS.

[See Assumpsit, I. Bond, III.]

EASEMENT.

[See Conveyance, X *c.* Corporation. Mills, II.]

ELECTIONS.

[See Constitutional law, III. Town, II.]

EMANCIPATION.

[See Parent and Child. Poor, I. *a. c.*]

EMPLOYMENT.

[See Constitutional law, VI.]

ENTRY.

[See Disseisin, IV. Tenant by the curtesy.]

ERROR.

Where, after verdict for the plaintiff, the question whether the action was maintainable, upon the facts proved at the trial and reported by the presiding Judge, was reserved for the consideration of all the Judges, and judgment was entered for the plaintiff according to their opinion; this was held to be no bar to a writ of error brought to reverse the judgment for a defect of substance in the declaration. *Smith v. Moore*, vi. 274.

[See Arbitrament and Award, I. Pleading, I. Practice, IX. XI. Review, I. Ways, II.]

ESCAPE.

1. No action can be maintained for an escape on mesne process, unless the plaintiff could have maintained the original action against the prisoner. *Riggs v. Thatcher*, i. 68.

2. No action lies at the suit of the prosecutor, against the Sheriff for the escape of a prisoner charged with larceny under *Stat.* 1804, *ch.* 143, before conviction: even though the prisoner have pleaded guilty at his examination before the magistrate. *Ib.*

3. 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. *Fullerton v. Harris*, viii. 393.

4. 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. *Ib.*

5. 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 admissible to show that the sureties were not sufficient, or that the bond was not regularly approved. *Ib.*

6. Whether debt for the escape of an execution debtor lies against one exercising the office of gaoler *de facto*, but not *de jure*,—*quære*. *Ib.*

ESTATE UPON CONDITION.

1. An estate was granted upon condition that the grantor should be permitted to occupy part of the premises, and that the grantee should cultivate the land in a husbandlike manner, and render to the grantor half the produce; provide him with fuel; and pay him certain sums of money. And they both occupied the land accordingly. The money being unpaid, the grantor notified the grantee that the condition was broken, and ordered him to quit the premises. But afterwards he received his proportion of the produce actually raised, though the farm was badly managed. The grantee then sold the land, subject to the condition. Hereupon it was held, that here was a sufficient entry for condition broken:—

2. That the acceptance of the produce was no waiver of the breach in the non-payment of the money:—

3. And that this forfeiture was not within the provisions of *Stat.* 1821, *ch.* 50, *sec.* 2, the land not having been granted by way of pledge, by the party seeking relief. *Frost v. Butler*, vii. 225.

4. Whether the case of such tenant is within the equity powers vested in this Court by *Stat.* 1830, *ch.* 462:—*quære*. *Ib.*

[See Grants by the State.]

ESTOPPEL.

I. Of estoppel by matter of record.
II. Of estoppel by deed.
III. Of estoppel by matter *en pais*.

I. *Of estoppel by matter of record.*

1. If a town way has not been legally laid out, and a return thereof made in writing under the hands of the Selectmen, the

town, in an action against it for damages occasioned by a defect in the road, is not estopped from showing the illegality of the location, notwithstanding the road has been accepted and recorded. *Todd v. Rome*, ii. 55.

2. If an action against the maker of a note be brought in the name of one only of two joint indorsees, and judgment be had therein; they are not thereby estopped to maintain a joint action against the indorser, as guarantor of the same note. *Cobb & al. v. Little*, ii. 261.

3. The equitable assignee of a chose in action is estopped by the verdict and judgment thereon, in the same manner as if he were a party to the record. *Rogers v. Haines*, iii. 362.

4. If in an action of trespass *quare clausum fregit*, before a Justice of the Peace, the defendant justifies under the plea of title in himself, and thereupon removes the cause, by recognizance, into the Court of Common Pleas, where he suffers judgment by default, before issue joined;—this judgment does not estop him from contesting the title of the same plaintiff, in a writ of entry subsequently brought for the same land. *Green v. Thompson*, v. 224.

5. A party is not estopped by every averment made by the other side which he does not deny; but only by averment of facts material and traversable, alleged directly and precisely, and not by way of argument, inference or recital. *Adams v. Moore*, vii. 86.

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

7. A plaintiff having caused goods to be attached and returned as the property of the defendant, is not thereby estopped from showing that they were the property of another. *Loomis v. Green*, vii. 386.

II. *Of estoppel by deed.*

1. If one, in consideration of a sum of money, bargain and sell land, and in the deed of conveyance acknowledge the receipt of the purchase money, when in truth no money was paid, yet the bargainor is estopped by the deed to say the contrary. *Steele v. Adams*, i. 3. [*Vid. Bowen v. Bell*, 20 *Johns.* 338; *Whitbeck v. Whitbeck*, 9 *Cowen*, 266; *Wilkinson v. Scott*, 17 *Mass.* 249; *Watson v. Blaine*, 12 *Serg. and Raw.* 131; *Weigley v. Weir*, 7 *Serg. and Raw.* 311; *Belden v. Seymour*, 8 *Conn.* 304.]

2. The acknowledgment of payment of the consideration-money in a deed of conveyance, does not estop the grantor from showing that a part of the money was left in the hands of the grantee, to be applied to the grantor's use. *Schillinger v. McCann*, vi. 364.

3. If the principal, in a letter of Attorney under seal, give it a false anterior date for the purpose of legalizing prior acts of the Attorney, he is estopped to aver or prove that it was in fact executed at a subsequent period. *Milliken v. Coombs*, i. 343.

4. The covenant of lawful seisin in fee, and good right in the grantor to convey, does not operate to estop him from setting up an after-acquired title in himself, against the grantee. *Allen v. Sayward*, v. 227.

5. A covenant that neither the grantor nor his heirs shall make any claim to the land conveyed, though not technically a warranty, is a covenant real, which runs with the land, and estops the grantor. And wherever the grantor is estopped, all claiming under him are estopped also. *Fairbanks v. Williamson*, vii. 96.

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

III. *Of estoppel by matter* en pais.

In replevin of a horse, the defendant pleaded property in one *G.*

and denied the title of the plaintiff; who replied that *G's* title was by sale from the defendant, after which the defendant again sold and delivered the horse, with warranty, to the plaintiff, who knew nothing of the prior sale; and relied on this by way of estoppel.—On demurrer it was held that the defendant was not estopped to set up the title of *G.* against the plaintiff; and that the replication was ill. *Boies v. Witherell*, vii. 162.

[See Covenant, II. Executors, &c. II. Poor, IV. Shipping, I.]

EVIDENCE.

I. Of public records, documents and official acts and certificates.

II. Of judgments, judicial instruments and proceedings.

(*a.*) Their admissibility.
(*b.*) Their effect.

III. Of corporation-books.

IV. Of deeds.

V. Of books of account and other entries.

VI. Of secondary and *prima facie* evidence.

VII. Of the admissibility and effect of parol evidence to explain, qualify or control written evidence.

(*a.*) When admissible.
(*b.*) When not admissible.
(*c.*) Its effect.

VIII. Of presumptive evidence.

(*a.*) Presumptions from lapse of time.
(*b.*) Presumptions from acts done.
(*c.*) Presumptions of law.

IX. Of the burden of proof.

X. Of admissions, confessions and declarations.

(*a.*) As part of the *res gestæ*.

I. *Of public records, documents, and official acts and certificates.*

1. The report of the commissioner under the resolve of *March* 3, 1803, respecting the townships assigned to Gen. *Knox* and others, is conclusive evidence, against all persons, as to the occupancy by actual settlers, of the lots therein mentioned. *Bussey v. Luce*, ii. 367.

2. A book found in the hands of the town clerk, and purporting to be a record of births and marriages in the town, is *prima facie* evidence of the facts it contains, though it may have no title, or certificate, or other attestation of its character. *Sumner v. Sebec*, iii. 223.

3. The certificate of membership granted by the overseers of a society of friends or quakers, pursuant to *Stat.* 1821, *ch.* 164, is conclusive evidence of the facts it contains. *Dole v. Allen*, iv. 527.

4. 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. —*Wedgwood's case*, viii. 75.

5. Where one, who had received a personal hurt, by reason of a bad road, demanded of the town compensation for the injury, and the town voted to allow him 80 dollars; and in the following year a similar vote was passed, but was reconsidered at an adjournment

of the same meeting; it was held that these were to be regarded as mere offers of compromise; not binding till accepted. *Rowell v. Montville*, iv. 270.

II. *Of judgments, judicial instruments and proceedings.*

(*a.*) *Their admissibility.*

1. Where, in trespass *quare clausum fregit*, the question turned upon the nature and duration of the plaintiff's possession of the land;—it was held that evidence of the allegations in the writs in former suits against him, brought for the benefit of the present defendant, in which he was charged as a disseisor, was admissible, in connection with other circumstances, to shew knowledge on the part of the defendant and his grantors of the nature and extent of the plaintiff's claim. *Robison v. Swett*, iii. 316.

2. The disclosure of a trustee is not admissible evidence for him in another action in favor of one not a party to the trustee process. —*Wise v. Hilton*, iv. 435.

3. Upon an issue, in a foreign attachment, to try the validity or effect of an assignment, where the assignee has become a party to the record, pursuant to *Stat.* 1821, *ch.* 61, *sec.* 7, the disclosure of the trustee may be read in evidence to the Jury. *Morrell v. Rogers*, i. 328.

4. The entries in the dockets, even if inconsistent with the judgment, are yet inadmissible for the purpose of impeaching it. *Southgate v. Burnham*, i. 369.

5. A verdict, and judgment thereon, are not admissible evidence of a copartnership, even where that fact was expressly put in issue by the pleadings, unless the action, in which such evidence is offered, is between both the parties to the former suit. *Burgess v. Lane & al.* iii. 165.

(*b.*) *Their effect.*

1. The grantee of land is not bound by a judgment in a suit subsequently commenced by his own grantor, against his immediate grantor, upon the covenants in his deed. *Winslow v. Grindal*, ii. 64.

2. A decree of the Judge of Probate, not appealed from, in a matter of which he has jurisdiction, is conclusive upon all persons. —*Potter v. Webb & als.* ii. 257.

3. The record of a judgment in a Court of another of the United States, properly authenticated, will be received by the Courts in this State as conclusive evidence of debt. *Mitchell v. Osgood*, iv. 124.

4. In *scire facias* against the indorser of a writ, the sheriff's return that he could find no property of the original defendant within his precinct, is not conclusive evidence of his inability to pay. *Palister v. Little*, vi. 350.

5. The party justifying under legal process, not being an officer, is not bound to show it returned. *Plummer v. Dennett*, vi. 421.

6. Since the passage of *Stat.* 1826, *ch.* 344, a verdict and judgment in favor of the tenant, upon the general issue, in a writ of entry, will not always be evidence of title in him; for the statute having declared that such plea shall not be taken as an admission of the tenant's seisin and possession of the land, it may be that he prevailed because he was not proved to be in possession. Whenever this is the case, it may be found expedient, in practice, that this fact should appear in the verdict; in order to protect the rights of the demandant, in any subsequent controversy. *Cutts v. King*, v. 482.

7. A recovery in a writ of right does not affect any claim of the tenant to an easement in the land. *Thompson & al. v. Prop'rs. Andr. Bridge*, v. 62.

8. A judgment in trover, if execution be sued out thereon, though without satisfaction, is a bar to an action of trespass afterwards brought by the same plaintiff, against another person, for taking the same goods. *White v. Philbrick*, v. 147.

9. *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*. *Smith v. Hall*, viii. 348.

III. *Of Corporation books.*

The rule that all the declarations of a party, or parts of an instrument, offered in evidence, are to be taken together, does not extend to the records of proprietors at different adjournments of the same meeting. *Pike v. Dyke*, ii. 213.

IV. *Of deeds.*

1. An execution had been extended on land as the estate of *G. W.* and in an action to recover possession of the land against the judgment creditor, the tenant, to shew an intermediate conveyance from the demandant to the judgment debtor, proved the existence of a deed of the land, seen by a witness in the possession of the debtor, but not registered; and also proved the signature of the demandant as grantor in the deed, and of one of the subscribing witnesses, who was also the magistrate before whom the deed was acknowledged, but who, being interested, could not be examined as a witness:—but this was held insufficient, without proof of diligent inquiry after the other subscribing witness. *Whittemore v. Brooks*, i. 57.

2. A deed void on its face, if it be registered, and the grantee enter on a part of the land and continue openly to occupy and improve it, is admissible as evidence of the extent of his claim.—*Robison v. Swett*, iii. 316.

3. A deed, imperfectly executed by an Attorney as the deed of his principal, is nevertheless admissible in evidence, in aid of the grantee's entry, to shew the extent of his claim of title. *Ross v. Gould*, v. 204.

4. Though a deed may be read in evidence to the Jury, after the preliminary proof by the subscribing witnesses, yet if the genuineness of the instrument is in controversy, the burden of proof is still on the party producing it, to satisfy the Jury, beyond a reasonable doubt, that it is genuine. *Ib.*

5. Office-copies of deeds of conveyance, to which he who offers them is not a party, are in all cases admissible in proof of title. And where such office-copy was rejected, though the party then produced, proved and read the original, yet the verdict, being against him, was for this cause set aside. *Woodman v. Coolbroth*, vii. 181.

6. 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. *Hewes v. Wiswell*, viii. 94.

V. *Of books of account and other entries.*

1. To prove a charge of $15 for that sum paid for the note of the defendant's testator to a third person, the charge having been made more than twenty years, and all the parties being dead; it was held that the books of the plaintiff's intestate containing the charge, together with the note found among his papers, with the payee's receipt of payment by the plaintiff's intestate on the back of it, were competent evidence from which the Jury might properly infer the fact of payment; it also appearing by unobjectionable proof, that the plaintiff's intestate had been in the practice of paying small sums for the defendant's testator. *McLellan v. Crofton*, vi. 307.

2. A paper book in the hand writing of the defendant's testator, containing accounts between himself and the plaintiff's intestate, being found among the intestate's papers, though mutilated and torn; it was held to be competent evidence to the Jury, as admissions of the defendant's testator against himself; and that the plaintiff was not bound at his peril to account for the mutilations; nor were the Jury bound to infer that the parts missing contained any settlement of the accounts; but that the whole was open to their consideration, to be weighed with the other evidence in the case. *Ib.*

3. Where an account of more than six years standing appeared

footed on the books of the plaintiff's intestate, and the balance carried to new account, and interest claimed thereon; it was held that the Jury were not therefore bound to regard this as conclusive evidence of an account then liquidated and stated, so as to enable the statute of limitations to attach to it; but that they were at liberty, if they were so satisfied by the evidence, to treat it as the act of the creditor alone, and of no effect. *Ib.*

VI. *Of secondary and* prima facie *evidence.*

1. Extraneous proof of the contents of an instrument lost by time and accident, is not admissible, until a foundation is first laid by evidence that an instrument was duly executed with the formalities required by law, and that it is lost. *Kimball v. Morrell*, iv. 368.

2. On the trial of an indictment for bigamy, oral proof of the official character of the minister or magistrate before whom the marriage was solemnized, is, *prima facie*, sufficient evidence of his authority. *Damon's case*, vi. 148.

3. Whether, in the absence of better proof of marriage in this State, evidence of long continued cohabitation, birth of children, and uniform reputation of a lawful marriage, is admissible in criminal cases,—*quære*. *Cayford's case*, vii. 57.

4. 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. *Dennett v. Crocker*, viii. 239.

5. Four defendants were sued as partners, and served with notice to produce the written agreement of their association; and three of them having been defaulted, the other appeared, denying the partnership. 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. —*Thomas v. Harding*, viii. 417.

VII. *Of the admissibility and effect of parol evidence to explain, qualify or control written evidence.*

(*a.*) *When admissible.*

1. Parol proof of a usage may be received in explanation of the terms of a deed. *Farrar v. Stackpole*, vi. 154.

2. The date of a writ is not conclusive evidence of the time when it was sued out, so as to affect a plea of the statute of limitations.—*Johnson v. Farwell*, vii. 370.

3. In an action of replevin against the sheriff, for goods attached by him under a writ, which had never been returned, the suit having been settled by the parties, it was held that he might prove the attachment by parol. *Frost v. Shapleigh*, vii. 236.

4. 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*: *Gardiner Bank v. Wheaton*, viii. 373.

5. Parol evidence is admissible to show the time of the debtor's death, for the purpose of avoiding an extent, as it does not contradict any fact stated in the officer's return. *Allen v. The Portland Stage Co.* viii. 438.

6. 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. *Ib.*

(*b.*) *When not admissible.*

1. Parol evidence is inadmissible to prove the transactions of a school district meeting; the only legal evidence being the record itself, or an attested copy. *Moor v. Newfield*, iv. 44.

2. Where, in a deed, a valuable consideration is expressed to have been paid, parol evidence is not admissible to prove another and different consideration intended, or promised and not performed. *Emery v. Chase*, v. 232.

3. If a written instrument, purporting to be a deed of partition, is signed by the parties, but not sealed, yet it is not therefore to be treated as a nullity, so far as to admit parol testimony to contradict it. *Gardiner Man. Co. v. Heald*, v. 381.

4. Where the course first given in a deed of conveyance was north 69 degrees west, forty-six rods, and thence to a certain range-line, and by that line, and other courses and monuments, to the beginning; and this description was intelligible, and unambiguous, agreeing with all the monuments given:—the grantor was not permitted to prove by parol that the first course actually run by the

surveyor, at the time of the conveyance, was south 69 degrees west, which would equally well agree with all the other courses and monuments in the deed; and that the surveyor, who also wrote the deed, inserted north instead of south, by mistake. *Linscott v. Fernald & al.* v. 496.

5. Parol proof to show that a deed of conveyance, absolute on its face, was intended only as a security for money lent, is not admissible. *Hale v. Jewell*, vii. 435.

6. Parol evidence is inadmissible to show a mistake in the computation of the amount for which a recognizance of debt was taken, under the statute; so as to enable the conusor, after having paid the money, to recover back the excess. *Morton v. Chandler*, vii. 44.

7. When the declarations of parties are admitted in evidence as part of the *res gestæ*, it is because they go to explain the true intent and meaning of the parties at the time. But this rule is not applicable to the contents of a deed; which is not to be limited, restrained or enlarged, by any parol declarations of the parties.—*Kimball v. Morrell*, iv. 368.

8. 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.—*Boody v. York*, viii. 272.

(*c.*) *Its effect.*

1. If a dividing line be settled by parol agreement and actual location between the owners of adjoining tracts of land; such location will be received as strong evidence of the accuracy of the line thus established; though it is not conclusive to prevent either party from shewing that it was settled erroneously. *Gove v. Richardson*, iv. 327.

2. Where the meaning of the parties to a written contract cannot be collected from the instrument itself, by reason of its ambiguity, or illegibility; it seems that parol evidence of the acts of the parties, contemporaneously with and immediately after the execution of the

instrument, is proper for the consideration of the Jury. *Haven v. Brown*, vii. 421.

3. Where the collector of a town had given bond with sureties, conditioned for the faithful collection of the town taxes; and afterwards had given another bond, with other sureties, for the faithful collection of a school-house tax; after which he paid over a large sum of money to the treasurer, taking his receipt, in which he promised to account for that sum to the town; it was held, in an action for contribution between the sureties on the first bond, one of whom had voluntarily paid the amount of an alleged delinquency,—that parol testimony was admissible to prove that the sum thus paid included the amount of the school-house tax, which had accordingly been paid over by the treasurer, by direction of the collector; and that therefore the deficiency existed only in the first bond. *Nason v. Read*, vii. 22.

VIII. *Of presumptive evidence.*

(a.) Presumptions from lapse of time.

1. The lapse of twenty years is not conclusive evidence of the payment of a debt, at common law; but is merely a presumption, liable, like all others, to be repelled by the circumstances of the case. *McLellan v. Crofton*, vi. 307.

2. In an action on an administrator's bond, to compel him to account for and pay over the amount of a private debt due from him to the intestate, the lapse of more than twenty years since the date of the bond affords no ground for the presumption of payment to the heirs; because such payment, without a previous decree of distribution, would be a violation of his duty, which the law will not presume. Neither does the presumption arise that the debt was forgiven by the intestate; for gifts, as well as wrongs, are not to be presumed. *Potter v. Titcomb*, vii. 302.

3. The presumption of payment, arising from the lapse of twenty years, does not seem applicable except in cases of bonds or other contracts for the payment of money, &c. or the performance of a specific duty, at a fixed time, from which the term of twenty years might be computed. *Ib.*

(b.) Presumptions from acts done.

1. After a lapse of more than seventy years without any adverse claim, the Jury may presume a grant from the original proprietor of a share in a township of land, to a person afterwards constantly acting as grantee of such share, sustaining various offices as such in the corporation of proprietors, and paying taxes thereon; although such share consist of wild land, and be not holden by any open visible possession. *Farrar & al. v. Merrill*, i. 17.

2. A general usage, like that of depositing lumber on the banks of a river, not accompanied by a claim of title, or an intention of occupying the land to the exclusion of the owner's rights, cannot furnish any legal presumption of a grant. *Bethum v. Turner*, i. 109.

3. No adverse appropriation or use of land as a road, for a period short of twenty years, is sufficient to raise the presumption of a grant; nor to impose on a town the obligation to pay any damages occasioned by its neglect to keep the road in repair.—*Rowell v. Montville*, iv. 270.

4. The undisturbed enjoyment of any known legal right, such as the flowing of lands for the support of mills, &c. for any term of time, furnishes no presumptive evidence of a grant. *Tinkham v. Arnold*, iii. 120.

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

6. After the lapse of more than thirty years, the authority and qualification of an administrator were presumed, from the existence of an inventory, and a schedule of claims, in the Probate office, attested by his oath; and a petition preferred by him to the Court of Common Pleas for license to sell the real estate of his intestate, with the original certificate of the Judge of Probate thereon, recognizing him as an administrator;—the Probate records and files of that period appearing to have been loosely kept; and no other vestige of his appointment being discoverable. *Battles v. Holley*, vi. 145.

(c.) Presumptions of law.

1. Where the record of a town states that certain persons were chosen to a certain office without saying whether by ballot or other-

wise, the presumption of law is that it was in the legal mode.—*Mussey v. White*, iii. 290.

2. Where a widow had held a parcel of her husband's estate for nearly thirty years, under a deed in fee from one of the heirs; it was held that in an action by another of the heirs for an undivided portion of the same land, it could not be presumed, against the deed under which she had entered and claimed, that she held as tenant in dower. *Hale v. Portland*, iv. 77.

3. Legal presumptions generally apply to facts of a transitory character, the proper evidence of which is not usually preserved with care; but not to records or public documents, in the custody of officers charged with their preservation, unless proved to have been lost or destroyed. *Brunswick v. McKean*, iv. 508.

4. It is presumed, where the lots of land in each range in a new township are numbered in a regular arithmetical series, that they were originally located contiguous to each other; and that the lot numbered two includes all the land lying between one and three in the same range; and so of the others. *Warren v. Pierce*, vi. 9.

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

IX. *Of the burden of proof.*

1. Where one has wilfully confounded his own goods with others of the same kind belonging to a stranger, and would reclaim them by law, the burden of proof is on himself, to distinguish his own goods from those of the stranger. *Loomis v. Green*, vii. 386.

2. Where, to a plea of the statute of limitations, the plaintiff replies that the accounts were merchants' accounts; and the defendant rejoins that the accounts between the parties were not open and current, but were liquidated and closed more than six years before action brought; which the plaintiff traverses; the issue is substantially framed not on the replication, but on the rejoinder;

and therefore the burden of proof is not on the plaintiff, to show that the accounts continued open; but on the defendant, to show that they were liquidated and closed. *McLellan v. Crofton*, vi. 308.

X. *Of admissions, confessions, and declarations.*

(a.) As part of the res gestæ.

1. Upon a question of domicil, the declarations of the party whose home is in controversy, made at the time of his going or returning, may be received as evidence of his intention. *Gorham v. Canton*, v. 266.

2. The parol declarations of a person in possession of land, are admissible to shew the character and intent of such possession, notwithstanding the statute of frauds. *Little v. Libby*, ii. 242.

3. 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. *Sewall v. Sewall*, viii. 194.

(b.) As the language of the party in interest.

1. The declarations of one copartner, made after the dissolution of the copartnership, concerning facts which transpired previous to that event, are admissible evidence for the plaintiff, in an action against all the members of the copartnership. *Parker v. Merrill*, vi. 41.

2. Where *M.* had conveyed goods to *C.* who afterwards sold them to *H;* it was held, in a suit between *H.* and the creditors of *M*, who attached the goods as his,—that the declarations of *C*, made two months before the sale from *M* to him, were admissible in evidence to impeach the consideration of the former conveyance. *Hale v. Smith*, vi. 416.

3. In order to avoid a sale of goods on the ground of false and fraudulent conduct in the vendee, in representing himself to be a man of good property and credit when he was not so; it is competent for the vendor, in addition to the direct proof of the case, to give evidence of similar false pretences successfully used to other persons, in the same town, about the same time, to shew a general plan to amass property by fraud. *McKenney v. Dingley*, iv. 172.

4. In an indictment for lewd cohabitation, adultery, or bigamy, the prisoner's confession of the fact of his marriage, if the marriage was in another State or country, is sufficient proof of the fact.—*Cayford's case*, vii. 57.

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

6. 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. *Vance v. Vance*, viii. 132.

7. 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. *Ware v. Ware*, viii. 42.

8. 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. *Savage v. Balch*, viii. 27.

9. 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. *Ib.*

10. Where one purchased a right in equity of redemption, and afterwards took an assignment of the mortgage; and immediately mortgaged the same land to the original mortgagee in fee;—it was held, in a writ of entry brought by the assignee against the mortgagor, that the declarations of the original mortgagee could not be given in evidence to prove usury in the first mortgage. *Richardson v. Field*, vi. 303.

(c.) *When not admissible.*

1. To impeach the title of the demandant in a writ of entry, on the ground of fraud, evidence of the fraudulent intent of his grantor in the conveyance of other lands, to another person, at a prior time, though with the connivance of the demandant, who was his brother-in-law, is not admissible. *Flagg v. Willington*, vi. 386.

2. 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. *Ware v. Ware*, viii. 42.

3. 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. *Pejepscot Prop'rs. v. Nichols*, viii. 362.

4. 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. *Ware v. Ware*, viii. 42.

5. 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. *Ib.*

6. 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. *Ib.*

XI. *Of hearsay, opinion and general reputation.*

1. Recitals in ancient deeds are good presumptive evidence of pedigree, where no adverse title by inheritance has been set up un-

der the same ancestor; even though the land conveyed by the deeds is itself the subject of controversy. *Little v. Palister*, iv. 209.

2. In the absence of better proof, evidence of long and uninterrupted usage, reputation, the declarations and conduct of the owners of the adjoining land, and the public acts of the town, was properly admitted to prove that an ancient corporation of proprietors, now extinct, had dedicated a certain lot to the public use as a landing place. *Sevey's case*, vi. 118.

3. 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.—*Ware v. Ware*, viii. 42.

4. A witness may testify to his belief of the genuineness of hand-writing from his acquaintance with the hand-writing of the party; whether this acquaintance were gained by having seen the person write,—or having received letters from him,—or having at any time seen writing either acknowledged or proved to be his. *Hammond's case*, ii. 33.

5. And there is no distinction between civil and criminal cases, in the application of this rule. *Ib.*

6. At the trial of an issue impeaching a decree of the Judge of Probate as obtained by fraud and collusion, the general character of the parties accused of the fraud is not examinable. *Potter v. Webb*, vi. 14.

XII. *Of the competency and incompetency of witnesses.*

(*a.*) *As to their interest.*

1. In an action by a father, for labor and services performed by his son, the latter is a competent witness for the plaintiff. *Keen v. Sprague*, iii. 77.

2. A member of a corporation who is its surety for the payment of a debt not in controversy in the suit on trial, is not on that ac-

count an incompetent witness for the corporation. *Miller v. Mariner's Church*, vii. 57.

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

4. In an action for contribution, between the sureties of a collector of taxes, for money paid by one of them without suit, the town treasurer is a competent witness to prove the collector's delinquency. *Nason v. Read*, vii. 22.

5. 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. *Ford v. Clough*, viii. 334.

6. 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. *McLaine v. Bachelor*, viii. 324.

7. 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. *Jewett v. Adams*, viii. 30.

8. 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. *Descadillas v. Harris*, viii. 298.

9. The members of a family or society of shakers are competent witnesses, without releases, in any suit, in which the deacons are parties, not directly concerning the common property. *Richardson v. Freeman*, vi. 57.

10. Where the plaintiff had declared that he was indebted to one offered as a witness, to whom the money sued for, when recovered, was by agreement to be paid over; it was held that this

agreement was no assignment of the debt, and therefore did not go to the competency of the witness, but only to his credibility.—*Seaver v. Bradley*, vi. 60.

11. Where the party objecting to a witness, on the ground of interest, which was acquired by a contract entered into subsequent to his knowledge of the facts he is brought to prove, is himself a party to the agreement creating the interest, or had any agency in causing it to be created, the witness may be admitted to testify, notwithstanding such interest. *Burgess v. Lane & al.* iii. 165.

12. In trespass *quare clausum*, by the deacons of a society of Shakers, for an injury to the common property, the members of the same society are competent witnesses, on releasing to the plaintiffs their interest in the action, and receiving releases from the plaintiffs of all obligation to contribute to the costs of the suit.—*Anderson v. Brock*, iii. 243.

13. In an action of trover by an executor for the conversion of goods since the decease of the testator, a legatee under the will is a competent witness, the event of the suit having no tendency to increase or diminish the assets. *Carlisle v. Burley*, iii. 250.

14. Where a party who had contracted to furnish a quantity of goods, afterwards admitted another to aid him in supplying the requisite quantity, for which he was to receive the same price, and was paid accordingly;—it was held that the person thus subsequently admitted was a competent witness for the party with whom he had contracted, in a suit brought by the latter to recover the price of the goods sold. *Barstow v. Gray*, iii. 409.

15. In a writ of entry, by the mortgagee against a stranger, the mortgagor was admitted a competent witness for the mortgagee, the latter having released him from so much of the debt as should not be satisfied by the land mortgaged, and covenanted to resort to the land as the sole fund for payment of the debt. *Howard v. Chadbourne*, v. 15.

16. In a prosecution by complaint against the owner of part of a mill-dam, for flowing lands, the owner of another part of the same dam, in severalty, is a competent witness for the respondent. *Clement v. Durgin*, v. 9.

17. A judgment debtor, whose goods have been seized and sold on execution, does not stand in the relation of vendor to the purchaser. And therefore, not being liable on any implied warranty, he is a competent witness in any suit between other persons respecting the goods. *Lathrop v. Muzzy*, v. 450.

18. The vendor of goods as his own, being therefore bound to warrant the title, is inadmissible as a witness for his vendee, in an action touching the title of the same goods; being directly interested to establish the title, for the purpose of protecting himself from all accountability on his implied warranty. *Hale v. Smith*, vi. 416.

19. The account-books of an interested witness are inadmissible evidence. *Ib.*

20. In an action by a town treasurer on a collector's bond given to his predecessor in office, such predecessor is not admissible as a witness for the plaintiff, to disprove the payment of money for which the collector held his receipt. *Pingree v. Warren*, vi. 457.

21. The defendant, in a suit in which his lands were attached, having sold the same lands pending the attachment; his grantee cannot be a witness for him in that suit, his title being directly affected by a verdict for the defendant. *Schillinger v. McCann*, vi. 364.

22. If the interest of a witness be discovered in any stage of the cause, even after an unsuccessful attempt to prove it, his testimony will be rejected. *Ib.*

23. The incompetency of the indorser of a writ, to testify as a witness for the plaintiff, arising from his liability to costs, may be removed by the plaintiff, by depositing with the clerk such sum as the Court shall deem sufficient for the purpose, out of which the defendant's costs are to be satisfied, in case he should finally prevail. *Roberts v. Adams & al.* ix. 9.

24. It is not the amount of interest which determines the question of the competency of a witness. Any direct interest, however small, is sufficient to exclude him, even if it be only in the costs of the suit. *Scott v. McLellan & al.* ii. 199.

25. The drawer of a bill of exchange is not a competent witness

for the indorsee, in an action against the acceptor, because of his liability to damages, interest, and costs, if the party calling him should not prevail. *Ib.*

26. The mortgagor, though not liable on any covenants in his deed, cannot be a witness for the mortgagee in an action brought to recover possession of the land; where the possession sought by the demandant would be a payment, *pro tanto*, of the debt. *Howard v. Chadbourne*, iii. 461.

(b.) From public policy.

1. The rule that a party to a negotiable promissory note is not admissible as a witness to impeach it, applies not only to actions directly upon the note, but to all others where its validity comes collaterally in question. *Deering v. Sawtel*, iv. 191.

2. The indorser of a note over-due is competent, in an action by the indorsee against the maker, to testify to the time when the note was negotiated, and to any other facts which happened prior to that time, and not affecting the original validity of the note.—*Adams v. Carver*, vi. 390.

3. The rule that a party to a negotiable note shall not be admitted as a witness to prove it usurious, extends to the maker of an accommodation note; and is applied even where the note had been delivered up to the real debtor, on his giving a recognizance to the creditor for the amount. And its application is not restricted to the case of an innocent indorsee; but is admitted where the usurer himself is a party. *Chandler v. Morton*, v. 374.

4. In an indictment against a husband, for an assault and battery upon the wife, she is a competent witness against him. *Soule's case*, v. 407.

