REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

BY JOHN FAIRFIELD,
COUNSELLOR AT LAW.

VOLUME I.

HALLOWELL:
GLAZIER, MASTERS AND SMITH.

1835.

JUDGES

OF THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

DURING THE PERIOD OF THESE REPORTS.

HON. PRENTISS MELLEN, L. L. D. CHIEF JUSTICE.
HON. NATHAN WESTON, L. L. D. } JUSTICES.
HON. ALBION K. PARRIS, }

Attorney General, JONATHAN P. ROGERS, ESQ.

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OF THE CASES REPORTED IN THIS VOLUME.

ERRATA.

Page 57, line 2, for "*Brownlow's*," read *Brown's*.

Page 82, line 24, for "*Beawes*," read *Beame's*.

Page 91, for "*Griffin v. Fairbrother*," read *Fairbrother v. Griffin*.

Page 237, line 25, for "*receiving*," read *reviving*.

CASES

IN THE

SUPREME JUDICIAL COURT

IN

THE COUNTY OF CUMBERLAND, APRIL TERM, 1833.

DUNN *vs.* WHITNEY.

The books of a plaintiff accompanied by his oath, are insufficient proof of a charge of $26 in money ;—the sum of *forty shillings*, or $6,67, is the extent that Courts have permitted to be proved in this way.

Nor is it competent for a plaintiff by his books and oath, to prove the defendant, his agent — the delivery of goods to him in that capacity,—and an agreement to sell and account.

THIS was an action of *assumpsit* for the price of certain lottery tickets, as per account annexed to the writ, which was as follows, viz. : —

" 1826, *Dec.* 28, To tickets,		$29, 00
" 1827, *Jan.* 15, " tickets,		29, 00
" " *Feb.* 13, " tickets,		29, 00
		$87, 00
Cr.		
" 1827, *March* 27, By return tickets,	$48, 48	
" 1828, *Jan.* By do. do.	12, 22	$60, 70
" Balance due,		$26, 30"

The writ contained one count of *indebitatus assumpsit* referring to the account annexed, and another of *quantum valebant* for the value of the tickets. Plea, the general issue.

The plaintiff to support his charges, offered his account books in evidence, accompanied by his oath. The entries in his daybook were as follows: —

" 1826, *Dec.* 23,	Joseph Whitney	Dr. to 8 tickets,	*a* $3,63	$29
" 1827, *Jan.* 13,	"	"	Dr. to 8 tickets,	"	29
" " *Feb.* 13,	"	"	Dr. to 8 tickets,	"	29"

The defendant objected to the admissibility of the books to support these charges, but *Whitman C. J.* in the Common Pleas, where the cause was tried, overruled the objection, and admitted them.

The defendant objected further, that the charges of *Dec.* 23, and *Jan.* 13, were inadmissible to support the first and second items in the account annexed to the writ; being of different dates. Whereupon the plaintiff moved for leave to amend the account annexed, by altering the date of *Dec.* 28, to *Dec.* 23; and by altering the date of *Jan.* 15, to *Jan.* 13; which the defendant opposed as being a new cause of action, and as against law. But the Judge allowed the account to be so amended.

The plaintiff being examined under oath, stated that the defendant *acted as his agent, and was to sell and account for the tickets at the price charged, except such of them as he might return before the drawing of the lottery;* and that he put the several parcels of tickets into letters and sent them to the defendant by mail, for sale on the terms aforesaid.

And to show that he received them, he offered in evidence the defendant's letter to him, dated at *Calais, March* 16, 1827, in the following words: " Sir, I enclose to you the remaining " parts of tickets that I have not sold which you sent to me " of the tenth and eleventh classes. The lot of tickets of the " ninth class you sent to me, I put into the hands of another " person to sell, and I believe he sold the lot together, and as " soon as I receive the money I will send it to you. The de- " mand for tickets in this place is so trifling I should not think

" it worth while to send any more. I will send you the amount " sold as soon as I can get western money."

The defendant upon this evidence, objected that here was no proof of any contract of sale, and that therefore the plaintiff could not recover. The plaintiff then moved for leave to file a new count for money had and received, which the defendant opposed as illegal and introducing a new cause of action, the plaintiff having charged him as purchaser of the tickets, and not as receiver of his monies as agent. But the Judge permitted the amendment.

There was evidence on the part of the defendant tending to show a payment to the plaintiff, which was met by opposing testimony introduced by the latter.

The defendant contended that the plaintiff's admission — that he was his agent, was conclusive against the plaintiff in this action. But the plaintiff proved by *Jedediah Dow*, that it was a general usage among lottery ticket venders in *Portland*, to deliver tickets to sub-venders for sale, and to charge them as sold, they having liberty to return all unsold tickets at any time previous to the drawing. And upon all the foregoing evidence the cause was submitted to the Jury, who found a verdict for the plaintiff.

To the foregoing opinions, directions, &c. of the Judge the defendant excepted, and brought the cause up to this Court.

Greenleaf, for the defendant, maintained the positions taken by him at the trial in the Court below, and cited, *Selden v. Beale*, 3 *Greenl.* 178; *Clark v. Moody*, 17 *Mass.* 145.

Longfellow, for the plaintiff, contended that the books of the plaintiff with his accompanying oath, were sufficient evidence to maintain the charge. It was for " 8 tickets $29." Suppose it had been for " 3 yards of cloth $29." Could there be any valid objection to it? And is not one as proper a subject of book charge as the other? The general rule is that, when the kind or amount of goods are such, that some other persons beside the seller must be supposed to know of the sale, other evidence than the book would be required; but not otherwise. Tickets are not of this description. They could

be sold and delivered without the aid or assistance of any person but the seller.

The books would be sufficient to prove *the delivery*, even if the defendant took the tickets to sell as agent, or on a commission. The case shows that a custom prevails among lottery venders, that in case of sale, the purchaser shall have a right to return what is unsold. The books were therefore properly admitted to support the charge. How else could it be proved? Will not a decision rejecting this evidence work much mischief? Suppose a delivery of goods in *Boston* to one here, to sell on commission, can any one doubt that the book of the *Boston* merchant with his suppletory oath would be sufficient evidence of the delivery? In *Herman v. Drinkwater*, 1 *Greenl.* 27, the plaintiff was permitted to make affidavit without a book, to identify articles delivered to the defendant. Surely that is a much stronger case than this.

But it is objected to the maintenance of the action that there was no *sale* — that the defendant took the tickets *as agent*. If it be so, the defendant in his letter acknowledges the sale of a part, — that the remainder he had passed over to another to sell for him, — and that that other had sold them. Hence then, the plaintiff's claim may well be supported under the count for money had and received.

The opinion of the Court was delivered by

Parris J. — From the exceptions it appears that, originally at the trial in the Court below, the defendant was charged, in appropriate counts, as purchaser of a quantity of lottery tickets, and that, in the progress of the trial, the plaintiff, failing to support these counts, was, on motion, permitted to amend by adding a new one for money had and received.

Under the latter count, the defendant was charged as the agent or factor of the plaintiff in vending the lottery tickets specified in the bill of particulars annexed to the writ. Previous to filing his new count, the plaintiff's books accompanied by his supplementary oath were offered to prove the sale and delivery of the tickets charged. The defendant objected to the admissibility of the books, but the objection was overruled

and they were admitted, supported by the oath of the party offering them. The charges were for tickets, in three separate items of $29 each.

There has, no doubt, been a diversity in practice as to the amount of charge which may be proved in this manner. The general principle of the common law, that the best proof should be produced which the nature of the transaction will admit of, is still adhered to, in all cases, with unyielding pertinacity. But it was early settled that the admission of tradesmen's books, to a certain extent, and fortified by the oath of the party by whom they were kept, was no violation of this salutary principle.

When the tradesman had a clerk who delivered the articles, his testimony was the best evidence, and, if obtainable, could not be dispensed with. In such a case the oath of a party could under no circumstances be received. In *England*, therefore, where trade has for centuries been carried on mostly, if not entirely in large establishments, where disinterested evidence relating to the ordinary business of the tradesman may be easily obtained through the clerks and others by him employed, the oath of the party in support of his books is never admitted. It is not considered the best evidence which can be produced.

But in a country where every tradesman is his own clerk, and from his limited business and profits must necessarily be so, as was generally the case in the early settlement of this country, and still continues to be the case in the new settlements, the sale and delivery of the usual articles of merchandise cannot ordinarily be proved in any other manner than by the books and supplementary oath of the party. Such evidence is considered the best in the power of the party to produce, or which the nature of the case will admit of, and to require more would have a ruinous effect upon his business. Still, however, as the evidence is from the interested party himself and repugnant to the general rules of evidence, it is to be admitted under every possible guard and security, and is never to be received in support of such demands as in their nature afford a presumption that better evidence exists. Whenever it does appear from the nature of the transaction or from disclosures

in the case, that other evidence is obtainable the law requires its production. If the articles were delivered by a clerk, by him must the fact be proved. If delivered to an agent or servant, he is the proper witness. And if sold and delivered in large quantities the presumption is that persons other than the party making the sale would be likely to have knowledge of it, and, therefore, the books of the seller are inadmissible.

The situation and circumstances of trade are gradually becoming such as very much to diminish the reason of the relaxation of the common law rule, and as the reason for the exception ceases, courts will rather restrain than enlarge the exception itself.

It is very questionable whether at this day the case of *Shillaber v. Bingham*, 3 *Dane's Abr.* 321, where the court permitted the sale and delivery of seventy-eight bushels of salt in one item, and one hundred and thirty-two gallons of rum in another, to be proved by the vendor's book and supplementary oath, would be considered as a safe rule. That decision was made more than forty years ago, when, from the mode of doing business, such proof might be the best the nature of the transaction would admit of. At this time, those who deal in merchandise in such large quantities, have clerks and porters by whom their transactions may be proved.

It is thus, that the common law yields to the form and pressure of the age, and the application of the same general principle under different circumstances may produce *apparently* contradictory decisions. Thus the best evidence that could be expected to be produced of the sale and delivery of the merchandise in the case just alluded to, and in similar cases at that day, might be the book and oath of the vendor; but at this day, in consequence of the improved mode of trade, such proof would not be the best the nature of the transaction would be presumed to afford, and consequently would not be admissible.

The court who decided *Shillaber v. Bingham*, were not given to judicial legislation, nor were they in the habit of trampling on the common law, but they gave it such an application as the peculiar circumstances of the people on whom it was to operate required and justified. Those circumstances have

changed, and consequently the application of the same general principle might produce a different practice.

In the case before us, we are not prepared to say that if the trial had proceeded on the original counts charging a sale, the books would not have been admissible, supported as they were by the oath of the party.

Whether they were or were not admissible under those counts it is not material to decide, as those counts were entirely abandoned, the plaintiff himself testifying that the tickets were not sold, but were entrusted to the defendant as an agent to sell and account therefor.

Having thus destroyed the foundation of his own action, as originally charged, by negativing a sale, the plaintiff then resorts to his new count for money had and received, amounting to twenty-six dollars and upwards in a gross sum. This sum, if regularly charged on his books, could not be proved by the books and oath of the party. No court has gone so far. From *Cleaves'* case in 1782, 3 *Dane's Abr.* 319, to the case of *Union Bank v. Knapp*, 3 *Pick.* 96, a cash charge of forty shillings, or six dollars and sixty-seven cents has been the extent which the court would permit to be proved in this manner.

But if this objection could be obviated, the plaintiff has no charge of cash in his books against the defendant. He has a charge of tickets sold, but his oath does not support the charge, and it is very clear that he cannot be permitted, by his books and oath, to prove the agency of the defendant, and the delivery of the tickets to him as agent, and the agreement to sell and account.

If the cause had been opened upon the new count for money had and received, and the plaintiff and his books had been offered to prove the defendant's agency and the delivery to him of the tickets to sell for and on account of the plaintiff, the existing difficulty in the case would probably never have arisen. They would, no doubt, have been at once excluded. But having been admitted, and perhaps correctly, for the purpose of proving a sale under the original counts, and the plaintiff testifying that there was no sale but an agency, the error was in

permitting that testimony to be applied to the new count for money had and received.

As the cause was tried upon the new count the whole of the plaintiff's testimony and his books, offered and admissible under the old counts charging a sale, but not admissible under the new count, should have been ruled out. The cause was, however, committed to the jury upon the whole evidence, and as the exceptions taken by the defendant, are sufficiently broad to cover the error, we think they must be sustained. It is therefore, unnecessary to discuss the other points made in the argument.

The exceptions are sustained and a new trial ordered at the bar of this court.

GREEN & al. *vs.* BLAKE.

The plaintiffs claimed title under a devise from S. E. in 1829. The devisor's title was by purchase, in 1790, from a trustee licensed to make such sale, by the S. J. Court of *Massachusetts*. The tenant entered on the land in question under a contract to purchase of S. E. which had been rescinded in consequence of his, the tenant's, inability to fulfil it; — and within six years, in a suit brought by S. E. against one for cutting on this lot, he, the tenant, testified that he did not own the land, but held it as tenant under S. E. *Held* that though the antiquity of the deed from the trustee to S. E. furnished no sufficient reason for the non-production of the license — and though in an action between the heirs of the original *cestui que trust*, and the present demandants, a production of the license would be indispensable to the perfection of their title — yet, that under the circumstances of this case, the deed of the trustee to the demandants' testator, might be read without first producing the license.

A devise to A. & B. *as trustees*, and to *their heirs*, and to the survivor of them and his heirs, passes a *fee simple*.

THIS was a *writ of entry*, wherein the plaintiffs demanded a lot of land in *Standish* containing 100 acres. Plea, the general issue. On trial the demandants offered in evidence a deed of the demanded premises from *John King* to *Simon Elliot*, dated *April* 15, 1790, recorded *April* 5, 1791. As the deed purported to be made by said *King* as *trustee* for the purpose

of making sale of the estate of *Aaron Richardson*, deceased, by virtue of a license from the Supreme Judicial Court of *Massachusetts*, granted *August*, 1789, the defendant's counsel objected to its being read until a copy of the license was produced. But *Parris J*, who tried the cause, overruled the objection, and permitted the deed to be read.

The demandants then offered a copy of the will of *Simon Elliot*, dated *Sept.* 12, 1829, and approved *Jan.* 21, 1832, in which the demandants are named as executors. After several devises and bequests in said will to the demandants as trustees, there is the following, viz.: "I give to same trustees as are "above named, and their heirs, and the survivor of them, and "his heirs, all my residuary real estate, if any, in trust that they "shall improve the same" and appropriate the income thereof as therein particularly directed; "provided, however, that the "said trustees may at any time sell the real estate aforesaid "for money or other personal property, holding, managing and "disposing thereof, in like manner as is provided concerning "my residuary personal estate in the preceding item of this "will."

The defendant's counsel objected that the demandants did not take a fee in the demanded premises by the said will, and was not entitled to recover on this evidence.

But the Judge overruled the objection, and instructed the jury that the verdict should be for the demandants, it being proved that the defendant was in possession at the time of bringing this action.

If the foregoing ruling and instructions were correct, judgment was to be rendered on the verdict, which was in favour of the demandants; otherwise the verdict was to be set aside and a new trial granted.

There was also a question made as to the defendant's right to betterments. On this point it was in evidence from the testimony of several witnesses, that the tenant had said within six years that he held the land under *Elliot* the testator — and that he had once so testified in Court, in an action in which one *Dorset* was prosecuted by *Elliot*, for cutting timber on the demanded premises. It was further proved that the present de-

fendant testified in that action that he did not own the land, that he entered upon it by permission of *Theodore Mussey, Esq.* the agent of *Elliot*, and that his possession was under *Elliot* by virtue of a contract to purchase, which he, *Blake*, had not been able to fulfil, and that the contract had been given up because he could not make out the payments. To this there was no opposing testimony.

The cause was submitted without argument, by

Longfellow, for the defendant, and

Fessenden & Deblois, for the demandants.

The opinion of the Court was delivered by

MELLEN, C. J. — In this case the tenant does not pretend to have any title to the demanded premises; and by the report of the Judge it appears that the principal question at the trial was, whether the possession of the tenant had been of such a character as to entitle him to obtain the value of his improvements made on the land; and this question was decided against him. Two objections, made by the counsel for the tenant, against the right of the demandants to recover, have been submitted to the consideration of the Court. *First*, was the deed from *King* to *Elliot* admissible, unaccompanied with a copy of the alleged license from the Supreme Court of *Massachusetts*. *Second*, was the instruction of the Judge correct as to the nature of the estate devised by *Simon Elliot* to the trustees named in his will.