5. An arbitrator is admissible as a witness to testify the time when, and the circumstances in which, he made his award. *Woodbury v. Northy*, iii. 85.

(c.) From necessity.

A Shipmaster having received a trunk of goods on board his vessel, to be carried to another port which on the passage he broke open and rifled of its contents; the owner of the goods, proving the delivery of the trunk and its violation, was admitted a witness,

in an action for the goods against the shipmaster, to testify to the particular contents of the trunk, there being no other evidence of the fact to be obtained. *Herman v. Drinkwater*, i. 27.

XIII. *Of the acts and declarations of agents.*

1. In order to prove the authority of an agent in a particular transaction, it is competent for the party, under certain limitations, to give evidence of his conduct, dealings, and declarations in other contemporaneous affairs of the principal, from which a general agency might be inferred. *Cobb v. Lunt, ex'r.* iv. 503.

2. The subsequent declarations of a general agent, touching a contract he has entered into in the name of his principal, being made to a stranger, cannot be received to affect the rights of the principal, already acquired. *Haven v. Brown*, vii. 421.

3. 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. *Judkins v. Lancey*, viii. 442.

4. 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. *Ib.*

5. In an action by the payee against the drawer of a bill not accepted, the declarations of the drawee, made at the time of presenting the bill, that he had no funds of the drawer in his hands, are not admissible in evidence; the drawee, in such case, not being the agent of the drawer. *Carle v. White*, ix. 104.

XIV. *Of the examination and impeachment of witnesses.*

1. A witness, upon the *voir dire*, may be examined respecting contracts, records or documents not produced at the trial, so far as relates to his interest in the cause. *Miller v. Mariners' Church*, vii. 51.

2. Where a witness testified to certain facts, which were contrary to his own admissions in a written contract made by him with the adverse party;—it was held that such party might read this contract in evidence to impeach his testimony, without first calling the subscribing witness thereto; the witness on the stand, who signed the contract, testifying that the signature was his own. *Drew v. Wadleigh*, vii. 94.

3. 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. *Ware v. Ware*, viii. 42.

XV. *Of depositions.*

1. Where a commission issues to any Judge or magistrate of another State, to take depositions in a cause pending in this Court, the official certificate of the Judge or magistrate is received as *prima facie* evidence of his authority. *Clement v. Durgin*, v. 9.

2. The want of notice is no valid objection to a deposition taken in perpetuam, under the provincial statute 7, *W.* 3, *ch.* 35, *sec.* 3. —*Goodwin v. Mussey*, iv. 88.

3. And such deposition may be used whenever the deponent is so sick as to be unable to attend Court. *Ib.*

4. Depositions taken before one who has acted as the agent of the party in the same cause, are inadmissible.—*Smith v. Smith*, ii. 407.

5. A leading interrogatory, in a deposition taken when both par-

ties are present, must be objected to at the time it is put to the witness, if at all. *Woodman v. Coolbroth*, vii. 181.

6. Where, at a trial by Jury, certain depositions were objected to by one party, but were used by consent, upon condition that the Judge should direct the Jury what parts of them to disregard as inadmissible; and no such direction was in fact given; but the Judge, before the Jury retired, offered to give them further instructions on any point which either party might desire; yet none were desired; it was held, that this silence of the party amounted to a waiver of any objection to the testimony. *Buckley v. Woodsum*, vii. 204.

7. 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. *Ulmer v. Hills*, viii. 326.

XVI. *Of variance between the allegations and proof.*

1. A count on a note payable on the occurrence of a certain event, or in a reasonable time, is not supported by evidence of a note payable only on the occurrence of the event; though it is proved that the contingency was rendered impossible by the misconduct of the defendant. The plaintiff should have alleged the facts tending to deprive the defendant of any excuse for not paying the money. —*Hilt v. Campbell*, vi. 109.

2. An indictment for forgery with intent to defraud *A.* is supported by proof of intent to defraud *A.* and *B.* *Veazie's case*, vii. 131.

[See Actions real, III. Agent, I. Assignment, I. II. Bastardy, I. Bills of Exchange, &c. IV. V. Chancery, I. III. IV. Contract, II. VII. IX. X. Conveyance, III. VII. *a.* Damages, II. Disseisin, I. Domicil. Estoppel, I. II. III. Executors, &c. IV. Indictment, I. Infant. Insurance. Justices of the

Peace *quorum unus*. Marriage and Divorce, III. Militia, II. IV. Mortgage, I. VII. Nonsuit. Parish, IV. Partnership, III. Pleading, I. Poor, I. *d*. IV. Practice, III. Principal and Surety, II. Sale, I. VII. Schools. Shakers. Sheriff, IV. *a. c.* Taxes, IV. Town, II. Trespass, II. Usury. Verdict, II. Ways, III. IV.]

EXCEPTIONS.

1. In deciding on a bill of exceptions taken to the admission of evidence, the Court will look to the whole evidence before them; and will not disturb the verdict when the facts proved, independent of the evidence objected to, fully justify the verdict. *Farrar & al. v. Merrill*, i. 17.

2. Leave to amend is granted at the discretion of the Court; and the exercise of this discretion cannot be impeached by a bill of exceptions. *Wyman v. Dorr*, iii. 183.

3. Under *Stat.* 1822, *ch.* 193, exceptions can be alleged only to the opinion of the Court in some matter of law, involving and deciding the legal rights of the parties;—but not to any exercise of the discretionary power of the Court, as, the terms or times of granting amendments of what is legally amendable, continuances, &c.—*Clapp v. Balch*, iii. 216.

4. A bill of exceptions under the statute of *Westm. 2, ch.* 31, is examinable only after judgment; nor then, but upon a writ of error. —*Colley v. Merrill*, vi. 50.

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

6. If the Court below improperly reject a report of referees appointed by a rule of Court, the remedy is by exceptions regularly filed and allowed. If the defendant, after the report is rejected, plead to the action, and the cause is brought up by appeal from a judgment rendered upon the pleadings or verdict, no question is open respecting the report. *Vance v. Carle*, vii. 164.

7. The *Stat.* 1822, *ch.* 193, authorising the filing of exceptions in a summary manner to any decision of the Court of Common Pleas, does not apply to causes brought there by appeal from the judgment of Justices of the Peace. *Witham v. Pray*, ii. 198.

8. Whether the merits of a motion in arrest of judgment made in the Court below for defects apparent on the face of the declaration, can be brought before this Court by summary exceptions, under *Stat.* 1821, *ch.* 93, *sec.* 5,—*dubitatur*. *Warren v. Litchfield*, vii. 63.

[See Appeal, I. Arbitrament and Award, IV. Nonsuit. Practice, IV. X. XI.]

EXECUTION.

I. *Of the issuing of execution.*

1. After an execution has been regularly issued and returned, it cannot be set aside. But it is in the power of the Court, for good cause shown, to order that no further execution be issued on that judgment. *Sturgis v. Read*, ii. 109.

2. 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.—*Allen v. The Portland Stage Co.* viii. 207.

3. If an execution be issued against an absent defendant, without the previous filing of a bond, pursuant to the statute, it cannot be avoided collaterally, but is good till superseded. *Gardiner Man. Co. v. Heald*, v. 381.

II. *What may be taken in execution.*

1. An extent may well be of a chamber in a house or store, with a right of ingress and egress by an outer door, entry and staircase. —*Buck v. Hardy*, vi. 162.

2. If a creditor extend his execution on land mortgaged for more than its value, he not in fact knowing the existence of the mortgage, though it had been long on record; he may have an *alias* execution, and satisfaction out of other estate of the debtor; the case being within the meaning of *Stat.* 1823, *ch.* 210. *Steward v. Allen*, v. 103.

3. The right of a widow to have dower assigned in the hands of her husband cannot be taken in execution for her debt. *Nason v. Allen*, v. 479.

III. *Of the time and manner of extending an execution.*

1. The extent of an execution on real estate cannot be considered as commenced till the appraisers are sworn. *Allen v. The Portland Stage Co.* viii. 207.

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

3. 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. *Ib.*

4. If the judgment debtor is not in the county, it is sufficient if the officer, who is about to extend an execution on his lands, should leave notice at his last and usual place of abode. But whether any notice in that case is necessary—*quære. Buck v. Hardy*, vi. 162.

5. Six hours notice to the judgment debtor, of an extent about

to be made on his lands, was held sufficient, he living within a quarter of a mile of the premises. *Ib.*

6. Where a judgment debtor was out of the State at the time of the extent of an execution on his land, the appointment of an appraiser by his wife was holden valid. *Russell & al. v. Hook*, iv. 372.

7. A deputy sheriff, holding a commission of the peace, and extending an execution on real estate, cannot lawfully administer the oath to the appraisers. *Bamford v. Melvin*, vii. 14.

8. If there are inherent defects in the return of an extent on land, or if the land is appraised at too high a price, the creditor may waive the extent, at any time before acceptance of the land.—*Gorham v. Blazo*, ii. 232.

IV. *Of the officer's return of an extent.*

1. If the sheriff's return of an extent on land have no date, it will be presumed to refer to the date of the appraisement. *Gorham v. Blazo*, ii. 232.

2. It is essential to the validity of the return of an extent, that it should show that the debtor was duly notified to choose an appraiser. *Means v. Osgood*, vii. 146.

3. If it does not, the officer will not be permitted to amend it, if a third person has in the meantime acquired a vested right in the land. *Ib.*

4. If, in the extent of an execution on lands, it nowhere appears that the person, before whom the appraisers were sworn, was a Justice of the Peace, the extent is bad. *Howard v. Turner*, vi. 106.

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

6. If, in the return of an extent, the land be described with such certainty that there could be no mistake as to its location, it is enough. *Buck v. Hardy*, vi. 162.

7. The time of returning into the clerk's office an execution extended on land, is not material, if it has been recorded in the Registry of Deeds within three months after the extent. *Emerson v. Towle*, v. 197.

8. Where the officer, in his return of the extent of an execution, states that the appraisement was made under oath, but does not refer to the certificate of the magistrate; the Court, in an action between other persons touching the title acquired by the extent, will not look beyond the officer's return to take judicial notice of any defect in the administration of the oath, though apparent on the face of the magistrate's certificate indorsed on the execution.—*Bamford v. Melvin*, vii. 14.

9. It is essential to the validity of the return of an extent, that it should show that the debtor was duly notified to choose an appraiser. *Means v. Osgood*, vii. 146.

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

V. *Of the effect and construction of an extent.*

1. There is no difference between a conveyance by extent, and a conveyance by deed, in the rules of construction to be applied to them. *Waterhouse v. Gibson & al.* iv. 230.

2. The extent of an execution on the debtor's land, conveys to the creditor all the debtor's buildings standing on the land, whether their foundations are sunk below the surface or not. *Ib.*

3. And parol evidence is not admissible to shew that certain buildings were not included in the appraisement, but were reserved by mutual consent, to be removed by the debtor, the returns of the appraisers and sheriff not stating any such exception. *Ib.*

4. By the acceptance of livery of seisin, from the sheriff, of the lands so taken, the creditor acquires a vested and perfect title to them, as between him and the debtor, which he cannot afterwards waive, and resort to debt on his judgment. *Gorham v. Blazo*, ii. 232.

5. An extent on lands, accepted by the creditor, is a statute purchase of the debtor's estate; and is good against a subsequent purchaser from the debtor, with notice. *Semble.* *Ib.*

6. 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. *Chandler v. Furbish*, viii. 408.

VI. *Who may take advantage of irregularities in the issuing or service of an execution; and in what manner.*

1. Whether the tenant in a writ of entry, whose title has been found fraudulent and void as against the creditors of his grantor, the demandant being one, can be admitted to take exceptions to the regularity of the demandant's extent on the premises—*quære*. *Buck v. Hardy*, vi. 162.

2. An irregularity in the issuing of execution within twenty-four hours after judgment, can only be shown by parties and privies; and it cannot affect the title of an innocent purchaser without notice. *Allen v. The Portland Stage Co.* viii. 207.

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

VII. *Of the discharge of an execution.*

1. Where the brother of one of several judgment debtors advanced the amount of the execution to the officer, in order to obtain the control of it, and to satisfy it out of the property of another debtor, which was done; the brother for whose relief the money was advanced being absent, but afterwards approving the act, and reimbursing the money;—it was held that by such payment the execution was satisfied and *functus officio;* and that therefore the subsequent levy was void. *Stevens v. Morse*, vii. 36.

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

VIII. *Of the officer's sale of an equity of redemption.*

1. If a tract of land mortgaged is situated in more towns than one, it is necessary that the sheriff, in making sale of the mortgagor's right in equity of redemption, under *Stat.* 1821, *ch.* 60, should post up two notifications in every town where any part of the land is situated. *Grosvenor v. Little*, vii. 376.

2. 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. *Chandler v. Furbish*, viii. 408.

IX. *Of the redemption of property taken by execution.*

1. Where an execution has been extended on two or more parcels of land, the debtor is not entitled to redeem one of them alone, without the others, even though its value is separately stated in the certificate of the appraisers. *Foss v. Stickney*, v. 390.

2. Where a judgment debtor, whose land has been taken by extent, having tendered the money within the year, brings his writ of entry for the land, pursuant to *Stat.* 1821, *ch.* 60, *sec.* 30, it is sufficient that the money be produced and lodged in Court at any time before the rendition of judgment. *Ib.*

3. If a judgment creditor extend his execution on land mortgaged for the same debt, and the debtor neglect to redeem for the space of a year after the extent, the estate is absolute in the creditor, notwithstanding the mortgage. *Porter v. King*, i. 297.

4. Where the right in equity of redeeming lands was sold on execution by the sheriff, and the purchaser forthwith brought his action against the mortgagor to have possession of the lands; and afterwards, and within the year, the mortgagor tendered to the demandant the purchase-money and interest, pursuant to the statute, but did not offer to pay the costs of the suit,—it was holden that

under the laws of this State the tender was no bar to the action, unless it included the costs also. *Jewett v. Felker*, ii. 339.

5. But in such case, the Court, on payment of the money and costs, will stay farther proceedings. *Ib.*

[See Amendment. Assumpsit, III. Estoppel, II. Evidence, VII. *a. b.* Landlord and tenant, III. IV. Mortgage, I. V. VI. Practice, VI. Principal and Surety, III. Sale, V.]

EXECUTORS AND ADMINISTRATORS.

I. Of presenting the will for probate.

II. What are assets in the hands of an executor or administrator.

III. Of their authority in relation to the real estate.

(a.) Their interest in the land, and liability for rents.

(b.) Of license to sell, and the granting thereof.

(c.) Of the bond, previous to a sale, and the deed of conveyance.

IV. Of their accountability for the personal estate, and the process for discovery thereof.

V. Of insolvent estates.

(a.) Of the grant of further time for the proof of claims.

(b.) Of the commissioners' report.

(c.) Of marshalling the payments.

VI. Of the settlement of their accounts at the Probate office.

VII. Of actions by executors and administrators.

VIII. Of the remedies against them.

IX. Of foreign executors and administrators.

I. *Of presenting the will for probate.*

In an action against an executor, under *Stat.* 1821, *ch.* 51, *sec.* 11, to recover the penalty there provided for not filing a will in the probate office, it is not competent for the executor to prove that the will was revoked, this being a question exclusively of probate jurisdiction. *Moore v. Smith*, v. 490.

II. *What are assets in the hands of an executor or administrator.*

1. 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 life-time;—and in either case it ceased at the death of the father:

2. 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:

3. 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. *Staples v. Bradbury*, viii. 181.

III. *Of their authority in relation to real estate.*

(*a.*) *Their interest in the land and liability for rents.*

1. The lands of a person deceased, of which he was disseised actually and not colourably at the time of his death, are not liable for the payment of his debts. *Thorndike v. Barrett*, ii. 312.

2. Whether an administrator, who is also an heir at law, is chargeable as administrator for the rents of real estate in his own occupancy, without some contract express or implied,—*quære*. *Heald v. Heald*, v. 387.

3. Where an administrator recovers judgment in that capacity, which is satisfied by an extent on land, he has a trust estate in the land, continuing till it is rendered certain, by proceedings in the

Probate office, or otherwise, that it will not be necessary to resort to this fund for any purposes of administration; after which a writ of entry may be maintained by the heirs at law, counting on their own seisin. *Webber v. Webber*, vi. 127.

(*b.*) *Of license to sell, and the granting thereof.*

1. The power vested in this Court to grant license to sell real estate for the payment of debts is discretionary, not imperative.—*Nowell v. Nowell*, viii. 220.

2. 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. *Ib.*

3. Nor will the 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. *Ib.*

4. Whether license to sell to defray charges of adminstration 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.* *Ib.*

5. 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 application to this Court, under *Stat.* 1821, *ch.* 51, *sec.* 65, and the decree reversed, notwithstanding the land had in the meantime been sold under the license. *Ib.*

(*c.*) *Of the bond, previous to a sale, and the deed of conveyance.*

1. Under *Stat.* 1783, *ch.* 32, an administrator is not required to give a new bond, on being licensed to make sale of the real estate of his intestate, except in those cases where he is authorized to sell the whole of such real estate, lest by a sale of part the residue would be injured. *Hasty v. Johnson*, iii. 282.

2. An administrator selling land by license, under *Stat.* 1821, *ch.* 60, *sec.* 29, cannot convey any other or greater estate than the intestate had in the land. *Ib.*

IV. *Of their accountability for the personal estate, and the process for discovery thereof.*

1. The Judge of Probate has power, by *Stat.* 1821, *ch.* 51, *sec.* 23, 24, to call before him and examine under oath as well the executor or administrator of an estate, when suspected and charged by the heir with embezzlement of the property, as any other person entrusted with property by the executor or administrator. *O'Dee v. McCrate*, vii. 467.

2. Such process can only result in a discovery of facts, to serve as the basis of ulterior proceedings. *Ib.*

3. The lapse of thirty years since the transactions inquired into, is no bar to such examination. *Ib.*

4. And such executor may be held to answer under oath respecting the existence of the will, his appointment as executor, the nature and value of the estate of which the testator died possessed, and any facts relative to his administration, and the existence of any muniment touching the estate; but not respecting any conveyance of real estate to him in trust, by the testator, prior to his decease. —*Ib.*

V. *Of insolvent estates.*

(*a.*) *Of the grant of further time for the proof of claims.*

It seems that the allowance of further time to settle an administration account, under the hand and seal of the Judge of Probate, ought to be made before the expiration of the six months mentioned in *Stat.* 1821, *ch.* 51, *sec.* 28; and that if a still further time be granted, the order should issue before the end of the term first allowed;—*sed quære.* *Ring v. Burton*, v. 45.

(*b.*) *Of the commissioners' report.*

1. It is no part of the official duty of an administrator to receive the report of commissioners, and carry or send it to the Judge of Probate; and if he do receive such report and undertake to return it, this is merely a personal engagement, for the performance of which the sureties in his bond are not liable. *Nelson v. Woodbury*, i. 251.

2. It is the duty of the commissioners on an insolvent estate to make their own return to the Judge of Probate. *Ib.*

(c.) Of marshalling the payments.

1. 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. *Huse v. Brown*, viii. 167.

2. 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. *Ib.*

VI. *Of the settlement of their accounts at the Probate office.*

1. No administrator is to be considered as refusing or neglecting to account, under oath, for such property of the intestate as he has received, within the meaning of *Stat.* 1786, *ch.* 55, until he has been cited by the Probate Court for that purpose. *Nelson v. Jaques & al.* i. 139.

2. Upon the death of an administrator without having settled his administration-account, it belongs to his representative, and not to the administrator *de bonis non*, to present such account to the Judge of Probate for allowance and settlement. *Nowell v. Nowell*, ii. 75.

3. Costs, reasonably incurred in a suit at law, are a proper charge for an administrator, against the estate in his hands. *Crofton v. Ilsley*, vi. 48.

4. Where an execution against an administrator was extended on lands in his occupancy, on which he had erected buildings and made improvements, the value of which was included in the appraisement; it was held that he might properly claim the value of these improvements in his administration account, and have it allowed by the Judge of Probate. *Webber v. Webber*, vi. 127.

5. The account which an administrator is required by *Stat.* 1821, *ch.* 51, *sec.* 28, to render within six months after the report of the

commissioners of insolvency, at the peril of being liable to the creditors of the deceased for their whole demands, is an account of the personal estate only. *Butler v. Ricker*, vi. 268.

6. 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. *Eaton v. Brown*, viii. 22.

7. 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. *Ib.*

VII. *Of actions by executors and administrators.*

1. An administrator may maintain trespass for an injury to personal property committed after the death of the intestate, and before administration granted. *Hutchins v. Adams*, iii. 174.

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

3. In a suit upon a contract arising, or for a tort committed, after the death of the testator, it is not necessary for the executor to declare in his official capacity. *Carlisle v. Burley*, iii. 250.

4. Where the personal estate of a testator, being chiefly neat stock, was suffered to remain on his farm, as before his death, in the hands of the residuary legatee, with an understanding that he would pay the legacies to his sisters, which would not become due till several years afterwards, but which he neglected to pay;—it was holden that the residuary legatee was only the bailee of the executor, and was answerable to him in trover for the goods, if they should be requisite in order to pay the legacies. *Carlisle v. Burley*, iii. 250.

VIII. *Of the remedies against them.*

1. A creditor of an insolvent estate, whose claim has been proved before the commissioners, cannot have an action on the administrator's bond, for the amount of his debt, till a decree of distribution has been passed by the Judge of Probate, and a demand has been made upon the administrator, for the amount decreed to be paid to him. *Nelson v. Woodbury & al.* i. 251.

2. If an administrator, under license for that purpose, sell real estate of the intestate to a certain amount, for payment of debts, and afterwards refuse to receive the purchase-money and to execute deeds of the land sold, this is mal-administration; to which his administration-bond given under *Stat.* 1783, *ch.* 36, does not extend; but the remedy is by petition to the Judge of Probate for his removal. *Nelson v. Jaques*, iii. 139.

3. A petition to the Court to enable an administrator to execute a deed, is not an adversary proceeding nor is the power, thus obtained, imperative on the administrator. *Emery v. Sherman*, ii. 93.

4. If an administrator of an estate represented insolvent, assume the defence of an action pending against his intestate, and neglect to suggest the insolvency on record and pray a stay of execution, so that execution is issued, and returned *nulla bona*, it is waste, and he is liable to a judgment and execution *de bonis propriis.*— *Sturgis v. Read*, ii. 109.

5. A feme sole, being one of two joint administrators, gave a mortgage to her sureties, conditioned to save them harmless from the official bond given by her and her colleague to the Judge of Probate; and afterwards took husband. It was held that this condition did not necessarily extend to any unfaithfulness but her own;—but that if it might apply to the acts of both, it included only their joint acts, and not those of her colleague, done after her own authority had ceased by the intermarriage. *Potter v. Webb*, vi. 14.

6. The provisions of *Stat.* 1821, *ch.* 51, *sec.* 28, apply to the cases where the creditor had already recovered his judgment against the administrator, before the estate was represented insolvent, as well as to those where the action was then pending, or is afterwards commenced. *Ring v. Burton*, v. 45.

7. In order to compel an administrator, on his official bond, to pay the amount of a debt due from him to the intestate, it is necessary that he should first be charged with the amount, in an administration account, by a decree of the Judge of Probate. *Potter v. Titcomb*, vii. 302.

8. In an action on an administrator's bond, brought for the benefit of the heirs at law here, it was held to be no good objection, in arrest of judgment, that the intestate was a foreigner, having a foreign domicil at the time of his death, and that the administrator here was therefore accountable to the administrator abroad for the assets, if any, in his hands. *Ib.*

9. Where an administrator, after judgment against him in that capacity, discovers new debts, and thereupon represents the estate insolvent, and proceeds regularly under the commission, the return of *nulla bona* on the execution does not support a suggestion of waste. *Ring v. Burton*, v. 45.

IX. *Of foreign executors and administrators.*

1. An executor, appointed under the laws of another State, cannot indorse a promissory note payable to his testator by a citizen of this State, so as to give the indorsee a right of action here in his own name. *Stearns v. Burnham*, v. 261. [*Harper v. Butler*, 2 *Pet.* 239; *Trecothie v. Austin*, 4 *Mason*, 16; *Story on Const. laws*, 296.]

2. And this objection, though in disability of the plaintiff, may be taken under the general issue, in an action by the indorsee against the maker of the note. *Ib.*

3. 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. *Barrett v. Barrett*, viii. 346.

4. 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. *Barrett v. Barrett & al.* viii. 353.

[See Actions real, II. Assumpsit, II. III. IV. Chancery, III. Conveyance, V. Covenant, II. Evidence, VIII. *a.* XII. *a.* Husband and wife. Landlord and tenant, I. Limitations, I. IV. V. Pleading, VII. Set-off. Will, IV. Writ.]

EXTENT.

[See Execution.]

FELONY.

[See Action, I.]

FENCES.

I. By the common law.
II. By statutes.

I. *By the common law.*

1. Parol proof of usage in the maintenance and repair of separate portions of a partition fence, is admissible evidence to show a prescription. *Heath v. Ricker & al.* ii. 72.

2. Where there is no prescription, agreement, or assignment under the statute, whereby the owner of land is bound to maintain a fence, no occupant is obliged to fence against an adjoining close; but in such case, there being no fence, each owner is bound at his peril to keep his cattle on his own close. *Little v. Lathrop*, v. 357.

3. Where a tenant is bound by prescription, agreement or assignment under the statute, to maintain a fence against an adjoining close, it is only against such cattle as are rightfully in that close;—and in such case, if the fence be not in fact made, the owner of

either close, thus adjoining, may distrain the cattle escaping from the adjoining close, and not rightfully there. *Ib.*

4. Whether to leave wild lands unfenced, be not an implied license for all cattle to traverse and browse them,—*quære.* *Ib.*

II. *By statutes.*

1. The *Stat.* 1821, *ch.* 128, *sec.* 6, respecting fences and impounding, is merely in affirmance of the common law. *Little v. Lathrop*, v. 357.

2. 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. *Eames v. Patterson*, viii. 81.

3. 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. *Ib.*

4. 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. *Ib.*

FERRIES.

1. 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. *Day v. Stetson*, viii. 365.

2. 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. *Ib.*

3. The Sessions may therefore license as many ferries at the same place, as may suit the public convenience. *Ib.*

4. The delegation of powers to the Sessions does not restrain the legislature from directly interposing, whenever the public exigencies may require. *Ib.*

5. 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. *Ib.*

[See Corporation.]

FISHERY.

1. The powers given to the committees appointed under the private statutes regulating the taking of fish in *Denny's* river and its tributary streams, cannot be exercised by an individual member, but are confided to a majority of the committee of any town named in the acts. *Stephenson v. Gooch*, vii. 152.

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

FIXTURES.

[See Conveyance, IV. Mortgage, III.]

FLATS.

[See Conveyance, X. *c.*]

FORCIBLE ENTRY.

1. The *Stat.* 5, *Rich.* 2, *cap.* 7, respecting entry *manu forti*, is part of the common law of this State. *Harding's case*, i. 22.

2. Forcible entry into a dwelling house is indictable at common law, though the force be alleged only in the formal words *vi et armis*. *Ib.*

FOREIGN ATTACHMENT.

[See Trustee process.]

FORFEITURE.

[See Chancery, IV. Estate upon Condition.]

FORGERY.

Forgery at common law, may be committed of any writing, which, if genuine, would operate as the foundation of another's liability.—*Ames's case*, ii. 365.

FRAUD.

The cases in which the Court will determine the question of fraud, as an inference of law, the facts being clearly proved or admitted, are those of sale, in which the rights of creditors are concerned, under *Stat.* 13, and 27, *Eliz.* or of sales with intent to defraud creditors, at common law. In other cases of alleged fraud, the imputed intent and *scienter* are subjects for the consideration of the Jury. *Sherwood v. Marwick*, v. 295.

[See Contract, II. Conveyance, VII. VIII. Estoppel, III. Limitations, IV. Mortgage, I. Parish, II. Partnership, II. Sale, VI. VII.]

FRUIT TREES.

The offence of cutting and girdling fruit trees is not punishable by indictment at common law; but only by *Stat.* 1821, *ch.* 33.—*Brown's case*, iii. 177.

FRYEBURG CANAL.

1. The statutes relating to the *Fryeburg* canal, are private statutes. *Fryeburg canal v. Frye*, v. 38.

2. The remedy by complaint, given in the statutes relating to the *Fryeburg* canal is cumulative, not precluding a resort to the process of the common law, nor to the statute-remedy by arbitration. *Ib.*

3. The statute incorporating the proprietors of the *Fryeburg* canal having prescribed a particular remedy for all damages occasioned by opening the canal, all other modes of remedy are by necessary implication excluded. *Spring v. Russell*, vii. 273.

4. The proprietors of the *Fryeburg* canal are not liable to an action for consequential damages occasioned by turning the channel of *Saco* river as directed by their act of incorporation. *Ib.*

GAOLER.

[See Escape. Bond, III. Poor debtors, III. IV.]

GRAND JURY.

[See Indictment, I.]

GRANTS BY THE STATE.

1. The usual reservation of a certain portion of lands for public uses, in a grant by the State to individuals, is a condition subsequent; imposing on the grantees the duty of impartially setting apart a quantity so reserved, for the designated uses. *Porter v. Griswold*, vi. 430.

2. When such lands are so set apart by vote of the proprietors, and designated in severalty, the fee thereby passes from the original proprietors, and becomes vested in the several parties for whose respective benefit the reservation was made, if in being, and capable of taking the estate. *Ib.*

3. Previous to the existence of such party capable of taking, the fee in such lands is not in the State, nor in the town as successor to the corporation of proprietors, for the purpose of custody; but is in the original grantees and their heirs. *Ib.*

A grant by the provincial government of *Massachusetts*, under the charter of *William* and *Mary*, conveyed no seisin to the grantee, against the province, without the approbation of the crown.—*Hill v. Dyer*, iii. 441.

[See Proprietors of lands. Settlers.]

GUARANTY.

I. Of the nature of the contract.
II. Of the notice to be given to the guarantor.
III. Of the discharge of the guarantor.

I. *Of the nature of the contract.*

1. *B.* gave to *S.* a collateral guaranty containing these principal words—"I have consented, and now hereby promise to you, that I will be ultimately accountable to you for the sum of one hundred and fifty dollars, if the said *H.* shall purchase goods of you, and should fail to pay you for them." On the same day *S.* sold to *H.* goods to that amount, on a credit of six months. No notice was given by *S.* to *B.* of the acceptance of the guaranty, or the sale of the goods; but about five months afterwards *H.* was summoned as the trustee of *S.* by one of his creditors, and employed *B.* to prepare his disclosure, in which it was stated that he owed *S.* 110 dollars for goods sold. After the lapse of about sixteen months more, *S.* and his creditor entered into a compromise, by which the debt was paid, but the trustee-process was kept on foot for the benefit of *S.* who was to receive to his own use, the money which might be obtained from the trustees. Judgment was accordingly rendered against *S.* and his trustees, of whom *H.* was one, and of whom the money was regularly demanded by the officer holding the execution; but nothing was paid by *H.* nor had any change taken place in his circumstan-

ces. Afterwards the execution was discharged. It was held that the guaranty was not absolute, but contingent;—that *B.* had sufficient notice;—and that as the judgment in the trustee-process had been assigned to *S.* and could therefore no longer endanger *H.* in making payment to him, it was no bar to an action by *S.* against *B.* on the guaranty. *Seaver v. Bradley*, vi. 60. [*Marland v. Jefferson*, 2 *Pick.* 240.]

2. 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. *Bradley v. Carey*, viii. 234.

II. *Of the notice to be given to the guarantor.*

1. Where a written guaranty or letter of credit is given, for a debt about to be created, and uncertain in its amount, so that the party cannot previously know whether he is to be ultimately liable, nor to what extent; it is necessary, in order to charge him, that he should have notice, in a reasonable time, that the guaranty is accepted, and of the amount of debt created upon the faith of it. *Norton & al. v. Eastman*, iv. 521.

2. In the case of a continuing guaranty, given for whatever goods may be delivered from time to time, limited only in its general amount, but not in the duration of the term for which it is to stand, notice of its acceptance is as necessary, as it is in the case of one given for a specific debt, to be contracted at one time. *Tuckerman v. French*, vii. 115.

3. The essence of the engagement of a guarantor of a pre-exist-

ing debt, is that the debt shall be paid if the creditor shall take the usual legal steps to secure it, or to render the principal debtor's liability absolute. But where the original debt was due and payable and absolute before the guaranty was given; or where the rights of the creditor of an indorsed note or bill of exchange have become absolute against all the parties chargeable upon it; or where, from the absolute character of the debt guarantied, nothing of a preliminary nature on the part of the creditor is by law required, to perfect his rights;—demand and notice are not essential to the maintenance of an action against the guarantor. *Read v. Cutts*, vii. 186.

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

III. *Of the discharge of the guarantor.*

A collateral undertaking to guaranty the payment of a debt, is not discharged by the creditor's taking a new stipulation from the debtor, with an additional surety; nor by the recovery of judgment against the surety, nor by his discharge from prison after commitment in execution, nor by any other transactions between him and the creditor, so long as the original debt remains unpaid. *Norton v. Eastman*, iv. 521.

[See Bills of Exchange, &c. IV. Contract, VII.]

GUARDIAN.

Where a guardian neglects to account, a citation from the Judge of Probate requiring him to render his account is a necessary preliminary in order to charge the guardian on his bond for refusing to account. *Bailey v. Rogers*, i. 186.