As to the first question, though the deed from *King* to *Elliot* was executed forty-three years ago, still, as the alleged license, if ever granted, is a matter of record, accessible to all, we do not think that the antiquity of the transaction furnishes a sufficient reason for the non-production of a copy of the license. *Harlow v. Pike*, 3 *Greenl.* 438; *Inman v. Jackson*, 4 *Greenl.* 237; *Brunswick v. McKeen*, 4 *Greenl.* 507. As a matter of *strict title*, we deem it necessary in the conveyance of the fee; and in a trial between the heirs of *Richardson* and the present demandants, the license would be indispensable to the perfection of their title. But in the present case we think the non-production of it is no objection to the mainten-

ance of the action. The deed was duly registered in *April*, 1791. It is thus evidence of the nature and extent of *Elliot's* claim under it. In addition to this, it appears he had appointed *Mussey* as his agent. That he had prosecuted one *Dorset* for a trespass on the land, and had taken and held possession of the same under the deed, by his tenant, peaceably and undisturbed; and that this tenant was no other than the defendant himself, who is now disputing the title of his lessor. *Elliot's* possession of the premises, thus obtained and continued, was sufficient to enable him to maintain a writ of entry against *any* stranger, and, *a fortiori*, against *Blake*. It was a sufficient seisin for this purpose; and being thus seised, he was competent to devise the land, and his devisees can, in the same manner, and on the same principles, maintain such an action against one who has no title. Even the possession of a *wrong-doer* is sufficient to maintain trespass or a writ of entry against one who enters upon him without any right. These principles are an answer to the first objection.

As to the *second* objection, we are not able to perceive any solid foundation to sustain it. The devise is to the demandants, as trustees, and to their heirs, and to the survivor of them and to his heirs. This language would pass a fee simple, if used in a *deed;* and surely it does when used in a *will*. The estate being devised to them *in trust*, does not affect the *amount* of interest devised. The point is too plain to require any further observations in respect to it. We are all of opinion that there must be

Judgment on the verdict.

WELD *vs.* GREEN.

Where personal property attached, has been lost through the negligence of the officer, or by him misappropriated, he is liable to the attaching creditor for the value of the property *at the time it would have been seised and sold on execution*, had no such loss or misappropriation taken place.

And in an action by the attaching creditor against such officer, the latter is not *estopped* from showing the true value of the property, by a judgment obtained by him against one to whom he had bailed the property for safe keeping, such bailee being insolvent, and the judgment against him remaining unsatisfied.

CASE for the neglect of one *Lambert*, a deputy of the defendant, while he was Sheriff of the County of *Lincoln*. On the trial of this action before the *Chief Justice*, it appeared that *Lambert* had attached, at the plaintiff's suit against *George Houdlette*, one eighth part of the brig *Mary & Nancy*, and placed the same in the possession of two *receiptors*, who in writing agreed to return the same to him on demand or pay him $300. Not having so returned the same, *Lambert* sued them on their receipt, and recovered judgment for said sum and interest. It did not however appear that he had ever received any satisfaction of his said judgment, but that his attachment on the property of said receiptors was lost by a prior attachment on their property and that they proved insolvent. But there was no proof of such prior attachment except *by parol*, and this was objected to by the plaintiff's counsel.

The counsel for the defendant offered evidence to show that, the value of one eighth of said brig when attached, and when execution issued, was far less than that sum. The counsel for the plaintiff objected to the admission of this evidence, on the ground that, the defendant was estopped by the receipt taken by *Lambert* and his judgment against the receiptors, to deny the value to be less than $300, and contended that he was liable for that amount and interest. But the *Chief Justice* overruled the objection and admitted the evidence — and instructed the jury that the defendant was only answerable for *the value* of the one eighth, and the jury accordingly found for the defendant, who had brought into Court a sum equal to the value and costs.

If the ruling and instructions aforesaid were right, judgment was to be entered on the verdict — otherwise it was to be set aside and a new trial granted.

Fessenden & Deblois, for the plaintiff.

1. The defendant is bound by the estimated value in the receipt. Where a deputy bails property attached, it is an *official act*, and the Sheriff may maintain an action against the bailee for it. The deputy is simply the agent of the Sheriff. 1 *Stark. Ev.* 191. The Sheriff, the deputy and the receiptors are all *estopped*, by the agreed value in the receipt.

2. The defendant is also estopped by the judgment which *Lambert*, his deputy, recovered against the receiptors. He is not permitted to deny that the property is not worth the sum recovered in that suit. What would estop the deputy would also estop the defendant, and he could give nothing in evidence which the deputy could not. *Gardner v. Hosmer*, 6 *Mass.* 325. And a verdict against the Sheriff for the default of a deputy may be used as evidence in an action over against the deputy by the Sheriff. *Tyler v. Ulmer*, 12 *Mass.* 163.

By the judgment recovered by the deputy against the receiptors, the value of the property attached became *matter of record*, and therefore is an *estoppel* to the defendant and all others. 5 *Dane's Abr.* 381; *Hubert's case, Cro. Eliz.* 53.

It operates as an estoppel also on the ground that the merits of a judgment can never be drawn in question by an original suit either in law or equity — the judgment is conclusive as to the subject matter until it is set aside or reversed. *Phillips Ev.* 243, 246; *Stark. Ev.* 1, 191.

That judgment being upon the same matter directly in question, is evidence for or against *privies in law* — and such are *Lambert* and the defendant. *Phillips Ev.* 245. It is not essential for this purpose that the parties or form of action should be precisely the same — it is sufficient if they are substantially the same. *Case v. Reeves*, 14 *Johns. R.* 82; *Whally v. Menhiem & al.* 2 *Esp. R.* 608; *Thacher v. Young & al.* 3 *Greenl.* 67. These two suits were substantially the same as to the matter in dispute and the parties.

It is of no consequence as to the plaintiff, whether *Lambert's* judgment has been satisfied or not; *non constat* but that it may be hereafter.

Why then should not the defendant be liable to the extent of the agreed value in the receipt and the ascertained value in the judgment? Suppose the receiptors had actually paid the agreed value of $300 to the officer, would he not be liable over to the plaintiff for that amount? Or suppose the officer had sold the property for $300, would he be permitted to say he had sold the property for more than it was worth, and to prove it?

3. But parol evidence of the existence of an attachment on the property of the receiptors, prior to that of *Lambert's* was improperly admitted. This was not the best evidence the case would admit. Copies of the writ, judgment and execution should have been produced. *White & al. v. Haven*, 5 *Johns. R.* 351; *Brush v. Taggart*, 7 *Johns. R.* 19; *Emmonstone v. Plaisted*, 4 *Esp. R.* 160; *Waterman v. Robinson*, 5 *Mass.* 303; *Foster v. Compton*, 2 *Stark. R.* 321; *Jenner v. Joliff*, 6 *Johns. R.* 9; *Phillips Ev.* 312.

4. But if properly admitted, it cannot affect the plaintiff's right in this action. It is admitted that where property attached has been destroyed by the act of God, the officer is excused. But it is otherwise where, as in this case, the property was lost by the gross negligence of the officer, in bailing the property to irresponsible persons.

Longfellow & Mitchell, for the defendant, cited *Clark v. Cluff*, 3 *Greenl.* 357; *Walker v. Foxcroft*, 2 *Greenl.* 270; *Tyler v. Ulmer*, 12 *Mass.* 163; *Rockwood v. Allen*, 17 *Mass.* 254.

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

Several questions have been discussed in this cause, respecting which we need not give any opinion. The *first* is, whether it is competent for the plaintiff to avail himself of the estoppel which it is said was created by the receipt and the judgment thereon, in respect to the value of the one eighth part of the vessel attached. The *second* is, whether the act of *Lambert*

in placing the property in the hands of the receiptors and taking security for its return, was an *official* act for which the defendant is in any way answerable. The *third* is, whether the defendant would be responsible for the estimated value of $300, mentioned in the receipt, provided *Lambert* had actually received that sum. We lay these inquiries aside and place our decision on the ground that in the case before us there *is no estoppel.* The sum of $300 was the estimated value of the property *when attached.* Had it remained in *Lambert's* possession until execution, and been seised and sold thereon, the defendant would have been accountable only for the amount produced by the sale, and with this *Weld* must have been content; and why should the defendant be answerable in damages for a greater sum than the fair value of it, when not seised and sold on the execution, but lost or misappropriated. See *Tyler v. Ulmer,* 12 *Mass.* 163. Such a sum would be the amount of injury sustained by the plaintiff; and that is the correct rule in the assessment of damages in such cases. It appears that *Lambert* has never received any thing from the receiptors. As the defendant is only liable for the value of the property attached, *at the time when it would have been seised and sold on execution,* had it not been delivered out of the possession of *Lambert,* it does not contradict the accountable receipt and the judgment thereon, to prove the value at a *subsequent period,* viz. when execution issued and was placed in *Lambert's* hands. There is no estoppel in such a case. *One* fact does not contradict the *other. One* was proved by the receipt, the *other* by parol testimony; and the jury have decided the question of value at the time when execution issued. This is according to perfect justice, whether property *rises* or *falls* in value between the *attachment* and the time when it becomes seisable on execution. As the law is perfectly clear that the Sheriff is answerable for such value at all events, though he never obtains any indemnity of the receiptors, the inquiry whether an attachment can be proved *by parol* to have been made of their property prior to *Lambert's* attachment of it, becomes perfectly useless. Accordingly there must be

Judgment on the verdict.

The STATE *in certiorari vs.* The INHABITANTS OF POWNAL.

The Court of Sessions has no *original* jurisdiction in the laying out of town or private ways; — its jurisdiction in such cases is of an *appellate* character merely; — and even then is confined to two specified cases, viz. where the Selectmen of a town shall *unreasonably* delay or refuse to lay out such way, or the town shall *unreasonably* delay or refuse to approve of the same.

This *unreasonable delay* or *refusal* should always appear of *record* in the Court of Sessions, as the *evidence* of *jurisdiction*. And where it is wanting it will be good cause for quashing the proceedings on *certiorari*.

IN this case the record of the Court of Sessions for this County being brought up on *certiorari*, it appeared that, on the 1st Tuesday of *June*, 1828, certain inhabitants of the town of *Pownal* petitioned said Court to lay out a road in said town. The petition ran thus; "The subscribers, inhabitants of the "town of *Pownal* are desirous of having the following *road* "located in said town, namely, beginning," &c. &c. "That "your petitioners on the 30th of *May*, A. D. 1828, requested "in writing of the Selectmen of said *Pownal* to lay out said "road and present and report the same to said inhabitants for "their acceptance as by law is provided — and that on the "12th instant the said Selectmen, by a majority of them, *re-* "*fused* to lay out said road, and report the same to said town; "your petitioners therefore pray that the said road may be "located and established by the Court as is provided by law."

On this petition, in pursuance of an order of Court, the inhabitants of *Pownal* were duly notified, and by their agent appeared and opposed the prayer of the petition, at which term the Court made the following adjudication. "It appears to the "Court, and it is considered and adjudged by the Court here, "that it is of *common convenience* and necessity that the town "road described in this application be opened and made by "said town of *Pownal*, and the Court appoint *Thomas B. Lit-* "*tle*, *Andrew B. Giddinge*, and *Robert D. Dunning* a com- "mittee to locate said *town road*."

The committee proceeded to locate the road, and their report was afterwards duly accepted by said Court.

And now *Greenleaf* and *Belcher* show for error in said proceedings: —

1. That they were not predicated on a petition in writing to the Selectmen, which is the *foundation* of any jurisdiction. Though it is so stated in the present petition, no such request is produced — nor does such fact appear in the adjudication. *Commonwealth v. Cambridge*, 7 *Mass.* 158; *Maine Stat. ch.* 118, *sec.* 10.

2. That it does not appear *what kind* of road was prayed for; — whether *town* or *private*. *Craige v. Mellen*, 6 *Mass.* 7.

3. That it does not appear that the Selectmen *unreasonably* refused to lay out the road prayed for.

4. That there was no adjudication that the road was of *general benefit*.

They also cited the following cases. *Lancaster v. Pope & al.* 1 *Mass.* 86; *Commonwealth v. Coombs*, 2 *Mass.* 489; *Commonwealth v. Great Barrington*, 6 *Mass.* 492.

Longfellow, for the petitioners, contended that by the proceedings it did appear that the petitioners had applied in writing to the Selectmen to lay out said road — it was alleged in the petition, which was sufficient, — also that the Selectmen had refused — and this being followed by the adjudication of the Court, it is to be inferred that it was proved before the Court that the refusal was *unreasonable*.

The Court of Sessions adjudged the road to be of *common convenience*, this is all that the statute requires — not necessary to adjudge it to be of "*general benefit*."

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

MELLEN C. J. — Several objections have been urged in the argument against the proceedings of the Court of Sessions in the location of the road in question. As to all of them, except one, we give no opinion; this one we consider as sustained, and as fatal. The *ninth section* of *ch.* 68, of the revised statutes, provides that the Selectmen of the several towns in this State may lay out *town* or *private* ways, for the use of such towns only, or for one or more individuals thereof or pro-

prietors therein ; but that no such town or private way shall be established, until the same has been reported to the town, at some public meeting thereof, held for that purpose, and by them approved and allowed. The *tenth section* provides, " that if " the Selectmen shall *unreasonably* delay or refuse to lay out, or " cause to be laid out, any such town or private way, as before de- " scribed, being thereto requested in writing, by one or more of " the inhabitants or proprietors of land in such town, *then* the " Court of Sessions for the same county, at any session thereof " within one year, if the request appear to them reasonable, may " cause the same private way to be laid out, &c. &c. — The *eleventh section* makes a similar provision for those cases where the *town* shall *unreasonably* delay or refuse to *approve* and *allow* of such road, when laid out by the Selectmen. From a view of these provisions it is evident that the jurisdiction of the Court of Sessions, in the laying of town or private ways, is of an *appellate* character only. It has no *original* jurisdiction in such cases. Neither has the Court *appellate* jurisdiction in laying out such roads, except in the two *specified* cases ; that is, when the Selectmen shall *unreasonably* delay or refuse to lay out such way ; or the town shall *unreasonably* delay or refuse to approve and allow of the same. Now in both the instances mentioned, the delay or refusal may have been founded on good and substantial reasons, existing and operating at the time of such delay or refusal ; or, in other words, the delay or refusal may have been perfectly *reasonable* and *proper*, instead of *unreasonable ;* and yet at the time the Court of Sessions undertake to lay out and establish the way, these reasons may have *ceased to exist ;* and the road prayed for may be highly beneficial to the town ; yet such facts would, of themselves, give no authority to the Court of Sessions to lay out the road. Now, on inspection of the record before us, we find, immediately after the recital that all parties concerned had been fully heard, the following sentence by way of adjudication. " It appears " to the Court, and it is considered and adjudged by the Court " here, that it is of common convenience and necessity that the " town road described in the application, be opened and made " by said town of *Pownal.*" It is no where stated in the record

and proceedings of the Court in their adjudication, that the Selectmen of *Pownal* had *unreasonably* delayed or refused to lay out the road; that is, it no where appears on such record and proceedings of the Court, that it had *any jurisdiction whatever* in the premises. If the Court were really satisfied from an examination of the facts of the cause while under their consideration, that the Selectmen had *unreasonably* delayed or refused to lay out the road, that fact should have been stated by the Court as the *evidence* of their *jurisdiction*, and of the *reason* for *exercising* such jurisdiction and proceeding to lay out the road. The omission or absence of this record evidence of jurisdiction is fatal. From the nature of the case, such evidence can only exist in the record of the *opinion* and *adjudication* of the Court; for the *facts* on which such *opinion* and *adjudication* are founded, in cases similar to the one under consideration, never appear on record. We are all of opinion, for the reasons above stated, that the proceedings brought before us on the *certiorari* must be quashed, and they are hereby quashed accordingly.

Thompson *vs.* Stevens.

Where property attached was permitted to remain in the hands of the debtor, on his procuring one to become receiptor for the same, and such debtor placed in the hands of the receiptor certain other property, as a pledge to secure him for the liability thus incurred, with power to sell and apply the proceeds to the payment of the principal debt, it was *held*, that the pledge was for a good and valuable consideration, and while the liability continued, the property pledged could not be attached by a creditor of the pledgor.

Replevin for a brown mare. The defendant pleaded *non cepit*, and filed a brief statement, alleging that at the time of the supposed taking, he was a deputy sheriff, and had in his hands for service, a writ against *Daniel Pottle* in favour of *Alpheus Shaw*, by virtue of which he attached said mare, the same being the property of said *Pottle*.