[See Executors, &c. III. *b. c.* VIII. License.]

HABEAS CORPUS.

[See Parent and Child.]

HEIRS.

[See Action, II. Assumpsit, III. Covenant, II.]

HUSBAND AND WIFE.

1. A husband has no right, by the marriage, to commit waste on his wife's land, though the coverture is a suspension of any remedy, at common law, against him. *Babb & ux. v. Perley*, i. 6.

2. And if a judgment creditor of the husband extend his execution on the land of the wife, he thereby succeeds to the husband's legal right to the rents and profits of the land, but not to his legal impunity for waste. *Ib.*

3. If the creditor in such case injure the inheritance of the wife, as by cutting down and selling the trees, an action on the case lies against him, in which the husband must join. *Ib.*

4. A husband cannot convey land by deed directly to his wife. *Martin v. Martin*, i. 394.

5. Where a husband, well able to support his wife, who was insane, neglected to protect and provide for her; and she wandered into an adjoining town, where she received support, the expenses of which were reimbursed in the first instance by the town where she was relieved, and then repaid by the town of the husband's settlement and abode;—it was held that the latter town might recover against the husband the expenses thus incurred. *Alna v. Plummer*, iv. 258.

6. An action for breach of a promise of marriage, by a *feme sole*, was compromised by her attorney, after her marriage to another person, by taking the defendant's promissory note, payable to her by her maiden name; both the attorney and the defendant being ignorant of the marriage. In an action by the husband in his own name upon this note, it was held good. *Templeton v. Cram & al.* v. 417.

7. A wife cannot be assignee of a mortgage made by the husband; but the debt is, by such assignment, extinguished. *Semble.* —*Clark v. Wentworth*, vi. 259.

8. A feme covert cannot bind herself, by an executory contract, to convey her own lands, even though her husband join with her in the obligation. *Ex parte Thomes*, iii. 50.

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

[See Domicil. Dower, III. Evidence, XII. *a.* Execution, III. VIII. Executors, &c. VIII. Marriage and Divorce, I. II. III. Parent and Child. Poor, I. *a.* Trustee process, II.]

IDIOT.

[See Poor, I. *d.*]

INDICTMENT.

I. Of the duty of the Grand Jurors.
II. Of the form of the indictment.

I. *Of the duty of the Grand Jurors.*

1. Grand Jurors, and their proceedings, are under the general superintendence of the Court; and the Court will institute inquiries, where necessary to protect the rights of the citizen. *Low's case.* iv. 439.

2. An indictment not found by twelve of the Grand Jury, is void and erroneous. *Ib.*

3. If an indictment is not found by twelve of the Grand Jury, the party accused may shew this by solemn suggestion to the Court, before pleading. *Ib.*

4. Grand Jurors may be examined as witnesses in Court, to the question whether twelve of the panel actually concurred or not, in the finding of a bill of indictment. *Ib.*

5. In such case the proof on the part of the accused must be sufficiently clear and satisfactory to the Court to control the strong presumption arising from the certificate of the foreman to the truth of the bill. *Ib.*

6. An indictment not certified to be "a true bill," though signed by the foreman of the Grand Jury, is bad. *Webster's case*, v. 432.

II. *Of the form of the indictment.*

1. In an indictment for forcible entry, at common law, it is not necessary to allege a seisin of the *locus in quo*. *Harding's case*, i. 22.

2. If an indictment for an offence against the statutes of *Massachusetts*, committed before the separation of *Maine* does not charge the offence to have been committed against the peace of *Massachusetts*, and the laws of that Commonwealth, the omission will be fatal. *Damon's case*, vi. 148.

3. 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 forman statuti*. *Butman's case*, viii. 113.

4. 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. *Ib.*

[See Evidence, I. VI. XVI. Forcible Entry. Fruit Trees. Misdemeanor.]

INFANT.

1. A deed of conveyance of land in fee, and a mortgage of the same, made at the same time by the grantee to the grantor, are to be taken as parts of one and the same contract. *Hubbard & al. Ex'rs. v. Cummings*, i. 11.

2. If such grantee, being an infant, continue in possession of the land after his arrival at full age, this is an affirmance of the contract. *Ib.*

3. So if, without actual possession, he bargain and sell the same land to a stranger. *Ib.*

4. Where an infant purchased land which was under a mortgage previously made by the grantor to a stranger, and agreed to pay part of the purchase-money by procuring the discharge of this debt and mortgage; which was accordingly done by substituting his own notes and a new mortgage to the creditor of the grantor; and the deeds were prepared and executed on different days, but were delivered at one and the same time;—it was held that the transaction was one and entire, though the deeds were between different parties; and that the infant, by retaining the land after he was of full age, ratified the mortgage. *Dana v. Coombs*, vi. 89.

5. 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.—*Lawson v. Lovejoy*, viii. 405.

6. 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. *Ib.*

7. Where an infant purchased lands, and for the purchase-money two of his friends of full age gave their joint note of hand, which the infant promised he would sign and pay after he should arrive at full age; and afterward, having come to full age, he by a memorandum on the bottom of the note acknowledged himself holden as co-surety;—in an action by the payee against him, as on an original promise, it was holden that the plaintiff might well shew by parol that the promise was for the defendant's own debt and not a collateral engagement, and so no new consideration necessary to be proved. *Thompson v. Linscott*, ii. 186.

INFORMATION.

[See Ways, IV.]

INSURANCE.

1. Where the underwriter, in a policy of Insurance, professes to take "the risks contained in all regular policies," a loss by capture is within the policy. And parol evidence is not admissible to prove that the parties understood it as covering sea risks only.—*Levy & als. v. Merrill & al.* iv. 180.

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

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

INTEREST.

1. Whether interest can be computed beyond the penalty of a bond given for official good conduct—*quære.* *Potter v. Webb*, vi. 14.

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

3. The law does not allow interest upon interest; even where a promissory note is made payable with interest annually. *Doe v. Warren*, vii. 48.

JUDGES.

[See Court.]

JUDGMENT.

1. If, in trespass *de bonis asportatis*, the Jury assess damages for the plaintiff in a greater sum than the goods are stated in the declaration to be worth; this is no good cause for arrest of judgment. *Hutchins v. Adams*, iii. 174.

2. If one of two counts be bad, and a general verdict be rendered for the plaintiff, the Court will not intend that the evidence supported the good count alone; but will arrest the judgment, on motion. *Clough v. Tenney*, v. 446. [Altered by *Stat.* 1830, *ch.* 463.]

3. If the plaintiff in trespass *quare clausum fregit* die after verdict in his favor, and before judgment, the Court will enter judgment as of the term in which the verdict was returned. *Goddard v. Bolster*, vi. 427.

[See Costs, I. Executors, &c. VIII. Justices of the Peace, II. Verdict, I.]

JURY.

1. Where a *venire facias* directed the constable to cause a Juror to be drawn, not more than twenty, nor less than six days before the sitting of the Court; and he made return that the Juror was drawn "as above directed," but without date; the return was held sufficient. *Fellows's case*, v. 333.

2. So, where the language of the return was—"We have appointed J. C. a Juror," &c.; for it shall be intended the language of the town, of which the constable was an inhabitant. *Ib.*

3. So, where the person drawn as a Juror was the constable himself, who served the *venire facias*, and made the return. *Ib.*

4. So, where the constable styled himself "constable of the

town," without saying of what town; the *venire facias* being directed to the constable of the town of *M*. *Ib*.

5. It is no good cause of challenge, that a Juror has been called as a witness for the State, on a former trial of the same indictment, to testify against the general character of the prisoner. *Ib*.

6. A defendant has no right, in any case, upon the coming in of the traverse Jury to have them polled, and each one separately interrogated as to his assent to the verdict. *Ib*.

7. An objection to a Juror because he is related to a party interested in the cause, must be made by way of challenge. After verdict it comes too late. *McLellan v. Crofton*, vi. 307.

8. 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. *Ware v. Ware*, viii. 42.

9. It is not within the province of the Jury to determine what acts or declarations amount to a new promise. *Miller v. Lancaster*, iv. 159. [5 *Price*, 638; 13 *Serg. & Raw.* 124, *acc.* 3 *New Hamp.* 467; 2 *B. & A.* 763, *contra.*]

10. If the sheriff return a talisman, in a cause in which his deputy is a party, it is good ground of challenge to the Juror, but will not support a motion to set aside the verdict. *Walker v. Green*, iii. 215.

[See Actions real, II. Verdict, II. III.]

JUSTICES OF THE PEACE.

I. Of their jurisdiction in criminal cases.
II. Of their jurisdiction in civil cases.
III. Where they act ministerially.

I. *Of their jurisdiction in criminal cases.*

1. If in a complaint of larceny, made to a Justice of the Peace, the goods alleged to have been stolen are described in a schedule annexed to the complaint, and not in the body of the complaint, it is bad. *Cummings' case*, iii. 51.

2. 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. *The State v. Berry*, viii. 179.

3. A recognizance for the appearance of the party in a criminal prosecution should state in substance all the proceedings which shew the authority of the magistrate or Court to take it. *The State v. Smith*, ii. 62.

II. *Of their jurisdiction in civil cases.*

1. In trespass *quare clausum fregit* before a Justice of the Peace, if the defendant plead a title to the soil and freehold, this plea, without any replication from the plaintiff, puts an end to the magistrate's jurisdiction over the cause; except that he must take the recognizance of the party for its prosecution in the Court of Common Pleas, where the pleadings are to be closed. *Low v. Ross*, iii. 256.

2. Since the statute of 1831, *ch.* 514, abolishing special pleading, the general issue, with a brief statement of soil and freehold, in an action of trespass *quare clausum fregit*, brought before a Justice of the Peace, is sufficient to bar any further proceedings before him, except the taking of a recognizance to prosecute the plea in the Court of Common Pleas; this statute having virtually repealed so much of *Stat.* 1821, *ch.* 76, *sec.* 10, as requires that in such cases the title to the *locus in quo* should be specially pleaded. *Hodgdon v. Foster*, ix. 113.

3. 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. *Bullen v. Baker*, viii. 390.

III. *Where they act ministerially.*

1. 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. *Knowles's case*, viii. 71.

2. 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. *Ib.*

[See Militia, IV. Trespass, II.]

JUSTICES OF THE PEACE QUORUM UNUS.

Where a statute confers certain powers upon, or requires certain duties to be performed by, any two Justices *quorum unus*, it is only necessary that one should be of the *quorum*. *Gilbert v. Sweetser*, iv. 483.

LAND AGENT.

1. The Land Agent cannot maintain an action in his own name, upon a promissory note not negotiable, given to him in his official capacity, for timber belonging to the State. *Irish v. Webster & al.* v. 171.

2. The resolve of *Massachusetts* passed *February* 18, 1829, authorizing its land agent to sell such small gores and tracts in *Maine* as might from time to time come to his knowledge, and evidently appear to belong to the Commonwealth, is sufficiently complied with if the agent knows of the general title of the Commonwealth to the tract sold, without having knowledge of its particular location or quantity. *Allen v. Littlefield*, vii. 220.

LANDLORD AND TENANT.

I. Of the creation, extent and dissolution of the tenancy.

II. Of an outgoing tenant.

III. Of the tenants at will.

IV. Of a lease of chattels.

I. *Of the creation, extent and dissolution of the tenancy.*

1. Where one, having intruded on the public highway, leased a part of the land for a term of years, on which the tenant erected a building, but afterwards, by order of the selectmen, removed it from the highway, part of which he again incumbered, within the term, as before;—it was held that the removal of the building restored the land to the public, for their use, and terminated the privity between the lessor and lessee; and that the replacing of a building on part of the same land, and continuing it after the end of the term, did not restore any privity between them, nor give the lessor any right of action, his possession being already gone. *Rogers v. Joyce*, iv. 93.

2. Where a farm was rented for a year, for two tons of hay and certain other produce, to be delivered from the farm to the landlord; it was held that he was not entitled to take the hay, till it was either delivered to him by the tenant, or severed and set apart for his use. *Dockham v. Parker*, ix. 137.

3. The tenant in that case having died before the hay was cut, and his widow and administratrix having completed the business of the farm for that season, it was held that the produce belonged to the husband's estate, if there was no new contract between the widow and the landlord. *Ib.*

II. *Of an outgoing tenant.*

An outgoing tenant in agriculture is not entitled to the manure made on the farm during his tenancy, even though lying in heaps in the farm yard, and though it were made by his own cattle, and from his own fodder. *Lassell v. Reed*, vi. 222.

III. *Of tenants at will.*

1. If one enter upon land in the possession of a tenant at will, and tread down the grass, and throw down a fence erected by the tenant for his own convenience, the landlord shall not have an action for this wrong; but the remedy belongs to the tenant, the injury being wholly to his rights, and not to any permanent rights of the landlord. *Little v. Palister*, iii. 6.

2. If a tenant at will makes a mortgage to a stranger in fee, the lessor may have trespass forthwith against the mortgagee. And it is no bar to such action, that the mortgagee has had judgment against the mortgagor, in a writ of entry upon his mortgage, and has been put into possession by the sheriff, under a writ of *habere facias*. *Little v. Palister*, iv. 209.

3. Where a tenant at will assented to an extent upon the land as his property, pointing it out to the creditor, assisting the surveyor, and not giving notice that the land belonged to another; this was held to be a determination of his tenancy at will. *Campell v. Procter*, vi. 12.

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

5. The manure on a farm in the possession of a tenant at will is liable, during the continuance of his tenancy, to be seized in execution and sold for the payment of his debts. *Staples v. Emery*, vii. 201.

IV. *Of a lease of chattels.*

1. Where cattle were leased for a term of years, to be taken back by the owner, within the term, if he should think them unsafe in the hands of the lessee; it was held that the lessor could not reclaim them without notice. *Wyman v. Dorr*, iii. 183.

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

LEGISLATURE.

[See Constitutional Law, II. IV. V.]

LEX LOCI.

[See Contract, XIII.]

LICENSE.

1. A license to sell goods by auction, granted under *Stat.* 1821, *ch.* 134, *sec.* 1, is of no force beyond the limits of the town to which the selectmen and auctioneer belonged at the time it was granted. *Waterhouse v. Dorr*, iv. 333.

2. A license to sell the land of a minor, under *Stat.* 1826, *ch.* 342, may be granted in the alternative, for public or private sale. *Cousins, ex parte*, v. 240.

3. Whether a license to cut timber on the land of the grantor is assignable,—*quære*. *Pease v. Gibson*, vi. 81.

4. A license to cut timber on the lands of the grantor, is not assignable. *Emerson v. Fisk*, vi. 200.

[See Fences, I. Lien. Mortgage, II. Trespass, I.]

LICENSE TO SELL RUM, &c.

[See Constitutional Law, IV.]

LICENSE TO SELL LANDS.

[See Conveyance, V. Executors, &c. III. *b. c.*]

LIEN.

1. An attorney's lien on the cause for his fees, does not exist till judgment is entered. *Potter v. Mayo*, iii. 34.

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

3. The owner of a township of land entered into a written contract with *A.* and *B.*, in the autumn of 1825, by which they were to cut all the pine timber on a certain tract in it, suitable for boards,

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

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

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

6. That the contractors *A.* and *B.* had no authority to sell the logs; being only bailees for a special purpose;—and that immediately upon the sale to third persons, their right as bailees terminated, and the owner might replevy the logs. *Emerson v. Fisk*, vi. 200.

7. The *Stat.* 1821, *ch.* 158, *sec.* 11, creating a lien on mill-logs, against the general owner, in favor of those who float them to market with their own timber, in which they happen to be intermingled, does not apply in favor of a wilful trespasser, against the owner of the land on which he had cut the logs. *Dwinel v. Fiske*, ix. 21.

[See Contract, I. Sheriff, II. *c.*]

LIMITATIONS.

I. What is within the statute.

II. What is not within the statute.

III. Of the computation of time.

IV. What does or does not take a case out of the statute.

V. Of the manner of showing the statute in bar.

I. *What is within the statute.*

1. To an action against an administrator *de bonis non*, upon a promise made by the intestate, it is a good plea in bar, that four years since the original taking out of letters of administration, elapsed during the life of the former administrator. *Heard v. Meader*, i. 156. [*Hemmenway v. Gates*, 5 *Pick.* 321.]

2. Where money has been paid more than six years, for a consideration recently discovered to be false and of no value; and no fraud is imputable to the party receiving the money; the statute of limitations is a good bar to an action brought to recover it back.—*Bishop v. Little*, iii. 405.

3. The statute of limitations applies to the civil actions at common law; and not to a claim made before the Judge of Probate against an administrator, for the rents of real estate occupied by him. *Heald v. Heald*, v. 387.

4. A promissory note payable in specific articles is not within the meaning of the *proviso* in the statute of limitations, (1821, *ch.* 62,) by which promissory notes for the payment of money, if attested by a subscribing witness, are excepted from its operation. *Gilman v. Wells*, vii. 25.

5. 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. *Jewett v. Greene*, viii. 447.

6. 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.—*Ib.*

7. A collector of taxes, who had sold the lands of a delinquent non-resident pursuant to law, was sued by the purchaser, on the covenant in his deed that the taxes were legally assessed, whereas in truth they were not, for which cause he had lost the land; and

judgment having been rendered against the collector, the execution was satisfied by extent upon his land. Soon afterwards the town voted to indemnify the collector; and after the lapse of a year, he repurchased the land. In an action against the town on the vote of indemnity, to which the statute of limitations was pleaded, it was held that the damage was sustained by the extent, and that the statute began to run from the passage of the vote, and not from the expiration of the right of redemption. *Page v. Frankfort*, ix. 115.

8. It was also held, that though the vote was entered on the town records, and was attested by the clerk, yet it was still within the operation of the statute. *Ib.*

II. *What is not within the statute.*

1. "Stated" or "liquidated accounts" are those which have been examined and adjusted by the parties; and where a balance due from one of them has been ascertained and agreed on as correct. *McLellan v. Crofton*, vi. 308.

2. In the case of merchants' accounts, the death of one or both of the parties has no operation on the accounts, by way of causing the statute of limitations to attach to them. *Ib.*

3. Neither has the cessation of dealings between the parties for more than six years any such operation. *Ib.*

III. *Of the computation of time.*

The time of the actual making of a writ, with an intention of service, is the time when an action is "commenced and sued" within the meaning of the statute of limitations; (1821, *ch.* 62,) for it is the acquiescence of the plaintiff for six years, that bars him, whether it be known to the defendant or not. *Johnson v. Farwell*, vii. 370.

IV. *What does or does not take a case out of the statute.*

1. Where the maker of a promissory note denied his signature, declaring the note to be a forgery; but said that if it could be proved that he signed the note, he would pay it; and it was proved

at the trial that he did sign it; this was held sufficient to take the case out of the statute of limitations. *Seaward v. Lord*, i. 163.

2. Whether an application to the Judge of Probate within four years from the granting of letters of administration, for further time for creditors to exhibit and prove their claims, is equivalent to a suit, so as to prevent the operation of the statute of limitations, the new commission not issuing till after the four years;—*quære.*—*Parkman v. Osgood*, iii. 17.

3. Proof that the defendant said—"If I owe you anything I will pay you; but I owe you nothing," is not sufficient evidence of a new promise to avoid the bar of the statute of limitations. *Perley v. Little*, iii. 97.

4. To take a demand out of the operation of the statute of limitations, there must be either an absolute promise to pay the debt;—or a conditional promise, accompanied by proof of performance of the condition;—or an unambiguous acknowledgment of the debt, as still existing and due. *Porter v. Hill*, iv. 41. [*Deshon & al. v. Eaton*, 413.]

5. Where the indorser of a note of more than six years standing, on a demand being made of payment, said he had not been duly notified, and was clear by law; this was holden to be no acknowledgment of the debt, to take it out of the statute of limitations.—*Miller v. Lancaster*, iv. 159.

6. The receipt of money for an outstanding debt, by an administrator, after the lapse of four years from the grant of administration, does not revive any creditor's right of action which had been previously barred. *Manson v. Gardiner*, v. 108.

7. Where a vessel on a voyage to *Trinidad*, and back to her port of discharge in the United States, was captured in the year 1797 by the cruisers of the king of *Spain*, and condemned; and a sum of money was allowed and paid to the owners in 1824, under the Spanish treaty, for the loss of the vessel and freight;—it was held that the receipt of the money by the owners, did not revive the claim of a seaman for his wages for the homeward voyage, even up to the time of capture. *Ib.*

8. An acknowledgment of debt, or a new promise, by the maker

of a promissory note, takes it out of the statute of limitations only so far as he is concerned; but does not affect the rights or obligations of collateral parties. *Gardiner v. Nutting & al.* v. 140.

9. Where the maker of a promissory note, of more than six years standing, died insolvent, and a collateral guarantor of the note was appointed a commissioner on his estate; the allowance of the note by the commissioner, as a valid claim against the estate, being an official act, was held not to amount to a new promise on his part to pay the debt. *Ib.*

10. The acknowledgment of a debt by one of several joint defendants, is sufficient to take the case out of the statute of limitations as to them all. *Getchell v. Heald*, vii. 26.

11. In mutual dealings between party and party, if there be items on both sides within six years, the statute of limitations does not attach to those of an earlier date. *Davis v. Smith*, iv. 337.

12. And if there be an item in the defendant's account within six years, this will take the account of the plaintiff out of the statute, though the latter contain no item within that period. *Ib.*

13. 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. *Morton v. Chandler*, viii. 9.

14. 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 transportion 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. *Jewett v. Greene*, viii. 447.

15. The plaintiff is not bound, in such case, to send to the near-

est officer; but is at liberty to send to any one within the county or precinct. *Ib.*

16. It is no answer to a plea of the statute of limitations, that the action is founded on a breach of trust, not discovered till within six years. In order to take a case out of the statute on this ground, there must be proof of actual fraud and concealment by the party to be charged. *Cole v. McGlathry*, ix. 131.

V. *Of the manner of showing the statute in bar.*

1. To a plea of the statute of limitations by an executor of an estate represented insolvent, it is not a sufficient answer to say that the estate is solvent, and that after the lapse of four years a further time was allowed by the Judge of Probate for creditors to exhibit and prove their claims, under which the demand in suit was duly proved. *Parkman v. Osgood & al.* iii. 17.

2. The *Stat.* 1821, *ch.* 62, *sec.* 14, limiting penal actions to one year from the time of forfeiture, may be given in evidence under the general issue. *Moore v. Smith*, v. 490.

[See Assumpsit, II. Covenant, II. Evidence, III. *a.* Pleading, I. Sheriff, IV. *a.*]

LOGS.

[See actions on Statutes.]

LOTTERIES.

1. The managers of the *Sullivan* bridge lottery are not liable, under the private statute of 1826, *ch.* 430, *sec.* 3, to pay into the Treasury of the State the price of any tickets, which, in the diligent and faithful execution of their trust, they have been unable to sell. *Thomas, treas. &c. v. Mahan*, iv. 513.

2. The Governor and Council have a right to charge the managers of lotteries granted by this State with the scheme price of the tickets, as advertized by them; and have not a right to settle with

them for a less sum; nor to deduct more than six per cent. from that price where the tickets are sold for the purpose of resale.—*App.* vii. 502.

3. Bad debts, made by sales on credit to venders, are not to be considered as money "raised" by the lotteries, so far as to authorize the allowance of twenty five per cent. thereon to the managers. *Ib.*

4. Nor is such twenty five per cent. allowed to the managers to be considered as a part of the sum authorized to be "raised" by lottery. *Ib.*

LUMBER.

[See Constitutional law, IV.]

MAINTENANCE.

Where divers citizens, being taxed for the support of public worship by a parish of a denomination other than their own, bound themselves in a bond to defray each one his proportion of the expense of defending any suit against any one of their number for the recovery of such taxes, and of the cost of any other legal mode of resisting the payment thereof; it was holden that the parties were not guilty of maintenance, and that the bond was good.—*Gowen v. Nowell*, i. 292.

[See Contract, II.]

MANUFACTORIES.

[See Conveyance, IV. Taxes, I. II.]

MARRIAGE AND DIVORCE.

III. Of divorce, and the proceedings therein.

I. *Of the manner of contracting marriage.*

1. Whether a contract of marriage *per verba de præsenti*, without any formal solemnization, would be sanctioned in this State as amounting to an actual marriage;—*dubitatur*. *Cram v. Burnham*, v. 213.

2. A marriage solemnized by a minister at his own house, neither of the parties residing in that town, is void under *Stat.* 1786, *ch.* 3, and this statute is not altered in this respect by *Stat.* 1811, *ch.* 6. *Ligonia v. Buxton*, ii. 102.

3. The resolve of *March* 19, 1821, does not render valid a marriage solemnized against the laws then in force. It only confirms those which, through misapprehension of the law, were defectively solemnized, the minister being not a stated and ordained minister, though erroneously supposed to be such. *Ib.*

4. Under the laws of *Massachusetts*, as they existed in 1805, a marriage between parties competent to contract, and solemnized by a person duly authorized, is to be considered legal and binding; without any evidence of the publication of banns, or of the consent of the parent or guardian of the party within age. *Damon's case*, vi. 148.

II. *Of the rights of the parties.*

1. Cohabitation, known to be adulterous in its origin, a former wife being still alive, conveys no right to the guilty parties, against third persons; nor does the continuance of such cohabitation, after the death of the lawful wife, afford legal presumption of a subsequent marriage. *Cram v. Burnham*, v. 213.

2. Therefore where a man, having deserted his wife and married another, sold land and took a promissory note for the purchase money, which was made payable to his second reputed wife, to induce her to sign the deed, in which she was described as his wife, and relinquished her right of dower; after which he brought an action upon the note, in his own name, as husband of the payee;—it was held that the defendant was not estopped to deny the legality

of the marriage; and that the plaintiff, not being the lawful husband of the payee, was not entitled to recover. *Cram v. Burnham*, v. 213.

III. *Of divorce, and the proceedings therein.*

1. In a libel for divorce *a mensa et thoro*, the Court will require evidence of the marriage, even though the respondent does not appear to answer to the libel. *Williams v. Williams*, iii. 135.

2. In a libel for divorce *a vinculo* for adultery, proof that the injured party has forgiven the offence by subsequent cohabitation with the offender, may be given in evidence under a general traverse of the facts alleged in the libel. *Backus v. Backus*, iii. 136.

3. Where, in cross libels between husband and wife for divorce *a vinculo* for adultery, each respondent pleaded in bar that the other party had committed the same crime; it was held that these pleas could not be received as admissions of the facts alleged in the libels. *Turner v. Turner*, iii. 398.

4. In a libel for divorce for the cause of adultery, the record of the conviction of the respondent, upon an indictment for that crime, is sufficient evidence, both of the marriage, and of the offence.—*Anderson v. Anderson*, iv. 100.

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

6. In a libel for divorce for the cause of adultery, the record of the party's conviction for that offence will be received, after default, in proof of the crime charged in the libel. *Randall v. Randall*, iv. 326.

7. The *Stat.* 1829, *ch.* 440, respecting divorces, applies only to cases where the desertion commenced after the passing of the statute. *Sherburne v. Sherburne*, vi. 210.

8. A libel for divorce in this State, for the cause of adultery, may be tried in the county where the injured party lived at the time of the adultery, within the meaning of *Stat.* 1821, *ch.* 71, *sec.* 1. *Harding & ux. v. Alden*, ix. 140.

9. If the husband has forfeited his marital rights by misbehavior,

and has deserted his wife, they are capable of having different domicils, in view of the law regulating divorces. *Ib.*

10. A divorce may be decreed in this State, where the husband has left his wife, established his domicil in another State, and there committed adultery. *Ib.*

11. If a married woman, domiciled in another State, having been deserted by her husband, establishes her residence in this State, she thereby becomes entitled to the benefit and protection of its laws, and her rights as a married woman will be recognized. *Ib.*

12. It is not necessary, as a foundation of jurisdiction, unless made so by positive statute, that the fact of adultery should have been committed within the State in whose tribunals a decree of divorce is sought for that cause. *Ib.*

13. Where a husband deserted his wife in this State, and went into North Carolina, and she removed to Rhode Island; after which he committed adultery in North Carolina; for which cause she was divorced from the bonds of matrimony by the Supreme Judicial Court of Rhode Island, he having been personally cited to appear, but refusing so to do;—it was held that the divorce was valid; and that the wife was entitled to dower in the lands held by the husband in this State during the coverture, in the same manner as if they had both continued to reside here, and the divorce had here been decreed. *Ib.*

14. A decree of divorce does not seem to fall within the rule laid down in *Bissell v. Briggs*, 9 *Mass.* 462, that a judgment, rendered against one not within the State, nor bound by its laws, nor amenable to its jurisdiction, is not entitled to credit against the defendant in any other State than that in which it was rendered. Divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, should be recognized, in the absence of all fraud, as operative and binding every where. *Ib.*

15. But this exception applies to the decree, only so far as it dissolves the marriage. If it proceeds farther to order the payment of money by the husband, such order would fall within the limitations laid down in *Bissell v. Briggs*. *Ib.*

[See Constitutional Law, IV. Evidence, I. X. *b*. Minister of the Gospel.]

MASTER AND OWNERS.

[See Shipping, I. II.]

MASTER AND SERVANT.

1. Where a poor child is bound an apprentice by the overseers of the poor, to do any work in which his master may see fit to employ him; this is understood to mean any lawful work; and the indenture is valid within the statute. *Bowes v. Tibbets*, vii. 457.

2. Where an apprentice is employed by a third person, without the knowledge or consent of his master; the master is entitled to recover the value of his earnings against the employer, even though the latter did not know that he was an apprentice. *Ib.*

MEDICAL SOCIETY.

The Statute establishing the *Maine Medical Society* is a virtual repeal of the *Statutes* of 1817, *ch* 131, and 1818, *ch.* 113, so far as they relate to this State. *Towle v. Marrett*, iii. 22.

MILITIA.

I. Of the persons liable to do military duty, and their enrollment.

II. Of the appointment and authority of the officers.

III. Of excuses for neglect of military duty.

IV. Of the prosecution for fines, and proceedings therein.

I. *Of the persons liable to do military duty, and their enrollment.*

1. In an action for a penalty incurred by neglect of military duty, under the act for organizing and governing the militia, it is competent for the defendant, at the trial, to show that by reason of permanent bodily disability he was not liable to be enrolled as a soldier. *Pitts v. Weston*, ii. 349.

2. In such case it is not necessary for the defendant to produce the certificate of the surgeon, nor to offer his excuse within eight days; these regulations applying only to cases of temporary disability. *Ib.*

3. If the overseers of a society of friends or quakers, in a certificate granted to one of their members under the militia act of 1821, *ch.* 164, *sec.* 1, state that he "measurably" conforms to the usages of their society, the certificate is good, notwithstanding that qualification. *Dole v. Allen*, iv. 527.

4. The forms of militia returns, prescribed and furnished by the Adjutant General, pursuant to the act of Congress of *May* 8, 1792, *sec.* 6, are of the same binding force as if they were contained in the act itself. *Sawtel v. Davis*, v. 438.

5. The day on which the name of a person, coming to reside within the bounds of a militia company, is placed on the muster roll, should be entered in the proper column on the roll. And parol evidence is not admissible to supply the omission of such entry. *Ib.*

6. Every citizen not within any class of persons specially exempted by statute from military duty, is presumed to be able bodied and liable to enrollment, until he show the contrary. *Hume v. Vance*, vii. 158.

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

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

9. 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 occassionally driving the mail stage, is not within the act exempting "stage-drivers" from military duty. *Littlefield v. Leland*, viii. 185.

10. 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. *Whitmore v. Sanborn*, viii. 310.

II. *Of the appointment and authority of the officers.*

1. If the captain of a company of militia be imprisoned for debt, he is nevertheless competent to issue orders for a company training. *Cutter v. Tole*, ii. 181.

2. If a captain of militia remove without the territorial limits of the company, he is still its commanding officer; and he alone is to receive and judge of the sufficiency of soldiers' excuses for non-appearance. *Cutter v. Tole*, iii. 83.

3. The commanding officer of a regiment, for the time being, is the proper officer to sign a surgeon's warrant. *Tripp v. Garey*, 266.

4. The only legal evidence of the appointment of a clerk of a company of militia, is the captain's certificate on the back of his sergeant's warrant, "that he does thereby appoint him to be clerk of the company." *Ib.*

5. If the standing clerk of a militia company be absent, and another be appointed "*pro tempore*," this is a sufficient specification of the term of his office, within the *Stat.* 1821, *ch.* 164, *sec.* 16, it being understood to continue during the absence of the standing clerk. *Cutter v. Tole*, iii. 83.

6. Where the clerk of a militia company had no other evidence of his appointment than a certificate on the back of his sergeant's warrant, stating that he, "appointed clerk," had taken the oath of office;—it was held not to be sufficient to satisfy the requirement of *Stat.* 1821, *ch.* 164, *sec.* 12. *Abbot v. Crawford*, vi. 214.

7. The clerk of a militia company was duly appointed, and sworn before the captain, who certified that he had subscribed the oath, omitting to state that he had taken it; but this omission the captain, being still in office, was allowed to supply by amending the certificate, even pending a suit brought by the clerk to recover a military fine. *Avery v. Butters*, ix. 16.

III. *Of excuses for neglect of military duty.*

1. Excuses for non-appearance at a military inspection must be offered to the commanding officer of the company within eight days after the inspection, unless the party be prevented from offering such excuse by severe sickness. *Tribou v. Reynolds*, i. 408.

2. The statute requiring that all excuses for non-appearance at a company training be made within eight days, does not apply to one who, though he may have been notified in a manner prescribed by law, yet had no actual notice to appear, and who, therefore, could not know that he was under any legal obligation to offer an excuse, nor that he had been guilty of any neglect which required one.—*Cutter v. Tole*, ii. 181.

IV. *Of the prosecution for fines, and proceedings therein.*

1. Whether it is necessary that the clerk of a militia company, suing for a penalty occasioned by neglect of military duty, should indorse the writ with his own name, provided the captain has indorsed his approval of the suit as required in *Stat.* 1821, *ch.* 164, *sec.* 46,—*quære*. *Abbott v. Crawford*, vi. 214.

2. The provision of *Stat.* 1821, *ch.* 164, *sec.* 46, exempting the clerk of a militia company from the payment of costs to the defendant in any suit where the captain has indorsed on the writ his approval of the prosecution, extends to the costs in all subsequent stages of the proceedings, as well as to those accruing in the Justice's Court. *Winslow v. Prince*, v. 264.

3. 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. *Bullen v. Baker*, viii. 390.

4. The proper evidence of enlistment in a company raised at large, is the signature of the party enlisting himself. *Ib.*

5. 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. *Ib.*

6. 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. *Ib.*

7. In an action for a penalty under the act for organizing and governing the militia, the declaration must allege the offence to have been committed "against the form of the statute in that case made and provided." *Heald v. Weston*, ii. 348.

MILLS.

I. Of mill-owners and their rights and liabilities.
II. Of the remedy for flowing lands.

I. *Of mill-owners, and their rights and liabilities.*

1. Where the proprietors of a township, in order to encourage its settlement, voted to give lands and a sum of money to any person who would build mills on one of the lots designated, and maintain them for ten years, which was done;—this was held to give no right to flow the lands of any individual proprietor, holden in severalty at the time of the vote, though more than forty years had elapsed since the mills were built, without any claim of damage.—*Stevens v. Morse & als.* v. 26.

2. 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. *Simpson v. Seavey*, viii. 138.

3. 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. *Ib.*

4. 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 of 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. *Blanchard v. Baker*, viii. 253.

II. *Of the remedy for flowing lands.*

1. In proceedings under the statutes respecting damages for flowing lands, the respondent may plead any matter shewing sufficient cause why further proceeding should not be had; though such plea be not enumerated in the statutes. And if such plea is in its nature preliminary to the appraisement of damages by the commissioners, it will be tried at the bar of the Court, previous to the issuing of the warrant. *Axtell v. Coombs & al.* iv. 322.

2. If the plea in such case involves matter triable by the Jury, with other matter cognisable only by the commissioners, the finding, as to this latter part, will be rejected as surplusage. *Ib.*

3. Where the question of damages for flowing land has been submitted to arbitration, and the award performed; whether a subsequent grantee of the land can pursue any remedy for damages accruing after his purchase;—*quære*. *Gordon v. Tucker*, vi. 247.

4. The remedy by complaint, provided by *Stat.* 1821, *ch.* 45, for the owner of lands flowed by the erection of a mill dam, does not lie for a town, against one who has flowed a town road, the fee still remaining in the original owner. For such injury, the remedy is by special action on the case. *Calais v. Dyer*, vii. 155.

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

[See Action on the Case, IV. Appeal, I. Arbitrament and Award, III. Contract, VII. Conveyance, IV. X. *b. c.* Watercourse.]

MINISTER OF THE GOSPEL.

1. A person elected by a Methodist Society to be one of their local preachers, and ordained as a deacon of the Methodist Episcopal Church, is a minister of the gospel within the meaning of *Stat.* 1811, *ch.* 6, *sec.* 4, though he have no authority to administer the sacrament of the communion. *Baldwin v. Mc Clinch*, i. 102.

2. It is sufficient if such minister be settled over any religious society, though it be composed of members resident in several towns. *Ib.*

3. It is not necessary that such society be under any legal obligation, as such, to pay him any fixed salary. *Ib.*

4. A minister ordained over an unincorporated religious society, composed of members belonging to different towns, is not a stated and ordained minister of the gospel, within the meaning of *Stat.* 1786, *ch.* 3. *Ligonia v. Buxton*, ii. 102.

[See Parish, III.]

MISDEMEANOR.

To cast a dead body into a river without the rites of christian sepulture, is indictable, as an offence against common decency.—*Kanavan's case*, i. 226.

MORTGAGE.

I. What constitutes a mortgage, and of the relations thereby created.

II. Of the rights of the parties in relation to the possession and enjoyment of the land.

III. Of the assignment of a mortgage, and the rights of the assignee.

IV. Of the redemption of land mortgaged.

V. Of the foreclosure of a mortgage.

VI. Of the extinguishment and discharge of a mortgage.

VII. Of the mortgage of personal chattels.

I. *What constitutes a mortgage, and of the relations thereby created.*

1. Where an absolute deed of real estate is given, on a bond executed by the grantee at the same time, though bearing a subsequent date, to convey the same land to the grantor, upon payment of a certain sum, the two instruments are to be taken as constituting a mortgage. *Semble. Blaney v. Bearce*, ii. 132.

2. Where a fulling-mill and land were sold, and mortgaged back to the grantor to secure payment of the purchase money; and by his bond of the same date he entered into certain stipulations respecting the liberties and immunities which the grantees should enjoy, in the use of the water and dam, &c.; and covenanted that he would forthwith build for them certain machinery for their mill; and that he would not follow nor permit others to pursue the same business there, while it should be followed by the grantees; and reserved to himself the use of a room in the premises for a limited term:—it was held that these stipulations amounted to a covenant that the mortgagors should occupy the premises, so long as they continued to fulfil the conditions of their deed of mortgage; and that they constituted a good bar to a writ of entry at common law, brought by the mortgagee. *Bean v. Mayo & al.* v. 89.

3. Where both parties to the action proved that a bill of sale, though absolute in its terms, was intended only as collateral security for a debt due, and this done with good faith; the transfer was holden valid as a mortgage. *Read v. Jewett*, v. 96.

4. Whether such proof is open to the vendee, if objected to, in a question between him and an attaching creditor of the vendor—*quære. Ib.*

5. Where a mortgagor and mortgagee joined in making a second mortgage to another person, who entered for condition broken, and afterwards before the mortgage was foreclosed by the lapse of the

three years, executed and tendered to them a deed of release of the premises according to a previous stipulation, which they refused to receive till five years after the time of entry; it was held that the effect of the release was merely to replace the estate in them as they held it before the second mortgage, restoring them to the original relation of mortgagor and mortgagee. *Baylies & als. v. Bussey*, v. 153.

6. Where a debtor, to defraud his creditors, made a fictitious mortgage of his estate; and afterwards a creditor, deeming the mortgage *bona fide*, attached the right in equity of redemption, which was subsequently sold by the sheriff to an innocent purchaser; and pending the attachment another creditor extended his execution on the land, and caused it to be set off in fee, treating the mortgage as a nullity; it was held, that the mortgage, being fraudulent, created no equity of redemption; that the sheriff's sale was void; and that therefore the subsequent extent gave the better title to the land. *Bullard v. Hinkley*, vi. 289.

7. 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. *French v. Sturdivant*, viii 246.

8. *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. *Ib.*

9. As between the mortgagor, and mortgagee, the fee of the estate passes to the mortgagee at the execution of the deed; and he may enter immediately, or have a writ of entry against the mortgagor; unless there be an agreement in writing between them that the mortgagor shall retain the possession and receive the profits.—*Blaney v. Bearce*, ii. 132.

10. But as between the mortgagor and other persons, he is con-

sidered as still having the legal estate in himself, and the power of conveying it to a third person subject to the incumbrance of the mortgage. *Ib.*

II. *Of the rights of the parties in relation to the possession and enjoyment of the land.*

1. If it appears that a debt secured by mortgage has been paid, the mortgagee, in a writ of entry upon his deed, cannot have judgment for possession of the land. *Vose v. Handy*, ii. 322.

2. If the mortgagor of land, being in possession, cut down and carry away timber-trees growing thereon, he is liable to the mortgagee, in an action of trespass *quare clausum fregit*, for their value. *Stowell v. Pike*, ii. 387.

3. If a lot of wild land be purchased, and mortgaged to secure payment of the purchase-money, *quære* whether a general usage and custom in the country for the purchaser in such cases to fell the trees and clear the land, may be considered as amounting to a license from the mortgagee so to do? *Ib.*

4. Whether the mortgagee, after he has lawfully entered into the mortgaged premises, has a right to cut down and carry away, for the purpose of sale, any timber or other trees growing thereon—*quære*. *Blaney v. Bearce*, ii. 132.

III. *Of the assignment of a mortgage, and the rights of the assignee.*

1. If the assignee of the mortgagor remove fixtures from the land, though erected by him after the execution of the mortgage, the assignee of the mortgagee may have an action of trespass against him for their value. *Smith v. Goodwin*, ii. 173.

2. Where the purchaser of an equity of redemption afterwards took a deed of release and quitclaim from the mortgagee, this was held to be no extinguishment of the mortgage, but only an assignment of the title of the mortgagee. *Carll v. Butman*, vii. 102.

3. 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.—*Dorkray v. Noble*, viii. 278.

4. 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*. *Ib.*

5. 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. *Ib.*

IV. *Of the redemption of land mortgaged.*

1. In computing the amount due on a mortgage, where the debt has been sued for and passed into judgment, the master assumed the amount of principal and interest due on the judgment at the time of entry for condition broken, as a new capital carrying interest; making annual rests in the subsequent computations of rents and profits, and of interest, to which no objection was made. *Porter v. King*, i. 297.

2. If the mortgagor has aliened the land to two persons, in separate parcels, a judgment obtained by the mortgagee against one of them for the whole tract, does not foreclose the other's right to redeem. *Carll v. Butman*, vii. 102.

3. If the first mortgagee afterwards acquires the right in equity of redemption, such purchase, and union of titles, will not affect the rights of an intervening second mortgagee; but he may still redeem the first mortgage, until foreclosure. *Thompson v. Chandler*, vii. 377.

4. In computing the three years after entry for condition broken, within which a mortgagor may redeem, the day of entry is to be excluded. *Wing v. Davis*, vii. 31.

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

6. Tender of money in a bag, made at the window of a house,

to redeem a mortgage, the creditor being at the window, and not admitting the debtor within the house, is sufficient. *Ib.*

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

8. 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. *Johnson v. Rice*, viii. 157.

9. 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. *Gilbert v. Merrill*, viii. 295.

10. 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. *Ib.*

V. *Of the foreclosure of a mortgage.*

If a judgment creditor extend his execution on land mortgaged for the same debt, and the debtor neglect to redeem for the space of a year after the extent, the estate is absolute in the creditor, notwithstanding the mortgage. *Porter v. King*, i. 297.

VI. *Of the extinguishment and discharge of a mortgage.*

1. Where the legal and equitable estates become united in the

mortgagee, the mortgage will be considered as subsisting, or not, according to his intention, actual or presumed. If no such intention appears, the Court will consider what is most for his interest. And if it appears wholly indifferent, the charge or incumbrance will be treated as merged. *Freeman v. Paul*, iii. 260.

2. If the purchaser of a right in equity to redeem a mortgage, takes an assignment of it, this shall not operate an extinguishment of the mortgage, if it is for the interest of the assignee to uphold it. *Thompson v. Chandler*, vii. 377.

3. Land being under mortgage, *A.* a creditor of the mortgagor attached his right in equity of redemption. Afterwards *B.* another creditor, attached the fee. *A.* having obtained judgment, caused the right in equity to be seized in execution, and sold by the sheriff; after which the mortgagee made a deed of release and quitclaim of his right in the land, to the mortgagor.—It was held that by this deed the original mortgagor became the assignee of the mortgage, invested with the character of a mortgagee;—and that *B.* the second attaching creditor, who subsequently obtained judgment in his suit, could not take the land for his debt, there having been no entry to foreclose the mortgage;—and that a deed of release and quitclaim, afterwards given by the original debtor to the purchaser of the equity of redemption, vested in the latter the title to the whole fee. *Bullard v. Hinkley*, v. 272.

4. A deed of quitclaim from the mortgagee to the mortgagor does not operate to extinguish the mortgage till it is delivered, although it may previously have been put on record by the mortgagee. *Ib.*

5. 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. *Johnson v. Rice*, viii. 157.

6. 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. *Ib.*

VII. *Of a mortgage of personal chattels.*

1. Where a creditor, who was also the surety of a debtor on the

eve of stopping payment, received from him his whole stock in trade, accompanied by a bill of parcels, at the foot of which payment was receipted in the usual form; and at the same time the parties executed an indenture of two parts, declaring the conveyance to be intended as security for the debt due to the grantee and certain others, for which he stood liable as surety or indorser, with power to sell for payment of these debts, and a covenant to pay over the surplus to the debtor or his order on demand;—it was held that both the instruments taken together amounted to a mortgage; and that it was a valid transaction against other creditors for whose debts no provision had been made; the Jury having found that no fraud was actually intended. *Bartels v. Harris*, iv. 146.

2. The possession of a personal chattel, by the mortgagor, is not inconsistent with the mortgage, and furnishes of itself, no conclusive evidence of fraud. *Holbrook v. Baker*, v. 309.

3. Nor is it a valid objection, by a creditor, against a mortgage of personal chattels, that it is made to cover future advances, if it is also made to secure an existing debt. *Ib.*

4. It is not essential to the validity of a mortgage of personal property, that it should contain a schedule or particular enumeration and valuation of the goods; if it be made without fraud, and sufficiently indicate the goods intended to be mortgaged. *Brinley v. Spring*, vii. 241.

[See Assignment, I. II. Attachment, I. Bills of Exchange, &c. II. Chancery, I. II. Conveyance, VII. *a.* Dower, I. IV. Evidence, X. *b.* XII. *a.* Execution, VIII. IX. Husband and Wife. Infant. Landlord and Tenant, III. Principal and Surety, III. Sale, I. II. Shipping, V. Trespass, I. Usury.]

NEW TRIAL.

1. A new trial will not be granted for the purpose of discrediting a witness by shewing contradictory testimony from his own deposition given at an early stage of the same cause; the deposition being on the files of the Court, but accidentally omitted to be read. *Keen v. Sprague*, iii. 77.

2. The fact, that some of the Jury misapprehended the testimony, does not furnish good cause for a new trial. *Bishop v. Williamson*, viii. 162.

3. On motion to set aside a verdict, on the ground that one of the Jury had prejudged the cause; the testimony of the Juror himself is to be heard, in explanation of the language and conduct imputed to him. *Taylor v. Greely*, iii. 204.

4. 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. *Ware v. Ware*, viii. 42.

5. If a question of law has been erroneously submitted to the decision of the Jury, it seems that the Court will not, for this cause alone, disturb the verdict, if it appears that they have decided it correctly. *Springer v. Bowdoinham*, vii. 442. *Copeland v. Wadleigh*, vii. 141.

6. A paper drawn up by the plaintiff, containing a statement of the items composing his claim for damages, having been accidentally passed to the Jury, with the other papers in the cause, though not by them regarded as evidence regularly before them; the verdict, which was for the plaintiff, was for this cause set aside. *Benson v. Fish*, vi. 141.

[See Constitutional Law, V. Practice, IX. Review, III. Verdict, II. III.]

NONSUIT.

1. Where, upon trial of a cause, there is no proof except what is offered by the plaintiff, and this is insufficient to warrant a verdict for him, the course is to direct a nonsuit. *Sanford v. Emery*, ii. 5.

2. Where the evidence offered by the plaintiff, and not controverted by the defendant, is deemed insufficient to maintain the action, the Court may order a nonsuit; and this is no infringement of the *Declaration of Rights, sec.* 20, which secures the privilege of trial by Jury. *Perley v. Little*, iii. 97. [*Mitchell v. New Eng. Ins. Co.* 1 *Pick.* 328.]

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

4. A decision of the Court in favor of the defendant, upon an agreed statement of facts, and a nonsuit of the plaintiff entered, and judgment thereon for the defendant for his costs, pursuant to such agreement, constitute no bar to a subsequent action for the same cause. *Knox v. Waldoborough*, v. 185.

[See Constitutional Law, V.]

NOTICE.

[See Bills, &c. IV. Poor, IV. Poor Debtors, IV. Practice, II. Proprietors of Lands. Ways, II. III.]

NUISANCE.

[See Action on the case, IV. Mills, I. Tenants in Common.]

NUNCUPATIVE WILL.

[See Will, II.]

OFFICE.

[See Constitutional Law, VI.]

OFFICER.

[See Constable. Sheriff. Towns.]

OUSTER.

In a writ of entry, the question being upon the fact of ouster by the defendant, and it appearing that he held a deed of the land, as security for a debt, given to him by a third person, who continued in possession, but under no certain agreement as to time or amount of rent; the defendant intending to take the land into his possession whenever he should think proper;—this was held to be no sufficient evidence of an ouster. *Jordan v. Sylvester*, vii. 335.

[See Actions real, II. III. Disseisin, I. Tenants in common.]

OVERSEERS OF THE POOR.

[See Town, III. *d.* Poor, III.]

PARENT AND CHILD.

1. Where a minor, at a great distance from his father, entered into a contract of labor for another, which he performed; and the party afterwards refused payment, insisting that he acted only as the agent of a third person, with whom the minor was induced, by his own destitute situation, to settle, taking his negotiable note payable at a distant day for the balance due;—it was holden that the father was not concluded by these proceedings, but might instantly maintain an action for the wages of the son, against the party with whom he originally contracted. *Keen v. Sprague*, iii. 77.

2. Where a parent, on removing to a distant part of the State, left his daughter in the care of an inhabitant of her native town, to live with him till she should be eighteen years old, and be treated as his adopted child;—this was held to be no emancipation, the father having still the right to reclaim her. *Sumner v. Sebec*, iii. 223.

3. Emancipation of a child is never to be presumed; but must always be proved. *Ib.*

4. A father may have an action for the seduction of his minor

daughter, though she resides out of his family; if he has not divested himself of the right to control her person, or to require her services. *Emery v. Gowen*, iv. 33.

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

6. A husband and wife having separated, pursuant to articles previously entered into, in which he had stipulated that in the event of such separation the children should remain with her; the Court, on *habeas corpus* sued out at his request, ordered the children into the custody of the mother, pursuant to the articles of separation; she living with her father, and they being of an age to require her care. *The State v. Smith*, vi. 462.

7. But independent of such articles, the Court, in such cases, in the exercise of its sound discretion, and for the good of the children, will only free them from undue and improper restraint; the father having no vested right, in any case, to the exclusive custody of his children. *Ib.*

[See Parish, II. Poor, I. *a*.]

PARISH.

I. *Of the formation of a parish.*

1. Where a town had become a congregational parish, by building a meeting house for that denomination, and settling a minister; and afterwards an act was passed incorporating certain individuals

by name, with their families, having *B. R.* for their pastor, with their associates and such others as might afterwards associate with them, as the congregational society in the same town of *P.*;—it was held that this act did not create a new corporation, but only recognized and confirmed the rights of the parish already existing and entitled to the parish funds, and to the lands reserved for the use of the ministry in the town. *Parsonsfield v. Dalton*, v. 217.

2. That part of *Stat.* 1786, *ch.* 10, *sec.* 4, which provides that when one or more parishes shall be set off from a town, the remaining part shall constitute the first parish, is still in force in this State. *Richardson v. Brown*, vi. 355.

3. A subscription to raise money for the support of public worship whenever a minister of a particular sect could be procured, is not the formation of an unincorporated religious society, within *Stat.* 1811, *ch.* 6. *Jones v. Cary*, vi. 448.

II. *Who are members of a parish.*

1. By the law as it stood prior to *Stat.* 1821, *ch.* 135, every person resident within the limits of a territorial parish, if otherwise qualified, was *ipso facto* a member of the same, unless he was regularly united as a member to some poll-parish. And on ceasing to be a member of such poll-parish, he became forthwith a member of the territorial parish within which he resided, unless such secession was colorable and fraudulent. *Lord v. Chamberlain*, ii. 67.

2. A pretended and colorable secession from a religious society or parish, thus becoming, by operation of law, a member of the territorial parish within whose limits the party resides, though apparently legal, yet if done with the fraudulent intent to aid in destroying the territorial parish and in transferring its property to others, operates no change of membership, but is ineffectual and void. *Ib.*

3. But by *Stat.* 1821, *ch.* 135, it seems that no person can become a member of any religious society without first obtaining its consent. *Ib.*

4. The legislature having incorporated certain persons "with their families" into a religious society, it was held that the minor

sons, as members of the father's family, became members of the corporation; and continued such after arriving at full age, until they changed their membership in some mode provided by statute.—*Bradford v. Cary*, v. 339.

5. The membership of a parishioner ceases *ipso facto*, upon his filing a certificate pursuant to *Stat.* 1821, *ch.* 135, *sec.* 8. *Fernald v. Lewis*, vi. 264.

6. The *Stat.* 1821, *ch.* 135, did not dissolve territorial parishes, but left them as they stood before it was enacted. *Osgood v. Bradley*, vii. 411.

7. Therefore the sons of the members of such parishes, on coming of age and continuing to reside within the limits of the parish, become *ipso facto* members of the same. *Ib.*

8. So also persons who come to reside within the limits of a territorial parish, and do not belong to any other religious society, do thereby become members of the parish within which they come to reside. *Ib.*

9. It is no longer necessary, in order to entitle a man to vote in parish affairs, that he should have been assessed in the last parish tax; that part of *Stat.* 1786, *ch.* 10, being virtually repealed by *Stat.* 1821, *ch.* 135, *sec.* 3. But the other provisions of *Stat.* 1786, *ch.* 10, so far as they are not inconsistent with the statutes of 1821, *ch.* 114, and 135, are still in force in this State. *Ib.*

10. Ceasing to attend the religious and secular meetings of a parish, and attending the worship and supporting the ministers of another denomination, for any length of time, will not alone amount to a renunciation of membership in the parish thus left; the only mode of withdrawing, without a change of residence, being by notice in writing, as provided in *Stat.* 1821, *ch.* 135. *Jones v. Cary*, vi. 448.

III. *Of the minister of a parish.*

Without the express concurrence or assent of a town, or parish, in its corporate capacity, no person can become its minister; and no minister, not thus recognized, can hold lands, reserved for the first settled minister in the town. *Bisbee v. Evans*, iv. 374.

IV. *Of parish meetings, and officers.*

1. The election of the moderator of a parish meeting will be valid, though the meeting was called to order, and the votes were received and declared, by a private parishioner, who assumed that authority to himself. *Jones v. Cary*, vi. 448.

2. The legality of a town or parish meeting for the choice of officers is sufficiently proved by showing that it was notified and warned in due form, by those claiming to act as the legally qualified officers of the preceding year. *Tuttle v. Cary*, vii. 426.

3. The return of the constable or collector on the back of the warrant for calling a town or parish meeting, is the only proper evidence that the meeting was legally warned. *Ib.*

4. And such return must show the manner in which the meeting was warned, or it will be bad. Nor can a defect in this particular be supplied by parol evidence. *Ib.*

5. But if the constable's return is thus defective, it does not follow that the proceedings of the inhabitants at the town or parish meeting are necessarily void, to all intents; since in some cases the objection may be lost, on the ground of waiver or estoppel. *Ib.*

6. Yet in an action against the moderator of a parish meeting, for refusing the plaintiff's vote, the constable's return not showing how the meeting was warned, this defect was held to be incurable, and fatal to the action. *Ib.*

V. *Of parsonage lands.*

1. Where lands, which had been originally granted to a town for the use of the ministry, were sold by virtue of a resolve of the legislature, and the money put at interest by the town, the annual income to be applied to the use of the ministry; and afterwards, a number of the inhabitants being incorporated into a separate religious society, the residue became a distinct parish; it was holden that this residue, thus forming a distinct parish, succeeded to all the parochial rights and duties of the town, and were entitled to recover of the town the money and interest arising from the sales of such land. *Winthrop v. Winthrop*, i. 208.

2. If lands be granted for pious uses to a person or corporation not *in esse*, the right to the possession and custody of the lands remains in the grantor, till the person or corporation intended shall come into existence. *Shapleigh v. Pilsbury*, i. 271.

3. And if, in the mean time, there be a disseisin, the grantor may maintain a writ of entry, counting generally upon his own seisin. *Ib.*

4. But he cannot resume the grant; nor can he alienate the lands without such consent as is necessary for the alienation of other church property. *Ib.*

5. The grant of land to a town for the use of the gospel ministry, is to be taken to refer to the town in its parochial and not in its municipal character. *Richardson v. Brown*, vi. 355.

VI. *Of parish taxes.*

1. Under *Stat.* 1821, *ch.* 135, parish taxes can be assessed only on the polls and property of members of the parish. *Dall v. Kimball*, vi. 171.

2. The *Stat.* 1786, *ch.* 10, *sec.* 3, so far as it regards parish taxes, is no longer in force in this State, its subject matter having been revised in *Stat.* 1821, *ch.* 135. *Ib.*

VII. *Of the remedy against a parish.*

1. The liability of seceding members of a parish to contribute to the payment of its then existing debts, is created for the benefit of the parish alone. *Fernald v. Lewis*, vi. 264.

2. The remedy for satisfaction of a judgment against a parish, by levy on the property of its members, is to be pursued against those only who were members at the time of the rendition of judgment, or, at farthest, at the time of commencement of the action.—*Ib.*

3. If all the members of a parish withdraw, and thus dissolve the corporation:—*quære* whether its creditors may not have a remedy by action of the case, or by bill in Chancery, against those individuals on whom the liability would have remained had the corporation continued to exist. *Ib.*

4. Whether a seceding member of a parish, who does not join any other society, is liable, by a fair construction of *Stat.* 1821, *ch.* 135, *sec.* 8, for any other and greater portion of the then existing debts of the parish, than one who does;—*dubitatur. Ib.*

[See Contract, I. Taxes, I. II.]

PARTITION.

1. In a petition under the statute for partition, assuming in none of its stages an adversary form, the appointment of commissioners by the Court to make partition seems virtually and substantially equivalent to the entry of judgment *quod partitio fiat. Southgate v. Burnham*, i. 369.

2. And in such cases if the report of the commissioners be accepted by the Court and recorded as the statute requires, the entry of the final judgment *quod partitio prædicta firma et stabilis*, &c. does not seem to be indispensably necessary, in order to give a perfect title to those claiming under it; but is at least good till reversed by writ of error. *Ib.*

3. It is no valid objection to an ancient record of partition by petition, under *Stat.* 1783, *ch.* 41, and *Stat.* 1786, *ch.* 53, that no interlocutory judgment was formerly entered, if it appears that notice was regularly given, and no one appeared to object, and that thereupon commissioners were appointed to make partition. *Sewall & al. v. Ridlon*, v. 458.

4. It is not necessary that commissioners, appointed to make partition under the statutes, should be inhabitants of the county in which the lands lie. *Ib.*

5. Proceedings in partition, in the Supreme Judicial Court, by petition pursuant to the statutes, may lawfully be in any county in the State, if no person appears to contest the title of the petitioner, or if the controversy is an issue of law. But when an issue of fact is joined, the record is to be remitted for trial of the issue, to the county where the lands lie. *Ib.*

6. But if the trial is in any other county, and without consent

of parties, yet the judgment will not be void for want of jurisdiction; but will be good, till avoided by writ of error. *Ib.*

7. Where commissioners, appointed by the Judge of Probate to divide an estate among heirs, undertook to divide a lot of land between two of them; and supposing it to contain one hundred acres, they assigned to one fifty five acres on the northerly part of the lot, to extend southward till the quantity should be completed; and to the other they assigned forty-five acres, being the southerly part of the lot; but made no survey or actual location of either parcel; and afterwards the lot was found to contain one hundred and thirty acres;—it was held that the surplus belonged to the two assignees, in the proportion of fifty-five to forty-five. *Witham v. Cutts*, iv. 31.

[See Conveyance, X. *a*. Proprietors of lands. Review, I.]

PARTNERSHIP.

I. What constitutes a partnership.
II. Of the power of one partner to bind the firm.
III. Of the remedies in favor of partnership creditors.

I. *What constitutes partnership.*

1. 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. *Doak v. Swan*, viii. 170.

2. Where two, being joint owners of a vessel, agreed to send her on a foreign voyage for their mutual benefit; and part of the outward cargo was purchased by each, separately, and part by both, jointly;—it was held that they were still but tenants in common of

the property, and not partners; and that therefore a creditor of both owners, for cordage for the vessel, was not entitled to priority in payment, out of the vessel and cargo, against the separate creditors of either. *Harding v. Foxcroft*, vi. 76.

II. *Of the power of one partner to bind the firm.*

1. Where one of two copartners, after the dissolution of the partnership, gave a note in the name of the firm, for his own private debt, the creditor knowing that the partnership was dissolved; and this note being afterwards sued, and the party who made it having become bankrupt, the other partner compromised the suit by giving his own note for half the debt and all the cost; part of which note he afterwards voluntarily paid;—it was held that the making and acceptance of the first note was a fraud upon the absent partner, and that the second note was therefore void. *Stearns v. Burnham*, iv. 84.

2. One partner cannot render another liable for his fraud, without an actual participation. *Sherwood v. Marwick*, v. 295.

III. *Of the remedies in favor of partnership creditors.*

1. The prior right of a partnership creditor, to be paid out of the common property, in preference to a separate creditor of either of the partners, does not exist in the case of a dormant partnership. In such case a creditor whose debt relates to the business of the firm, and who is behind the creditors or vendees of the ostensible partner in his attachment, shall not be permitted to defeat them and gain a priority, because he has discovered the concealed liability of a secret partner. *French v. Chase*, vi. 166.

2. The mere insolvency of a copartnership is sufficient to defeat an attachment made by a creditor of one of the firm; although the partnership creditors have commenced no action for the recovery of their debts. *Commercial Bank v. Wilkins*, ix. 28.

3. Therefore where an officer had attached the partnership effects, in a suit against one of the partners, and afterwards, with the consent of the firm, suffered the effects to be applied to pay a partnership debt due to a stranger; it was held that he was not respon-

sible to the first attaching creditor, in an action for not having seized the goods in execution. *Ib.*

4. Although the effects were applied to pay a judgment against the firm, which included some demands not yet due and payable, yet this circumstance was held of no importance, the claim being good between the parties to the judgment, and resting, not on priority of attachment, but on the superiority of the plaintiff's title as a creditor of the partnership. *Ib.*

5. In such action against the officer, the partnership creditor is a competent witness for the defendant, having no interest either in the event of the cause, or in the record as an instrument of evidence. *Ib.*

6. *G. & M.* being partners in trade, and owing certain debts, took *C.* into partnership with them, constituting a new firm, under the style of *G. M. & Co.* The new firm received a transfer of all the effects, and the partners verbally agreed among themselves that it should pay all the debts of the old firm. The new firm afterwards became insolvent, its stock was attached by *L.* a creditor of *G. & M.* in a suit against them; and was afterwards attached by the same officer, in the suits of other creditors against *G. M. & Co.* In an action brought by *L.* against the sheriff, for neglect to levy his execution on the goods, and for giving priority to the subsequent attachments against the new firm, it was held, that the goods were first liable to the creditors of the new firm;—that no creditor of the old firm could avail himself of the engagement of the new firm to pay its debts till he knew and assented to it;—and that his remedy on such agreement was to be sought only in an action against the new firm. *Locke v. Hall*, ix. 134.

[See Action, II. Evidence, X. *b.* Shipping, V.]

PAYMENT.

Where it was agreed between a debtor and his creditor that the former should give an absolute deed of conveyance of his farm, as collateral security for the debt, and that a bond should be executed

by the latter, conditioned to reconvey on payment of the money; and the deed was executed, delivered and recorded; but the execution of the bond was deferred to another day, before which the creditor died, and so the bond was never made;—it was holden that this was no bar to a recovery of the debt by the administrator of the creditor. *Woodman v. Woodman*, iii. 350.

[See Release.]

PEJEPSCOT CLAIM.

The Indian deed of the *Pejepscot Claim*, described the lands as "all the aforesaid lands from the uppermost part of *Androscoggin falls*, four miles westward, and so down to *Maquoit*, and by said river of *Pejepscot*, and from the other side of *Androscoggin falls*, all the land from the falls to *Pejepscot* and *Merrymeeting Bay* to *Kennebec*, and towards the wilderness, to be bounded by a southwest and northeast line, to extend from the upper part of the said *Androscoggin falls* to said river of *Kennebec*," &c.—Also, "all the lands lying five miles above the uppermost of the said *Androscoggin falls*, in length and breadth, holding the same breadth from *Androscoggin falls* to *Kennebec* river, and to be bounded by the aforesaid southwest and northeast line," &c. The falls in question are in a bend of the river, which contains several islands, and the commencement of the fall or broken water on the west side, is many rods higher up the river than any similar appearances on the east side.—Hereupon it was held, that the head or upper part of the tract was to be bounded by a line drawn southwest from the point where the uppermost part of the falls touched the bank on the west side; and by another line drawn northeast from the point where the uppermost part of the falls touched the bank on the east side. *Pejepscot Prop'rs. v. Cushman*, ii. 94.

PETITION.

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. *Day v. Stetson*, viii. 365.

PLAN.

[See Conveyance, II.]

PLANTATION.

[See Poor, II.]

PLEADING.

I. *Of the declaration.*

1. Whether, in an action upon a statute, the omission of the

words *contra formam statuti*, can be supplied by any other words of equivalent import; *quære*. *Barter v. Martin*, v. 76.