The plaintiff proved that in *October*, 1830, one *Harrison Blake* sued out a writ of attachment against said *Pottle*, and by virtue thereof caused *a light red horse, cow, gig, sleigh and harness* to be attached; that at the time of the attachment, the said *Pottle* procured the plaintiff in this action to become receiptor, and the property was left in *Pottle's* possession. Some time in the latter part of the year 1830, *Pottle* put into the hands of the plaintiff a *dark red* mare, to secure him as receiptor, and authorised him to sell or dispose of the mare, and to apply the proceeds towards the payment of the *Harrison Blake* debt. On the second Monday of *September*, 1831, the plaintiff exchanged said mare with one *Johnson*, and received the *brown mare* replevied in this action, and $5 in addition. The writ of replevin was served *Sept.* 27, 1831, and in *October* following the mare was sold at auction, by *Thompson's* direction, and the proceeds were paid over to satisfy the *Blake* debt.

The defendant contended, that the plaintiff had not such an interest in the brown mare as would enable him to maintain this suit and defeat the attachment made on *Shaw's* writ. And so the presiding Judge ruled, for the purpose of having that question settled by the full Court, before the defendant should offer evidence, as he proposed to do, to show the transaction between *Pottle* and the plaintiff fraudulent. The plaintiff became nonsuit, with leave to move to have the nonsuit set aside, if, in the opinion of the Court, his evidence unrebutted was sufficient to enable him to maintain the action.

Mitchell, for the plaintiff.

The nonsuit ought not to stand. The case of *Woodman v. Trafton*, 7 *Greenl.* 178, is plainly distinguishable from this. That, was a case between the original attaching officer, and one who had purchased of the debtor. This, is an action by a receiptor, for property put into his hands, to secure him for the liability incurred as receiptor. The plaintiff thus acquired a special property, and had the absolute possession, with which no stranger had a right to interfere.

The consideration for the pledge of the mare to the plaintiff, was a valuable one. Even in ordinary cases, the property at-

tached and receipted for, would be liable to many accidents, which would render the receiptor liable. Much more so would it be the case, where the property attached goes back into the hands of the debtor.

Adams, for the defendant.

To maintain replevin, the plaintiff must have a general, or special property. A receiptor for property attached, has no such property. *Ludden v. Leavitt*, 9 *Mass.* 104; *Warren v. Leland*, 9 *Mass.* 265; *Perley v. Foster*, 9 *Mass.* 112.

No sufficient consideration passed from the plaintiff to *Pottle*, when the dark red mare was placed in his hands. For, though the property attached was permitted to go back again into the hands of the debtor, yet the attachment and lien were not thereby defeated. *Woodman v. Trafton*, 7 *Greenl.* 178; *Maine Stat. ch.* 60, *sec.* 34.

The plaintiff then, wanted no security; — the law had already sufficiently secured him. The brown mare therefore, at the time of the exchange, became the property of *Pottle*, as the red one had been, and as his, was liable to *Shaw's* attachment.

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

From the facts reported it appears that the plaintiff, having become the surety of *Pottle*, at his request, for the safe keeping and return to an officer of certain personal property which he had attached, belonging to *Pottle*, received of him a dark red mare as a pledge to secure him against eventual loss on account of such suretyship. The mare was placed in the plaintiff's possession, with power to sell or dispose of the same to the best advantage, applying the proceeds towards payment of the debt due to *Blake*; at whose suit the property receipted for had been attached. Was the pledge given for a lawful purpose, and for a good and valuable consideration? The purpose appears to have been a commendable one, but it is contended that there was no valid consideration. To establish this position and shew that the plaintiff has none of the rights of a surety, the counsel has cited the 34th section of chapter 60 of the revised statutes, which declares "that when *hay in a barn, sheep, horses,*

" or *neat cattle* are attached on mesne process, at the suit of a " *bona fide* creditor, and are suffered by the officer, making " such attachment, to remain in the possession of the debtor, " on security given for the safe keeping or delivery thereof to " such officer, the same shall not, by reason of such possession " of the debtor, be subject to a second attachment, to the pre- " judice of the first attachment." The argument is, that as the *lien* created by *Blake's* attachment continued upon the property attached and receipted for, the plaintiff needed no indemnity from *Pottle*, on account of his suretyship, and, of course, could have no *valuable* interest in the pledge, or lose any rights by the defendant's attachment. Without pausing to examine the merits of this argument on the facts *assumed*, the *real* facts in the case will show at once that it has no legal foundation; for although *some* of the property, for which the plaintiff gave his accountable receipt, is of the kind mentioned in the above quoted section, yet *three* of the articles are not of that description, and the legal provision has no relation to them; as to these, therefore, at least, the plaintiff was a surety of *Pottle*, possessing the rights of a surety; and the pledge was given upon a good and valuable consideration to protect him from ultimate loss by reason of his suretyship. The mare, for this reason, while she was held as a pledge, in his possession, was not liable to attachment for the debts of *Pottle*. 1 *Pick.* 389. By a recent statute, the law on this point has been altered in *Massachusetts;* and it would seem that if a similar statute were passed in this State, it would be calculated to secure the rights of creditors, and in many instances, prevent fraudulent proceedings on the part of debtors, especially in those cases where the pledgee is not empowered to dispose of the pledge. The mare, being thus pledged to the plaintiff, was disposed of to *Johnson*, in exchange for the mare now in dispute; and she became the property of *Pottle*, as a pledge to the plaintiff, in the same manner as the mare first named; substituted in her stead and for the original purpose. She, therefore, was not liable to *Shaw's* attachment. We are to decide this cause according to the rights of the parties at the time the present action was commenced. If it was *then* maintainable, the sale of the mare

since does not change the principle. It appears that the sale was made for the purpose of raising money wherewith to pay *Blake's* debt; and the proceeds of the sale have been so applied. The property of *Pottle* thus *appears* to have been honestly appropriated to the payment of one of his debts. Whether the whole transaction was *in reality* a fraud, is a question of fact for the jury to decide, on such proof as the defendant can produce. Unless there was such fraud, we are satisfied that the action is maintainable; of course, the nonsuit must be set aside and the cause stand for trial.

HOLBROOK *vs.* ARMSTRONG.

H. delivered to A. six cows, which, by *parol* agreement, were to be returned to him at the end of two years, or their value in money, unless A. should be dissatisfied with a certain trade, or exchange of farms then made between them; in which case they were to remain the property of A. forever. At the end of the two years A. expressed himself satisfied with the trade, but refused to redeliver the cows, or to pay their value; — whereupon H. brought assumpsit to recover what they were reasonably worth, and by the Court it was *held*:

That this was not technically a bailment, but that it amounted to a *sale*.

That the contract was not within the statute of frauds, though not in writing, and in part not to be performed within a year; the statute not applying to cases of sale, where there is a part execution of the contract within the year, by a delivery of the goods, though the price is stipulated to be paid at a period beyond a year.

Held, also, that even if the contract were within the statute of frauds, still the plaintiff would be entitled to recover on the general counts what the cows were reasonably worth.

THIS was an action of *assumpsit*. The first count in the declaration was a general *indebitatus assumpsit* on account annexed, wherein the defendant was charged with the value of six cows. The second charged him with the cows as having been sold and delivered, and the third set forth a special contract, that in consideration that the plaintiff would permit the defendant to have and to receive to his own use the profits and increase of six cows on a certain farm in *Freeport*, for the term

of two years, it was agreed between the plaintiff and defendant that, if at the end of said two years the said defendant should be dissatisfied with a trade then made respecting certain farms, the plaintiff would leave said cows on said farm for the defendant's use forever; otherwise, that, at the end of said term of two years, the defendant should either return said cows to the plaintiff, or pay him the value thereof in money forthwith; — with an averment that, the plaintiff permitted the defendant to have the use, profits and income of said cows on said farm during said two years, and at the end of said two years the defendant was not dissatisfied, but did not return the cows or pay their value.

The plaintiff offered to prove the alleged contract by *parol*. And offered to prove that the defendants had the use of the cows during the two years, and that after the expiration of that time he declared himself well satisfied with the trade concerning the farm; and that, he subsequently disposed of the cows, and applied the proceeds to his own use.

The defendant objected to the admission of the evidence, and relied in his defence on the contract's being within the statute of frauds, not being to be performed within one year.

Whereupon the *Chief Justice*, who tried the cause, directed a nonsuit, with leave to move to take it off, if the whole Court should be of opinion that the evidence was improperly excluded.

Greenleaf and *Mitchell*, for the plaintiff.

The contract is not within the statute of frauds. It did not commence until the expiration of the two years. The defendant had that period in which to make his election; and consequently the plaintiff's claim did not attach until after that time. During all that time the property was in *Holbrook*, and might have been taken by his creditors. There was no consideration moving from the defendant to the plaintiff for leaving these cattle with him, it was a mere gratuity on the part of the plaintiff. *Badger v. Phinney*, 15 *Mass.* 359.

But if the contract be within the statute of frauds, still the plaintiff is entitled to recover on the general counts. *Daven-*

port v. Mason, 15 *Mass.* 85; *Seymour v. Bennett*, 14 *Mass.* 266; *Phillips v. Thompson*, 1 *Johns. Chan. Cas.* 274; 7 *Dane's Abr.* 542; *Sherburne v. Fuller*, 5 *Mass.* 133; *Kidder v. Hunt*, 1 *Pick.* 323.

No case can be found in opposition to this doctrine. It would be manifestly unjust to permit the defendant to have the property of the plaintiff without rendering any returns. If the contract be void on account of the statute, then it is as if there had been none made between the parties, and the plaintiff is let in to recover what the cows were reasonably worth.

Longfellow and *Belcher*, for the defendant, insisted that the contract was within the statute of frauds, not being to be performed within one year, and cited, *Boydell v. Drummond*, 11 *East*, 142; 1 *B. & Alderson*, 723; 2 *Stark. Ev.* 601; *Com. on Con.* 220; *Cabot & al. v. Haskins & al.* 3 *Pick.* 83; *Moore v. Foss*, 10 *Johns.* 244.

Again, it is within the statute of frauds because relating to the sale of lands, these cattle being a part of the consideration.

If within the statute, the plaintiff must fail. He cannot recover on the general counts. Where there is an express promise, no promise can be *implied*. In this case the special contract was proved.

There may be cases where a contract may be declared void, and yet the plaintiff let in to recover on the general counts; but this must be where the claim under the common counts would not be tainted with the illegality, which would not be the case here.

Parris J. delivered the opinion of the Court, at the ensuing *April* term in this county, as follows: —

[After reciting the facts as above.] In the examination of the case, we are to consider these facts as proved, and the question to be decided is, whether upon such proof, the plaintiff is entitled to recover upon either count in his declaration. It may be well to inquire in whom was the property in these cows subsequent to the agreement, supposing that to be valid and binding on the parties. Here was a lease or bailment of property, to be returned or accounted for in two years, upon a cer-

tain contingency then to be determined by the defendant. If the contingency did not happen, the cows were to remain with him free from accountability therefor; — if it did happen, they were to be returned by the defendant, or he was to pay the plaintiff the value thereof in money.

In cases of lease or bailment, where by the contract the identical article loaned is to be returned, the property remains unchanged, the lessee or bailee having the right of use during his term, at the expiration of which, the bailor, having the right of possession as well as property, is entitled to its return, and may maintain trover for its value against any one who shall thereafter convert it to his use; or replevin against any one in whose possession it may be found. But where the identical article is not to be returned, as where the bailee is to return another article of the same kind, or has an option to return the same or another, or, as in the case at bar, to return the article or pay its value in money, the property passes. It is the case of a sale or exchange; — the original owner acquires a property in the price, while all his interest is gone in the specific thing; and no action will lie, except assumpsit for the price, until the thing to be delivered in compensation, has been so delivered or tendered. *Sir William Jones* in his treatise on bailments, says, "there is a distinction between an obligation to restore the *spe-* "*cific* things, and a power or necessity of returning others "equal in value. In the first case it is a regular bailment, in "the second, it becomes a debt." *Story*, in his treatise on bailments, recognizes the same principle. He says, "the dis- "tinction between an obligation to restore the specific things, "and a power of returning other things equal in value, holds in "cases of hiring as well as in cases of deposits and gratuitous "loans. In the former case, that is, the obligation to restore "the specific thing, it is a regular bailment, in the latter, *viz.* "when there is a power of returning other things equal in value, "it becomes a debt." — *Story on Bailments, chap.* 6, *sect.* 439.

If, in the case under consideration, the agreement had been to return the same cows, if at the end of two years the defendant should not be dissatisfied with the trade concerning farms, the property might not have passed; but it might have fallen

within the first class of cases, mentioned in the authorities just cited.

But the additional clause, giving the defendant the election to return the cows or pay for them the value in money, divests the plaintiff of his interest in the specific thing, and leaves him to his remedy on the contract for the value. Such would seem to be the legal operation of this contract, even before the election was expressly or impliedly made by the defendant; but when he admits that the contingency has happened upon which he was either to return the cows or pay their value, and he neglects to return them, he is to be considered as electing to hold them as his own, and consequently to consider the original transaction as a sale, which he has a right to do under his contract. By that, they became his property, to be paid for or not as he might be satisfied or dissatisfied with the trade respecting farms.

If he should be satisfied, as we are to consider the fact to have been, he might fulfil his agreement by returning the identical cows; but if he declined doing that, it is clear that the plaintiff had no remaining interest in the article and could maintain no action for its recovery, but his only remedy, if he have any, is for the value. *Hurd v. West*, 7 *Cowen*, 752.

Here then is an article sold, and the consideration of such sale is the defendant's promise to pay upon a certain contingency, which has happened. The promise then became obsolute. Suppose that the promise of the defendant had been unconditional, to pay in two years; — that the plaintiff sold and delivered him the cows upon receiving his absolute, unconditional parol promise to pay in two years. Can it be that, in such a case, the defendant could hold the property and by shielding himself under the statute to prevent frauds and perjuries, escape from all liability to pay for it. If A. sell B. merchandise and deliver it on the parol promise of the latter to pay in two years, shall B. escape from the performance of his promise, under that clause in the statute, which provides that no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, upon which such action shall be

brought, or some memorandum or note thereof shall be in writing, &c.: — and shall B. be permitted to hold the merchandize free from all liability to pay for it? — If A. labour for B. a year, under a parol agreement, entered into at the commencement of the labour, that B. shall pay therefor in one month after the labour is performed; shall A. be met with the statute of frauds as relieving B. from all liability? — Shall the latter escape by saying, in answer to the special promise, "my "agreement was not to be performed within one year, and "therefore no action can be maintained upon that," and in answer to a charge for work and labour done and performed, "there "was a special agreement and, therefore, you cannot charge me "upon an implied promise." — The mere statement of such a case seems to be sufficient to show its inconsistency; and if the law did not afford relief, it might well be said of it, as was said by a venerable Judge in another case, "I should think it had "been fined and refined out of all its spirit, and was the cor-"ruption of human reason." *Wilmot J.* in *Drury v. Drury*, *Wilmot's Rep.* 211.

But the law is not liable to this imputation. It is said in *Long's* treatise on sales, *p.* 56, in a commentary on this clause of the statute of frauds, if goods are sold and delivered for a certain price, at thirteen months credit, without writing, the delivery of the goods being a clear execution of the contract on one part, the vendor would be bound by the agreement. In *Boydell v. Drummond*, 11 *East*, 142, the counsel in argument put a case. Suppose goods sold and delivered at a certain price, at thirteen months credit, without writing; the terms of the payment would be a part of the contract, and if no evidence could be given of that, by the statute the vendor would not be bound by the stipulated price, and the jury could only give a verdict for the value of the goods. To which *Lord Ellenborough* replied, — In that case the delivery of the goods which is supposed to be made within the year, is a complete execution of the contract on the one part; and the question of consideration only would be reserved to a future period. — In *Cabot v. Haskins*, 3 *Pick.* 83, *Parker C. J.* says, it was urged that the plaintiffs were to deliver the goods within six months,

and that where there is a mutual agreement and either party is to perform in less than a year, the contract is not within the statute. This position of law he does not controvert, but says, in point of fact it did not appear that the delivery of the goods made a part of the consideration for the promise.