2. In an action against a constable for the penalty given by *Stat.* 1821, *ch.* 92, *sec.* 9, for serving a Justice's execution and taking fees before he had given bond, it is necessary that the amount of the debt should be set forth, that it may appear that the precept was within his authority to serve. *Ib.*

3. In an action against two of four joint and several promissors, if it is stated in the writ that four promised, it is material also to allege that the other two are dead, or otherwise incapable of being sued; or it will be bad, and may be reversed on error. *Harwood v. Roberts*, v. 441.

4. In a declaration upon *Stat.* 1821, *ch.* 51, *sec.* 11, to recover the penalty there enacted against an executor for neglecting to file and obtain probate of a will, it is necessary to allege in the words of the statute, that the neglect was "without just excuse made and accepted by the Judge of Probate for such delay." And the want of this allegation is not cured by verdict. *Smith v. Moore*, vi. 274.

5. But it is not necessary to aver that such omission was intentional. *Ib.*

6. Where *S.* sold a vessel to *A.* who promised, in consideration thereof, to pay *B.* a debt due from *S.* to him; upon which promise *B.* brought his action against *A.* it was held sufficient for the plaintiff to set forth so much of the promise as enured to his own benefit; and that proof of other and further particulars of the contract did not affect the action. *Brown v. Attwood*, vii. 356.

7. It was also held that such promise was good, though not in writing; for it was a promise to pay *A's.* own debt, though it enures to the benefit of *B.* *Ib.*

8. It was also held that *S.* was a competent witness for the plaintiff, his interest being equally balanced. *Ib.*

9. 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. *Barrett v. Barrett & al.* viii. 353.

II. *Of pleas in abatement.*

1. The rule requiring the defendant, when pleading in abatement, to give the plaintiff a better writ, applies to the averment of facts only. *Brown v. Gordon*, i. 165.

2. A plea in abatement that the officer who served the writ was, after his appointment as deputy sheriff, appointed and commissioned as a Justice of the Peace, whereby the former office became vacant, is a bad plea, unless it shews not only that he took the oaths of the latter office, but that he also subscribed them.—*Vid. Constitution, art.* 9, *sec.* 1. *Chapman v. Shaw*, iii. 372.

3. In debt on a judgment of the superior Court of *Georgia*, the defendant pleaded in abatement that the judgment was rendered agianst 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. *Hall v. Williams*, viii. 434.

4. 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. Ib.*

III. *Of pleas in bar.*

1. Though a plea admit the registry of an adverse title deed, yet it may, in proper cases, well aver the want of actual knowledge of the existence of the deed; and the fact will be well pleaded. *Steward v. Allen*, v. 103.

IV. *Of pleadings in real actions.*

1. If the tenant in a writ of entry, after action brought, purchase of a third person an outstanding title derived from the demandant himself, this cannot be pleaded in bar of the action. *Aliter*, if the title was purchased directly from the demandant. *Parlin v. Haynes*, v. 178.

2. In a writ of entry, to a plea that the tenant was not tenant of the freehold, with a disclaimer, the demandant replied that, at the time when, &c. the tenant was in possession of the demanded premises, claiming to hold the same as his own, concluding to the coun-

try; and the replication, on special demurrer, was held good.—*Parlin v Macomber*, v. 413.

V. *Of pleadings in assumpsit.*

1. If two be sued on a joint promise, and one alone appears, the general issue should be that he and the other defendant did not promise, &c. *Butman v. Abbot*, ii. 361.

2. But if the defendant in such case plead that he alone did not promise, upon which issue is taken, and it be found for the plaintiff; —whether the defendant can reverse the judgment for this error,—*quære*. *Ib.*

3. Where, in an action on a note not negotiable, the defendant pleaded that this debt had been attached in his hands, in a foreign attachment at the suit of a creditor of the plaintiff, and judgment rendered thereon, which was in full force;—and at a subsequent term the plaintiff replied that the execution on that judgment having been returned *nulla bona*, the creditor had sued out a *scire facias* against the trustee, who had appeared and was discharged, upon his disclosure;—the replication was held good, though the judgment in the *scire facias* was since the filing of the plea. *Sargeant v. Andrews & al.* iii. 199.

4. Where the defendant in a suit, after service of the writ, and before entry of the action, was summoned as the trustee of the plaintiff, in a foreign attachment, in which he disclosed the facts, was adjudged trustee, and paid over to the judgment creditor, on execution, all he owed to the plaintiff; and at a subsequent term pleaded these facts in bar of the original action; to which the plaintiff demurred; it was held that the plea was a good bar, and that the defendant was entitled to his costs subsequent to the joinder in demurrer. *Killsa v. Lermond*, vi. 116.

5. 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. *Smith v. Hall,* viii. 348.

VI. *Of pleadings in covenant.*

1. In covenant, and in debt on bond conditioned for the performance of covenants, if all the covenants are in the affirmative, the general plea of *omnia performavit* is a good plea. *Bailey v. Rogers & al.* i. 186.

2. And the mere occurrence of negative words does not make the covenant negative, if the words be in affirmance of a precedent affirmative; or if the whole clause, taken together, is essentially affirmative. *Ib.*

3. Where the plaintiff covenanted to build a certain mill-dam within three months, (unavoidable accidents excepted,) in a workmanlike manner; and the defendant pleaded in bar that the plaintiff did not, within three months, in a workmanlike manner, build the dam;—the plea, on demurrer, was held ill, both for duplicity, and for not alleging that the plaintiff was not prevented by unavoidable accidents. The latter objection may be taken on general demurrer. *Scott v. Whipple,* vi. 425.

4. 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. *Hacker v. Storer,* viii. 228.

VII. *Of pleadings in debt.*

1. In debt brought upon a recognizance given pursuant to *Stat.* 1782, *ch.* 21, the defendant pleaded in bar that he had been taken in execution, and committed, and afterwards voluntarily discharged from prison by the plaintiff;—who replied that he had discovered effects of the debtor in the hands of a trustee, and sued out the present foreign attachment, and thereupon had liberated the debtor from prison pursuant to the statute. The defendant rejoined, denying the discovery of such effects;—and the rejoinder was held bad, as leading to the trial of the fact by another mode of proof than the statute had provided, viz. the oath of the trustee. *Cutts v. King*, i. 158.

2. In debt on bond, conditioned for something else than the performance of covenants, if the condition be to do several distinct things, the plea should answer specially to every particular mentioned in the condition. *Bailey v. Rogers & al.* i. 186.

3. Yet if the condition is general in its terms, but extends to and comprehends in its meaning a multiplicity of particulars, all being in the affirmative, the general plea of performance is allowed, to avoid prolixity. *Ib.*

4. If the condition of a bond be in the alternative, the general plea of performance is bad. *Ib.*

5. But the use of disjunctive words, does not necessarily make the clause an alternative one, within the meaning of the preceding rule; as, if it be, "to pay to them or one of them," or the like. *Ib.*

6. In debt on a guardian's bond to the Judge of Probate, the general plea of performance is a good plea. *Bailey v. Rogers*, i. 186.

7. The English *Stat.* 8 and 9, *W. & M. ch.* 11, was never adopted in this State, but the pleadings in our Courts in debt on bond continue to be governed by the rules of the common law. *Ib.*

[*Note.* The English Statute has since been adopted by *Stat.* 1830, *ch.* 463.]

8. In debt on a bond, conditioned to submit to arbitration a dispute respecting a division-line between the lands of the parties; it is not a good plea in bar, that the arbitrator established the line wholly on the defendant's own land. *White v. Dickinson & al.* iv. 280.

9. The plea of payment of a judgment rendered for the penalty of an administrator's bond, should show that the money was paid by virtue of some judgment or decree, or was otherwise necessarily paid; or it is bad. *Potter v. Webb & als.* v. 330.

10. To an action of debt on a bond taken pursuant to *Stat.* 1824, *ch.* 282, respecting poor debtors, a plea of performance in the words of the condition will be sufficient; though the condition, as prescribed in the statute, does not include all which, by the same statute, is necessary to be done for the debtor's enlargement. *Fisher v. Ellis*, vi. 455.

11. In debt on an administrator's bond, the defendant pleaded in bar that he had paid to the heirs and creditors of the intestate divers sums which had been allowed by the Judge of Probate, amounting to more than the penalty of the bond. The plaintiff replied that the defendant was indebted to the intestate in certain promissory notes, of which he had never rendered any account; but without any averment that he had been cited for that purpose. And on demurrer it was held that the replication was bad, for the omission of such averment; that the plea would have been bad if demurred to; that the defect of the plea was cured by the fault of the replication; and that a citation to account being an essential prerequisite to the right to maintain the action, and it judicially appearing that the defendant had never been cited, though several issues of fact had been found against him, he was entitled to judgment *non obstante veredicto*. *Potter v. Titcomb*, vii. 302.

VIII. *Of pleadings in dower.*

To a plea, in an action of dower, that the widow claimed the premises in fee, and that her estate therein had been duly set off to the tenant by extent, for her own debt, a replication that she had no right, interest, or estate in the premises, other than a right to have her dower therein, ought to conclude to the country. But if it be concluded with a verification, it is good on general demurrer. *Nason v. Allen*, v. 479.

IX. *Of pleadings in* scire facias.

1. In a *scire facias* brought to have further execution of a judg-

ment rendered upon a Probate bond, for the amount of a dividend decreed since the judgment, a plea by the sureties in the bond that the decree was obtained by fraud and collusion, without naming the parties to the fraud, was held bad. *Potter v. Webb & als.* ii. 257.

2. Where the defendant, in a *scire facias* against the indorser of a writ, pleaded that the original judgment debtor was of sufficient ability, and had sufficient real estate within this State to satisfy the execution; to which the plaintiff replied by setting forth the issuing of execution, and the sheriff's return thereon that he could find no property within his precinct; the replication was held bad. *Palister v. Little*, vi. 350.

3. In a *scire facias* upon a recognizance taken by a Justice of the Peace in a criminal case, it must appear that the recognizance has been returned to the Court having jurisdiction of the matter. *Ib.*

X. *Of pleadings in trespass.*

1. Where, in trespass *quare clausum fregit*, the declaration was general, describing no particular close, and the defendant in his plea described a large close, in which he alleged that the act complained of was committed, and to which he pleaded title; and the plaintiff replied, newly assigning a small close, parcel of the large one, as the place where the trespass was done, which he alleged was his own soil and freehold, and traversed the title of the defendant to the whole of the large close; to which the defendant rejoined that he was not guilty of any trespass in the small close, and concluded to the country;—it was held on demurrer that the plaintiff's traverse of the defendant's title to the whole close was an immaterial traverse, which the defendant might well pass by; and that the rejoinder was good. *Low v. Ross*, iii. 256.

2. Pleas in justification of a trespass *quare clausum fregit* for cutting down a fence, which allege that the act was done on two public highways, leading the one from the other: and also that it was done on one of the highways only, are not inconsistent with each other; and a verdict finding each of these issues for the defendant is not void for inconsistency or uncertainty. *Brunswick v. McKean*, iv. 508.

XI. *Of oyer.*

1. Where a judgment is declared on, without a *profert*, no *oyer* can be had. *Hall v. Williams*, viii. 434.

XII. *Of replications.*

1. If an award be good for the damages awarded, but bad as to the costs; whether a replication would not be vitiated by assigning non payment of costs as part of the breach;—*quære*. *Gordon v. Tucker*, vi. 247.

2. Where a private statute created a corporation for the purpose of opening a canal, without directing when it should be done; under which statute the defendants as corporators, justified certain acts complained of; and the plaintiff replied that they had never opened the canal in manner and form as prescribed by the statute, without alleging that reasonable time for that purpose had elapsed; the replication was for this cause held bad on general demurrer. *Spring v. Russell*, vii. 273.

XIII. *Of demurrers.*

1. A special demurrer to a plea because it is double and argumentative, is fatally defective unless it state particularly wherein these defects consist. *Ryan v. Watson*, ii. 382.

XIV. *Of Pleadings by officers.*

1. In an action of trespass against an officer, for taking goods, if he would justify the taking of them as the goods of a third person, under a legal precept against him, this defence is admissible under the general issue, no brief statement being necessary. *Daggett v. Adams*, i. 198.

XV. *What is cured by verdict.*

1. Where the plaintiff, in an action of the case for not transporting certain goods, declared that he loaded the goods upon the defendant's vessel, to be transported to a certain port and there delivered to a third person for a stipulated freight, to be paid by

the receiver; the declaration was held well after verdict, though it contained no averment, who was the owner of the goods, nor that a reasonable time for the transportation had elapsed after the lading of the goods. *Stimpson v. Gilchrist*, i. 202.

2. The objection that such action should have been brought by the consignee and not by the consignor, cannot arise after verdict. *Ib.*

3. After verdict, the Court will support the declaration by every legal intendment, if there is nothing material on record to prevent it. *Warren v. Litchfield*, vii. 63.

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

[See Actions real; III. Bastardy, II. Chancery, II. Contract, VII. Dower, IV. Estoppel, I. III. Evidence, IX. Executors, &c. VII. Justices of the Peace, II. Militia, IV. Mills, II. Practice, VII. Release. Tender. Trustee process, II.]

PLEDGE.

[See Mortgage, VII. Bills of Exchange, &c. II. Contract, IX.]

PLYMOUTH PATENT.

The line of the *Plymouth* Patent, as run and marked by *Ballard* in 1795, is conclusive upon the Commonwealth, and upon the patentees, and all persons claiming under them. *Prop'rs of Ken. Purchase v. Lowell*, ii. 149.

[See Conveyance, X. *c.*]

POOR.

I. Of settlements, and how they are acquired and lost.

(a.) By derivation from parents, and by marriage.
(b.) By incorporation and annexation.
(c.) By residence and being taxed.
(d.) By domicil, under *Stat.* 1821, *ch.* 122.

II. Who are entitled to relief, and from what source.

III. Of the overseers of the poor.

IV. Of notice, and its form and effect.

V. What are the "supplies," intended by *Stat.* 1821, *ch.* 122.

VI. Of the remedy by one town against another.

VII. Of the offence of bringing into and leaving a pauper in a town where he has no settlement.

I. *Of settlements, and how they are acquired and lost.*

(a.) By derivation from parents and by marriage.

1. The settlement of a person *non compos*, though of full age, will follow that of his father, with whom he resides. *Wiscasset v. Waldoborough*, iii. 388.

2. Minor children follow the settlement which their mother acquires by a second marriage, provided none has been gained from their father. *Parsonsfield v. Kennebunkport*, iv. 47.

3. Where an alien who had married a woman of this State, subsequently abandoned the country, without any intention of returning; leaving his wife and infant son here; but afterwards sent for them, and continued for 17 years to express affection for his son, and a strong desire to have him come and reside with him;—it was held that the son was not emancipated by such abandonment; and so was not capable of acquiring or receiving a settlement in his own right, while a minor. *Pittston v. Wiscasset*, iv. 292.

4. A marriage unlawful and void, as where the first husband was still living, conveys no settlement to the wife; either by deri-

vation from the second husband, or by dwelling and having her home in his house, at the time of passing the *Stat.* 1821, *ch.* 122. *Ib.*

5. A wife gains no settlement, during the coverture, where the husband gains none. *Jefferson v. Litchfield*, i. 196.

6. The wives and children of men who had been married *de facto* by the persons described in the Resolve of *March* 19, 1821, follow the settlement of the husband. *Lewiston v. N. Yarmouth*, v. 66.

7. An illegitimate child does not gain a new derivative settlement under the mother; but retains that which the mother had at the time of the birth. *Sidney v. Winthrop*, v. 123.

8. The illegitimate *non compos* child of a *non compos* mother is considered as emancipated, for all the purposes of the act concerning the settlement and support of the poor. *Ib.*

9. A legitimate child being a minor, and having a settlement derived from its father at the time of his death, does not follow any new settlement afterwards acquired by the mother. *Fairfield v. Canaan*, vii. 90.

10. Minor children cannot have a settlement distinct from the father; nor can a wife acquire one separate from her husband. *Hallowell v. Gardiner*, i. 93.

(*b.*) *By incorporation and annexation.*

1. The incorporation of a town fixes the settlement of all persons having their legal home within the territory incorporated; whether they be actually resident thereon at the time of the incorporation, or not. *St. George v. Deer Isle*, iii. 390.

2. If, at the time of the incorporation of a town, a person having a legal home there, be resident in another town, at service, with the intention of returning at some future day, which intention was afterwards abandoned; such subsequent abandonment of the purpose of returning does not affect the question of settlement. *Ib.*

3. A slave, resident out of his master's family, in a plantation, at the time of its incorporation, gained no settlement by such incorporation. *Hallowell v. Gardiner*, i. 93.

4. Neither could the wife, nor the minor children of such slave, gain a settlement in such case, in their own right. *Ib.*

5. By the words "all persons" in *Stat.* 1793, *ch.* 34, in the ninth mode of gaining a settlement, are intended only those persons who are legally capable of gaining a settlement, in their own right, in any other mode. *Ib.*

6. The annexation of a part of one town to an adjoining town, has the same effect as the incorporation of a new town, so far as regards the legal settlement of the persons resident on the territory thus annexed. *Hallowell v. Bowdoinham*, i. 129.

7. But such annexation does not transfer the settlement of any persons except those who actually dwell and have their homes upon the territory set off, at the time of its separation. *Ib.*

8. An alien, resident in a plantation at the time of its incorporation, gains no settlement thereby; that method of gaining a settlement being limited to citizens of this or some other of the United States. *Jefferson v. Litchfield*, i. 196.

(c.) *By residence and being taxed.*

1. Being taxed in any town for five successive years, does not gain a settlement, if the party during that period has left the town with an intention of never returning; though such intention was changed, and he did in fact return, within the same year. *Westbrook v. Bowdoinham*, vii. 363.

2. The assessment of taxes for five successive years, on a person afterwards a pauper, does not estop the town, in a question of settlement, from showing that during part of that period his domicil was in another town. *Ib.*

(d.) *By domicil, under Stat.* 1821, *ch.* 122.

1. The *Stat.* 1821, *ch.* 122, *sec.* 2, which fixes the settlements of persons not paupers, in the towns where they resided at the passage of the act; relates as well to those who previously had settlements in this State, as to those who had none. *Green v. Buckfield*, iii. 139.

2. A minor, emancipated from his parents, is capable of acquiring a settlement under *Stat.* 1821, *ch.* 122. *Lubec v. Eastport*, iii. 220.

3. An idiot, or person *non compos*, is capable of gaining a settlement by any mode, not requiring any act of volition of his own. *Ib.*

4. A residence in any town for a temporary purpose, on the 21st day of *March*, 1821, does not fix the settlement in that town under *Stat.* 1821, *ch.* 122, *sec.* 2. *Hampden v. Fairfield*, iii. 436.

5. An alien is capable of acquiring a settlement in this State, under the provisions of *Stat.* 1821, *ch.* 122. *Knox v. Waldoborough*, iii. 455.

6. Where a husband had been absent at sea more than sixteen years prior to *March* 21, 1821, without having been heard from, except a rumor that he was impressed on board a British vessel of war; this was held to afford legal ground for the presumption that he was dead; so that the wife was capable of acquiring a new settlement for herself by dwelling on that day in another town, under *Stat.* 1821, *ch.* 122. *Biddeford v. Saco*, vii. 270.

7. Illegitimate children, under age, living with their mother on the 21st day of *March*, 1821, do not follow a new settlement acquired by her by residence on that day in some town in this State; but retain the settlement which she had at their birth. *Ib.*

8. 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. *Wells v. Kennebunk*, viii. 200.

II. *Who are entitled to relief, and from what source.*

1. The first section of *Stat.* 1821, *ch.* 127, and the eighth section of *Stat.* 1821, *ch.* 104, so far as they provide that the expenses of relieving certain paupers, being foreigners, shall be borne by the State, are virtually repealed by the subsequent *Stat.* 1821, *ch.* 122, *sec.* 18. *App.* iii. 487.

2. The wife of an alien, having her lawful settlement in this State, together with their children, being paupers, are to be supported by the town where that settlement may be;—though the husband, and of course the family, may require and receive relief as paupers in the first instance from another town, in which they happen to reside, under *Stat.* 1821, *ch.* 122, *sec.* 18. *Sanford v. Hollis*, ii. 194.

3. The provisions of the pauper laws, requiring towns to relieve and support the poor, do not extend to plantations. *Blakesburg v. Jefferson*, vii. 125.

4. Though plantations may raise money for the support of the poor, they are not obliged so to do. Nor have their assessors any general authority to bind the plantation by their contract for the support of the poor, beyond the amount of the money raised.—*Means. v. Blakesburg*, vii. 132.

III. *Of the overseers of the poor.*

1. Overseers of the poor have no authority, as such, to intermeddle with the property of persons who receive relief from their towns, as paupers. *Furbish v. Hall*, viii. 315.

2. 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. *Ib.*

IV. *Of notice, and its form and effect.*

1. The provision of *Stat.* 1821, *ch.* 122, *sec.* 17, that if a pauper-notice be not answered within two months, the defendant town shall be barred from contesting the question of settlement, does not apply to cases where the settlement can be shown to be in the town giving the notice. *Turner v. Brunswick*, v. 31.

2. Where the town in which a pauper had his settlement, being duly notified pursuant to the statute, paid the expenses of his support and removed him, but before he reached the place of his settlement he returned to the town whence he had been removed, where he again became chargeable; it was holden that the town in

which he had his settlement was not liable for the expenses accruing after his return, without a new notice. *Green v. Taunton*, i. 228.

3. A notice under *Stat.* 1793, *ch.* 59, [*Stat.* 1821, *ch.* 122,] that persons have become chargeable as paupers, should state the names of such persons, or otherwise so describe them, as that the overseers may certainly know whom to remove. *Bangor v. Deer Isle*, i. 329.

4. Notice that "*S.* and his family"—or that "*S.* and several of his children" are chargeable, is good as it respects *S.* but insufficient as it respects the family or children. *Bangor v. Deer Isle*, i. 329.

5. Notice under *Stat.* 1821, *ch.* 122, *sec.* 17, is sufficient, if it be signed by the chairman of the selectmen, *eo nomine*;—and it will be presumed that the town did not appoint any overseers of the poor, unless the contrary appear. *Garland v. Brewer*, iii. 197.

6. The notice required by *Stat.* 1821, *ch.* 122, *sec.* 17, may properly be sent or delivered to such persons, or any one of them, as appear, by the records of the town notified, to be overseers of their poor for the current year; though subsequently they may have declined to accept the office. *Gorham v. Calais*, iv. 475.

7. Notice that *S.* and his family are chargeable as paupers, the only subject of expense being one of his sons, who was alluded to in the notice, but not named, was held to be insufficient. *Dover v. Paris*, v. 430.

8. If the notice, to a town chargeable with the support of paupers, be defective in not being signed by the overseers in their official capacity, or in not describing the paupers with sufficient precision; yet if it be understood and answered without any objections on account of its insufficiency, such objections are thereby waived. *York v. Penobscot*, ii. 1.

V. *What are the "supplies" intended by Stat.* 1821, *ch.* 122.

1. Supplies cannot be considered as furnished to a man as a pauper, under *Stat.* 1821, *ch.* 122, *sec.* 2, unless furnished either to himself personally, or to some of his family, who reside under his immediate care and protection. *Green v. Buckfield*, iii. 136.

2. Where the selectmen of a town drew an order in favor of a pauper on one of the inhabitants, for supplies to be furnished to the pauper, which the drawee did not accept, but the supplies were voluntarily advanced by another person, who took up the order;—it was holden that these supplies were not "received from some town" within the meaning of *Stat.* 1821, *ch.* 122, *sec.* 2, the person who advanced them not having any remedy on the town for reimbursement. *Canaan v. Bloomfield*, iii. 172.

3. Supplies furnished to a woman as a pauper, without the knowledge of her husband, she living apart from him,—are not supplies received by him, as a pauper, within the meaning of *Stat.* 1821, *ch.* 122, *sec.* 2. *Dixmont v. Biddeford*, iii. 205.

4. Where a son, having received a conveyance of all his father's property, gave a bond to the town, conditioned to support him and another son during life; this was held not to be "supplies or support indirectly received from some town as a pauper," so as to prevent the father, and with him the other son, from gaining a settlement by residence, under *Stat.* 1821, *ch.* 122. *Wiscasset v. Waldoborough*, iii. 388.

5. Supplies furnished by order of one of a board of overseers, acting under a parol agreement with the rest of the board relative to the general manner of executing their office, are supplies furnished "by some town," within the meaning of *Stat.* 1821, *ch.* 122, *sec.* 3. *Windsor v. China*, iv. 298.

6. In order to have received supplies as a pauper, constructively, so as to prevent the operation of *Stat.* 1821, *ch.* 122, they must have been furnished to one under the care and protection of him whose settlement is in question, and for whose support he is by law responsible. *Hallowell v. Saco*, v. 143.

VI. *Of the remedy by one town against another.*

1. The town in which a pauper has his settlement, is not liable to an action by the town relieving him, until the expiration of two months after notice given pursuant to *Stat.* 1821, *ch.* 122. *Belmont v. Pittston*, iii. 453.

2. Where the marriage of a female pauper was rendered valid by the operation of the *Resolve* of *March* 19, 1821, it was holden that her derivative settlement, thus gained, could not operate to oblige the town, thus newly charged with her support, to pay for supplies furnished prior to the passage of the Resolve. *Brunswick v. Litchfield*, ii. 28.

VII. *Of the offence of bringing into and leaving a pauper in a town where he has no settlement.*

1. In an action upon *Stat.* 1793, *ch.* 59, *sec.* 15, [*Stat.* 1821, *ch.* 122, *sec.* 22,] for bringing into and leaving a pauper in a town where he has not a legal settlement, the intent of the defendant is a fact to be found by the Jury. *Sanford v. Emery*, ii. 5.

2. And it is the unlawfulness of the intention which constitutes the offence against the statute. *Ib.*

[See Appeal, I. Constitutional Law, III. Contract, I. Domicil. Justices of the Peace, II. Master and Servant. Time.]

POOR DEBTORS.

I. *Of the prison limits.*

Under *Stat.* 1822, *ch.* 209, the Court of Sessions may lawfully extend the debtors' limits to the exterior bounds of the county.—*Codman v. Lowell*, iii. 52.

II. *Of bonds taken upon mesne process.*

1. A debtor, committed by his bail after a return of *non est inventus*, and before *scire facias*, is entitled to the prison limits in the same manner as if committed by order of Court, upon a surrender

before judgment in the original suit. And if the creditor does not charge him in execution within fifteen days after such commitment, he may lawfully go at large, the bond for the prison limits having done its office. *Thayer & al. v. Minchin & al.* v. 325.

2. 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.—*Kavanagh v. Saunders*, viii. 422.

3. 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. *Ib.*

4. 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 gaol yard. *Holmes v. Chadbourne*, iv. 10.

5. Where a debtor, committed on mesne process, gave bond 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 gaol yard, the description of the suit in the recital was held sufficient. *Ib.*

III. *Of bonds taken on execution.*

1. A bond given for the prison limits by a debtor in execution, under *Stat.* 1822, *ch.* 209, is a valid bond, though it be taken in less than double the amount of the debt and costs. *Kimball v. Preble & als.* v. 353.

2. The delivery of such bond to the gaoler is a good delivery to the obligee. *Ib.*

3. And if the obligee brings a suit upon the bond, this is an ap-

proval of the sureties, equivalent to the approbation of two Justices of the *quorum*. *Ib.*

4. The bond given by a debtor in execution pursuant to *Stat.* 1824, *ch.* 281, may be given either to the creditor or to the officer. *Pease v. Norton*, vi. 229.

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

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

IV. *Of the discharge of the debtor.*

1. The "prison charges" mentioned in *Stat.* 1821, *ch.* 59, *sec.* 8, do not include the sheriff's fees on execution. *How v. Codman*, iv. 79.

2. Where the time for taking the poor debtor's oath under *Stat.* 1824, *ch.* 281, was fixed in the bond to be *December* 17, but the notification to the creditor was altered to *December* 19, by the officer, without the debtor's knowledge; and the debtor attended at the time and place fixed in the bond, but the Justices to whom he applied to administer the oath declined attending on that day, for want of notice to the creditor; and on the 19th, the debtor and the Justices met at the place named in the bond, but the debtor refused to take the oath; and within ten days from the day named in the bond the debtor surrendered himself to the officer making the arrest, who now refused to receive him;—it was held that the debtor having done all in his power, and committed no fraud, the condition was saved. *Pease v. Norton*, vi. 229.

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

4. 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. *Lewis v. Staples*, viii. 173.

5. The condition of a debtor's bond for the liberty of the yard, if not previously broken, is saved as soon as he is lawfully admitted to the poor debtor's oath. *Kendrick v. Gregory & al.* ix. 22.

6. The certificate of the oath is intended merely as a notice to the prison keeper of what has been done, that he may set the debtor at liberty if in his custody; but he may do this upon any other satisfactory information of the fact, taking upon himself the peril of proving it. *Ib.*

[See Bail. Bond, II. III.]

PRACTICE.

I. *Of amendments.*

1. Whether the plaintiff may file a new writ, the original being lost, *quære. Feyler v. Feyler*, ii. 310.

2. Whether the plaintiff may alter his writ after the service is commenced, and before it is completed,—*quære. Greely & al. v. Thurston*, iv. 479.

II. *Of notice to produce papers.*

The 35th of the rules of this Court, respecting notice to produce papers at the trial of a cause, is to be applied only to cases where the notice was given previous to the commencement of the trial.—*Emerson v. Fisk*, vi. 200.

III. *Of depositions, and the examination of witnesses.*

1. If, at the taking of a deposition out of Court, the adverse party interrogates the witness touching his interest in the suit, and he testifies that he has none; this is an election of the mode of proof, and the party will not be permitted to shew such interest *aliunde* at the trial. *King v. Upton*, iv. 387.

2. A deposition, opened by mistake out of Court, may be received and filed, on affidavit of the fact. *Law v. Law*, iv. 167.

3. It is the duty of the party calling a witness, to see that he is duly sworn. Therefore where a witness testified, believing that he had been sworn, but by some oversight the oath had been omitted, and this was not discovered by either party till after the trial; yet the verdict was set aside. *Hawks v. Baker*, vi. 72.

4. 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. *Savage v. Balch*, viii. 27.

5. 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 char-

acter of the magistrate, and admitted the deposition without other proof. *Ib.*

IV. *Of the manner of conducting trials, and of arguments to the Court.*

1. At the hearing of summary exceptions under *Stat.* 1822, *ch.* 193, the argument regularly should be confined to the points taken at the trial, and stated in the bill. *Wyman v. Hook*, ii. 337.

2. In the argument upon a bill of exceptions, whether under our statute, in the summary mode, or under the statute of *Westm.* 2, *ch.* 31, followed by a writ of error, the party excepting is confined to the objections taken at the trial, and stated on the face of the bill. *Colley v. Merrill*, vi. 50.

3. In a case reserved upon the report of the Judge, no point is open to the parties except those which appear in the report. *Tinkham v. Arnold*, iii. 120.

4. It is the duty of a Judge, when requested, to instruct the Jury upon every point pertinent to the issue. *Lapish v. Wells*, vi. 175.

5. 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. *Ware v. Ware*, viii. 42.

6. 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. *Ib.*

7. 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. *Ib.*

V. *Of nonsuits and defaults.*

1. The defendant, in an action in the Court of Common Pleas of which it has not final jurisdiction, is not bound to disclose the mat-

ter of his defence, but is entitled to have a verdict returned, and to appeal. *Frothingham v. Dutton & als.* ii. 255.

2. The power of the Court, in an action of which it has final jurisdiction, to order the entry of a default, is derived from the consent of the party. *Ib.*

VI. *Of the entry of judgment and issuing of execution.*

1. Where the defendants in an action of trespass, plead severally, and have several judgments in the Court below, from which the plaintiff appeals, but neglects to enter and prosecute his appeal in the Court above; each defendant is entitled, upon his separate complaint, to affirmation of his own judgment, independent of his co-defendant. *Cook v. Bennet,* ii. 13.

2. Where a *scire facias* is brought to have a new execution upon a judgment of the Court of Common Pleas, the land extended upon not having belonged to the debtor; and judgment is rendered in this Court for the plaintiff; the Clerk issues an *alias* execution from the Court of Common Pleas to satisfy the former judgment in that Court; and an execution from this Court for the costs of the *scire facias*. *Steward v. Allen,* v. 103.

3. If a case is referred to the decision of the Court, upon a statement of facts agreed, without special limitation, the course is to enter judgment for the defendant, if the facts would verify any plea which would be a bar to the action. *Gardiner v. Nutting & al.* v. 140.

VII. *Of awarding repleaders.*

1. Leave to replead may be granted after argument upon demurrer. *Potter v. Titcomb,* vii. 302.

2. Where the title to real estate has been specially pleaded to an action of trespass *quare clausum fregit,* brought before a Justice of the Peace, and the cause has been brought up from the Common Pleas by demurrer, it is not the course of this Court to permit the defendant to add any other plea which could have been tried by the Justice. *Copeland v. Bean,* ix. 19.

VIII. *Of motions.*

A motion for a *venire de novo* comes too late, if not made till after judgment is arrested, though it be made in the same term.—*Gibson v. Waterhouse*, v. 19.

IX. *Of new trials.*

1. A motion to set aside a verdict for the supposed misdirection of the Jury by the Judge, in a matter of law, will not be sustained, unless the grounds of the motion appear in the Judge's report, or are stated in a bill of exceptions. *Brunswick v. McKean*, iv. 508.

2. This Court, after the reversal of a Justice's judgment, will not remand the cause to him for further proceedings. *How v. Merrill*, v. 318.

3. If the judgment of an inferior tribunal is reversed for error in its proceedings in the course of the trial, or in the rendition of judgment, the action itself being well laid, a new trial will be ordered at the bar of this Court. But not if there is no foundation in the record itself, on which the action can be sustained. *Ib.*

X. *Of reports of referees.*

1. 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. *Patton v. Hunnewell*, viii. 19.

2. 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. *Ib.*

XI. *Of bills of exceptions and writs of error.*

1. In a writ of error *coram vobis* the regular authentication of the record under the hand of the Judge and seal of the Court below cannot be dispensed with, even by consent of parties. *Jewett v. Hodgdon*, ii. 335.

2. Consent of parties cannot be received to give validity to a bill of exceptions, unless it is certified by the Judge to be conformable to the truth of the case. *Coburn v. Murray*, ii. 336.

[See Amendment. Contract, XIII. Evidence, XV. Exceptions. Judgment. Trover.]

PRINCIPAL AND SURETY.

I. Of the extent of the surety's liability.

II. How he is affected by the acts and admissions of the principal.

III. Of his remedy against the principal.

IV. How he is discharged.

I. *Of the extent of the surety's liability.*

1. Where a lease was made to two, one of whom was sole occupant of the premises, which he held over the term, and debt for the rent of the whole period of actual occupancy was brought against both;—it was holden that the other lessee was not estopped to shew that he signed the lease only in the character of surety, for the term specified, without having in fact occupied the premises at any time; and that he was not liable for rent after the time mentioned in the writing, the holding over being, as to him, no continuance of the lease. *Kennebec Bank v. Turner & al.* ii. 42.

2. 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. *Green v. Young*, viii. 14.

II. *How he is affected by the acts and admissions of the principal.*

1. 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. *Ford v. Clough*, viii. 334.

2. In an action against the surety in an executor's bond, he is not precluded, by a previous judgment against the executor, in a suit by a legatee, from showing a deficiency of assets. *Hayes v. Seaver*, vii. 237.

3. If, in an action on a bond given for the faithful performance of the duties of an office, the principal is defaulted, the declaration is to be taken as true against him alone; and the sureties are not thereby precluded from any matter proper for their defence. *Foxcroft v. Nevens & als.* iv. 72.

III. *Of his remedy against the principal.*

1. If a surety pays the money due from his principal, taking from the creditor an assignment of the contract and of the collateral assurances, it is no extinguishment of the security, but he succeeds to all the rights of the creditor against the principal. *Norton v. Soule*, ii. 341.

2. Thus where the principal had executed a mortgage to the creditor, conditioned for the payment of the debt by him, and the surety paid the debt, and took an assignment of the mortgage, it was holden that the surety might enter and hold the land in mortgage for the debt. *Ib.*

3. A surety has no right of action against his principal merely because the debt is not paid as soon as it is due; nor until he has either paid it, or procured the discharge of the principal by assuming the payment himself. *Ingalls v. Dennett*, vi. 79.

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

5. Where a deed of conveyance of lands, absolute in its terms, was made to three persons, to secure them against their liability as the sureties of the grantor for his debt; and they gave him a written promise, not under seal, to reconvey the land upon his payment of the debt; after which two of them were compelled to pay it, the grantor and the other surety being insolvent; it was held that an extent, by a creditor of the insolvent surety, upon his undivided portion of the land, was valid, and conveyed to him the title to that portion, unaffected by any supposed equitable claims of the other sureties, who had paid the original debt. *Jewett v. Bailey*, v. 87.

IV. *How he is discharged.*

1. Where the payee of the note, after having been requested by the surety to collect the money of the principal, gave further time to the principal, in pursuance of a new agreement with him to that effect, it was held that the surety was discharged. *Kennebec Bank v. Tuckerman*, v. 130. [*Oxford Bank v. Lewis*, 8 *Pick.* 458.]

2. 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. *Strafford Bank v. Crosby*, viii. 191.

[See Action, I. Assignment, I. III. Contract, IX. Executors, &c. V. *b.*]

PROPRIETORS OF LANDS.

1. Whether the proprietors of land granted by the State, but not yet located in any particular county or place, can, prior to such location, act as a corporation under a warrant from a Justice of the Peace, pursuant to *Stat.* 1783, *ch.* 39, and *Stat.* 1821, *ch.* 43;—*quære. Innman & als. v. Jackson*, iv. 237.

2. The forty days' notice required by the Provincial act of 1753, *Ancient Charters, ch.* 253, and the sixty days' similar notice required by the act of 1762, *Ancient Charters, ch.* 289, to be given previous to the sale of delinquent proprietors' lands, is to be computed after the expiration of the respective periods of three, six, and twelve months, mentioned in those statutes. *Semble. Ib.*

3. The proprietors of land, organized as a corporation under the statute, may have their respective proportions set off by process of partition, after discharging all legal liens existing thereon in favor of the corporation; but against all other persons, their rights can be enforced only by an action in the name of the proprietors as a corporation. *Chamberlain v. Bussey*, v. 164.

4. Under the statute of 1753, *Ancient Charters, ch.* 253, the committee for the sale of the lands of delinquent proprietors, might consist of one person only; and a designation of the collector, for that purpose, by the name of his office alone, was sufficient. *Farrar & al. v. Eastman & al.* v. 345.

5. The provincial statute of 1738, [11 *Geo.* 2,] authorizing the sale of delinquent proprietors' lands after thirty days notice, was not, by any necessary or fair implication, repealed by that of 1753, [21 *Geo.* 2 *An. Char. p.* 598,] which required a delay of six and twelve months and a subsequent notice of forty days, they not being in *pari materia. Farrar v. Perley*, vii. 404.

6. An article to raise money for certain purposes inserted in the warrant for a meeting of the proprietors of lands, is not exhausted of its efficacy by a single vote raising a certain sum; but further sums may from time to time be lawfully raised at subsequent adjournments of the same meeting, till the objects of the proprietors are accomplished. *Ib.*

[See Agent, II. III. Conveyance, II. V. X. XI. Evidence, III. VIII. c. Mills, I. Parish, V.]

PUBLIC LOTS.

[See Town, IV.]

QUAKERS.

[See Militia I.]

RECOGNIZANCE.

[See Action of debt. Appeal, II. Assumpsit, II. Justices of the Peace, I. II. Pleading, IX.]

REFEREES.

[See Arbitrament and Award.]

RELEASE.

1. A covenant never to sue one of two or more joint obligors or promissors, cannot be pleaded as a release, except in a suit between the same debtor and creditor. *Walker v. McCulloch*, iv. 421.

2. Nothing short of full payment by one of several joint debtors, or a release under seal, can operate to discharge the other debtors from the contract. *Ib.*

3. Where judgment is rendered for the whole penalty of a bond, to stand as security against further 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. *Adams v. Gould*, viii. 438. [See Town, I.]

REPLEVIN.

1. The *Stat.* 1821, *ch.* 80, has so far altered the common law, that an action of replevin may be maintained for goods unlawfully detained, though the original taking was lawful. *Seaver v. Dingley*, iv. 306.

2. In replevin of goods, the original taking of which by the defendant was lawful, if he plead property in himself, it is not necessary for the plaintiff to prove a demand of the goods previous to suing out the writ of replevin. *Ib.*

3. Nor is a previous demand of the goods necessary, where the original taking was tortious. *Ib.*

4. The *Stat.* 1829, *ch.* 443, giving to Justices of the Peace jurisdiction of actions of replevin of goods not exceeding the value of twenty dollas, does not, by implication, take away any jurisdiction previously existing in the Court of Common Pleas. *Ridlon v. Emery*, vi. 261.

5. But should replevin now be brought originally in the Court of Common Pleas, for goods of less value than twenty dollars, it seems the plaintiff can recover no more than a quarter of the value in costs, by a fair construction of *Stat.* 1822, *ch.* 186, *sec.* 2. *Ib.*

[See Action, I. Evidence VII. *a.* Landlord and Tenant, IV.]

REPRESENTATIVES.

[See Constitutional Law, II.]

RESERVATIONS.

[See Conveyance, X. *b.*]

RETAILERS.

[See Constitutional Law, IV.]

REVIEW.

I. To what cases the statutes of review apply.

II. Within what time a review may be granted.

III. In what cases the Court, in its discretion, will grant reviews.

IV. Of the proceedings and costs.

I. *To what cases the statutes of review apply.*

1. A writ of review cannot be granted in a criminal case, under any of the provisions of *Stat.* 1821, *ch.* 57. *Wells' case*, ii. 322.

2. Whether the provisions of *Stat.* 1821, *ch.* 57, and of *Stat.* 1822, *ch.* 193, *sec.* 8, respecting the granting of reviews and new trials, extend to prosecutions under the statute for the maintenance of bastard children,—*quære. Gowen, ex parte*, iv. 58.

3. Whether the process by petition for partition is within the statute of reviews,—*quære. Sturdivant v. Greeley & als.* iv. 534.

4. But if it is, yet no review can be had of one of the judgments in partition, without the other. *Ib.*

5. Therefore where the judgment *quod partitio fiat* was rendered upon demurrer, the title of the petitioners not being contested, but a mistake was made by the commissioners, which was not discovered till after the final judgment, it was held that a review could not be granted for the correction of this error. *Ib.*

6. 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. *Elden v. Cole*, viii. 211.

7. The *Stat.* 1831, *ch.* 502, *sec.* 2, granting reviews as of right in all actions in the Supreme Judicial Court, where a verdict has

been rendered for the defendant in the Court below, and on appeal the plaintiff has prevailed, is to be applied only to such actions as were then pending in this Court, or might afterwards be commenced. *Treat v. Ingalls*, ix. 60.

II. *Within what time a review may be granted.*

1. Whether a new trial can be granted by the Court of Common Pleas after a year from the rendition of judgment, though the application was made within that time,—*quære*. *Gowen, ex parte*, iv. 58.

2. The three years, limited for the prosecution of a petition for review, are to be computed from the term of which the judgment was entitled. *Leighton v. Lithgow*, ii. 114.

III. *In what cases the Court, in its discretion, will grant reviews.*

1. Where a witness, whose testimony was in favor of the prevailing party in a cause, is afterwards convicted of perjury in giving such testimony, the Court, in the exercise of its discretion under *Stat.* 1791, *ch.* 17, [*Stat.* 1821, *ch*, 57,] will grant a writ of review. *Morrell v. Kimball*, i. 322.

2. And this too, although the witness were summoned by the party against whom the verdict was returned. *Ib.*

3. The Court, in the exercise of its discretion, will not grant a review on petition, where the object is merely to discredit a witness who testified at the trial;—nor because one of the Jury was not impartial, or was hostile in his feelings to the petitioner, if this fact was known to the petitioner before the trial;—nor because a Juror had expressed a general opinion of the cause before the trial, if it appear that he had formed no judgment of the merits, and stood indifferent between the parties. *Haskell v. Becket*, iii. 92.

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

5. This Court, in the exercise of its general power to grant reviews in all cases, will not sustain an application for the review of

an action in a Justice's Court, where the party grieved may have redress in the Court of Common Pleas. *Merrill v. Crocket*, vi. 412.

6. No new trial or review will be granted on account of newly discovered evidence, if such evidence is merely cumulative. *Warren v. Hope*, vi. 479.

7. Reviews and new trials will be granted, where a material witness, whose testimony at the trial was against the interest of the petitioner, has since discovered that he testified incorrectly, by mistake :— *Ib.*

8. Or, where the newly discovered evidence relates to confessions or declarations of the other party respecting a material fact, and inconsistent with the evidence adduced by such party at the trial :— *Ib.*

9. Or, where such newly discovered evidence was placed beyond the knowledge or control of the petitioner, by means of the other party, and with a view to prejudice the petitioner's cause. *Ib.*

[See New Trial.]

IV. *Of the proceedings and costs.*

1. At the hearing of a petition for a review, the petitioner will be confined to the facts and witnesses named in the petition. *Warren v. Hope*, vi. 479.

2. When a review is granted, pursuant to *Stat.* 1791, *ch.* 17, [*Stat.* 1821, *ch.* 57,] the writ must be entered at the next following term, unless otherwise specially provided in the order of Court by which the review is granted. *Hobart v. Tilton*, i. 399.

3. Where, upon the review of a real action, brought by the original demandant, the land and improvements were each estimated by the Jury at a less sum than by the former verdict, and the demandant thereupon elected to abandon the land, it was holden that the tenant was entitled to his costs of the review. *Erving v. Pray*, i. 255.

[See Constitutional Law, V. Costs, IV.]

RIPARIAN PROPRIETORS.

[See Conveyance, X. *c.*]

RIVERS.

[See Ways, I.]

RULES OF COURT.

I.

Of Attornies and Counsellors admitted prior to March 15, 1820.

All Attornies and Counsellors at law, who had been admitted as Attornies or Counsellors at the bar of the Supreme Judicial Court of Massachusetts, prior to the fifteenth day of March, A. D. 1820, and were resident within this State on the tenth day of February, A. D. 1821, are Attornies or Counsellors of this Court.

II.

Of the admission of Attornies graduated at some public College.

Any person, being a citizen of the United States, may be admitted an Attorney of this Court, who shall have had a liberal education and regular degree at some public College, and shall afterwards have commenced and faithfully pursued the study of the law, in the office and under the instruction of some Counsellor of this Court within this State for three years, and shall afterwards, being first recommended by the bar of that county, within which he pursued his studies during the last of said three years, to the Court of Common Pleas, for said county, as having a good moral character, and as having completed the full term of study required by this rule, and being suitably qualified for admission as an Attorney of said Court, have been thereupon admitted as an Attorney by said Court, and shall afterwards have practiced law with fidelity and ability in said Court for the term of two years, and be thereupon recommended by the bar of the county in which he shall dwell, for admission as an Attorney of this Court.

III.

Of studies commenced in another State.

The commencing and diligently pursuing the study of the law in the office of an Attorney of the highest Judicial Court in any other State for the full term of one year, and afterwards pursuing the study of the law in the office of some Counsellor of this Court within this State for the full term of two years at least, shall in all cases be considered as equivalent to commencing and pursuing the study of the law for three years in the office, and under the instruction of some Counsellor of this Court.

IV.

Of the admission of Attornies not graduated at some public College.

Any person not having a liberal education and regular degree from some public College, who shall have attained such a knowledge of the English and Latin languages as is usually required for admission to public Colleges, and shall in addition thereto, after having arrived at the age of fourteen years, have faithfully "devoted seven years at least, to the acquisition of scientific and legal attainments," five years at least of which period shall have been spent in professional studies with some Counsellor at law, and the last two of said five years in the of-

fice, and under the instruction of some Counsellor of this Court within this State, shall be considered as possessing a qualification for admission equivalent to that of having a liberal education and a regular degree, together with that of having commenced and pursued the study of the law for three years in the office and under the instruction of some Counsellor of this Court within this State.

V.

Admission in another State not equivalent to study in this.

The bar shall not recommend for admission as an Attorney, any person either to the Court of Common Pleas, or to this Court, unless he be qualified for such admission agreeably to the provisions of these rules. Nor shall the admission of any person to practice in the Courts of any other State be deemed or construed by the bar equivalent to the course of study required by the statute regulating the admission of Attornies, or as relieving the candidate for admission from the necessity of complying with the provision requiring that he should pursue the study of the law two years in the office, and under the instruction, of some Counsellor of this Court within this State. But any person who, prior to the passing of said statute, had been regularly admitted to practice at the bar of any Court of Common Pleas in any county in the State agreeably to the rules then in force, and who shall after such admission have practiced law in the Court of Common Pleas with fidelity and ability for the term of two years, may be admitted an Attorney of this Court, being first recommended for admission by the bar of the county, in which such person shall dwell.

[*Repealed so far as it regards persons admitted to the highest Court in another State, by* Stat. 1825, ch. 308.]

VI.

Of the admission of Attornies without the recommendation of the bar.

If the bar of any county shall unreasonably refuse to recommend, either to this Court or the Court of Common Pleas, for admission as an Attorney, any person suitably qualified for such admission, or if, after the recommendation of the bar, the Court of Common Pleas shall unreasonably refuse to admit, as an Attorney, the person so recommended, such person, submitting to an examination by one of the Justices of this Court, and producing to him sufficient evidence of his good moral character, may be admitted an Attorney of this Court on the certificate of such Justice, that he is duly qualified therefor, and has pursued the study of the law agreeably to the provisions of these rules.

VII.

Of the admission of Attornies of the Courts of another State.

Any person, who shall have been admitted an Attorney of the highest Judicial Court of any other State, in which he shall dwell, and afterwards shall become an inhabitant of this State, may be admitted an Attorney or Counsellor of this Court, at the discretion of the Justices thereof, after due inquiry and information concerning his moral character and professional qualifications; such person having first conformed to the requisition of the statute regulating the admission of Attornies, by pursuing the study of the law two years in the office of some Counsellor of this Court.

VIII.

Of the admission of Counsellors.

Any person, who now is, or who shall be an Attorney of this Court, having practised law therein with fidelity and ability as an Attorney thereof, for two years, may be admitted a Counsellor of this Court on the recommendation of the bar of the county in which such Attorney shall dwell, or without such recommendation, if it be unreasonably refused; unless such person was admitted an Attorney of this Court, because he had been unreasonably refused admission as an Attorney of the Court of Common Pleas, in which case he shall not be recommended nor admitted as a Counsellor of this Court, until he has practised law as an Attorney thereof for the term of four years.

IX.

Attornies and Counsellors may be admitted in any county, &c.

Any person, who is duly qualified for admission as an Attorney or Counsellor of this Court, may be admitted in any county within the State, where the Court shall be holden by two or more Justices thereof, on producing a certificate of recommendation according to the rules now established of his qualifications, professional studies, and good moral character, from the bar of the county in which he may have dwelt and practised. And where the candidate proposed for admission as an Attorney of this Court, was admitted an Attorney of the Court of Common Pleas of this State, prior to the passing of the statute regulating the admission of Attornies, such certificate of recommendation shall so state the fact; but if such admission were not prior but subsequent to the time aforesaid, such certificate of recommendation shall state whether such candidate had, prior to his admission to practice at the bar of the Court of Common Pleas, pursued the study of the law two years at least in the office and under the instruction of some Counsellor of this Court within this State.

X.

What Attornies may do.

Attornies of this Court may prepare and sign the pleas and pleadings and statements of facts in cases stated, may draw and file interrogatories, give and receive notice on rules obtained to plead, or produce papers, and generally may do whatever is necessary and proper in preparing a cause for trial.—They may also read depositions and other papers to the Jury, and assist Counsellors in the examination of witnesses, but are not permitted to open a cause to the Jury, nor to argue to the Court or Jury any issue of law or fact.

XI.

What Counsellors must do.

All issues in law and in fact, and all questions of law arising on writs of error, *certiorari* and *mandamus*, on special verdicts and cases stated, on motions for new trials and in arrest of judgment, shall be argued only by the Counsellors of this Court.—And the Counsellors of this Court may also practice as Attornies.

XII.

Of the time of entry of actions.

No civil action shall be entered after the first day of the term, unless by consent

of the adverse party, and by leave of the Court; or unless the Court shall allow the same upon proof that the entry was prevented by inevitable accident, or other sufficient causes.

XIII.

Of the entry of the Attorney's name on the Clerk's docket, and of a party's changing his Attorney.

Upon the entry of every action or appeal, the name of the plaintiff's or appellant's Attorney shall be entered at the same time on the Clerk's docket, and in default thereof, a nonsuit may be entered; and within two days after the entry of the action or appeal, the Attorney of the defendant or respondent shall cause his name to be entered on the same docket as such Attorney, and if it be not so entered, the defendant or respondent may be defaulted. And if either party shall change his Attorney, pending the suit, the name of the new Attorney shall be substituted on the docket for that of the former Attorney, and notice thereof given to the adverse party. And until such notice of the change of an Attorney, all notices given to or by the Attorney first appointed, shall be considered in all respects as notice to, or from his client, excepting only such cases, in which by law the notice is required to be given to the party personally: *Provided however*, that nothing in this rule contained, shall be construed to prevent either party in a suit, from appearing for himself, in the manner provided by law; and in such case the party so appearing shall be subject to all the same rules that are or may be provided for Attornies in like cases, so far as the same are applicable.

XIV.

Of amendments in matters of form.

Amendments in matters of form will be allowed as of course, on motion; but if the defect or want of form be shewn as cause of demurrer, the Court will impose terms on the party amending.

XV.

Of amendments in matters of substance.

Amendments in matters of substance may be made, in the discretion of the Court, on payment of costs, or on such other terms as the Court shall impose; but if applied for after joinder of an issue of fact or law, the Court will in their discretion, refuse the application, or grant it upon special terms; and when either party amends, the other party shall be entitled also to amend, if his case requires it. But no new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration, and for the same cause of action.

XVI.

Of pleading double.

In all actions originally brought in this Court, leave to plead double will be granted of course, on application to the Clerk, and entered on his docket at any time within two days after the action is entered, the day of the entry to be reckoned as one day: and if any one or more of the pleas so filed shall appear to the Court unnecessary or improper, the same will be struck out, at the motion of the plaintiff or demandant: and no leave to plead double will be granted after the expiration of the said two days, unless by consent of the plaintiff or demandant, or unless the Court shall allow the same upon proof that the party was prevented from making the motion by inevitable accident, or other sufficient cause.

XVII.

Of leave reserved to plead anew.

In all actions of replevin, trespass *quare clausum fregit*, ejectment or real actions, brought by appeal from the Court of Common Pleas, wherein the defendant or tenant may have reserved leave to plead anew, he shall file such new plea within two days after the action is entered, the day of the entry to be reckoned as one, unless it shall appear to the Court that the matter of the plea, or the circumstances of the case are such, as to require a longer time; in which case the Court will, on motion, assign a time for the filing of the plea: and if such plea be not filed within the time prescribed by this rule or to be assigned by the Court as aforesaid, the defendant or tenant will be considered as electing to abide by his plea, pleaded in the Court of Common Pleas.

XVIII.

Of pleas in abatement.

Pleas in abatement, or to the jurisdiction in actions originally brought in this Court, must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and if consisting of matter of fact, not apparent on the face of the record, shall be verified by affidavit.

XIX.

Of writs of error and certiorari.

In every writ of error, the plaintiff may file the assignment of errors in the Clerk's office before taking out the *scire facias*, in which case the same shall be inserted in the *scire facias*, and the defendant shall be held to plead thereto within the first two days of the return term, unless the Court shall by special order enlarge the time. And writs of error and *certiorari* to correct proceedings in the Court of Common Pleas, may be directed to, and returned by either of the Justices of said Court.

XX.

Of obtaining a rule to plead.

Either party may obtain a rule on the other to plead, reply, rejoin, &c. within a given time, to be prescribed by the Court; and if the party so required neglect to file his pleadings at the time, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require, unless the Court, for good cause shewn, shall enlarge the rule.

XXI.

Of the time of filing amendments or pleadings.

When an action shall be continued, with leave to amend the declaration or pleadings, or for the purpose of making a special plea, replication, &c. if no time be expressly assigned for filing such amendment or pleadings, the same shall be filed in the Clerk's office, by the middle of the vacation, after the term when the order is made; and in such case the adverse party shall file his plea to the amended declaration, or his answer to the plea, replication, &c. as the case may be, by the first day of the term to which the action is continued as aforesaid. And if either party neglect to comply with this rule, all his prior pleadings shall be struck out and judgment entered of nonsuit or default, as the case may require; unless the

Court, for good cause shewn, shall allow further time for filing such amendment or other pleadings.

XXII.

Of continuances.

Causes standing for trial will not be allowed to be continued, even by consent of parties, unless for good cause shewn; and a continuance granted at the motion of either party shall be allowed upon such terms as to the Court shall seem just and equitable, when the Court think it reasonable to impose terms.

XXIII.

Of the time of making motions for continuances.

All motions for the continuance of any civil action shall be made at the opening of the Court in the morning of the second day of the term unless the cause shall come in course to be disposed of in the order of the docket on the first day, and in case the entry of the action were not made by the time aforesaid, such motion shall be made on the day of the entry. *Provided however*, where the cause or ground of the motion shall first exist or become known to the party after the time prescribed by this rule, the motion shall be made as soon afterwards, as it can be made, according to the course of the Court; and whenever an action is continued on such motion, after the time above prescribed, the party making the motion shall not be allowed any costs for his travel and attendance for that term, unless the continuance is ordered on account of some fault or misconduct in the adverse party.

XXIV.

Of affidavits to support a motion for continuance.

No motion for a continuance, grounded on the want of material testimony, will be sustained, unless supported by an affidavit, which shall state the name of the witness, if known, whose testimony is wanted, the particular facts he is expected to prove, with the grounds of such expectation; and the endeavors and means, that have been used to procure his attendance or deposition, to the end that the Court may judge whether due diligence has been used for that purpose. And no counter affidavit shall be admitted to contradict the statement of what the asbent witness is expected to prove; but any of the other facts stated in such affidavit may be disproved by the party objecting to the continuance. And no action shall be continued on such motion, if the adverse party will admit that the absent witness would, if present, testify to the facts stated in the affidavit, and will agree that the same shall be received and considered as evidence, on the trial, in like manner as if the witness were present and had testified thereto; and such agreement shall be made in writing at the foot of the affidavit, and signed by the party, or his Counsel or Attorney. And the same rule shall apply, *mutatis mutandis*, when the motion is grounded on the want of any material document, paper, or other evidence that might be used on the trial.

XXV.

Of the evidence to support any motion grounded on facts.

The Court will not hear any motion grounded on facts, unless the facts are verified by affidavit or are apparent from the record, or from the papers on file in the case, or are agreed and stated in writing signed by the parties or their Attornies, and the same rule will be applied as to all facts relied on, in opposing any motion.

XXVI.

Of motions in arrest of judgment and for new trials.

Motions in arrest of judgment and for new trials must be made in writing, and assign the reasons thereof, and must be filed within two days after the verdict, unless the Court shall for good cause by special order enlarge the time: *Provided nevertheless*, motions for new trials founded on any supposed misdirection to the Jury in any point of law, or the admission or rejection of testimony by the Judge who presided at the trial, may be made at any time before judgment is rendered on the verdict.

XXVII.

Of the time of making motions, and presenting petitions, &c.

All motions, petitions, reports of referees, applications for commissions to take depositions, surveys, or for views by the Jury in causes touching the realty, and such like applications, shall be made and presented at the opening of the Court on the morning of the second day of the term: *Provided*, that when the cause or ground of such motion or other application shall first exist or become known to the party, after the time in this rule appointed for making the same, it may be made, (if the cause require it,) at any subsequent time. But motions or applications, such as from their nature require no notice to any adverse party previous to granting the same, may be made at the opening of the Court on the morning of each day.

XXVIII.

Of notice previous to motions.

When any motion is made in relation to any civil action at the times specifically assigned for such motions by the rules of this Court, no previous notice of such motion need be given to the adverse party. But the Court, if notice have not been given, will allow time to oppose the motion if the case shall require it. Where however for any special cause, such motion may by the proviso of any rule be made at a subsequent time, it will not be heard, unless seasonable notice thereof shall have been given to the adverse party.

XXIX.

Of depositions taken in term time.

Depositions may be taken for the causes, and in the manner by law prescribed in term time, as well as in vacation: *Provided*, they be taken in the town in which the Court is holden, and at an hour when the Court is not actually in session. But neither party shall be required during term time to attend the taking of a deposition, at any other time or place than is above provided, unless the Court, upon good cause shewn, shall specially order the deposition to be taken.

XXX.

Of commissions to take depositions.

The Court will grant commissions to take the depositions of witnesses, and will appoint the commissioners; and in vacation a commission may be issued upon application to either of the Judges of the Court, in the same manner as may be granted in term time; or either party upon application to the Clerk, may obtain a like commission; but in the latter case, unless the parties shall agree on the person to whom the commission shall issue, the commission shall be directed "to any Judge of any Court of Record." And in each case the evidence by the testimony of witness-

es shall be taken upon interrogatories to be filed in the Clerk's office by the party applying for the commission, and upon such cross interrogatories as shall be filed by the adverse party, a copy of the whole of which interrogatories shall be annexed to the commission. And no such commission shall issue but upon interrogatories to be filed as aforesaid by the party applying, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within fourteen days from the service of such notice. And no deposition taken out of the State without such commission shall be admitted in evidence unless the same were taken by some Justice of the Peace, Notary Public or other officer, legally empowered to take depositions or affidavits in the State or County in which the deposition is taken, nor unless the adverse party was present, or was duly and seasonably notified but unreasonably neglected to attend. And in all cases of depositions taken out of the State without such commission, it shall be incumbent on the party producing such deposition to prove that it was taken and certified by a person legally empowered as aforesaid.

XXXI.

Of the filing of depositions.

All depositions shall be opened and filed with the Clerk, at the term for which they are taken; and if the action in which they are to be used shall be continued, such deposition shall remain on the files, and be open to all objections when offered on the trial, as at the term at which they were opened; and if not so left on the files they shall not be used by the party who originally produced them: but the party producing a deposition may, if he see fit, withdraw it, during the same term in which it is originally filed, in which case it shall not be used by either party.

And all depositions taken to be used in any action in the Court of Common Pleas, and there opened and filed, in case such action be appealed, shall at the same term, when the action shall be entered in this Court, be filed with the Clerk and remain on the files, subject to the same regulations which are above mentioned in relation to depositions taken for and to be used in this Court.

XXXII.

Of bringing money into Court.

In all actions wherein the defendant on leave first obtained for that purpose, shall bring money into Court, unless the plaintiff will accept the same with costs in discharge of the suit, the sum thus paid into Court on account of the debt or damage claimed by the plaintiff shall be considered as paid before action brought, *and thereupon as struck out of the declaration.* And the action shall proceed for the residue of the demand in the same manner as if it had been originally commenced for such residue only. But if upon the trial the verdict shall be for the defendant, the plaintiff shall not be liable for any costs incurred before the bringing of the money into Court, but only for the costs incurred subsequent to that time.

XXXIII.

Of the denial of signatures.

In actions on promissory notes, orders, or bills of exchange, the counsel of the defendant will not be permitted to deny at the trial the genuineness of the defendant's signature, unless he shall have been specially instructed by his client that

the signature is not genuine, or unless the defendant, being present in Court, shall deny the signature to be his, or to have been placed there by his authority.

XXXIV.

Of the use of copies of deeds.

In all actions touching the realty, office copies of deeds pertinent to the issue from the registry of deeds, may be read in evidence without proof of their execution, where the party offering such office copy in evidence is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs.

XXXV.

Of notice to produce written evidence.

Where written evidence is in the hands of the adverse party, no evidence of its contents will be admitted unless *previous notice* to produce it on trial shall have been given to such adverse party or his attorney, nor will counsel be permitted to comment upon a refusal to produce such evidence, without first proving such notice.

XXXVI.

Of the order in which civil actions are to be tried.

All civil actions shall be heard and tried in the order in which they stand on the docket, unless the Court shall, upon good cause shewn, postpone any trial to a time later than that in which it would come in course: *Provided however*, that any one action may with the consent of all parties concerned and with the leave of the Court, be substituted for another action standing earlier on the docket; but in such case the said action which stood earliest, shall take the place of the one which is substituted for it, and shall be tried when the latter would have come on in course, if no such change had taken place. And *provided also,* this rule shall not be construed to extend to questions and issues of law.

XXXVII.

Of copies in causes for argument on questions of law.

No cause standing for argument on a question or issue in law will be heard by the Court, until the parties shall have furnished each of the Judges with a copy or abstract of the case, fairly and legibly written, containing the substance of all the material pleadings, facts and documents, on which the parties rely, and each party shall also note on the copies or abstracts, the points of law intended to be presented at the argument.

XXXVIII.

By whom copies are to be furnished.

In all cases of writs of error or *certiorari*, issues of law on pleadings, facts agreed and stated by the parties, and trustee processes, it shall be the duty of the plaintiff or complainant to furnish the papers or abstracts for the Court; and in all other cases the same shall be done by the party who moves for a new trial, or who holds the affirmative upon the question to be argued; but this shall not prevent the adverse party from furnishing the papers if neglected by him whose duty it is to furnish them; and where the party whose duty it is shall neglect to furnish the papers as by the rules of this Court is required, he shall not have any costs that term, and shall further be liable to be nonsuited, defaulted or to have judgment against him as upon a *nol. pros.* or discontinuance, or such other judgment as the case may require.

XXXIX.

Of the payment of Jury and Clerk's fees.

No cause shall be open for trial by the Jury, until the fees due in that behalf are paid to the Clerk; all other fees due to the Clerk shall be paid as soon as they are by law payable, and if the Clerk shall fail to demand and receive any such fees when payable as aforesaid, he shall be chargeable with all those, for which he is by law required to account to others, in like manner, as if he had actually received the same.

XL.

Of costs in actions under reference.

When an action is continued by the Court for advisement, or under reference by a rule of Court, costs shall be allowed to the party prevailing, for only one day's attendance and his travel, at every intermediate term.

XLI.

Of the taxation of costs.