It is said by *Petersdorff*, in his abridgement of cases argued and determined in the common law Courts in *England*, that a parol contract for the sale of goods to be delivered, and which are accordingly delivered within a year from the making of the bargain, but which, by the terms of the contract, are not to be paid for until the expiration of that period, is not within the fourth section of the statute of frauds, which requires that an agreement which is not to be performed within a year from the making thereof, shall be in writing, because, in such case all that is to be performed on one side, namely, the delivery of the goods, is done within a year. 10 *Petersd.* 105, *note.*

In *Bracegirdle v. Heald*, 1 *Barnw. & Ald.* 723, the action was brought on an agreement in which the plaintiff alleged that at the request of the defendant on the 27th of *May*, the plaintiff agreed to enter into his, the defendant's service, as groom and gardener, on the 30th of *June* then next, to serve for twelve months, and that the defendant promised to receive and take the plaintiff and retain and employ him for said term, and alleged as a breach, that although the plaintiff was willing to enter into the service on the 30th of *June*, and requested the defendant to receive him, yet the defendant refused so to do. The statute of frauds was relied upon in defence. In the argument for the plaintiff, the counsel say, it is clearly not necessary in all cases, where some one term specified in a contract happens to exceed a year, that the whole contract should be in writing. For if a man bargain for goods to be delivered within the year, and that the payment shall not be made till after more than a year from the bargain has elapsed, it is not necessary in such case that the bargain should be in writing. To which *Abbot J.* assents, saying, the case put in argument of an agreement for goods to be delivered by one party in six months and to be paid for in eighteen months, being after more than a year has elapsed, is distinguishable on this ground, that

there, all that is on one side to be performed, *viz.* the delivery of the goods, is to be done within a year, whereas, here the service, which was the thing to be performed *by the plaintiff*, cannot possibly be completed within that period. The case of *Lower v. Winters*, 7 *Cowen*, 263, was similar to *Bracegirdle v. Heald*. In *January*, 1824, the parties agreed that the defendant should have the plaintiff's improvements in *March*, 1825, and that the defendant should at that time pay therefor one hundred dollars in stock. Neither part of the contract was to be performed within a year, and the case was properly considered as falling within the statute. In a recent case in the *King's Bench*, the Court in delivering an opinion, say, "as to the con- "tract not being to be performed within a year, we think that "as the contract was entirely executed on one side within a "year, and as it was the intention of the parties, founded on a "reasonable expectation, that it should be so, the statute of "frauds does not extend to such a case. In case of a parol "sale of goods, it often happens that they are not to be paid "for in full till after the expiration of a longer period of time "than a year; and surely the law would not sanction a de- "fence on that ground, when the buyer had had the full bene- "fit of the goods on his part. *Donellan v. Read*, 3 *Barnw. & Adolp.* 899.

But what if the defendant should succeed in bringing his express promise within the statute? — Is he then to hold the consideration free from all accountability? — He is charged in the general counts for goods sold and delivered, and the proof is that they were actually delivered under such a contract on the part of the plaintiff as divested him of the property in the goods and chattels sold, and consequently they became the property of the defendant. If the defendant's special promise was within the statute, still the contract was not illegal, was neither *malum prohibitum* nor *malum in se*, and in such cases the force of the statute operates upon the special agreement only, by providing that no action shall be brought upon that. — It was said by *Chief Justice Mansfield*, in *Cooke v. Munstone*, 1 *New Rep.* 355, that "where a party declares on a special contract "seeking to recover thereon, but fails altogether in his right so

" to do, he may recover on a general count, if the case be such " that supposing there had been no special contract he might " still have recovered." — It has been held that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract where the contract has been completely executed, and that it is not in such case necessary to declare on the special agreement. *Bank of Columbia v. Patterson*, 7 *Cranch*, 299; *Bull. N. P.* 139; *Keyes v. Stone*, 5 *Mass.* 391; *Starkie's Rep.* 277; *Holt's N. P.* 236; *Roscoe on Evidence*, 221. So where there is a count on a special agreement, and a general count for goods sold and delivered, the plaintiff may, if he fail to prove the special agreement, abandon the special count and resort to the general count; — but this cannot be done if the goods were in fact sold under the special agreement, *and the plaintiff might, if he had framed the special count properly, have recovered upon it. Robertson v. Lynch*, 18 *Johns.* 451. — So in the case at bar, the plaintiff has declared on a special agreement; — the defendant says, you have failed to prove it, for it is within the statute and cannot be proved by parol evidence; you cannot recover upon it, because the statute says no action shall be brought upon such an agreement, unless it be reduced to writing. If these positions of the defendant be sound, why may not the plaintiff, upon the authority of *Robertson v. Lynch*, recover upon his general count for goods sold and delivered, inasmuch as no action can be sustained upon the special agreement.

In *Burlingame v. Burlingame*, 7 *Cowen*, 92, it appeared that the defendant agreed with the plaintiff to convey him a certain piece of land if he served the defendant faithfully till twenty-one years of age. The declaration contained the general counts in *indebitatus assumpsit* for work and labor, &c. It was objected that the plaintiff's claim, being on a special agreement, was inadmissible under the general counts, and that the agreement was void by the statute of frauds. The Court say, in giving their opinion, " it is contended that the statute of " frauds is a bar to the action. To this objection it may be " answered, the action is to recover for work, labour and ser- " vices, not to enforce the contract to convey the land. It will

" be readily admitted that the agreement to convey is within " the statute. The question then is presented whether in any " given case where one party has parted with his money or " rendered services, and the consideration for so doing is a " promise by the other party to convey land, the party who " has rendered the service or paid the money is without reme- " dy. The case of *Gary and Hull*, 11 *Johns.* 441, shows, " that where goods are delivered on a special contract, which " the opposite party refuses to perform, the person delivering " the goods may elect to consider the contract as rescinded, " and recover in an action for goods sold and delivered. In " the present case the defendant refuses to convey, and alleges " that the contract is void. It seems, therefore, to be clear " upon principles of law and justice, that the plaintiff may " elect to consider the contract as rescinded; and his right " to recover back his money, or compensation for his services, " is unquestionable."

So in *Little v. Martin*, 3 *Wend.* 219, which was assumpsit for use and occupation of a house. In *August*, 1826, it was agreed between the parties that the defendant should take a lease of the house for five years. The defendant entered under the parol agreement, but never occupied under a lease in writing. In defence it was contended that the agreement, being by parol, for a lease for five years was void by the statute of frauds. Upon this point the Court say, " it is a sufficient " answer that the action is not upon the contract; it has nothing " to do with the suit any further than that the proof of it, though " not made as the statute requires, establishes the fact that the " defendant below went into the occupation of the premises by " the permission of the plaintiff. This fact it was incumbent on " the plaintiff to shew, and it is as well proved by shewing an " entry under a void contract, as under a valid one." In *Shute v. Dorr*, 5 *Wend.* 204, it was held that a parol agreement by a parent, that his child aged sixteen, shall serve a third person until he arrives to the age of twenty-one, when his master is to pay him one hundred dollars, is within the statute of frauds; but if any services are rendered under such contract, there may be a recovery for the same upon a *quantum meruit*. In

that case, the Court held the parol agreement within the statute, because it could not have been performed *on either side* within a year.

The case of *Kidder v. Hunt*, 1 *Pick.* 328, seems to be in conformity to the same principle. In that case, the Court decided that part performance of a parol agreement relative to an interest in land does not take the contract out of the statute of frauds, so as to sustain an action at law for damages for breach of the contract. *But assumpsit will lie for the expenses incurred in such part performance.* The Court say, "certainly so "much as has been expended in money or labour, by the plain- "tiff, may be recovered in an action for money paid, or work "and labour done for the defendant." And in general, where a contract within the statute of frauds has been in part executed by one party, there is a plain remedy for such party, to a certain extent, in a court of law, if the other party fraudulently refuses to execute the contract on his part. If money has been paid, it may be recovered back. If labour has been performed, a compensation for it may be recovered. *Lane v. Shackford*, 5 *N. H. Rep.* 133.

But it is contended that there can be no action maintained upon an implied promise, where the subject matter is embraced in a special contract. The authorities before referred to, all shew that this general principle applies to cases where the special contract is valid, and the plaintiff might, if he had framed a special count properly, have recovered upon it. But where the plaintiff brings his action upon an implied promise and the defendant would avoid it by proving a special agreement, he must show such an one as would be valid in law. He cannot avoid the special agreement by bringing it within the statute of frauds, and still make use of that agreement to defeat his implied promise. When the defendant, in bar of the plaintiff's right of action, pleads such an agreement as cannot be the subject of a suit unless in writing, then he ought to plead it to be in writing that it may appear to the Court that an action will lie upon it, for he ought not to be allowed to take away the plaintiff's action, without giving him a complete remedy upon the agreement pleaded. *Case v. Barber, Raym.* 450 ; *Com. Dig. Action*

in assumpsit, F. 3; *Bull. N. P.* 279; 1 *Bac. Abr. Agreements, C.*

We find nothing in the books, which prevents the recovery on the general counts in the case at bar, even if the defendant could bring his special promise within the statute. The case mentioned by *Treby J.* in 1 *Salk.* 280, was upon the special promise, and would have been defeated if that had not depended upon a contingency, which might have happened within a year. The case of *Fenton v. Emblers*, 3 *Burr.* 1278, was also upon the special promise, which was saved from the operation of the statute upon the same principle as the case in *Salkeld.* But in the last case, if the promise of the defendant had not depended upon a contingency, but it had been expressly and specifically agreed that performance on his part was not to be within a year, there is nothing which shows that the plaintiff might not have recovered for her services, as housekeeper, on a general *indebitatus assumpsit* for work and labour.

The defendant, in the case before us, had the property charged in the account annexed to the writ; it became his; he has thus treated it, and there can be no good reason in justice, and we think none in law, why he should be permitted to retain it free from all accountability to the plaintiff for its value, unless the contingency has happened, upon which he was thus to hold it. By the original agreement there was what amounted to a sale, so far at least as it depended upon the plaintiff; perhaps, it might be considered, so far as it regarded the defendant, a bailment until the expiration of the two years, with the right of then determining whether he would consider it a bailment or a sale. If so, by retaining the article, he has elected to consider it a sale, and if it *then*, when he made the election, assumed the character of a sale on his part, he would be accountable; — or if, by retaining the article, he is to be considered as electing to consider it a sale, *ab initio*, then, inasmuch as there was a delivery of the cows, and a complete performance on the part of the plaintiff within a year, it may well be doubted whether the clause of the statute relied upon has any applicability to the case. But if it had, and the defendant could shield himself under it from the performance of his special agreement, we

think the action may well be maintained on the general counts for goods sold and delivered.

Whether the plaintiff can in fact prove what he offered to prove, remains to be seen. As he was not permitted to do it before the jury, in considering this motion for a new trial for that cause, we are to consider it as proved, for unless we were satisfied that the proof would avail him, if received, its rejection would be no ground for opening the case for a new trial. The motion to take off the nonsuit is granted, and the cause will stand for trial.

Skillings *vs.* Boyd.

Where, in the statute of 1821, *ch.* 59, *sec.* 8, the agent or attorney of a plaintiff, indorsing a writ, is made liable to a prevailing defendant for costs in case of the avoidance or inability of the plaintiff, — *the plaintiff of record*, is intended; though he may be a *nominal* one merely.

In a suit brought in the name of A. B. for the benefit of C. D.; the writ was indorsed thus: "*C. D. by his attorney, E. F.*" On *scire facias* afterwards being brought by the original defendant against E. F. for the costs recovered in the original suit, it was held that he was not liable, not having acted as the agent or attorney of the *plaintiff on record.*

Scire Facias against the defendant as indorser of the original writ in an action brought by *Lot Davis* against the present plaintiff, *Skillings*. In that action, *Skillings* recovered judgment against *Davis* for his costs, amounting to $49,43. Execution had issued for the same, on which *Davis* had been committed, and discharged from imprisonment under the act for the relief of poor debtors. Payment of the execution had also been demanded of *Dyer*, who refused to pay it. — The original writ was indorsed thus: "This action is brought for "the benefit of *Isaac Dyer* of *Baldwin*."

"*Isaac Dyer*, by his attorney, *Wm. Boyd*."

At the trial before *Whitman C. J.* in the Court of Common Pleas, it appeared that the original action was founded on a

note or memorandum in writing for the payment of specific articles. It was made payable to *Lot Davis*, and by him had been assigned to *Isaac Dyer*, for whose benefit this suit had been commenced.

The defendant contended that he was not liable on this indorsement, it being *the indorsement of Isaac Dyer*, the plaintiff in interest, and not of the defendant; — Or, at all events, that he was liable only in case of the avoidance or inability of *Dyer* for whom the defendant had acted as attorney. But the *Chief Justice* in the Court below, ruled that the indorsement was sufficient to charge the defendant. Whereupon exceptions were filed, pursuant to the provisions of *statute*, and the case brought up to this Court.

N. Emery and *Boyd*, for the defendant, argued to the following effect: —

1. *Maine Stat. ch.* 59, *sec.* 8, requires all writs to be indorsed by the plaintiff, or his agent or attorney, and such an attorney only is made liable for costs. In this case, it is contended that, the defendant was not the agent or attorney of *Lot Davis*, the plaintiff; — but he was the agent of *Dyer*, who was the agent of *Davis*. Where one indorses a writ without adding that he does it as agent, the law will imply it. But it will not imply an agency of the defendant contrary to his express declaration on the writ. *Middlesex Turnpike v. Tufts*, 8 *Mass.* 266; *Gilbert v. Nantucket Bank*, 5 *Mass.* 97.

2. The indorsement in this case was wholly at common law, and rests on common law principles. The indorsement was not made in pursuance of the requirements of our statute. Hence, the cases of *Davis v. McArthur*, 3 *Greenl.* 27; and *Howe v. Codman*, 4 *Greenl.* 79, do not affect this case. They only decide as to the nature and extent of the liability of the attorney to the *plaintiffs in those suits.*

3. The plaintiff in this suit is now *estopped* from denying that *Dyer* was the attorney of *Davis* in the original suit, he not having pleaded in abatement to it, as a sufficient indorsement. *Strout v. Bradley*, 5 *Greenl.* 316. If *Dyer* was not the agent of the original plaintiff, then the writ was not indorsed at all.

4. If *Dyer* was not the *attorney*, then he was the ***plaintiff***. If the latter, the defendant is not liable as his attorney, because the present plaintiff has taken no steps to show his ***avoidance*** or ***inability***.

Deblois and *W. P. Fessenden*, for the plaintiff.

1. That an indorsement in the form adopted in this action is sufficient to hold the attorney, is fully established in the cases of *Middlesex Turnpike Corporation v. Tufts*, 8 *Mass.* 266; *Davis v. McArthur*, 3 *Greenl.* 27; *Howe v. Codman*, 4 *Greenl.* 79. He is not then excused, unless by the fact that he indorsed the writ as attorney to *Dyer*, and not as attorney to *Davis*.

But the writ in this case charges, that the original was sued out in the name of ***Lot Davis, for the benefit of one Isaac Dyer, and that said writ was indorsed by the defendant, Boyd.*** It was not necessary to aver that the writ was indorsed by *Boyd* as attorney to *Davis*. It is sufficient that he indorsed the writ *as attorney*, within the meaning of the statute; — and as *Dyer* could not be legally called on, *on the execution*, the defendant would lose the whole remedy the statute intended to give him, if an indorsement of this kind were not sufficient.

In *Ruggles v. Ives*, 6 *Mass.* 494, *Parsons C. J.* says, "the "indorser is considered as stipulating for the plaintiff that he "shall pay to the defendant his costs." Now here, *Boyd* was the indorser, according to the case of *Davis v. McArthur*, and he must be considered as stipulating for the plaintiff. — *Davis* was the plaintiff ***against whom Skillings had any remedy on the execution*** — and the defendant is bound to go no further than ***to endeavour to collect his execution.*** *Ruggles v. Ives.* He cannot certainly ***avoid*** this liability by indorsing as attorney to another person against whom *Skillings* had no remedy *on his execution.* The indorsement of *Dyer's* name on the writ may be considered as intended to notify the officer, and the defendant *where the property of the note was.*

If this objection could be made at all, it should come only from the original defendant, by way of objection to the in-

dorsement as insufficient, but the defendant, *Boyd*, cannot object to the liability which he has voluntarily assumed. *Strout v. Bradbury*, 5 *Greenl.* 313.

2. In this case, too, all the steps have been taken that the law requires to fix the liability of the defendant. He must be liable for the avoidance or inability of the plaintiff, — and as *Davis* was the only plaintiff against whom *Skillings* could have had any remedy on the execution, it is for his avoidance, or inability, that the defendant is liable.

Was Davis unable to pay? In *Ruggles v. Ives*, before cited, *Parsons C. J.* says, "If the return be that the body is "taken and committed in execution, such return is *prima fa-* "*cie* evidence of the plaintiff's inability, to be controlled only "by evidence that he has satisfied the defendant's execution." In the case at bar, *Davis* has not only been committed, but has taken the *Poor Debtor's Oath.* The execution has not been *paid*, and this, says *Parsons C. J.* is the only evidence that can control the *prima facie* evidence arising from the commitment.

The defendant has gone farther, and demanded payment of *Dyer, who refused to pay*, — this was all he could do, having no legal remedy, by which he could compel him to pay — in no other way could he show his *avoidance* or *inability.*

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

MELLEN C. J. — The question whether the defendant is liable in this action, as indorser of the original writ, must depend on the construction of the 8th *section* of *ch.* 59 of the revised statutes. It declares that all original writs, before service, shall be indorsed by the *plaintiff* or *plaintiffs*, or one of them, if inhabitants of this State, or by *his* or *their* agent or attorney, being an inhabitant thereof: and it then declares that the *plaintiff's* agent or attorney who shall so indorse his name on an original writ, shall be liable in case of the avoidance or inability of the *plaintiff* to pay the defendant all such costs as he shall recover, and to pay all prison charges that may happen where the plaintiff shall not support his action. In the case of *Ruggles*

& al. v. Ives, 6 *Mass.* 494, giving a construction of the Act of *Massachusetts*, the section of which relating to the indorsement of writs, is similar to ours, above cited, *Parsons C. J.* says, that the defendant, who has recovered his costs, must use all reasonable diligence to obtain the money of the plaintiff; and, as proof of this, must take out execution against *him* and have a proper return on it. The whole section, and the above construction show, beyond all possibility of doubt, that the *plaintiff on record* is the plaintiff intended, whether he is the *real* or *nominal* one; for execution for the costs can issue against no *other* person. To subject an indorser to the statute liability, the indorsement must be such as the statute requires; for at common law, the mere indorsement of a name on the back of a writ, would create no obligation. From what we have stated, it is evident that the indorsement of the words, "This action is brought for the benefit of *Isaac Dyer* of *Bald-*"*win*," can make no difference as to the application of those principles by which the cause must be decided. The indorsement of the writ is in these words, "*Isaac Dyer*, by *his* at-"torney, *William Boyd*." It has been argued that *Mr. Boyd* must be considered as the attorney of *Lot Davis*, the *nominal* plaintiff, as well as *Dyer;* because it was necessary to commence the action in the name of *Davis*. The objection to this argument is, that it is founded on an assumed fact, which expressly contradicts the language and terms of the indorsement. To adopt such a construction would be *making* a contract for *Boyd*, instead of giving a construction to the indorsement as it stands. He states that in doing what he did, he acted as the attorney of *Isaac Dyer;* which excludes the idea and presumption of his having acted as the attorney of any other person. Our statute subjects no agent or attorney to liability on his indorsement, except the attorney of the *plaintiff on record*. *Boyd* has not assumed to act *as such*, but for *another* person. In a note appended to the case of *How v. Codman*, 4 *Greenl.* 79, this Court particularly noticed the alteration of the *common law*, made by the 8th section above mentioned. It is important to state it again here. At *common law*, when an authorised *agent* does an act in the name of *his principal*, he thereby binds his *prin-*

cipal but not ***himself***. But our statute declares that the attorney or agent, duly empowered, by indorsing the writ, thereby binds ***himself:*** and this Court has decided that he is equally bound, whether he signs his own name as attorney to the plaintiff, or the name of the plaintiff, by himself as his attorney. See the above case of *How v. Codman*. In the case of *Middlesex Turnpike Corporation v. Tufts*, 8 *Mass.* 266, it was decided that the simple indorsement of a man's name, without designating himself as agent or attorney, was good and binding; for the law would imply that he was *agent*. Therefore, if *Isaac Dyer* had *in person* indorsed his name on the writ, it would have bound him; and upon the principles of the *common law*, if he employed ***Mr. Boyd***, as his attorney, to indorse his name *for* him, *such* an indorsement would bind ***Dyer***; for *such* an attorneyship is not within the 8th section, which has reference only to an ***attorney of the plaintiff on record***, as we have before observed. ***Boyd*** states that he acted as ***Dyer's*** attorney in making the indorsement; and in a suit against ***Dyer***, he would, without any doubt, testify the same to be true. From the facts before us, we are of opinion, for the reasons above assigned, that the present action cannot be maintained. The instruction of the Judge before whom the cause was tried, "that the indorsement aforesaid was sufficient to charge the "defendant," was, in our opinion, incorrect. The exception to this instruction is therefore sustained. The verdict is set aside, and a new trial is to be had at the bar of this Court.

MANNING *vs.* BROWN.

By articles of agreement between A. and B. the former covenanted to convey to the latter a certain lot of land, if certain notes given at the same time, payable at a future day, should be paid at maturity by B.; and by said articles it was therein further agreed, that on failure of payment of said notes by B. the agreement was to be void — B. to be liable to pay all the damages that should thereby have occurred to A. — and to forfeit all that should previously have been paid. In a suit on one of the notes, it was held that the promise on the notes, and the promise or covenant to convey, were independent, and that a suit on the former might well be maintained without showing a conveyance or offer to convey.

But by enforcing payment of the notes, the plaintiff waived the right to avoid his covenant to convey. It was at his election to do this, or to relinquish his right to compel payment of the notes, and hold the defendant answerable on his covenant to pay all damages.

ASSUMPSIT, on a promissory note of hand for sixty dollars, dated *Sept.* 19, 1828, and payable to the plaintiff's testator *Richard Manning*, or order, as agent for the heirs of *Richard Manning*, late of *Salem*, deceased, in one year and four months. The general issue was pleaded and joined.

The defendant, to maintain the issue on his part, produced and read the following articles of agreement, *viz.*

"*Articles of Agreement* made and concluded this 19th of "*Sept.* 1828, by and between *Richard Manning* of *Raymond* "in the county of *Cumberland*, agent to superintend and man- "age the sale of lands belonging to the heirs of the estate of "*Richard Manning*, late of *Salem*, *Massachusetts*, deceased, "the said agent in behalf of said heirs of the one part, "and *Daniel Brown* of *Raymond* aforesaid, of the other part, "— Witnesseth, that the said parties hereby covenant and agree "each with the other as follows, the said *Daniel Brown* to "purchase of said agent the following described lot of land, "*viz.* — The lot numbered two, in the tenth range of lots in "*Raymond* aforesaid, containing one hundred acres, be the "same more or less, according to the survey and plan taken by "*Nathan Winslow*, and accepted by the proprietors of *Ray-* "*mond*, *March* 17, 1791. And the said *Daniel Brown* has

" given his notes to said agent, of the same date of this agree-
" ment, payable to him or order, for the sum of one hundred
" and sixty dollars, for the purchase or consideration for said
" lot of land, *viz.* one note for $60 — and two for $50 each,
" payable in one, two and three years and four months, interest
" annually. *And the said agent in behalf* of said heirs doth
" agree, that *if said Daniel Brown shall pay, or cause to be*
" *paid, to said agent or his successors in office, the above-*
" *mentioned sum and interest, according to the tenor of said*
" *agreement, then said Daniel Brown shall be entitled to a*
" *good and sufficient deed of the above described lot of land*
" *— but it is now understood and agreed, by and between*
" *both parties, that in failure of the above payments this*
" *agreement is to be void and of no effect, and the said Brown*
" *to pay all damages that shall arise in consequence of hav-*
" *ing said land in possession, and all that he shall have paid*
" *to be forfeited,* otherwise to remain in full force and virtue."

It was admitted or proved that, the note declared on was one of the three named in the agreement, neither of which, or any part of them, had ever been paid, all of them remaining in the hands of the plaintiff or his attorney, and all being due prior to the commencement of this suit.

The defendant insisted, to the jury, that on the true and legal construction of said agreement, and from the facts admitted and proved, he ought not to be held to pay said notes. But *Whitman C. J.* in the Court of Common Pleas, where the cause was tried, instructed the jury that the writing produced by the defendant was still in force, and was no bar to the present action, and that their verdict should be for the plaintiff, which was returned accordingly. To this opinion and direction the defendant took exceptions, on which the cause was brought to this Court.

Eveleth, for the defendant, cited *Winter v. Livingston*, 13 *Johns.* 54, and *Johnson v. Reed*, 9 *Mass.* 80.

J. Adams, for the plaintiff.

The opinion of the Court was delivered by

PARRIS J. — The defendant gave the plaintiff's testator three several notes, payable at different periods, each of which had become due at the commencement of this action. The defence rests upon the construction of certain articles of agreement entered into between the parties at the time of giving the notes, and which, the defendant contends, shews a conditional contract, and on his part entirely optional. The notes are particularly described in the articles of agreement, and the whole, having been executed at the same time and constituting the same transaction, are to be construed together.

The consideration of the notes is the covenant on the part of the promisee, that on their payment the promisor shall be entitled to a deed of a certain lot of land. For the defendant it is insisted, that the contract is conditional and dependent, and therefore he is not liable on the notes. If it were conditional on his part, that is, if his promise to pay was conditional, depending on the prior performance of some act on the part of the promisee, which had not been performed the position would unquestionably be sound. That such was not the intention of these parties is manifest from the agreement on which the defendant relies. By that, the payment of the notes by the defendant is a condition precedent to his becoming entitled to a deed. His promise to pay is absolute; — the plaintiff's promise to give the deed is conditional, and it is not for the former to avoid his absolute promise because he has accepted, as a consideration therefor, the conditional promise of the plaintiff.

We find nothing in the case of *Johnson v. Reed*, 9 *Mass.* 78, which supports the construction put upon this agreement by the defendant. On the contrary, the Court, in that case, manifest a determination to look to the true intent of the parties, as apparent in the instrument, to determine whether covenants or promises are independent or conditional; and courts generally, at the present day, are more anxious to give effect to the intentions of the contracting parties, and not by refined and subtle distinctions, and an adherance to quaint technicalities, to outrage common sense and decide contrary to the real meaning of the parties and the true justice of the case. *Platt on Covenants*, 72 — 80.

The defendant further contends that the agreement has been rescinded and annulled in consequence of his neglecting to pay the notes, and he relies upon the concluding clause in the agreement, which is in these words, "It is understood and agreed "by and between both parties, that in failure of the above pay- "ments, this agreement is to be void and of no effect, and the "said *Brown* to pay all damages that shall arise in consequence "of having said land in possession." What is to be void upon the failure of the payment? Not the notes, but the agreement by which the plaintiff's testator covenanted conditionally to give a deed.

But if he enforces payment, he waives the right to avoid this covenant. He has the election, either to compel payment of the notes and be answerable on the covenant to give a deed, or waive his right on the notes and hold the defendant answerable under his covenant to pay all damages. He takes the former course, and, if he succeed in enforcing payment, the defendant may resort to his remedy under the agreement. 2 *Hovend. on Fr.* 19; *Brashier v. Gratz*, 6 *Wheat.* 528; *Bank of Columbia v. Hagner*, 1 *Peters*, 455; *Hepburn v. Auld*, 5 *Cranch*, 262.

The defendant relies on *Winter v. Livingston*, 13 *Johns.* 54. That case resembled the one before us in many of its features. *Livingston* gave notes to *Winter* and took from him a bond covenanting, among other things, to convey certain real estate on payment of the notes, with an express declaration of the intention of the parties, that if either of the notes should not be paid, when it became due, the covenant of *Winter* to give a deed should be void. The notes were not paid, and *Winter* took possession of the land. The Court say, "The "notes in question were given as the consideration for the re- "conveyance of the land by *Winter* to *Livingston*, according "to the covenant entered into between them. By this cove- "nant, however, it was provided that the agreement was to be "void, unless *Livingston* paid his notes as they fell due. He "did not pay them, and of course, the agreement was void, "*if Winter elected so to consider it.* And the case fully "shows that he availed himself of this forfeiture, for he went "on and sold the land for his exclusive benefit." — Not so in

the case at bar. *Manning* did not elect to consider the agreement void. He did not enter into or sell the land, but permitted the defendant to retain the undisturbed possession. — He has not, therefore, availed himself of the forfeiture, but, by enforcing payment of the notes, has waived it. There was a good and legal consideration for them when they were given and that consideration has neither failed or been cancelled.

The exceptions are overruled, and judgment is to be entered on the verdict.

POTTER *Judge, vs.* JOSEPH TITCOMB, *Administrator of estate of Moses Titcomb.*

If an administrator know of the existence of notes of hand, belonging to the estate of his intestate, deposited in the hands of a stranger, and do not cause them to be inventoried, within the time prescribed by statute, it is a breach of the administration bond.

Nor is it less his duty thus to do, though he, himself, was the promissor in the notes. — Nor even though he *deny* or does not *admit* them to be due.

In a suit on an administration bond, the defendant pleaded special performance. The plaintiff replied, that two certain promissory notes, (describing them) given by the defendant to the deceased, came to, and were *in the knowledge of the defendant* within three months next following the date of the bond declared on, and that he had not caused them to be inserted in the inventory, as he should have done. The rejoinder alleged that said notes were not *known* and *admitted* by the administrator *to be due.* In the surrejoinder the plaintiff alleged that the notes at the time when, &c. were justly due from the defendant and were a part of the goods and chattels, rights and credits, of the intestate, of all which the defendant was *well knowing* within said three months, and concluded to the country. To which the defendant demurred, assigning causes. *Held*, that by the demurrer the facts stated in the surrejoinder were admitted; and it thereby appearing that "a true and "perfect inventory" had not been returned, there was a forfeiture of the bond, — that the bond was not saved by returning an inventory, if it were not a *true* one.

Held further, that the surrejoinder was not bad for omitting to answer the averment in the rejoinder of the defendant's *non-admission* of his indebtedness, it being an *immaterial* averment.

Nor was the surrejoinder bad for concluding to the country; it containing a direct denial of the only material allegation in the rejoinder.

Nor was it bad for multifariousness. A party is not precluded from introducing *several matters* into his plea, if they are constituent parts of the same entire defence, and form one connected proposition.

THIS was an action of debt brought upon a Probate bond, and is the same case reported in 7 *Greenl.* 302. The defendant pleaded that, within three months from the granting of letters of administration, *viz. Feb.* 28, 1804, he did make and return a true inventory of the estate of said *Moses Titcomb*, including all debts to the estate, which were *known* and *admitted* by the defendant to be due; — that he had fully administered the same; — and that before the commencement of this suit he had settled in the Court of Probate, three accounts of administration, and had paid over to the heirs the sum of $10,853, 21: — that no other estate of said deceased ever came to the possession, or knowledge, of the defendant; — that he has never been cited to render any further inventory of said estate, or any further account of his administration.

The plaintiff replied that, at the time of the granting of administration as aforesaid, the defendant was justly indebted to the estate of the said *Moses Titcomb* on two promissory notes of hand; one dated *Aug.* 26, 1799, for $454,04, payable in two years with interest; and another dated *Aug.* 10, 1804, for $4450, payable in three years and interest. Which notes on the 28th *Nov.* 1804, the time when administration was granted, and the bond executed, were a part of the *goods*, *chattels*, *rights* and *credits* of said *Moses Titcomb*, all which, afterwards, and within three months, came to the knowledge of the defendant, and of which it was his duty to have made a true and perfect inventory, and the same to have exhibited in the Registry of the Court of Probate for the County of Cumberland, at or before the 28th of *Feb.* 1805, according to the intent, effect and meaning of said bond, and the conditions thereof; — and avers that he did not exhibit such inventory as aforesaid.

The defendant rejoined that, the said notes were not *known* and *admitted* by him to be due, and as being a part of the goods, chattels, rights and credits of said *Moses Titcomb* de-

ceased, to be administered on in manner and form as the plaintiff had alleged, — and that he had never been *cited* to render an *inventory* or *account* thereof.

The surrejoinder averred that, the notes at the time alleged in the replication, to wit, *Nov.* 28th, 1804, were justly due from the defendant, and were a part of the goods, chattels, rights and credits of the said *Moses Titcomb* deceased; — and that of these facts, before the 28th day of *Feb.* 1805, the defendant was *well knowing*, and tendered an issue to the country.

To this, there was a demurrer and joinder.

The causes assigned were 1. that the surrejoinder did not traverse or deny the rejoinder, nor confess and avoid it.

2. That it avoids taking issue on the rejoinder, and turns to put in issue an allegation which the rejoinder had avoided, to wit, the making and existence of the notes, and did not deny that the defendant did not know and admit the notes to be due.

3. That the surrejoinder did not allege that the defendant knew and *admitted* the notes to be due, and to be administered on as a part of the estate of the deceased. Nor did it aver that he had been *cited to inventory, or account* for, the same; nor deny that he had not been so cited.

4. That, it undertook to set up *foreign* and *independent* and *issuable* matter, as though it were in reply and repugnant to the rejoinder, without protesting or traversing the allegation in the rejoinder — and did not conclude as it ought with a verification, but irregularly to the country.

5. That, it did not directly and distinctly deny the *substance* and *gist* of the rejoinder — and that if it purported in any manner to be a negative of the rejoinder, it was pregnant with the truth thereof. Therefore it confessed the truth and undertook to avoid the effects of the rejoinder by implication and argument only.