Bills of costs shall be taxed by the Clerk, upon a bill to be made out by the party entitled to them, if he shall present such bill, and otherwise upon a view of the proceedings and files appearing in the Clerk's office; and no costs shall be taxed without notice to the adverse party to be present, provided he shall have given notice to the Clerk in writing, or by causing it to be entered on the Clerk's docket, of his desire to be present at the taxation thereof; and either party dissatisfied with the taxation by the Clerk, may appeal to the Court, or to a Judge in vacation.

XLII.

Of the day of rendition of judgment.

The Clerk shall make a memorandum on his docket, of the day on which any judgment is awarded; and if no special award of judgment is made, it shall be entered as of the last day of the term.

XLIII.

Of the custody of papers by the Clerk.

The Clerk shall be answerable for all records and papers filed in Court, or in his office; and they shall not be lent by him, or taken from his custody, unless by special order of Court; but the parties may at all times have copies. Provided only that depositions may be withdrawn by the party producing them, at the same term at which they are opened; and whilst remaining on the files, they shall be open to the inspection of either party, at all seasonable hours.

XLIV.

Of the filing of papers, and recording of judgments.

In order to enable the Clerks to make up and complete their records within the time prescribed by law, it shall be the duty of the prevailing party in every suit forwith to file with the Clerk, all papers and documents necessary to enable him to make up and enter the judgment, and to complete the record of the case; and if the same are not so filed within three months after judgment shall have been ordered, the Clerk shall make a memorandum of the fact on the record; and the judgment shall not be afterwards recorded, unless upon a petition to the Court at a subsequent term, and after notice to the adverse party, the Court shall order it

to be recorded. And no execution shall issue until the papers are filed as aforesaid. And when a judgment shall be recorded upon such petition, the Clerk shall enter the same, together with the order of the Court for recording it among the records of the term in which the order is passed, with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found; and the judgment when so recorded, shall be, and be considered in all respects as a judgment of the term in which it was originally awarded. And the party delinquent in such case shall pay to the Clerk the costs of the recording judgment anew, and also the costs on the petition, and the costs of the adverse party, if he shall attend to answer thereto.

XLV.

Of writs of venire facias.

Every *venire facias* shall be made returnable into the Clerk's office by ten of the clock in the forenoon of the *first day of the term*, and the Jurors shall be required to attend at that time; excepting only when in case of a deficiency of Jurors, the Court shall order an additional *venire facias* in term time, in which case the same shall be made returnable forthwith, or at such time as the Court shall order.

XLVI.

Of writs of capias upon indictments, and scire facias upon recognizances.

On indictments found by the Grand Jury, the Clerk shall *ex officio*, issue a *capias* without delay; and when default is made by any party bound by recognizance in any criminal proceeding, the Clerk shall in like manner issue a *scire facias* thereon, returnable to the next term, unless the Court shall make a special order to the contrary.

SALE.

I. *Of the forms of sale, and the consideration.*

1. The liability of the vendee to damage as the surety of the vendor, is not of itself a sufficient consideration to support an absolute conveyance of property against creditors. *Gorham v. Herrick*, ii. 87.

2. And where the vendee, at the time of such absolute conveyance, executed a bond of defeasance to the vendor, it was holden to be incumbent on the vendee in an action brought by him against an officer attaching the goods so conveyed, at the suit of a creditor of the vendor, to produce such bond, or to shew that upon due diligence its production was out of his power. *Ib.*

3. *A.* sold a boat to *B.* who paid part of the price, and gave his promissory note for the residue, taking a bill of sale of the boat. Afterwards, being unable, when called upon, to pay the balance due, *B.* gave up the bill of sale to *A.*, under an agreement that on payment of the remainder of the price originally agreed, the boat should be reconveyed or restored to him. *A.* having no convenient place to keep the boat, which was half a mile from the place of this transaction, left it in the care of *B.* with authority to sell it, subject to the lien of *A.* Hereupon it was held, that the transaction might be regarded either as a resale of the boat to *A.* and thereby a payment of the note;—or as a mortgage of the boat for the balance of the price;—and that in either case *A.* might well maintain replevin against an officer who took it as the property of *B.* *Gleason v. Drew*, ix. 79.

II. *Of the delivery.*

1. Where parties agree to rescind a sale once made and perfected without fraud, the same formalities of delivery, &c. are necessary to revest the property in the original vendor, which were necessary to pass it from him to the vendee. *Quincy & al. v. Tilton*, v. 277.

2. Where one contracted to burn a kiln of bricks, for which he was to receive ten thousand of them when burnt, and he performed his part of the contract;—it was held that he had no vested interest in the bricks, which his creditor could attach, till actual or constructive delivery. *Brewer v. Smith*, iii. 44.

3. Where the conveyance of a chattel is not invalidated by fraud, the mere want of possession in the vendee will not so defeat his rights, as to justify an officer in seizing it as the property of the vendor; if he have previous notice of the conveyance. *Haskell v. Greely*, iii. 425.

4. In the sale or mortgage of an undivided portion of a chattel, in which the vendor has only a minor interest, and the other owners have the actual possession; a symbolical or constructive delivery to the vendee or mortgagee is sufficient, even against creditors. *Ib.*

5. Where, in a negotiation for the purchase of a yoke of oxen, the buyer, having his arm over one of them in the act of measuring him, said he would give the price demanded; to which the seller replied that he might have them; and the seller then borrowed them to haul a load of lumber to his home, which was ten miles distant, engaging to put them to no other use; it was held that this was no delivery of the oxen; and so no title passed to the intended buyer; no earnest having been paid, and no memorandum given.—*Phillips v. Hunnewell*, iv. 376.

6. The delivery of the deed of transfer of a ship at sea, passes the title to the vendee, subject only to be defeated by his negligence in not taking possession of her within a reasonable time after her return to port. *Brinley v. Spring*, vii. 241.

7. The negligence in that case must be such as to afford ground for the presumption of fraud. *Ib.*

8. Should such vessel arrive at another port, notice of the sale, forwarded by the purchaser to the captain, would seem to be equivalent to taking possession. *Ib.*

III. *Of warranty.*

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. *Goodhue v. Butman*, viii. 116.

IV. *Of sales by consignees.*

1. The consignee of goods for sale, is at liberty to incur upon them all such expenses as a prudent man would find necessary, in the discreet management of his own affairs. *Colley v. Merrill*, vi. 50.

2. Thus, where the owner of a vessel conveyed her to his creditor, to be sold by him to the best advantage, and after payment of

the debt, the surplus to be paid over to himself; and the creditor caused her to be sold by a ship-broker;—it was held that the broker's commissions were a reasonable charge upon the gross proceeds of sale, which the owner was bound to allow. *Ib.*

V. *Of sales by operation of law.*

1. It is only where the damages recovered include the value of the article for the taking of which the action was brought, that the chattel is transferred by operation of law, and the property therein vested in the trespasser. *Loomis v. Green*, vii. 386.

2. Therefore where, in an action of trespass for breaking and entering the plaintiff's close, and cutting down and carrying away divers timber trees, the plaintiff attached the timber, and took it into his own possession as reclaimed by himself; the defendant confessed the trespass; and the plaintiff entered a formal abandonment of so much of the action as related to the carrying away of the timber, and proceeded for damages for breaking and entering his close and prostrating his trees; for which he had judgment for nominal damages only;—it was held that by this judgment the title to the timber was not changed. *Ib.*

3. The title of a purchaser under a sheriff's sale may be good, without showing the execution returned. *Clark v. Foxcroft*, vi. 296.

4. The property in the goods in an action of trover is not changed by the default of the defendant, but by the recovery of judgment against him. *Carlisle v. Burley*, iii. 250.

VI. *Of the right of the creditor to reclaim the goods.*

1. If the vendor would rescind a contract for the sale of goods, and reclaim them, on account of fraud in the vendee, it must appear that deceptive assertions and false representations were fraudulently made, to induce him to part with the goods. *Cross v. Peters*, i. 378.

2. The mere insolvency of the vendee, and the liability of the goods to immediate attachment by his creditors, though well known to himself and not revealed to the vendor, will not be sufficient to avoid the sale. *Ib.*

3. In order to entitle the vendor of goods to vacate the sale, and reclaim the goods on the ground of fraud, it is not necessary that the fraudulent representations be made at the time of sale; as in case of a warranty, which is part of the contract of sale; but it is sufficient if the goods be obtained by the influence and means of false and fraudulent representations, though they were made on a previous occasion. *Seaver v. Dingley*, iv. 306.

4. If a sale of goods be obtained by the fraud of the vendee; the vendor may treat the sale as a nullity, and reclaim the goods, although the term of credit on which they were sold has not expired. *Seaver v. Dingley*, iv. 306.

5. And the right to reclaim the goods is not affected by an intervening sale of them to a third person, unless he was a *bona fide* purchaser, without notice of the fraud. *Ib.*

6. Where goods, obtained by fraudulent pretences and a sale thereupon, have been transferred by the vendee, to a third person, with notice of the fraud, from whose possession they are replevied by the original owner; it is no defence in such suit that the defendant has been summoned in a foreign attachment, as the trustee of the fraudulent vendee, from whom he received the goods, which suit is still pending. *Ib.*

7. Where goods were purchased by means of fraudulent representations made by the buyer, the party defrauded cannot avoid the sale, and claim the goods, against an attaching creditor of the fraudulent purchaser, whose debt accrued subsequent to the sale. *Gilbert v. Hudson*, iv. 345.

8. But if such creditor attach for a subsequent, and also for a prior debt, joined in the same writ, his lien on the goods as against the party defrauded, extends only to so much of them as will satisfy the subsequent debt, and the costs. *Ib.*

9. If in the exchange of goods one party defrauds the other, who elects, for that cause to rescind the contract; it is not enough for the injured party to give notice to the other, and call on him to come and receive his goods,—but he must himself return them back to the party defrauding him, before any right of action accrues. *Norton v. Young*, iii. 30. [Vid. *Rutter v. Blake*, 2 *Har. & Johns.* 353; *Ellis v. Hamlen*, 3 *Taunt.* 52; *Long on Sales*,

128; *Cash v. Giles*,3 *Car. & Payne*,407; *Okell v. Smith*,1 *Stark. R.* 107; 2 *Stark. Ev.* 640.]

VII. *Of fraudulent sales.*

1. The fraudulent purchaser of the goods of a judgment debtor has no right to contest the regularity of the doings of an officer, who has seized them as the goods of the debtor, by virtue of an execution against him. *Dagget v. Adams*, i. 198.

2. If a bill of sale absolute on its face, was in truth made for collateral security only;—or if the possession of a chattel remains in the vendor, after sale;—neither of these circumstances is conclusive evidence of fraud, *per se;* but is only a fact to be considered by the Jury in determining the question of fraud. *Reed v. Jewett*, v. 96.

3. 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. *Ulmer v. Hills*, viii. 326.

[See Action on the case, I. Agent, I. VI. Attachment, II. Contract, I. II. VII. IX. X. Executors, II.]

SCHOOLS.

1. The superintending school committee have no power to dismiss a school-master, unless for one of the causes mentioned in *Stat.* 1821, *ch.* 117, *sec.* 3;—and this must be by writing, under their hands, specially assigning the cause of dismissal. *Searsmont v. Farwell*, iii. 450.

2. A school committee of three, appointed by a district, has no authority to hire a school master; that power being vested in the school agent by *Stat.* 1821, *ch.* 117. *Moor v. Newfield*, iv. 44.

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

[See Evidence, VII. *b.*]

SCIRE FACIAS.

1. *Scire facias* lies to revive a judgment in a real action, by the common law of this State. *Prop'rs. Ken. Pur. v. Davis*, i. 309.

2. A writ of *scire facias* on a recognizance to prosecute an appeal, should be issued originally from the Court appealed to. *Vallance v. Sawyer*, iv. 62.

3. The proper remedy against the indorser of a writ is by *scire facias*. *How v. Codman*, iv. 79.

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

5. A judgment rendered in *Massachusetts* against a citizen of *Maine*, before the separation, may be revived in the same Court by *sci. fa.* though the defendant is not resident in that Commonwealth; the jurisdiction of both Courts as to processes brought to execute such judgments, remaining unaffected by the separation, by *Stat.* 1819, *ch.* 161, *sec.* 1, *art.* 8, adopted into the Constitution of *Maine*, *art.* 10, *sec.* 5. *Mitchell v. Osgood*, iv. 124.

[See Interest. Pleading, IX. Practice, VI. Trustee Process, II.]

SELECTMEN.

[See Town, III. *a.*]

SENATE.

[See Constitutional law, II.]

SET-OFF.

1. Where the indorsee of a promissory note has only a lien upon a part of the amount, as collateral security for money due from the promissee; a debt due from the promissee to the maker of the note may be set off against the residue, upon motion, though such debt

consists of a judgment recovered in another Court. *Moody v. Towle*, v. 415.

2. A promissory note, given to a third person by the defendant as surety for the plaintiff, and taken up by the defendant, with the creditor's receipt of payment from the defendant thereon, being duly filed in the clerk's office by way of set-off, is of itself sufficiently explicit as a demand for monies paid, within the meaning of *Stat.* 1821, *ch.* 59, *sec.* 19. *Fox v. Cutts*, vi. 240.

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

4. Whether, where the creditor in one execution is joint debtor with others in another execution, the officer, having both in his hands, is bound, by *Stat.* 1821, *ch.* 60, *sec.* 4, to set off one against the other, at the request of such creditor;—*dubitatur*. *Gould v. Parlin*, vii. 82.

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

6. *Aliter*, if the Court declined interfering at all in the matter, in that summary mode. *Ib.*

[See Bills of Exchange, &c. V. Costs, III.]

SETTLEMENT.

[See Poor, I.]

SETTLERS.

1. *B.* a "settler" on lands of the Commonwealth of *Massachusetts* in *Bangor*, within the terms of the two Resolves of *June* 25, 1789, sold one acre of his possession, by metes and bounds, to

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

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

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

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

5. That if the committee on Eastern lands accidentally omitted to except the acre sold to *McG.* from their deed to *L.* and others, and the latter, perceiving the mistake, took the deed in silence, intending to defraud *McG.* of the acre; the deed, as to that acre, was void. *Lapish v. Wells*, vi. 175.

6. 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:—

7. 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:—

8. 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. *Sargent v. Simpson*, viii. 148.

[See Conveyance, X. *c.* Evidence, I.]

SHAKERS.

1. The deacons of the societies of Shakers are capable of taking and holding lands in succession, within the meaning of *Stat.* 1785, *ch.* 51, and *Stat.* 1821, *ch.* 135. *Anderson v. Brock*, iii. 243.

2. The covenant by which the members of the societies of shakers are bound to each other, is a valid instrument, obligatory on all who voluntarily enter into it. *Waite v. Merrill*, iv. 102.

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

[See Evidence, XII. *a.*]

SHERIFF.

I. Of the relation of the sheriff and his deputy to each other.

II. Of the service of process.

(*a.*) What process he may serve, and in what manner.

(*b.*) Of arrest of the person.

(*c.*) Of the attachment of goods.

III. Of the return of process.

IV. Of the sheriff's liability for the misconduct of himself or of his deputy.

(*a.*) Its nature and extent in general.

(*b.*) Under the statute for not paying over money.

(*c.*) What he may show in defence.

(*d.*) Of the statute of limitations.

V. Of the offence of pretending to be a deputy sheriff.

I. *Of the relation of the sheriff and his deputy to each other.*

1. In this State a deputy sheriff acquires a special property to himself in goods by him attached, which the sheriff can neither divest nor control; his character essentially differing from that of a sheriff's servant or deputy in *England*. *Walker v. Foxcroft*, ii. 270.

2. If one deputy sheriff attach goods, and another deputy of the same sheriff attach and take the same goods out of his possession by virtue of another precept against the same debtor, the deputy who made the first attachment may have trespass *vi et armis* for this injury, against the sheriff himself. *Ib.*

II. *Of the service of process.*

(*a.*) *What process he may serve, and in what manner.*

1. Where a coroner, who was also a deputy sheriff, was sued for neglect of his duty as a coroner, service of the writ on him by another deputy of the same sheriff was holden to be bad. *Brown v. Gordon*, i. 165.

2. The *Stat.* 1817, *ch.* 13, removes the disability of a deputy sheriff to serve process in which the town where he resides is a party not only from the deputy resident in such town, but from the sheriff, and from all his other deputies. *Bristol v. Marblehead*, i. 82.

3. In an action against a banking company in which a deputy sheriff is a stockholder, the writ may be served by another deputy of the same sheriff, within *Stat.* 1821, *ch.* 92. *Adams v. Wiscasset Bank*, i. 361.

4. If a writ be delivered to an officer with directions to attach property if practicable; otherwise, to make no service; it is his duty to make diligent search for property; and if none is found, to make a seasonable return of that fact, on the writ, in his official capacity, as a reason for omitting to serve the precept. *Green v. Lowell*, iii. 373.

5. The *Stat.* 1821, *ch.* 67, requiring the sheriff to notify the bail fifteen days before the return day of the execution, does not excuse the sheriff from making diligent search for the body and goods of the debtor, as before. *Kidder v. Parlin*, vii. 80.

(b.) Of arrest of the person.

1. The sheriff has no control over the body of a debtor, after he has given bond for the liberty of the yard, except in cases specified in *Stat.* 1822, *ch.* 209. *Codman v. Lowell*, iii. 52.

2. After the execution of a bond for the debtor's liberties, the sheriff is not liable if the debtor escape. *Palmer v. Sawtell*, iii. 447.

3. It is not lawful to arrest a debtor, on mesne process, in any case where, after judgment, his body is not liable to be taken in execution. *Green v. Morse*, v. 291.

4. Where the officer and 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. *Strout v. Gooch*, viii. 127.

(c.) Of the attachment of goods.

1. The expense of the safe custody of goods attached on mesne process, is a lien on the goods; and it is not affected by the allowance of a sum for that purpose by the Court in the taxation of costs for the original plaintiff. *Twombly v. Hunnewell*, ii. 221.

2. The receipt taken by a deputy sheriff, from the person to whom he delivers for safe keeping the goods by him attached, is a contract for his own private security, which the creditor has no right to control. *Clark v. Clough*, iii. 357.

3. But if the officer place such receipt in the hands of the creditor's attorney, to be prosecuted for his benefit; this is an equitable assignment of the contract for which his liability to the creditor forms a sufficient consideration. *Ib.*

III. *Of the return of process.*

1. It has never been the practice in this State to proceed by attachment against a sheriff for not returning process, whether mesne or final; though the common law would authorize such a course of proceeding. *Clark v. Foxcroft*, vi. 296.

2. It is competent for the sheriff to make out and certify a return of his doings under an execution, even while an action is pending against him for neglecting to levy it, and after he is out of office. *Ib.*

3. Where the sheriff justifies under final process, it is not necessary to show it returned. *Ib.*

IV. *Of the sheriff's liability for misconduct of himself or of his deputy.*

(a.) Its nature and extent, in general.

1. Where in an action by a judgment creditor against a sheriff, the writ contained an allegation of the misconduct of one of the defendant's deputies who served the original writ on the plaintiff's debtor, and wasted the goods attached; and of another deputy in not serving and collecting the execution; and the Jury found the latter deputy guilty; and afterwards an action was brought, for the benefit of the latter deputy, in the name of the sheriff, upon the bond of the deputy who served the writ;—it was holden that it was not competent for the plaintiff to shew, against the record of the former judgment against him, that the non-feasance of the deputy who had the execution, was caused by the prior misconduct of him who served the writ. *Thatcher v. Young*, iii. 67.

2. Where a deputy sheriff, having a writ in his hands for service,

undertook to receive the money of the debtor, and make no service of the writ;—it was holden that the sheriff was liable, under a charge for neglecting to serve and return the writ, to the amount of the money and interest; and this without any previous demand on the officer. *Green v. Lowell*, iii. 373.

3. In an action of the case against a sheriff for returning bail to the action, when no bail was taken, the sheriff may be admitted to shew the insolvency of the debtor; and this fact being proved, the creditor is entitled to none but nominal damages. *Eaton v. Ogier*, ii. 46.

4. In such case the Court refused to permit the plaintiff to amend his writ, by inserting a count for not delivering up the bail bond mentioned in the officer's return. *Ib.*

5. Where an officer, having a writ of attachment against a party who had removed out of his precinct, falsely returned that he had left a summons at his last and usual place of abode in *B.* being the place of his late residence; and judgment went by default, the defendant having no notice of the suit; and afterwards the defendant obtained a grant of the writ of review, which he never sued out, but sued the officer for a false return;—it was holden that the officer, though liable for some damages, was not liable for the costs of the application for review, nor for the amount of the original judgment, till the latter had been proved erroneous, by a successful termination of the action of review;—but that if the debt on trial, should prove to be due, the officer might be liable for the amount of the original costs. *Waterhouse v. Gibson*, iv. 234.

(b.) Under the statute for not paying over money.

1. 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*. *Bulfinch v. Balch*, viii. 133.

2. 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. *Ib.*

(c.) What he may show in defence.

1. Where an officer is charged by the original debtor with having lost or wasted a portion of the goods which he had attached, it is competent for him to excuse himself from liability by showing that he has applied the amount to the use of the plaintiff, by paying with it the expenses of keeping the goods. *Twombly v. Hunnewell*, ii. 221.

2. In an action against the sheriff for neglect or misconduct in the service of an execution, he is not permitted to impeach the creditor's judgment, except on the ground that it was obtained by fraud. *Adams & al. v. Balch*, v. 188.

3. In a suit against the sheriff for not levying an execution, it is a good defence that the plaintiff's judgment was fraudulent, the sheriff first proving that he represents a creditor of the judgment debtor, by showing a legal precept in his hands. *Clark v. Foxcroft*, vi. 296.

4. The sheriff, justifying under a brief statement, is not bound to prove all the facts therein stated, if enough is shown to constitute a good defence. *Ib.*

5. If several successive attachments be laid on the same goods, at the suit of several creditors, and the officer neglect to seize and sell them on any of the executions; and the last attaching creditor sues the officer for this neglect; the defendant may show that the judgment of the prior attaching creditors, to whom he is still liable, would absorb the whole value of the goods; and this, it seems, would constitute a good defence. *Commercial Bank v. Wilkins*, ix. 28.

6. Where one became bail at the request of a third person, who afterwards paid him the greatest part of the judgment, which the bail had been compelled to satisfy;—this was held to constitute no defence for the sheriff, in an action brought against him by the bail, for a false return on the execution. *Kidder v. Parlin*, vii. 80.

(d.) Of the statute of limitations.

1. Where a deputy sheriff has collected money on execution,

which he has neglected to pay over, the limitation of four years, applied by *Stat.* 1821, *ch.* 62, to all actions against sheriffs for the misconduct of their deputies, commences with the return day of the execution. *Williams College v. Balch*, ix. 74.

2. Therefore where the amount of an execution had been collected, and the execution returnable, more than four years, but within that period a demand had been made upon the deputy for the money, and an action brought against the sheriff, to recover the same with interest at thirty *per cent.* under *Stat.* 1821, *ch.* 92, it was held that the action was barred by the statute of limitations. *Ib.*

V. *Of the offence of pretending to be a deputy sheriff.*

Where the plaintiff in an action served his own writ by leaving a summons with the defendant, and made a return of the same, with an attachment of property thereon, in the name of *J. D.* a deputy sheriff;—this was held not to be "pretending himself to be a deputy sheriff," nor acting as such; and therefore not indictable under *Stat.* 1821, *ch.* 92, *sec.* 8. *Coffin's case*, vi. 281.

[See Action, I. II. Agent, I. Amendment. Attachment, I. II. Bailment. Bond, III. Constable. Constitutional Law, VI. Contract, II. Damages, II. Escape. Evidence, X. *b.* XII. *a.* Execution, II. III. IV. VII. VIII. Limitations, I. Partnership, III. Pleading, XIV. Set-off.]

SHIPPING.

I. Of the relation of master and owner, and their mutual remedies.

II. Of the authority of the master.

III. Of recusant owners.

IV. Of the liability of the owner to the shipper.

V. Of the liability of charterers and mortgagees.

VI. Of seamen's wages.

I. *Of the relation of master and owner, and their mutual remedies.*

1. Smuggling, by the master of a vessel, when it is not gross and attended with serious damage or loss to the owner, is not visited with the penalty of forfeiture of wages; but the damage actually sustained by the owner may be deducted from the wages due to the master, by way of diminished compensation. *Freeman v. Walker*, vi. 68.

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

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

4. The purchase of a ship, in a foreign port, by the master, at a sale by authority, is generally to be considered as made for the benefit of the owners, if they elect so to regard it. *Chamberlain v. Harrod*, v. 420.

II. *Of the authority of the master.*

1. The master of a vessel cannot, by the mere virtue of his office, as such, bind his owners by a charter-party under seal, so as to subject them to an action of covenant thereon. *Pickering v. Holt*, vi. 160.

2. 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. *Descadillas v. Harris*, viii. 298.

3. 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. *Ib.*

III. *Of recusant owners.*

1. The owner of a 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. *Rodick v. Hinckley*, viii. 274.

IV. *Of the liability of the owner to the shipper.*

1. Where, in the usual course of business, goods shipped on freight are consigned to the master for sales and returns, the owner of the vessel is liable, as well for the payment of the proceeds to the shipper, as for the safe transportation of the goods. *Emery v. Hersey*, iv. 407.

2. *A.* and *B.* being joint owners of a vessel, *A.* who was master, purchased supplies for her, giving therefor a negotiable note in his own name and that of *B.* jointly, but without authority from *B.* In an action by the promissee against *A.* and *B.* brought upon this note, with the usual general counts for money and goods, and an *insimul*

computassent, it was held—that the note being void as to *B.* it was no extinguishment of the original implied promise of both the owners; and that therefore the plaintiff might well recover against both, on the general counts. *Wilkins v. Reed*, vi. 220.

3. The owner of a vessel is not liable to contribution for the jettison of goods laden on deck. *Dodge v. Bartol & als.* v. 286.

V. *Of the liability of charterers and mortgagees.*

1. Where a vessel is let to the master on shares, he victualling and manning her, paying a portion of the port charges, employing her at his pleasure, and yielding to the owners, for her hire a certain share of the net earnings; the liability of the general owner ceases, and the master is placed in their stead, during the time the vessel continues thus under his control. *Thompson v. Snow & al.* iv. 264.

2. Such transactions do not create a partnership between the owners and the master, in the business of the voyage. *Ib.*

3. To subject the hirer of a vessel to the liabilities of an owner, he should have the possession, and the entire control and direction of the vessel; so that the general owner, for the time being, could have no right to interfere with her management. *Emery v. Hersey*, iv. 407.

4. Where a fishing vessel was let on shares to the master, who was to victual and man her, the owner having nothing to do with the purchase of supplies, nor with the employment of the vessel;—it was held that the owner was not liable for supplies furnished to the master. *Winsor v. Cutts*, vii. 261.

5. Whether one holding the title to part of a fishing vessel, as security for the payment of the purchase-money, in trust for the master who had contracted for the purchase, and had taken the vessel for the fishing season on the usual shares, is liable for supplies furnished to the master;—*quære*. *Ib.*

6. The register or enrollment of a vessel at the custom-house is not conclusive evidence of ownership. *Colson v. Bonzey*, vi. 474.

7. Hence the mortgagee of a ship, not in possession, though he appears in the ship's papers as the sole owner, is not liable for supplies directed by the master. *Ib.*

VI. *Of seamen's wages.*

1. Where a vessel was chartered "for a voyage to be made from *Portland* to sea, and take a cargo from on board the British brig *Fountain*, and proceed with the same to one or more ports in the *West Indies*, and from thence to *Portland*," this was holden to be one entire voyage. *Blanchard v. Bucknam*, iii. 1.

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

[See Agent, I. Bills of Exchange, &c. I. Evidence, XII. *a. c.* Limitations, IV. Partnership, I. Sale, II.]

STAMPS.

[See Bills of Exchange, &c. I.]

STATUTES.

1. Wherever the Legislature of this State appear to have revised the subject matter of any statutes of *Massachusetts* and enacted such provisions as they deemed suitable to the wants of the people of this State, the former statutes are to be considered as no longer in force here, though not expressly repealed. *Towle v. Marrett*, iii. 22.

2. In the exposition of a private statute, conferring special privileges or imposing particular obligations, it is not proper to resort to the language of any other private act, not relating to the same parties and the same subject matter; such private statutes standing upon the same basis with contracts by deed, which generally are not to be affected by evidence *aliunde*. *Thomas, treas. &c. v. Mahan*, iv. 513.

3. Statutes of a penal character should, if possible, be so construed as to leave the citizen free from penalties and from danger, without appealing to the discretion of any one. *Butler v. Ricker*, vi. 268.

4. To constitute a statute a public act, it is not necessary that it should be equally applicable to all parts of the State. It is sufficient if it extends to all persons within the territorial limits described in the statute. *Pierce v. Kimball*, ix. 54.

5. The statutes of *Massachusetts* incorporating banks in *Maine* and in force at the time of the separation, being recognized in the public statutes of *Maine* for the regulation of banking corporations, are thereby become public statutes and may be proved by a printed copy. *Case of James M. Rogers*, ii. 301.

6. If a statute contains provisions of a private nature, as, to incorporate a bank, &c. yet if it contains also provisions for the forfeiture of penalties to the State, or for the punishment of public offences in relation to such bank, it is a public statute. *Case of Charles Rogers*, ii. 303.

7. The statute incorporating the Bank of the United States is a public statute. *Ib.*

[See Androscoggin Bridge and Booms. Baldwin. Corporation. Medical Society.]

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23 Hen. 6, cap. 9, bonds, iii. 162
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SULLIVAN.

[See Settlers.]

SURETY.

[See Principal and Surety.]

SURVEYOR OF HIGHWAYS.

[See Town, III. *c.*]

TAXES.

I. Of the purposes for which taxes may be laid, and the property taxable, and the votes to raise money.

II. Of the assessment of taxes.
III. Of collection of taxes.
IV. Of direct taxes by the United States.

I. *Of the purposes for which taxes may be laid, and the property taxable, and the votes to raise money.*

1. The power given to towns by statute to raise money for "necessary charges," extends only to those expenses which are incident to the discharge of corporate duties. *Bussey v. Gilmore*, iii. 191.

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

3. The capital employed in manufactures, within the meaning of *Stat.* 1825, *ch*, 288, includes whatever is essential to the prosecution of the business, whether it be fixed or circulating capital. And it is immaterial whether it is derived from assessments, or loans, or otherwise. *Gardiner C. & W. Factory v. Gardiner*, v. 133.

4. It is within the ordinary powers and duties of towns in this State, in which no distinct and separate parish or religious society is established, to provide for religious instruction; and for this purpose they may raise and assess money to support ministers, and to build and repair meeting houses. *Alna v. Plummer*, iii. 88.

5. 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. *Ford v. Clough*, viii. 334.

6. 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. *Ib.*

II. *Of the assessment of taxes.*

1. The merchandize of a manufacturing corporation, employed in trade in a store, is not taxable to the corporation, in the town

where the store is situated; but to the individual holders of the stock: the provision usually inserted in the annual tax acts being intended to apply only to individuals, having their domicil in towns other than the place of their business. *Gardiner C. & W. Factory v. Gardiner*, v. 133.

2. The town of *W.* when it constituted but one parish, erected a meeting house; and after several years, divers citizens having in the mean time become members of other parishes, the town in its municipal capacity raised money to repair the house; which was assessed generally on all the inhabitants. It was holden that this assessment, so far as these citizens were concerned, was illegal.—*Paine & als. v. Ross*, v. 400.

3. Where a private statute required the assessors of a corporation to "make perfect lists of assessments under their hands, and commit the same to the collector, with a warrant under their hands and seals;"—it was holden that the signing of the warrant, though it were on a leaf of the same book which contained the assessment, was no signing of the assessment, and that without a separate signature the assessment was imperfect and invalid. *Colby v. Russell*, iii. 227.

4. If one of the inhabitants of a town absent himself, in order that he may not receive personal notice from the assessors to bring in a list of his taxable estate, where the known usage was to give notice in that method, he cannot afterwards object to the legality of his tax on that account. *Mussey v. White*, iii. 290.

5. Under *Stat.* 1821, *ch.* 116, *sec.* 1, the lists of assessment of taxes must be signed by the assessors. The signing of the warrant, usually inserted at the end of the tax bill, is not a sufficient compliance with the statute in this particular. *Foxcroft v. Nevens & als.* iv. 72.

6. A collector of taxes, having given bond conditioned that he should "well and truly collect all such rates for which he should have sufficient warrant, under the hands of the assessors, according to law, and pay the same into the treasury," &c. received of the assessors a tax-bill not signed, together with a warrant in legal form for the collection of the taxes; after which he received, by volun-

tary payments, the amount of a large part of the taxes, which he neglected to account for. In an action on the bond it was held to extend only to such taxes as he might collect after receiving a full legal authority to enforce the collection;—and that the tax-bill not being signed, the warrant annexed to it was insufficient, and the condition was therefore saved. *Ib.*

7. If in the assessment of a tax, the assessors exceed the sum voted to be raised and five per cent. thereon, though the excess be of a few cents only, the whole is void; and the assessors are liable in trespass to the party whose goods have been distrained for the tax. *Huse v. Merriam*, ii. 375.

III. *Of the collection of taxes.*

1. If land be sold for the non-payment of divers taxes, one of which is illegal, and the rest legal, the sale is void. *Elwell v. Shaw*, i. 339.