6. That it undertook to offer an affirmative, and tender an issue thereon, by way of reply to the rejoinder, without negativing or noticing the averment of the rejoinder, and therefore, came to no proper point.

7. That it did not present a proper issue of fact made upon an affirmative and negative thereof; but irregularly and inartificially attempted to raise an issue upon two different and independent affirmatives; — or it sought to narrow and alter the issue offered by the rejoinder, so as to substitute a different question of fact from what the rejoinder proposed.

8. That, it was multifarious and divisible; — that it set forth and alleged two separate, distinct and issuable matters or facts, 1. the legal indebtedness of the defendant on said notes, — and 2. his *knowledge* of such indebtedness.

9. That it was irrelevant, inconclusive, &c. &c.

N. Emery, Longfellow, Greenleaf and *Daveis*, were of counsel for the defendant.

Daveis. The whole case turns upon the question, whether the defendant can be compelled to answer in any other way than by being *cited* into Probate Court.

By the administration bond, the administrator is bound to render an inventory, and *but one*. He is bound to render an account, and *but one*. If it be sought to charge him any *further*, he must be cited — and no action can be sustained on the bond *until he is cited*. *Dickinson v. Hastings*, 1 *Mass.* 41; *Boylston v. Boylston*, 4 *Mass.* 318; *Nelson v. Jaques*, 1 *Greenl.* 139; *Dawes Judge v. Boylston*, 9 *Mass.* 357; *Paine v. Fox*, 16 *Mass.* 129; *Hooker v. Bancroft*, 4 *Pick.* 53.

After the administrator has returned an inventory and rendered an account, the bond *quoad* these points, is *functus officio*. 2 *Fonblanque*, 418, *note b*; *Catchside v. Orrington*, 3 *Burrows*, 1922; *Toller on Ex.* 198.

What is the object of an inventory? To limit the liability of the administrator. *Toller on Ex.* 250.

An inventory is *prima facie* evidence that it contains all the property. If it do not, then he shall be required to answer further, in such manner that his own oath will be available to him. *Phillips v. Bignell*, 1 *Phillemore's Eccles. Rep.* 239; *ib.* 224; 2 *Phillemore*, 56; *Toller on Ex.* 252; *Commonwealth v. Bryan*, 8 *Serg. & Rawle*, 128.

If the administrator returns an inventory, however *imper-*

fect it may be, yet the bond is saved. After that, there can be no action till citation. 2 *Brownlow's Parliamentary Cases*, *Blunt v. Burrows*, 1 *Ves.* 546; *Stevens v. Gaylord*, 11 *Mass.* 256; *Robbins v. Hayward*, 16 *Mass.* 524; *Newcomb v. Wing*, 3 *Pick.* 168; *Cringan v. Nicholson*, 1 *Hen. and Mum.* 428; *Judge of Probate v. Briggs*, 5 *N. H. Rep.* 66; *Powell on Con.* 413, 414.

The receipt of a sum of money by an administrator, of which he has not rendered an account, is no breach of his administration bond.

The rights of the parties must first be ascertained and established, before they can have a suit on the bond, — both as to creditor and heir.

The bond in this case was not forfeited by a neglect to inventory the notes given by the administrator to his intestate. It is true, they were known to exist, but they were known to be *not due*. Can he be required to inventory disputed claims against himself? Shall he not have an opportunity to have these settled at law? Suppose the case of a claim against the administrator bound by the statute of limitations. Is he bound to inventory this demand? Or take the case of an equitable offset. Is he bound to inventory the demand against himself, without setting off?

Fessenden and *Shepley*, for the plaintiff.

The principal questions in this case are 1. whether a suit can be maintained against an administrator on his bond, for *not returning an inventory*. 2. Whether *accounting* is tantamount to returning an inventory. 3. Whether there be any necessity to cite the administrator to return an inventory before a suit can be brought on the bond.

The duty to return an inventory is one enjoined by statute. It is one of great importance, as well as to have it returned as *early* as the statute requires. Great facilities exist in such cases for embezzling the estate, and putting it out of the way. And the greater the lapse of time, the greater would be the difficulty to say what belonged to the estate.

The duty is also enjoined by the bond. By that also he is bound to render a *true* and *perfect* inventory. The position taken on the other side therefore, that if an inventory be returned, though a *false one*, the bond is saved, is not tenable. It would be a gross evasion of the law, and the positive requisitions of the bond. The law not only enjoins the duty, and requires the bond to be given for its performance, but also prescribes the judgment that shall be rendered in case of non-compliance. That is, that, where the administrator having received personal property of his intestate, and has not returned an inventory thereof, judgment shall be rendered against him for such part of the penalty of the Probate bond as the Court may consider reasonable. *Maine Stat. ch.* 51, *sec.* 72; *Dawes Judge v. Edes & al.* 13 *Mass.* 177; *Boston v. Boylston*, 4 *Mass.* 318; *Dawes Judge v. Boylston*, 9 *Mass.* 357; *Paine Judge v. Gill & al.* 13 *Mass.* 368; *Parsons v. Mills & al.* 1 *Mass.* 431, and in 2 *Mass.* 80.

2. Is this neglect to *return an inventory* distinct from a neglect *to account* ?

It is recognised as such by the statute, and is required to be thus inserted in the bond — a different mode of remedy is also prescribed in case of neglect, and a different penalty provided. They are so distinct that cases may exist where it would not be in the power of the Judge to accept one for the other. An administrator who has neglected to return an inventory, may be dead — or after such neglect he may be removed, in such cases surely he could not be summoned in. Or suppose the administrator neglects to inventory notes against himself — they become outlawed — and the administrator dies — what remedy have the heirs but on the bond?

3. Must the *citation* precede the suit on the bond?

It is contended that such citation is unnecessary. The reason for the distinction between returning an inventory, and accounting, is that an inventory is to be returned once, and *but once;* while in regard to the other the administrator cannot be considered as accounting in the sense of the statute until he has accounted for the whole estate, however many separate accounts, or however great a length of time it may take for that

purpose. The law not requiring or authorising a second inventory to be returned, it would be absurd to contend that the administrator should be cited into Probate Court to do it. *Hooker v. Bancroft*, 4 *Pick.* 53.

4. There is no distinction between property in the hands of a stranger and that in the hands of the administrator himself. The statute creates no such distinction. The bond makes no such distinction. They require him to inventory all property *within his knowledge*. If the statute had made any such distinction it would have been administering to iniquity — it would have increased the facilities for defrauding creditors and heirs, and would be placing temptations before the administrator to embezzle the estate. It is contended that he was bound to inventory all the property of the intestate that was within his knowledge in whosoever hands it might be.

Nor, in case of notes, is it of any consequence whether any equitable offsets exist or not. He is still bound to inventory them. Take the notes in question; were they the property of *Moses Titcomb*? Could he have maintained an action of trover for them? If so, the administrator was bound to inventory them. It is of no consequence whether they have been in part paid, or an equitable offset exist, or not; the *notes*, the property, whether valuable or not, was the property of the intestate, and should therefore be inventoried.

As to the questions on the pleading, they cited, *Bennett v. Filkins*, 1 *Saund.* 14, *notes* 1 and 2; *Digby v. Fitzherbert*, *Hob.* 101; *Haymen v. Gerrard*, 1 *Saund.* 103, *note* 1; *Barker v. Thorald*, 1 *Saund.* 48; *Salman v. Smith*, 1 *Saund.* 206; *Newman v. Moore*, *Hob.* 80; *Osborn v. Rogers*, 1 *Saund.* 267; *Hancock v. Prowd*, 1 *Saund.* 328; 2 *T. R.* 439; *Hayman v. Truant*, *Raym.* 199; *Ld. Abbington v. Merrick*, 3 *Saund.* 403; *Treewithy v. Ackland*, 2 *Saund.* 48; *The King v. Coke*, *Cro. Chas.* 384; *Potter v. Titcomb*, 7 *Greenl.* 312.

Greenleaf, in reply for the defendant, thought there was a misconception on the part of plaintiff's counsel of the meaning of the language used in the pleading. Legal phraseology in pleading is to be construed like all other language. It is

to be interpreted by the *animus loquentis* — the meaning of the parties.

The plaintiff charges the defendant with not inventorying the notes. — The defendant answers, "that was a disputed "claim." — He admits the notes were genuine, and in existence; but no more. He denies that they constituted a just claim against him. In saying that he did not "admit" the debt to be due, he meant, that he considered the notes *not to be due*, that they were in dispute, and that therefore he did not inventory them; not that, though the notes *were due*, yet he had never *admitted the fact.*

When the plaintiff sues the defendant on the bond for not inventorying these notes, the latter excuses himself by the fact that his liability was controverted. So that, the true question was, not whether the defendant was in law liable to pay; but whether the claim was, or was not, in reality and *bona fide* disputed. The defendant pleads the latter — the plaintiff replies the former — which is no answer to the plea.

This brings up the question whether the matter of the plea is *issuable* — i. e. Whether it is a *material averment.* In other words, is an administrator, at his peril, to settle the question of his own legal indebtedness, without resort to judicial tribunals; and to inventory a claim against himself, the validity of which is denied?

He is bound to return *an* inventory within three months. And has done so. Also to render an account within a year. Which he did. Also to administer all the estate that has come to his hands. This is in dispute.

It is to be observed that the pleadings do not charge the defendant with a *fraudulent omission* to inventory the notes. Now if he omits, *without fraud*, a *disputed claim*, how can this be a breach of this part of the bond?

Suppose an administrator by the purest *accident* omits to inventory a small and trifling piece of property. Is the bond therefore, forfeited? Suppose he *knew* that the intestate had sold certain property without receiving pay for it at the time, but *could not recollect to whom*, nor find any note or charge, at the time of making the inventory. Must the supposed debt

be inventoried, or the bond forfeited? Suppose he find a note among intestate's papers against a stranger which he, the administrator, knew to be paid, and was the only witness of the fact. Is he bound in such case to inventory it? Contend that he is not. The reasonable construction of the statute is, that the administrator shall inventory what he knows, or has good reason to believe, is the property of the intestate.

He is bound to inventory only what goes to the heirs, widow, or creditors. Not a *donatio causa mortis*; — therefore if he is donee, he need not inventory the thing given.

Again, in case of property not known at the time of making the inventory, but afterward discovered; — what is to be done with it? According to the argument on the other side, the administrator must call together the appraisers, and have it appraised, though it be but a *tenpenny nail*, on pain of forfeiting his bond! The correctness of this course is denied. The condition in the bond to *account*, is a *full security* to all parties — what need of more?

But again, before this suit could be maintained, the defendant was *entitled to a previous citation.*

1st. on *principle.* The Probate Court is the peculiar forum for settling all the rights and liabilities of the administrator in relation to the estate. It is unreasonable to compel him to litigate in various tribunals at the same time. Different Courts may adopt *different rules* in fixing his liabilities. The Probate Court has original and exclusive jurisdiction of *the estate*, and of the rights of all persons in relation to it, till *final distribution.* Courts of common law are only ancillary to it; and only in specified cases — As to settle a creditor's claim, disallowed by Commissioners — or to *enforce its decrees*, by an action on the bond; which is in the nature of a *writ of execution*, the Court of Probate not having power to issue one. The administrator is also a *trustee* for all concerned, and so entitled to be dealt with *in equity.* By the present suit the Court of Probate is ousted of its right to settle the *distributive share* of each heir, and to *deduct advancements* made to each. The Judge of Probate is by law *solely* to settle all claims of the administrator, as a creditor to the estate — why not *as debtor also?*

Again, the defendant was entitled to a previous citation upon authority. In the case of *Boston v. Boylston*, 2 *Mass.* 384, the language of the Court throughout shows that they considered it a settled point that there must be a citation to account further.

The Statute of 1821, *ch.* 51, *sec.* 71, 72, provides the remedy in *all cases* on Probate bonds. If by a *creditor*, he must first have his debt "*ascertained*," &c. If by an *heir*, he "must produce" a copy of *the decree*, &c. It is *imperative* — a *condition precedent* to his recovery — *a sine qua non.* And so is *Coffin v. Jones*, 5 *Pick.* 61 ; 5 *N. H. Rep.* 70 ; *Boston v. Boylston*, 4 *Mass.* cited on the other side.

In *Stevens v. Gaylord*, 11 *Mass.* 256, if an administrator *acknowledge* the debt, it is held to be so much money in his hands, and as such he is bound to account for it. If he "admits the debt to be due," say the Court.

The administrator is not bound to put into the inventory mere evidences of debts. The appraisers fix no value upon such. *Nowell v. Nowell*, 2 *Greenl.* 79. He is to be sure to return a *list* of *evidences of debt* which come to his hands, e. g. notes, &c. but not to inventory. This is only of those things which are *appraised* — and they never appraise *debts.* He was not therefore in this instance bound to put these notes in the inventory. Surely not unless they *came to his hands.* They were *negotiable* notes — not in his hands — and for aught he knew, *negotiated.*

A case is supposed on the other side, where the administrator has been removed, or has deceased, without returning an inventory, when he cannot of course be cited. In answer it may be said, that *his* administrator can. See *Nowell v. Nowell*, 2 *Greenl.* 75.

It is said that great mischiefs would grow out of the construction contended for by the defendant. Not so, cite him to *account*, and appeal to his *conscience.* If he can *only* be sued on the bond, the heirs may lose their remedy. The mischiefs contemplated would arise from the plaintiff's construction, not the defendant's.

The opinion of the Court was delivered at the ensuing *April* term in this county by

MELLEN C. J. — This case is again before us on special demurrer, in consequence of the amendment of the pleadings under leave granted for that purpose. *See* 7 *Greenl.* 302 — 337. The plaintiff's surrejoinder is the subject of the demurrer; and to the question as to its sufficiency or insufficiency all the authorities produced and arguments urged have had immediate reference.

The plea in bar is intended as a special performance; and as such it has been considered by the plaintiff. In the replication he assigns a breach, which, stripped of its technical phraseology, amounts to this; namely, that the two promissory notes therein described, given by the defendant to the deceased came to, and were *in the knowledge of the defendant*, within three months next following the date of the bond declared on, a part of the goods and chattels, rights and credits of the said *Moses Titcomb*; and that it was the duty of the defendant to have caused them to be inserted in the inventory of the deceased's estate; but that the defendant neglected so to do. The defendant in his rejoinder alleges that the notes described in the replication were not *known* and *admitted* by him to be due and a part of the goods and chattels, rights and credits of said *Moses Titcomb* to be administered on, in manner as alleged by the plaintiff. In the surrejoinder the plaintiff alleges that the notes set forth in the replication and at the time therein mentioned, were justly due from the defendant and were *a part* of the goods and chattels, rights and credits of said *Moses Titcomb;* of all which the defendant was *well knowing* within the three months beforementioned; and the surrejoinder concludes to the country. The questions are, whether it is good in *substance* and in *form*. That part of the condition of the bond to which the alleged breach has reference, required the defendant to make "a true and perfect inventory of all and singular the "real estate, goods and chattels, rights and credits of said de- "ceased," which *had* or *should* come to his *hands, possession* or *knowledge*, or into the hands or possession of any *other* person or persons *for him*, and the same, so made, to exhibit or cause

to be exhibited upon oath into the registry of the Court of Probate within three months from the date of the bond. Has this part of the condition been performed? If the facts stated in the surrejoinder are well pleaded, then they are admitted by the demurrer; and if they are admitted, then the fact is, that the defendant did not make a true and perfect inventory of all the property of the deceased which had *come to his knowledge before* he made and exhibited the inventory. As a perfect inventory, according to the condition of the bond was to be made and exhibited within a specified and limited period, a delay to make and exhibit it within that period would have been a breach; the condition required no notice or request to the defendant to perform this duty, which by the terms of the condition, he had agreed to perform. If the omission to include the two notes in the inventory, was a breach of the condition, we need go no further: We need not inquire whether an inventory and an account are considered the same thing; or whether more than one inventory can ever be required; or in what cases a citation to an administrator is necessary. We pass over these inquiries, though the opening counsel for the defendant has seen proper to dwell upon them. With respect to his proposition that the part of the condition respecting the making and returning an inventory, is saved, if *any* inventory is returned, whether *true* or *false*, if returned within three months, we will only say, that we deem it utterly destitute of any legal foundation. The counsel asks whether an administrator is bound to inventory property which he does not know to belong to the intestate, or which he claims as his own. It is not necessary to answer these questions, if the surrejoinder is well pleaded; for if so, as we have before said, the facts it states are admitted, *viz.* that the notes were due — were a part of the estate of the deceased — and that *he knew* both those facts. But in the cases supposed by the above questions, an administrator might comply with the terms of the condition of the bond by inserting the property in the inventory, accompanied in the one case with a statement of the doubt as to ownership; and in the other, with a statement of his own *claim* of the property as his own. By this course, the condition of his

bond, and his own rights would be saved. There can be no doubt that an administrator is as much bound to inventory notes or bonds due from himself as from others. He cannot sue himself it is true, but he can and ought to place on record their amount for the benefit of all concerned; otherwise, in case of his death, an administrator *de bonis non* might never arrive at the knowledge of their existence.

We now proceed to examine the causes of demurrer.

The ***first three*** and the 5th, 6th and 7th causes assigned, amount in fact, to the same thing, namely, that the surrejoinder does not traverse or deny the rejoinder, nor confess and avoid it.

The 4th cause is partly of the same character, and also has reference to the manner in which the surrejoinder is concluded to the country.

The 8th is that it is double and multifarious.

The 9th is merely formal.

To understand and appreciate the causes assigned, of the ***first*** class, we must look to the facts composing the rejoinder; which are, that the two promissory notes were not *known* and ***admitted*** by the defendant to be due, and a part of the estate of the intestate. In the surrejoinder the plaintiff passes over and takes no notice of the defendant's *non-admission* of his indebtedness and that the notes were a part of the intestate's estate, and traverses merely the defendant's alleged *want of knowledge* of those two facts. It can require neither argument or authority to prove that where a man is under a legal obligation to do a certain act, he cannot excuse his non-performance of the act, merely by alleging that he does not *admit* the existence of such legal obligation. To sanction such logic in a Court of law would be to constitute every defendant a judge in his own cause, and the manufacturer of his own defence. The defendant, by the condition of the bond, was *bound* to inventory all the property which, *to his knowledge*, belonged to the estate of the intestate, whether he *admitted* the fact to be so or not. The allegation in the rejoinder, therefore, as to what the defendant did or did not *admit* to be true, is of no importance; it is an averment wholly *immaterial*, which the plaintiff was not bound to notice in his surrejoinder. "The

" general rule is that a traverse must be taken to some *material* " point alleged by the adverse party, which, if found for him " who takes it, absolutely destroys the adverse party's right, by " shewing he hath none in manner and form as he has alleged." 2 *Saund.* 5, 175, *note* 1; 5 *Bac. Abr.* 390; *Roll. Rep.* 235. " Where the allegation is *not material* it cannot be traversed." 1 *Ch. Pl.* 586. Suppose that the defendant in his rejoinder had merely alleged that the notes were not *admitted* by him to be due and a part of the estate of the deceased; surely, in such case, it would have been bad on demurrer, as containing nothing but an immaterial and useless allegation. The character of the fact alleged did not become in any manner changed by being connected in the rejoinder with the *other* fact, namely, that the notes were not *known* to be due and a part of the estate of the deceased. As this alleged *want of knowledge* on the part of the defendant, is the only *material* fact averred in the rejoinder, we are well satisfied, for the reasons given, that the traverse of that fact was proper; and that the surrejoinder is not bad for any of the causes assigned, of the *first* class.

We are equally clear that the *fourth* cause assigned, is insufficient. When the plaintiff denies the fact stated in the plea, whether in cases of contract or tort, a replication to the country is frequent; and it is the better and shorter way. 1 *Ch. Pl.* 592. The same principle is equally applicable to a rejoinder and surrejoinder. " Where there is an *affirmative* on one side " and a *negative* on the other, or *vice versa*, the conclusion must " be to the country." 1 *Saund.* 103, *note* 1, and cases there cited. The only material fact alleged in the rejoinder is the defendant's *want of knowledge* that the notes were due and a part of *Moses Titcomb's* estate; and this fact is expressly denied or traversed by the surrejoinder. Upon the correct principles of pleading, the conclusion to the country was strictly proper.

The multifariousness and duplicity complained of in the 8th cause assigned, are, that the notes in question at the time the inventory was made and returned, were due, and a part of the estate of the intestate, and that the defendant well knew those facts. These are alleged to be separate, distinct, issuable facts.

Chitty, vol. 1, *page* 512, says, "The defendant is not precluded "ed from introducing several matters into his plea, if they are "constituent parts of the same entire defence and form one "connected proposition. Thus in detinue at the suit of a *feme*, "the defendant pleaded that after the bailment of the goods to "him by the plaintiff, she married E. F. and that during the "marriage, E. F. released to him all actions. It was objected "that the plea was double, *viz.* property in the husband and a "release by him; but it was resolved not to be double, because "he could not plead the release without showing the marriage." —To same point are *Robinson v. Rayley*, 1 *Bur. R.* 316. *Lord Mansfield* says, "Tis true you must take issue on a sin"gle point; but it is not necessary that this single point should "consist only of a single fact." —To the same principle are *Strong & al. v. Smith*, 3 *Caines*, 160; *Currie & al. v. Henry*, 2 *Johns. R.* 433; *Patcher v. Sprague*, *ib.* 462; and it is equally applicable in any stage of the proceedings. In the case before us both the facts stated in the surrejoinder were necessary. For if the notes in question were a part of the estate, still if the defendant did not know the fact, it would have been no breach of the condition not to inventory them. In the replication it is stated that both the notes are negotiable; and it is no where stated that they were in the *possession* of the defendant, but only that they came to and were in his *knowledge*. As they might have been in the hands of an indorsee, unknown to the defendant, it was necessary to bring his neglect within the terms of the condition to allege that the notes, at the time mentioned, were due to, and a part of the estate, and that the defendant knew it. This objection, therefore, has no legal foundation.

The opinion of the Court is, and they accordingly adjudge that the *surrejoinder is good and sufficient.*

Clapp *vs.* Sturdivant.

An *appeal* lies from the judgment of the Court of Common Pleas in a *suit in equity*, originally brought in that Court to redeem an estate under mortgage.

The *Report* of a Master in Chancery in the Court below, comes up with the case on appeal, and may be used as evidence in the same manner as if the Master had been appointed by this Court.

This, was a *Bill in Equity*, brought for the redemption of an estate under mortgage. It was originally commenced in the Court of Common Pleas pursuant to the provisions of *stat.* of 1821, *ch.* 39, *sec.* 1, and was brought to this Court by appeal.

Two questions were presented, 1. whether it was *appealable*, and, 2. whether the Report of the Master made in the Court below came up in the case, and could be used here.

Greenleaf and *W. Goodenow*, contended that it was not appealable. The words of the statute are "in any *action*," &c. and they insisted that this was not *an action* within the meaning of the statute.

They further insisted that if the appeal should be sustained, the Report of the Master was evidence here; — and likened it to the report of an auditor which always comes up with the case, and is used as evidence.

Daveis, maintained the contrary; and with regard to the latter, he likened it to a verdict in the Court of Common Pleas, which is not recognized in the Supreme Court on appeal, and makes no part of the case.

By the Court. — We think the appeal lies in this case. It is substantially embraced in the provisions of *stat.* of 1829, *ch.* 144, *sec.* 1, which have not been restrained or qualified in this respect by any subsequent statutes.

The Court of Common Pleas have the authority to appoint a Master — consequently, when one is appointed, who makes a Report, that Report is *evidence*; — and though on appeal, the judgment below is vacated, still the Report, as evidence, comes up with the case, and may be used in the same manner as a plan or an auditor's report might be used.

POLLEYS *vs.* SMITH.

The plaintiff recovered judgment in the Court of Common Pleas for nearly $200. The defendant appealed, and in this Court the plaintiff recovered $37 only. *Held* that this case, in regard to the question of costs, was not embraced in the special provisions of the act of *March* 4, 1829; but that the plaintiff was entitled to his costs after the appeal, under the general provisions of the act of 1821, *ch.* 59, he being "*the prevailing party.*"

THIS case is fully stated in the opinion of the Court, which was delivered by

MELLEN C. J. — This is an action of assumpsit. In the Court of Common Pleas the plaintiff recovered judgment for nearly $200. The defendant appealed: and on trial in this Court the plaintiff recovered judgment for about $37. Each party moves for costs since the appeal. By the 4th section of the act of *February* 4th, 1822, *ch.* 193, it is, among other things, provided that in case of appeal in all personal actions, except trespass *quare clausum fregit* and actions of replevin, wherein the value of the property replevied shall by the finding of the jury exceed one hundred dollars, if made "by the plaintiff, and "he shall not recover more than one hundred dollars debt or "damage, he shall not recover *any* costs after such appeal; but "the defendant shall recover *his* costs, on such appeal, against "the plaintiff, and shall have a separate judgment therefor; "and in case such appeal was made by the defendant, and the "debt or damages recovered in the Court of Common Pleas "shall *not be reduced*, the plaintiff shall be entitled to recover "*double* costs on the appeal." This provision being found unsatisfactory in its operation, was repealed by the act of *March* 8th, 1826, *ch.* 347, the 4th section of which provides, that in case of appeal, in any action, originally commenced in the Court of Common Pleas, if made by the plaintiff, and if on the final judgment "he shall not recover greater debt or damage than "were rendered for him in the Court of Common Pleas, the "defendant shall recover against him such costs as may arise "after the appeal, and shall have his execution for the same ac- "cordingly. And if the defendant shall appeal, and the debt

" or damage recovered by the plaintiff in the Court of Common " Pleas *shall be* reduced, he shall recover his costs, which costs " may arise after the appeal." The above provision was soon found to be unsatisfactory and the same was repealed by the act of *March* 4th, 1829, the first section of which enacts " that " in any personal action, except actions of trespass *quare clau-* " *sum fregit* and replevin, when the appeal shall be made by " the plaintiff, and he shall not recover more than one hundred " dollars as damages, he shall not recover any costs after such " appeal, but the defendant shall recover *his* costs after such " appeal, and shall have a separate judgment therefor. And in " case such appeal be made by the defendant, and the damages " recovered in the Court of Common Pleas shall *not be* reduced " the plaintiff shall recover his costs after such appeal, and an " additional sum equal to twenty-five per cent. on the amount " of such cost." Thus it is perceived that the 4th section of the act of 1826, which is now repealed, allowed costs to the defendant, after the appeal, when the damages were reduced; yet such repeal and the omission of such a provision in the act of 1829, shows plainly that it was intended that in such case the defendant should not recover costs. But it is contended that under the general provision in the act of 1821, that the *prevailing party* shall recover costs, the defendant has a right to costs since the appeal; that as to the cause *since the appeal*, he is the *prevailing* party. This construction cannot be admitted. As well might a defendant who, in the Court of Common Pleas, has reduced the amount recovered before a Justice of the Peace, claim the benefit of the general provision, and the allowance of costs, after the appeal, as the prevailing party, yet such a taxation was never known. We are satisfied that the *defendant*, therefore, in the present case, cannot have judgment for *his* costs since the appeal. The remaining inquiry is, whether the *plaintiff* is entitled to *his* costs since the appeal. On this point the last act is silent. It provides, in terms, only for the case where the damages are *not* reduced on trial in this Court. In the present case they *are* reduced, and, of course, the plaintiff cannot have any claim for the penalty of *twenty-five per cent.* beforementioned. Can he tax his simple costs since the appeal?

Upon *general* principles he is the *prevailing party*, although his damages have been lessened on the appeal, and as no *special* provision has been enacted, controlling the general principle, in such a case as the present, we are not at liberty to deprive the plaintiff of the benefit of it. The *special* provisions in the acts of *Massachusetts*, were repealed by our statute of 1822 before mentioned; and none exist in this State, but those we have quoted. The *general* provision therefore is in full force, and the plaintiff, as the prevailing party, is entitled to his costs, as well *since* as *before* the appeal.

Judgment accordingly.

SMITH *& al. vs.* HUBBS *Administrator of* HUBBS.

A. furnished goods to B. at the request of C. to hold and sell in the name, and as the agent of C. under a fraudulent arrangement between the three, to protect the goods from attachment at the suit of B's creditors. In a suit brought by A. against C. to recover the price of the goods, it was *held*, that it was competent for C. to allege and prove the fraud, in defence of the action — and that B. was admissible as a witness for that purpose.

ASSUMPSIT, on account annexed to the writ for goods sold and delivered. They were delivered to one *Silas M. Weymouth;* and the plaintiffs contended, and stated in the opening of the cause to the jury, that they were delivered to *Weymouth* on the credit of the defendant's intestate, and his promise to pay for them. This was denied by the defendant.

The plaintiff then called *Oliver B. Dorrance* as a witness, who testified, that on the 21st *Sept.* 1829, the intestate, who was a seafaring man, and *Weymouth*, came to his store and applied for goods to be delivered to *Weymouth;* — that he let *Weymouth* have a small assortment, say to the amount of three or four hundred dollars, and charged them to the intestate, who said he was going to supply *Weymouth* with goods to fill up a small store; — that *Weymouth* made the selection of goods; — that one or the other of them said that *Smith & Brown*, (the plaintiffs,) were to furnish the West India goods:

— that *Weymouth* soon after opened a store ; — that the witness supplied him with goods from time to time, and charged them to the intestate, *Hubbs* ; — that he should not have credited *Weymouth* ; — that he had settled with *Weymouth*, who had paid him in full.

George E. Hacker, also called by the plaintiff, testified that he was clerk to *Weymouth* in his store, which was kept by him *as agent*, and it was so expressed on his sign ; — that it was kept in *Hubb's* name ; — that the invoice of goods purchased were in his name, and bills against purchasers were made out in *Weymouth's* name as *agent*, and some of the notes were thus taken ; — that *Hubbs*, the intestate, once furnished money to the amount of $273, for which *Hubbs* asked, and *Weymouth* gave a receipt ; — and at another time $110, by way of an order on a *Mr. Lunt* ; — that *Weymouth* charged himself with what he took from the store.

Weymouth, who testified in behalf of the defendant, stated that *Brown*, (one of the plaintiffs) informed him of a vacant store, and advised him to take it ; — that he told *Brown* he was embarrassed by the failure of the *Merrills* ; that *Brown* told him he had better begin again and try ; that there would be no difficulty ; that the witness might get his father's name ; that he, *Brown* should be willing to have the witness trade under him, as matter of form, but they had so much business of their own they did not wish it. That *Brown* also named *William Hubbs*, the intestate, as one who might make such an arrangement ; — that some days after, the witness met *Brown* and *Hubbs* and had some conversation with them ; that *Brown* told *Hubbs* he did not wish any one to lend his name for security of payment ; observing that he was willing to look to the witness for payment ; but wished, or advised the witness only to appear *as agent*, so as to prevent the old creditors of the witness from calling on him ; that soon after all three went into *Smith & Brown's* store, and nearly the same conversation took place there ; that *Hubbs* examined some of the articles purchased ; that he took some notes for goods sold in the name of *Hubbs* ; that he bought goods of several other merchants in Portland in his own name ; that since the death of *William*

Hubbs he had made several payments to *Smith & Brown*, amounting to about $223.

Moses Hall was called by the plaintiffs, and testified that he was one of the assessors for Portland, during the years 1831 and 1832; — that *Weymouth* told him the stock in the store belonged to *William Hubbs*; — that he did not know which was taxed for it, but whoever was, he, *Weymouth*, should pay the tax.

The counsel for the plaintiffs objected to *Weymouth* as a witness, or rather to his competency to testify to the arrangement by him stated, with *Smith & Brown*; — contending that such an arrangement was a fraud and conspiracy to deceive and injure the creditors of *Weymouth*; that though such an arrangement, if proved by legal evidence, would defeat the plaintiffs' action, still that *Weymouth* could not be admitted as competent to prove the fraud and conspiracy.

The *Chief Justice* however overruled the objection, and the jury returned a verdict in favour of the defendant — the case being reserved for the opinion of the whole Court upon the correctness of this ruling of the presiding Judge.

There was also a motion filed by the plaintiffs' counsel for a new trial, because the verdict was against evidence.

Longfellow, for the plaintiffs, contended that *Weymouth* was incompetent to testify to the facts, for the proof of which he was called, because he would thereby be testifying to his own fraud. It would be against the policy of the law to permit it. *Churchill v. Suter*, 4 *Mass.* 156.

Weymouth was not only incompetent, but *the evidence* itself was inadmissible. — Not competent for the defendant to set up the fraud of his intestate in the defence of this action. A third person might avail himself of it, and take the property, but *a party* to the fraud cannot. *Roberts v. Roberts*, 2 *Barn. & Ald.* 367; *Montefeori v. Montefeori*, 1 *Wm. Bl. R.* 363; *Osborne v. Moss*, 7 *Johns. R.* 161; *Bac. Abr. tit. Fraud, p.* 307.