2. Where lands of non-resident proprietors which are advertised to be sold for taxes, have within three years next preceding such advertisement been taken from one town and annexed to another; the name of the former as well as of the latter town must be expressed in the advertisement, within the meaning of *Stat.* 1785, *ch.* 70, *sec.* 7. [*Stat.* 1821, *ch.* 116, *sec.* 30.] *Porter v. Whitney*, i. 305.

3. The words "In the name of the State of Maine,"—and the sentence beginning with the words—"it being this town's proportion of a tax," &c. in the form of the warrant for collecting taxes, in *Stat.* 1821, *ch.* 116, *sec.* 17, are matters of form only, the omission of which does not vitiate the warrant. *Mussey v. White*, iii. 290.

4. It is not necessary to the validity of a warrant for the collection of taxes, that it be delivered to the collector during the year for which he and the assessors were elected; it being sufficient if they made and signed it while in office. *Ib.*

IV. *Of direct taxes by the United States.*

1. A deputy collector of the direct tax, appointed under the act

of Congress of *July* 22, 1813, providing for the collection of internal taxes, was not authorized to collect the taxes imposed by the acts of subsequent years, without a new appointment and qualification. *Preble v. Young*, iv. 431.

2. It is not necessary for the purchaser of lands sold for non-payment of the direct tax of the year 1813, in an action between him and the original owner of the land, to shew that the collector had given bond for the faithful performance of his duty; this being intended only for the security of the United States. *Hale v. Cushing*, ii. 218.

3. In such action the administration of the oath of office to the assistant assessor may be proved by parol;—the statute requiring a certificate of the oath to be filed in the collector's office being merely directory. See *Stat. U. S. July* 22, 1813, *sec.* 3. *Ib.*

[See Constitutional law, I. Conveyance, X. *a*. Evidence, VI. Poor, I. *c*.]

TENANT BY THE CURTESY.

Where a tenant by the curtesy of an undivided portion of an estate had abandoned the land for more than forty years, leaving it in the possession of another tenant in common, whose occupancy was no ouster;—it was held that the reversioner of such undivided portion of the estate had no right of entry upon the tenant in possession, during the life of the tenant by the curtesy, his abandonment of the land being no forfeiture of the estate. *Witham v. Perkins*, ii. 400.

TENANTS IN COMMON.

1. Where one tenant in common refused to admit his co-tenant to enter on the land, or to suffer his agent to occupy, denying his title, and retaining himself the exclusive possession and occupancy;—this was held sufficient evidence of an ouster of his companion. *Brackett v. Norcross*, i. 89.

2. If one tenant in common sues a writ of entry against his co-tenant, who pleads *nul disseisin;* proof of the demandant's title as tenant in common will not now entitle him to judgment; the *Stat.* 1826, *ch.* 344, having rendered it necessary that he should also prove an actual ouster. *Cutts v. King*, v. 482.

3. By a devise of the income of one third part of a farm, the devisee becomes a tenant in common of that portion of the land itself. *Andrews v. Boyd*, v. 199.

4. Where two non-residents held in common an unsettled tract of land, which without their knowledge was sold for non-payment of the State taxes; and they afterwards made partition by mutual deeds of release and quitclaim, in common form; after which one of them, within the time of redemption, paid the tax to the purchaser at the sheriff's sale, from whom he took a deed of release and quitclaim to himself alone, of the whole tract;—it was held that this payment and deed enured to the benefit of them both;—that the party paying had his remedy by action against the other for contribution;—and that he who had not paid, might still maintain a writ of entry against the other, for his part of the land.—*Williams v. Gray*, iii. 207.

5. 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. *Simpson v. Seavey*, viii. 138.

6. 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. *Ib.*

7. 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*. *Ib.*

8. 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. *Ib.*

[See Actions real, II. Agent, IV. Assumpsit, II. Attachment, II. Partition. Partnership, I. Watercourse.]

TENANT AT WILL.

[See Landlord and Tenant, III.]

TENDER.

1. If there be a promise to deliver specific articles at a day certain, and no place be mentioned in the note, the creditor has the right of appointing the place. *Aldrich v. Albee*, i. 120.

2. A plea of tender of specific articles must state that they were kept ready until the uttermost convenient time of the day of payment. *Ib.*

3. If a promise be in the alternative, to deliver one article at one place, or another at another place, at the election of the debtor, it seems he ought to give the creditor seasonable notice of his election. *Ib.*

4. If a note be given for specific articles, to a creditor living out of the United States, and no place is assigned for the delivery of them; the foreign domicil does not absolve the debtor from the obligation of ascertaining from him the place where he will receive the goods. *Bixby v. Whitney*, v. 192.

5. Where a town order, payable in corn and grain, was presented to the town treasurer, who offered to pay it in those articles, but said that if the payee would wait till a future day he would pay it in money; which was agreed;—it was held that this was a waiver of the tender; and that the treasurer had sufficient authority thus to bind the town. *Veazy v. Harmony*, vii. 91.

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

7. 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.—*Brown v. Gilmore*, viii. 107.

8. 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. *Ib.*

9. 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. *Benson v. Carmel*, viii. 110.

[See Costs, II. Damages, I. Execution, IX. Mortgage, III. IV.]

TIDE WATERS.

[See Conveyance, X. *c.* Settlers.]

TIME.

1. In the computation of time from an act done, the day on which the act is done will be excluded, whenever such exclusion will prevent an estoppel, or save a forfeiture. *Windsor v. China*, iv. 298.

2. Thus, in the computation of the two months, mentioned in *Stat.* 1821, *ch.* 122, *sec.* 17, the day of giving the notice is to be excluded. *Ib.*

3. 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. *Tillson v. Bowley*, viii. 163.

[See Contract, V. Limitations, III. Mortgage, I. IV.]

TOLLS.

The acts establishing boom corporations impose upon the owners of lumber the liability to pay toll for the security and preservation of their property; but do not attach to rafts intended to pass down the river, but accidentally stopped by the boom, where its use and security were not sought or desired. *Chase v. Dwinal*, vii. 134.

[See Action, I. Assumpsit, 1. Lien.]

TOWNS.

I. Of their limits, powers and duties in general.
II. Of town meetings and the election of officers.
III. Of town officers, and their duties.
  (*a.*) Selectmen.
  (*b.*) Collectors of taxes.
  (*c.*) Surveyors of highways.
  (*d.*) Overseers of the poor.
IV. Of the lots reserved for public uses.
V. Of town-orders for the payment of money.

I. *Of their limits, powers and duties in general.*

1. Where the legislature divided a town into two, and providep that all persons dwelling on lands adjoining the division line should have liberty to belong, with their lands, to either town, at their election, made within a limited time;—it was held that this election was not merely a personal privilege, terminating at the death of the party; but was a definitive and perpetual change of the line of territorial jurisdiction. *Cumberland v. Prince*, vi. 408.

2. The *Stat.* 1821, *ch.* 59, *sec.* 26, empowering the treasurers

of towns, &c. to maintain suits in their own names upon the securities therein mentioned, does not take away the right of the towns, &c. to sue, as before. *Newcastle v. Bellard*, iii. 369.

3. 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. *Ford v. Clough*, viii. 334.

II. *Of town meetings and the election of officers.*

1. Under *Stat.* 1821, *ch.* 115, *sec.* 14, it is sufficient if the assessors post up notice of the time and place of their intended session to receive evidence of the qualifications of voters; without causing such notice to be inserted in the warrant for calling the town meeting. *Tompson v. Mussey*, iii. 305.

2. 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. *Ford v. Clough*, viii. 334.

3. It is no valid objection to such return, that it bears date on the day of the meeting. *Ib.*

4. Where the inhabitants of a town, at their annual meeting, voted that their selectmen should also be assessors, but did not elect them such by ballot, as the statute requires, and they were sworn into both offices; and afterwards, at an adjournment of the same meeting, they were regularly elected assessors by ballot, and proceeded to discharge the duties of their office as such, but were not sworn again;—it was holden that their neglect to be sworn after the valid election was a refusal of the office; but that their proceedings might be supported as the doings of selectmen, acting under the statute, in a vacancy of the office of assessors. *Mussey v. White*, iii. 290.

5. The preparation of an alphabetical list of voters, previous to the annual meeting of a town for the choice of its officers, is not necessary to the validity of the election; the *Stat.* 1821, *ch.* 115, being in this respect merely directory. *Ib.*

6. Where a town officer is sworn into office by the moderator of the meeting at the time of his election, the proper evidence of the

fact is the certificate of the moderator, filed in the office of the town clerk, and proved by an attested copy. *Abbot v. Hermon*, vii. 118.

III. *Of town officers and their duties.*

(*a.*) *Selectmen.*

The Selectmen of a town have no authority by law to lay out a public landing, or place for the deposit of lumber. *Bethum v. Turner*, i. 109.

(*b.*) *Collectors of taxes.*

1. Upon the choice of a collector of taxes, the town electing him may lawfully require sureties for the faithful discharge of his office. *Morrell v. Sylvester*, i. 248.

2. And the refusal to find such sureties is a non-acceptance of the trust, even after the person chosen has taken the oath of office. *Ib.*

3. The penalty annexed by law to the refusal to accept a town office, does not extend to a collector of taxes. *Ib.*

(*c.*) *Surveyors of highways.*

A surveyor of highways cannot, under *Stat.* 1821, *ch.* 118, employ persons to labor at the expense of the town, without the consent of a majority of the selectmen. *Haskell v. Knox*, iii. 445.

(*d.*) *Overseers of the poor.*

1. Overseers of the poor are justifiable in advancing money, employing counsel, and rendering assistance in the prosecution of a bastardy process, the complainant being poor, and an inhabitant of their town. *Dennett v. Nevers*, vii. 399.

2. And where they had done so, and procured a judgment of filiation with costs, which were collected by the attorney of record for the complainant, and passed to the credit of the town, to which he had charged his fees; and the record was afterwards quashed on *certiorari;* it was held that neither the overseers, nor the town, nor the attorney, but the complainant alone was liable to refund the costs so paid. *Ib.*

IV. *Of the lots reserved for public uses.*

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 State v. Baring*, viii. 135.

V. *Of town orders for the payment of money.*

1. A town order, drawn by the selectmen on the treasurer, must be presented to the treasurer for payment, before any action can be sustained on it, in the same manner as a note for the payment of money at a particular place. But no notice need be given to the selectmen, of nonacceptance or nonpayment by the treasurer. *Varner v. Nobleborough*, ii. 121.

2. Such a town order is good evidence to support a count on an *insimul computassent*. *Ib.*

[See Action, II. Action on the case, II. III. Assumpsit, II. Baldwin. Constitutional Law, III. V. Contract, XII. Corporation. Estoppel, I. Evidence, I. Limitations, I. Parish, I. IV. V. Poor. Proprietors of Lands. Taxes, I. II. Tender.]

TRESPASS.

I. When it lies.

II. Of the proceedings and damages.

I. *When it lies.*

1. The *Stat.* 5, *Rich.* 2, *cap.* 7, forbidding any entry into lands and tenements with actual force, even where the party had a legal right of entry, is part of the common law of this State. *Harding's case*, i. 22.

2. For executing legal process in an unlawful manner, trespass is proper remedy. *Green v. Morse*, v. 291.

3. The owner of land, having, for valuable consideration, given

license to another by parol to build a bridge on his land, an action of trespass *de bonis asportatis* will lie against him for taking away the bridge without the consent of him who erected it. *Ricker v. Kelly*, i. 117.

4. Where one conveyed lands in fee with general warranty, and a stranger at the same time was seised in fact of part of the same land by an elder and better title, the entry of the grantee under his deed gives him seisin only of that part of which his grantor was seised ;—but as to the stranger, the entry of the grantee is a mere trespass. *Cushman v. Blanchard & als.* ii. 266.

5. If, in such case, the stranger sue the grantee in trespass, and recover damages and costs against him, yet the grantee can only recover of his grantor the proportion of the consideration-money and interest ;—the damages and costs being recoverable only when incurred in defending the seisin, which a grantee actually gained by conveyance from one who was seised in fact. *Ib.*

6. The purchaser of a right in equity of redemption at a sheriff's sale, may maintain trespass *quare clausum fregit* against the mortgagor in possession, who cuts and takes off the growing grass ; the mortgagee never having entered for condition broken. *Fernald v. Linscott*, vi. 234.

II. *Of the proceedings and damages.*

1. In a complaint under *Stat.* 1821, *ch.* 33, against one for cutting trees on land not his own, it is material to allege that it was without the consent of the owner. *Hall's case*, v. 409.

2. In an action of trespass for breaking and entering the plaintiff's close, and cutting and taking away a large quantity of his timber trees, it is not competent for the defendant, in mitigation of damages, to prove that the estate is made more valuable by his labor and expense in opening the forest and making improvements. *Loomis v. Green*, vii. 386.

3. In an action of trespass for demolishing certain dwelling houses, it was held incompetent for the defendant to prove, in mitigation of damages, that they were occupied as houses of ill fame. *Johnson v. Farwell*, vii. 370.

[See Abatement, I. Absent Defendants. Action on the case, II. Amendment. Appeal, I. Costs, III. IV. Disseisin, I. Evidence, II. *b*. Executors, &c. VII. Judgment. Landlord and Tenant, III. Mortgage, II. III. Pleading, X. Sale, V. Sheriff, I.]

TROVER.

1. Where a tenant at will erected a dwelling house and other buildings on the land, with the express consent of the landlord, and died; and his administrator sold them to a stranger;—it was held that the purchaser might maintain trover for them, against the owner of the land, who had converted them to his own use. *Osgood v. Howard*, vi. 452.

2. If the defendant, in an action of trover, would bring the property into Court, in mitigation or discharge of damages, he must apply for leave by a motion to the discretion of the Judge, whose decision is final. *Rogers v. Crombie*, iv. 274.

[See Action, I. Agent, I. Contract, I. Executors, &c. VII. Sale, V.]

TRUSTS.

[See Chancery, III.]

TRUSTEE PROCESS.

I. What is subject to this process.
II. Of the proceedings therein, and their effect.

I. *What is subject to this process.*

1. A note deposited in another's hands, and not collected, is not the subject of a foreign attachment, even though a judgment has been recovered on it in the name of the trustee. *Rundlet v. Jordan*, iii. 47.

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

3. Where one, for an agreed premium, entered into a contract with the payee of a note, to guaranty its payment at maturity by the maker, but without the request or knowledge of the latter; and afterwards the maker, being in failing circumstances, but still ignorant of the guaranty, was induced by the payee to convey property to the guarantor, as a friend, in order to make provision for the payment of the note;—it was holden that the latter could not retain this property against a foreign attachment, the guaranty having created no contract between him and the maker of the note, and the conveyance of the property being without consideration. *Knight v. Gorham & trustees*, iv. 492.

4. Money in the hands of an attorney, collected for his client, is subject to a foreign attachment, though it was received in bank bills, and though it has not been demanded of him. *Staples v. Staples & tr.* iv. 532.

5. Where a son gave to his father a bond for the payment of divers sums of money, and the delivery of certain quantities of provisions, at fixed times in each year during his father's life; it was held that he could not be charged as trustee of the father for any thing not then actually payable; all future payments being contingent, depending on the life of the obligee. *Sayward v. Drew*, vi. 263.

6. A creditor, whose debt is secured by the pledge of goods in his hands of greater value than the amount of the debt, but without power to sell, cannot be holden as the trustee of the debtor for the surplus, in the absense of any fraud. *Howard v. Card*, vi. 350.

II. *Of the proceedings and judgment therein.*

1. If a debtor be committed in execution, and the creditor sue out a foreign attachment against his effects supposed to be in the hands of the person summoned as trustee, and thereupon release the body of the debtor from prison, pursuant to *Stat.* 1788, *ch.* 16, *sec.* 4, and the trustee is afterwards discharged, having no effects of the debtor,—yet the foreign attachment may still be prosecuted

to final judgment against the debtor, and the release of his body is no discharge of the debt; but he may be taken again in execution by virtue of the judgment in the foreign attachment. *Cutts v. King*, i. 158.

2. In a foreign attachment against several trustees, the disclosures cannot be taken in aid or explanation of each other; but each trustee is to be held liable or discharged on his own disclosure only. *Rundlet v. Jordan*, iii. 47.

3. If the trustee in a foreign attachment discloses an assignment of the debt to a third person, who thereupon is made a party to the suit, pursuant to the *Stat.* 1821, *ch.* 61;—the trustee is bound by the result of the ulterior litigation in that suit between the creditor and the assignee, in the same manner as they are, though he had no agency in making up the issue. *Fisk & al. v. Weston*, v. 410.

4. A *feme sole* being summoned as trustee in a foreign attachment, took husband *pendente lite*, and afterwards disclosed, and was adjudged trustee. On *scire facias* brought against the husband and wife, to have execution *de bonis propriis*, they pleaded that at the time when, &c. she had no goods, effects or credits of the principal in her hands; and on general demurrer the plea was held bad.—*Crockett & al. v. Ross & ux.* v. 443.

5. A trustee who has once been examined and charged as trustee in the original suit, cannot be again examined on *scire facias*, even to correct an error in the judgment upon his former disclosure. *Taylor v. Day*, vii. 129.

6. A trustee judgment is no protection to the trustee, against the claims of the person whose effects or credits were in his hands, unless it has been satisfied. *Semble. Wise v. Hilton*, iv. 435.

[See Abatement, I. Assignment, III. Contract, XII. Costs, II. Evidence, II. *a.* Guaranty, I. Pleading, V. Principal and Surety, III.]

USAGE.

1. The usages adopted by the individuals employed in any particular course of business, become as to them, the rules by which

their contracts relative to that business are to be construed. *Williams v. Gilman*, iii. 276.

2. A usage among printers and booksellers, that a printer, contracting to print for a bookseller a certain number of copies of any work, is not at liberty to print from the same types, while standing, an *extra* number for his own disposal, is not an unreasonable usage, nor in restraint of trade. *Ib.*

[See Evidence, VII. *a.*]

USURY.

1. If money be loaned on a usurious contract, and on maturity of the note it be partially paid, and a new note similar to the former be given for the balance, such new note is void for the usury.—*Warren v. Crabtree*, i. 167.

2. And if the borrower be not a party to the usurious note, being neither maker nor indorser, but the security is such, both as to parties and time of payment, as had been previously agreed between the borrower and lender; the indorser, in an action against him, may shew the usury in bar of the action. *Ib.*

3. The consideration of a recognizance or statute-acknowledgement of debt, it seems may be impeached for usury, even in an action brought by the creditor, against the debtor, for possession of the land taken by extent in satisfaction of the debt. *Chandler v. Morton*, v. 374.

4. The party giving a usurious security is in all cases entitled, at some time, to avoid it by showing the usury, unless he has waived the right by his own act, or forfeited it by his own neglect. *Richardson v. Field*, vi. 35.

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

6. Where the title to real estate is absolutely vested by deed of bargain and sale, it shall not be disturbed by proof that all or part of the consideration was a usurious debt. *Hale v. Jewell*, vii. 435.

VERDICT.

I. Its form and effect.

II. When it may be amended.

III. When it will be set aside for error or misconduct in the Jury.

I. *Its form and effect.*

1. Where money is tendered and brought into Court, and the plaintiff takes it out, but proceeds for more; and the Jury find the sum tendered insufficient; their proper course is to return a verdict for the whole sum due, without regard to the sum deposited with the clerk, which latter sum the Court will deduct, and render judgment for the residue. *Dresser v. Witherle & al.* ix. 111.

2. After a verdict every promise alleged in the declaration, is taken to have been an express promise. *Stimpson v. Gilchrist*, i. 202.

3. After verdict, no *assumpsit* can be presumed to have been proved at the trial, but that which is alleged in the declaration; and every fact necessary to be proved at the trial, in order to support the declaration, must be taken to have been proved. *Stimpson v. Gilchrist*, i. 202. *Little v. Thompson*, ii. 228.

II. *When it may be amended.*

1. Where the finding of the Jury, or the record of it, is defective or erroneous in a matter of form, having no connexion with the merits of the case, nor affecting the rights of the parties, the Court will amend it, and render the verdict and record pursuant to the issue. *Little v. Larrabee*, ii. 37.

2. But where the Jury themselves have erred in matter of sub-

stance, as by returning a verdict for the wrong party, or for a larger or smaller sum than they intended, and thereupon have separated, the Court will not amend the verdict, but will set it aside. *Ib.*

3. To such mistakes the affidavit of the Jurors is admissible. *Ib.*

III. *When it will be set aside for error or misconduct in the Jury.*

1. Where the Jury, after they retired to deliberate on a cause, received and were influenced by the declarations of one of their fellows, discrediting a material witness of the plaintiff; it was held to be no good cause to set aside the verdict. *Purinton v. Humphreys*, vi. 379.

2. Neither will a verdict be set aside because the Jury, without the privity of the prevailing party, and being fatigued and exhausted with the length of the trial, were furnished with some refreshments at their own expense, during their deliberations on the cause; however liable the jurors might be to personal admonition from the Court for such misconduct. *Ib.*

3. But if ardent spirits constitute part of such refreshments, and appear to have operated upon any Juror so far as to impair his reasoning powers, inflame his passions, or have an improper influence upon his opinions, the verdict would probably be set aside. *Ib.*

4. In trover for certain promissory notes, where the title, and not the value, was the only subject of controversy, the Jury being sent out late in the evening, with permission to separate after agreeing and sealing up their verdict did so, and returned a verdict the next morning for the plaintiff, with the amount of damages in blank; the foreman observing that they had some doubt as to the time from which interest should be computed, and that some supposed this would be done by the Court; whereupon, by direction of the Judge, they retired again, and returned a new verdict for the amount of the notes and interest; and it was held well. *Bolster v. Cummings*, vi. 85.

5. Where the prevailing party in a cause tried by Jury, previous to the trial, but during the same term, conveyed one of the Jurors several miles, in his own sleigh, to the house of a friend, where he

was hospitably entertained for the night; the verdict was, for this reason, set aside. *Cottle v. Cottle*, vi. 140.

6. Where there has been evidence on both sides, which the Jury have considered, *quære* whether the Court will set aside the verdict as being against the weight of evidence. *Williams v. Gilman*, iii. 276.

7. In cases of *tort*, the Court will not set aside a verdict on the ground of excessive damages, unless from their magnitude, compared with the circumstances of the case, it be manifest that the Jury acted intemperately, or were influenced by passion, prejudice, partiality, or corruption. *Tompson v. Mussey*, iii. 304.

[See Exceptions. Mills, II.]

VOYAGE.

[See Shipping, VI.]

WALDO PATENT.

1. The deed of *July* 20, 1799, from the Commonwealth of *Massachusetts* to *Henry Knox*, for himself "and all others interested in the *Waldo* patent," is, at law, a conveyance to Gen. *Knox* alone, from the uncertainty respecting the other persons intended. *Chamberlain v. Bussey*, v. 164.

2. The Ten Proprietors have no legal interest in the lands granted *July* 20, 1799, to *Henry Knox* for himself and all others interested in the *Waldo* patent. *Ib.*

WARRANT.

[See Taxes, III. Town, II.]

WASTE.

[See Executors, &c. VIII. Husband and Wife.]

WATERCOURSE.

1. 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. *Blanchard v. Baker*, viii. 253.

2. In an action of the case for diverting a watercourse, if the unlawful diversion be proved, the plaintiff is entitled to recover, without proof of actual damage. *Ib.*

3. Whether aquatic rights are acquired by mere prior occupancy, not continued for twenty years;—*quære*. *Ib.*

4. 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. *Ib.*

5. 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. *Ib.*

WAYS.

I. Of rivers and streams of fresh water.
II. Of county roads.
III. Of town roads.
IV. Of the liability of towns for bad roads.
V. Of the discontinuance of ways.

I. *Of rivers and streams of fresh water.*

1. Rivers and streams, above the flow of the tide, if they have been long used for the passage of boats, rafts, and timber, are public highways, and, like other highways, are to be kept open, and free from obstruction. *Berry v. Carle*, iii. 269.

2. Fresh water rivers, of public use in the transportation of goods,

are of common right as public highways by water. *Spring v. Russell*, vii. 273.

II. *Of county roads.*

1. The Court of Sessions may lawfully order the location of a county road, to be made at the expense of the petitioners. *Semble*. *Jewett v. Somerset*, i. 125.

2. Under *Stat.* 1786, *ch.* 67, it was competent for the Court of Sessions, in the exercise of a sound discretion, to impose as a condition on granting the prayer of a petition for a new highway, that the expense of its location should be borne by the petitioners.—*Partridge v. Ballard & al.* ii. 50.

3. The petitioners in such case are not bound to cause the road to be laid out; but if they do, they assent to the condition imposed, which they are therefore bound to perform. *Ib.*

4. If, pending such petition, it be altered in a part not affecting the general object sought by the petitioners, such alteration will not discharge their liability. *Ib.*

5. The effect of such alteration upon the road prayed for being a question of fact, and not of construction, is to be determined by the Jury. *Ib.*

6. 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. *Ex parte Baring*, viii. 137.

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

8. A petitioner for the location of a county road, is ineligible as one of the locating committee; and his appointment vitiates the subsequent proceedings. *Ex parte Hinckley*, viii. 146.

9. 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. *Ex parte Pownal*, viii. 271.

10. Where a county road had been laid out through a township owned by *Massachusetts*, and a tax illegally ordered and assessed thereon, to defray the expense of opening and making the road, and agents were appointed, pursuant to the statute, who contracted with a person to receive the money from the county treasurer and expend it in making the road; but the contractor, anticipating the ultimate receipt of the money, made the road at his own expense; after which the land was sold at auction by the sheriff, for nonpayment of the tax, and struck off to the contractor, who received a deed accordingly;—it was held that on discovery of the failure of title, the contractor had no remedy against the county; the Court of Sessions having exceeded its jurisdiction in assessing the tax, and the contractor having exceeded his instructions in making the road before the receipt of the funds specially appropriated for that purpose. *Emerson v. Co Washington*, ix. 89.

11. The Court of Sessions, in appointing a committee to enter into a contract for opening and making a road laid out by their order, and the committee, in making such contract, do not act as the private agents of the county, but as public officers, exercising their authority in carrying into effect a public law, for the public good. *Emerson v. Co. Washington*, ix. 98.

12. For the expense of making such a road the county is not liable; the only remedy being by warrant of distress against the towns through which the road runs, according to the statute. *Ib.*

III. *Of town roads.*

1. The regularity of the proceedings in the location of a town way, may be contested in an action of trespass *quare clausum fregit*, against the surveyor who proceeds to open and make it; no *certiorari* lying to quash such proceedings. *Harlow v. Pike*, iii. 438. *Todd v. Rome*, ii. 55.

2. It is necessary to the legality of a town way, that due notice be previously given by the selectmen to all persons interested in the location;—that they make a return of their doings under their hands,

to the town;—and that it be accepted and allowed by the town, at a legal meeting, called for that purpose. The two latter facts may be proved by the record; but the return of the selectmen is not sufficient evidence of the notice. *Ib.*

3. Where a town way has been opened, publicly used, and acquiesced in, the legal presumption is, that the owners of the land were duly notified of its location. *Ib.*

4. It is essential to the legality of the location of a town road, that a particular return or certificate of the location be made by the selectmen, under their hands, and that it be accepted by the town at a legal meeting, and recorded on the town book. *Todd v. Rome*, ii. 55.

IV. *Of the liability of towns, for bad roads.*

1. In an action against a town for damages occasioned by a defect or obstruction in the highway, it is not necessary to prove that the surveyor or selectmen had notice of the existence of the nuisance, if it were seasonably known to other inhabitants of the town. *Springer v. Bowdoinham*, vii. 442.

2. Therefore, where a stick of timber was deposited in the highway, on the confines of a village, between one and two hours before sunset, which was seen by several inhabitants of the town, though not known to the selectmen or the surveyor; and in the same evening the plaintiff's chaise-wheel struck the timber, whereby he was thrown out and injured; it was held that the town was liable, under *Stat.* 1821, *ch.* 118, *sec.* 17. *Ib.*

3. What is reasonable notice to a town of the existence of a nuisance in the highway, is a question of law. *Springer v. Bowdoinham*, vii. 442.

4. A town is not liable in any form, for the deficiency of a road, unless, by regular legal proceedings, or by *user* and acquiescence for a sufficient term of time, they have acquired the right to enter upon the land, and make and repair the road. *Todd v. Rome*, ii. 55.

5. Such use and acquiescence for twenty years, and perhaps for a shorter period, may be considered sufficient to give the town a

right, and subject them to liability to repair, and to its legal consequences. *Ib.*

6. Ten years user of a way by the inhabitants of a town, is not sufficient to oblige them to keep it in repair. *Estes v. Troy*, v. 368.

7. Towns are punishable by information for not opening public highways newly laid out, as well as for not keeping them afterwards in repair. *The State v. Kittery*, v. 254.

V. *Of the discontinuance of ways.*

1. If a county road be laid out and accepted over land of a private citizen, to whom damages are awarded for the easement, which are paid by the town, and the road is afterwards discontinued without having been opened, the town cannot recover back the money thus paid. *Westbrook v. North*, ii. 179.

2. The discontinuance of a road by the Court of Sessions is no reversal of the proceedings respecting its location. *Ib.*

[See Assumpsit, I. Contract, XII. Court of Sessions. Estoppel, I. Evidence, VIII. *b.* Mills, II. Town, III. *a.*]

WILLS.

I. Of the execution, validity and construction of a will.

II. Of nuncupative wills.

III. Of the revocation of a will.

IV. Of foreign wills.

I. *Of the execution, validity and construction of a will.*

1. It is not necessary to the validity of a will, that the testator should declare it to be his will, in the presence of the subscribing witnesses. *Small & al. v. Small*, iv. 220.

2. Whether a will made *in terrorem* is valid,—*quære*. *Ib.*

3. If a wife by her virtues, has gained such an ascendancy over

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

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

II. *Of nuncupative wills.*

1. One being possessed of personal estate, having also a wife, but no child, on the morning before his death, being dangerously sick, was asked who he intended should have his estate; to which he replied that his wife should. His father, being present, observed that he did not wish for a cent of the property, but desired that it might go to his son's wife; and spoke of it, both then and afterwards, as a matter well understood and agreed on. In the evening of the night on which he died, the son being again asked whether he wished his wife or his father to have the property, he replied "all to my wife; that is agreed upon;" and looking up inquiringly to his father, the latter answered "yes—yes";—whereupon the son, turning to his wife, added, "you see, my father acknowledges it." These facts, being regularly proved, within the legal time after his decease, were held sufficient to establish a nuncupative disposition of the estate. *Parsons v. Parsons*, ii. 298.

III. *Of the revocation of a will.*

The alienation of real estate by the testator himself, after he has devised the same by will, is a revocation of the will only as to the part thus alienated. The will being suffered to remain uncancelled, evinces that his intention was not changed with respect to the other property therein devised or bequeathed. *Carter v. Thomas*, iv. 341.

IV. *Of foreign wills.*

A will made and proved in a foreign country prior to *March* 20, 1821, may be filed in the Probate office, here, though it be attested by only two witnesses; notwithstanding the proviso in *Stat.* 1821, *ch.* 51, *sec.* 14, which, in this respect, is to be taken prospectively. *Crofton v. Ilsley*, iv. 134.

[See Actions on Statutes. Evidence, X. *b.* XI.]

WITNESS.

[See Evidence.]

WRIT.

1. If in an action on a probate bond, the writ, besides the usual indorsement of the attorney's name, be also indorsed with the name of the person who is entitled in any capacity to receive the money sued for, it is a sufficient compliance with *Stat.* 1821, *ch.* 51, *sec.* 70, though the party have only an equitable interest in the subject of the suit. *Potter v. Mayo*, ii. 239.

2. The common law that an agent, acting in the name of his principal, does not bind himself, is altered by *Stat.* 1821, *ch.* 59, *sec.* 8, so far as it regards indorsers of writs. *How v. Codman*, iv. 79.

3. Where a defendant, having judgment and execution for his costs, caused certain property to be taken in execution, which was replevied, but the replevin was not pursued;—it was held that his remedy against the indorser of the original writ was not impaired by his omitting to obtain judgment for a return, it appearing that this would have been fruitless, as the property was under a prior attachment. *Strout & al. v. Bradbury & al.* v. 313.

4. If the indorsement of a writ does not contain the whole christian name, and is not objected to by the defendant on that account, the indorser cannot afterwards take advantage of this omission to avoid his own liability. *Ib.*

5. 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. *Harmon v. Watson*, viii. 286.

6. The employment of an attorney at law to commence an ac- does not, of itself, give him authority to indorse the writ with name of the plaintiff. *Ib.*

7. In an action on a Probate bond, it is sufficient if the writ be indorsed with the names of the persons for whose benefit it is brought, without mentioning the characters in which they claim. *Potter v. Titcomb*, vii. 302.

8. The change of the indorser of a writ, before service, does not affect its character as a legal writ from the time of its date. *Steward v. Riggs & al.* ix. 51.

9. If an original writ is indorsed with the name of the plaintiff "by *A. B.* his attorney," the attorney is personally liable for costs, under *Stat.* 1821, *ch.* 59, *sec.* 8. *Davis v. McArthur*, iii. 27.

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

[Vid. Abatement, II. Action, I. Evidence, XII. *a.* Mili a IV. *Scire facias.*]

ERRATUM.

On page 326, the statutes of 1821, quoted as statutes of Massachusetts, should be placed among those of Maine; the statute of 1811, quoted as a statute of Maine, should be placed among those of Massachusetts; and the statutes of Massachusetts from 1738 to 1762, inclusive, should be inserted among the Colony and Province Laws.

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