A contract, though fraudulent, is binding between the parties to it, and may be enforced, unless the plaintiff is obliged to disclose the fraud in seeking his remedy. A defendant cannot al-

lege and prove his own turpitude in defence, and thereby discharge himself from an obligation otherwise legal.

The verdict ought also to be set aside, because it is against the weight of evidence.

Mr. *Longfellow* here went into a particular examination of the testimony, and endeavoured to maintain the position taken.

Fessenden & Deblois, for the defendant.

The facts in the case do not show any attempt to defraud the creditors of *Weymouth.* The debts due to his then existing creditors had been incurred long before this transaction — they therefore, could not be deceived by it — those credits had not been given on the faith of these new goods. Nor could the new creditors be deceived — no false credit was given *Weymouth* — he did not pretend to the trading community, that he owned the store and goods, but the contrary.

But if the agreement between the plaintiffs and *Hubbs* and *Weymouth* was fraudulent, then a demand arising out of such contract will not be enforced by a court of law. And it is not only competent for the defendant to avail himself of this defence, but he may show the fraud by *Weymouth* himself. In support of which, they cited, *Jordan v. Lashbrook,* 7 *T. R.* 601; *Stark. Ev.* 2, 87, *in note; also pages* 17, 18; *Clark v. Shee & al. Cowper,* 197; 2 *Ld. Raym.* 1008; *Ward v. Mauns,* 2 *Atkins,* 228; *Bean v. Bean,* 12 *Mass.* 20; *Loker v. Haynes,* 11 *Mass.* 498; *Hill v. Payson & al.* 3 *Mass.* 559; 1 *Phillips Ev.* 32, *and cases there cited; Goodwin v. Hubbard,* 15 *Mass.* 210; *Wait v. Merrill,* 4 *Greenl.* 102.

Where both parties are equally guilty, the maxim of law is *in pari delictu, potior est conditio defendentis.*

Where one has paid money to induce another to do an illegal act, the payer cannot recover it back. The cases cited by the counsel on the other side are of this kind. There is a marked distinction in this respect, between contracts *executed* and contracts *executory.* If the money be not paid in the case above supposed, the facts may be shown and payment resisted — but if paid it cannot be recovered back.

As to the motion to set aside the verdict as against evidence,

they contended, that if there was any evidence on the part of the defendant, which uncontradicted would authorise the jury to find a verdict for him, then it should not be disturbed. It should be an extreme case to authorise the Court to set aside a verdict as against the weight of evidence. The present, certainly not such an one. On the contrary, the weight of evidence, it was contended, was entirely in favour of the defendant.

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

MELLEN C. J. — The motion for a new trial, predicated on the report of the presiding Judge, has been placed, in the argument, by the counsel for the plaintiffs, on two grounds — *viz.:*

1. That by law it was not competent for the defendant to set up the defence which he was permitted to make: —

2. That *Weymouth*, in support of the defence, was an inadmissible witness. The counsel contended that both objections were well founded, because the *intestate* and *Weymouth* were both parties to the fraudulent arrangement to which *Weymouth* testified. And the counsel for the defendant, on his part, contended that the arrangement abovementioned was *not* fraudulent and illegal. — The correctness of this position, we apprehend cannot be maintained on any sound principles; for the object in view of the parties was to secure and protect the property that was purchased of the plaintiffs, as well as of other persons, and placed in the store, from the *old*, that is, the *then existing*, creditors of *Weymouth;* under false appearances to deceive them, and thus to defraud them. Surely such a transaction cannot be sanctioned in a court of justice. The design of all three, according to the finding of the jury, was, in reality, that *Weymouth* was to be considered to all intents and purposes as the purchaser of the goods; and then they were to be placed by him, under the cover of the name of the intestate, and, to appearance, as *his* property. Such is the real nature of the transaction, as the jury must have found it: it thus assumes the essential character of a fraudulent sale by a debtor, to conceal his property from his creditors; in the formation and execution of which design all three of the parties were

aiding and acting in concert. Nine times in ten, in similar cases, the object is to defraud ***existing***, not ***future***, creditors. *Howe v. Ward*, 4 *Greenl.* 195. The next inquiry is, whether the plaintiffs' *first* ground of objection, above stated, is tenable. The argument is, that no man shall defend himself by alleging and proving his own turpitude. The counsel for the plaintiffs admits that where the fraud that poisons, or the illegality that destroys a contract is disclosed and proved by him who claims the benefit of it, there the ***other*** party, attempted to be charged by such contract, may avail himself of such fraud or illegality to defeat it. But he contends that when a plaintiff has proved the contract on which he has declared, and which appears to be fair and legal, the defendant shall not be permitted, by way of defence, to prove that the contract was fraudulent and illegal between the plaintiff and himself, and thus avail himself of his own wrong and violation of law. Notwithstanding the emphatical manner in which the counsel contended for the above distinction, we are not aware of its existence, except under a limitation which is not applicable to the case before the Court. That limitation we will state. There is a marked and settled distinction between *executory* and *executed* contracts of a *fraudulent* or *illegal* character. Whatever the parties to an action have *executed* for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently or illegally ***contracted to execute***, the law refuses to compel the contractor to execute or pay damages for not executing; but in both cases leaves the parties where it finds them. The object of the law in the ***latter*** case is, as far as possible, to prevent the contemplated wrong; and in the *former*, to punish the wrongdoer, by leaving him to the consequences of his own folly or misconduct. The case of *Doe on dem. of Roberts v. Roberts*, cited from 2 *Barnw. & Ald.* 367, differs from the case under consideration. It is a case of an ***executed*** contract. *George Roberts* made a deed to the plaintiff, of the premises in question, for which ejectment was brought against the grantor's widow, and on cross examination of a witness to the deed, it appeared that it was made on an illegal consideration. On a question reserv-

ed, the Court disallowed the defence, on the ground that a grantor could not impeach his own deed on account of his own fraud. To make this case more plain, suppose the grantor had brought an action against the grantee to recover the land back on the ground of fraud; it is very clear he could not recover against his own conveyance, though it was a voluntary and fraudulent one; for it was good between the parties and unaffected by the statute of *Eliz.* Yet if in the case reported the Court had sustained the defence, on the ground of fraud between the grantor and grantee, the title of the latter would have been defeated and the heir of the grantor would have held the land, in direct opposition to the principle above stated, as to *executed* contracts of a fraudulent or illegal character. The case from *Wm. Bl.* 363, *Montefeori v. Montefeori*, was of the same nature as *Doe v. Roberts.* The abstract of the case of *Osborne v. Moss* is in harmony with the case of *Doe v. Roberts:* it is in these words, "where a person makes a fraudulent conveyance of his goods to another, for the purpose of defrauding his creditors, and dies intestate, the conveyance though void against creditors, is good against the intestate; and an action may be maintained against the administrator for the goods." This is the case of an *executed* contract also. — With respect to the supposed distinction abovementioned, we have not found it stated in any of the numerous cases we have examined, which relate to contracts of an *executory* kind, and which were fraudulent or illegal. In many of them there is a statement of the facts on which the questions of law arose, without an intimation by which party the proof of them was introduced. In some cases of special contract, the fraud or illegality appeared on the face of it. In others, as cases for money had and received, the facts are necessarily disclosed in the opening of the cause. In others, a fair contract and ground of action is displayed in the opening, and it must, from the nature of the case, have been the testimony on the part of the defendant that disclosed the fraud or illegality to the Court. In numerous other cases it appears distinctly that the evidence, destructive of the plaintiff's right to recover, was introduced by the defendant, though he was a party to the fraud or illegality. The following

cases support the last position. *Cockshot v. Bennett*, 2 *T. R.* 763; *Lightfoot & al. v. Tenant*, 1 *Bos. & Pul.* 55. It was an action on bond, and the defendant pleaded the facts which disclosed the poison and defeated the action. *Clugar v. Panaluna*, 4 *T. R.* 466, — a smuggling transaction — proved by the defendant. *Waymell v. Reed & al.* 5 *T. R.* 599, a case of the same kind; and the smuggling arrangement between the parties proved in the same manner. *Howard v. Hodges*, 1 *Bos. & Pul.* 341, *note*; 1 *Selw. N. P.* 79; *Bowry v. Bennel*, 1 *Camp.* 348; *Girardy v. Richardson*, 1 *Esp. Cas.* 13; *Bayley & al. v. Taber*, 5 *Mass.* 286. In *Holman v. Johnson, Cowp.* 341, *Lord Mansfield* says, "The objection that a contract is im- "moral or illegal as between plaintiff and defendant, sounds at "all times very ill in the mouth of the defendant. It is not for "*his* sake, however, that the objection is ever allowed; but it "is founded on general principles of policy, which the defen- "dant has the advantage of, contrary to the real justice, as be- "tween him and the plaintiff, by accident, if I may so say. "The principle of public policy is this, *ex dolo et malo non ori-* "*tur actio.* No Court will ever lend its aid to a man who founds "his cause of action upon an immoral or illegal act. If from "the plaintiff's own showing *or otherwise*, the cause of action "appears to arise *ex turpi causa*, or the transgression of a pos- "itive law of this country, the Court says he has no right to be "assisted. Where both are equally in the wrong, *potior est* "*conditio defendentis.*" *Starkie, vol.* 2, *page* 86, says, "Where the illegal consideration is set forth upon the record, "the objection may be taken either by demurrer, or in arrest of "judgment. But where it does *not* appear on the record, *the* "*defendant may shew* that the claim is in reality founded upon "an illegal and noxious agreement." In the case of the *Inhabitants of Worcester v. Eaton*, 11 *Mass.* 368, *Parker C. J.* in delivering the opinion of the Court, says, "It appears to be "the settled law in *England*, and we are satisfied it is also the "law here, that where two persons agree in violating the laws "of the land, the Court will not entertain the claim of either "party against the other, for the fruits of such an unlawful bar- "gain. If one holds the obligation or promise of the other, to

" pay him money, or do any other valuable act, on account of " such illegal transaction, *the party defendant may expose the* " *nature of the transaction to the Court*" — and thus defeat the action.

We apprehend that the authorities we have collected and stated in this opinion, are sufficient to shew that there is no such legal distinction as the counsel for the plaintiffs has endeavoured to establish, as to the source from which the evidence of covin or illegality is to be derived, in actions on *executory contracts.* We may, however, add to the list, the familiar defence of usury in actions on contracts: in all such cases, the evidence of the usury is always introduced by the defendant to prove the illegality of the contract. The defence which destroys a gaming note is always sustained by proof adduced by the defendant, though he is guilty of a violation of law, and relieves himself from his obligation by such violation in concert with the plaintiff. For the reasons thus given, we are of opinion that it was competent for the defendant to set up the defence which he was permitted to make.

As to the *second* ground of objection, namely, the alleged incompetency of *Weymouth* to testify in support of the defence, there seems to be no room for hesitation. In *Hill v. Payson,* 3 *Mass.* 559, it was decided that the grantee of a deed was a good witness to prove the deed without consideration and void against creditors. In *Loker v. Haines,* 11 *Mass.* 498, it was decided that the grantor in a deed, if not interested, was a good witness for a similar purpose. The same principle was decided in the above cited case of *Inhabitants of Worcester v. Eaton.* So also in *Bean v. Bean,* cited in the argument. It would seem to be a sound principle, that the same reasons and policy which render it proper and salutary to permit a partner in the fraud or illegality in the contract, when sued upon it, to disclose and prove such fraud or illegality by way of defence to the action, render it proper for any other partner, except the plaintiff, to be a good witness in support of the defence. On the whole, we are all of opinion that the ruling of the Judge was correct, and that the motion for a new trial cannot be sustained for any reasons appearing on the report of the Judge.

The only remaining question is, whether the verdict ought to be set aside, as being against evidence, as stated in the motion on file. On this point, we need say no more than that the testimony was contradictory, and therefore, peculiarly proper for the exclusive consideration of the jury. We see no ground for disturbing the verdict on account of the conclusion to which they arrived.

Judgment on the verdict.

ELDER, *plf. in equity vs.* ELDER.

A. in writing agreed to convey to B. on the payment of a certain agreed sum "a lot of land situated in the town of *Windham*." B. alleging that there was a mistake in the contract, — that *the whole* of a particular lot was intended to be embraced by it, though a part of the lot lay in the town of *Westbrook*, brought his bill in equity to have the mistake corrected, and specific performance decreed, of the contract *as amended*. *Held*, that *parol evidence* was inadmissible to vary the terms of the written contract, according to the prayer of the bill.

THIS was a ***bill in equity***, in which the plaintiff alleged that on the 17*th* of *October* 1830, he contracted with *Reuben Elder*, now deceased, for the purchase of a certain lot of land lying in the towns of *Windham* and *Westbrook*, being one parcel, and not several, though accidentally intersected by the boundary line of those towns, said lot being the entire share of *Reuben Elder* in the real estate of *John Elder*, deceased, which had been set off according to the will of the latter. That he agreed to pay therefor the sum of $300 by instalments as follows: $100 in three months — $100 in one year — $50 in two years, and $50 in three years. That it was agreed the deed should be given on the payment of the first instalment. That $25 was paid to *Reuben Elder* before his decease in part of the first instalment, and after his decease, to Elizabeth Elder, his widow and administrator $75 more, being the balance of the first instalment. He further alleged that a memorandum *intended* to

express the foregoing agreement was signed by *Reuben Elder*, in which the land intended to be conveyed was described as "a lot of land situated in the town of *Windham*, formerly "owned by *John Elder*." That there was *a mistake* in writing the memorandum of agreement, inasmuch as part of the lot intended to be embraced in the description was in the town of *Westbrook*. That at the time of making the contract he was ignorant of this fact. That he believed if *Reuben Elder* was living, he would not hesitate to correct this mistake, and to fulfil his agreement by conveying the whole lot. But that the administrator and heirs at law had refused. These he prayed might be summoned in to answer the foregoing allegations, and certain inquiries put to them, with regard to conversations had with *Reuben Elder*, and admissions made by him.

The bill closed with a prayer that the mistake in the contract before named might be corrected, and that the administrator and heirs might be required to convey to him by deed the whole lot claimed — and also for such general relief as the Court might grant.

Elizabeth Elder, the widow and administrator of *Reuben Elder*, in her answer set out the written contract between her deceased husband and the plaintiff, in the words following: —

"*Gorham, Aug.* 17, 1830.

"I *Reuben Elder* do agree to sell to *Josiah Elder* a lot of "land situated in *Windham* formerly owned by *John Elder* for "three hundred dollars. — One hundred dollars in three months "— the first year one hundred dollars — the second year fifty "dollars — the third year fifty dollars — the deed to be given "when the first hundred dollars is paid.

"*Reuben Elder.*"

She denied all knowledge of any other agreement than the above and averred her disbelief of the existence of any mistake in the contract, as alleged by the plaintiff.

The answers of the other defendants were substantially the same as the foregoing — all averring a willingness to convey the land lying in *Windham* according to the terms of the contract, and no more.

Several depositions were taken by the plaintiff tending to prove, by the admissions of *Reuben Elder*, and otherwise, that there was in fact *a mistake* in the contract as alleged in the bill — and the principal question in the case was upon the admissibility of this testimony.

Daveis, in opening for the plaintiff, to the point that parol testimony is admissible to correct the mistake in the contract, cited the following authorities: 1 *Maddox Chan.* 49; 2 *Atkins*, 33 and 50; *Sugden on Vendors*, (2*d. ed.*) 107, *et sequitur*, and cases there cited; *Bradbury v. White*, 4 *Greenl.* 391; *Dunlap v. Stetson*, 4 *Mason*, 349; *Washburn v. Merrill*, 1 *Bay's Cas. in Error*, 139; *Marks & al. v. Pitt*, 1 *Johns. Chan. Cas.* 594; *Lyman v. U. S. Ins. Co.* 1 *Johns. Chan. Cas.* 630; *Gillespie v. Moon*, 2 *Johns. Chan. Cas.* 585; *Abbey v. Goodwin*, 7 *Con. R.* 377; *Avery & ux. v. Chappel & al.* 6 *Con. R.* 270; *Patterson v. Hull*, 9 *Cowen*, 747; *Davenport v. Mason*, 15 *Mass.* 85; *Brown v. Gilman*, 13 *Mass.* 158; *Wilkins v. Scott*, 17 *Mass.* 251; *Codman v. Winslow*, 10 *Mass.* 146; *Leland v. Stone*, 10 *Mass.* 459; *Fowle v. Bigelow*, 10 *Mass.* 379; *Hathaway v. Spooner*, 9 *Pick.* 23; *Allen v. Bates*, 6 *Pick.* 460; *Sugden on Vendors*, 87 to 94; *Fonblanque's Eq. ch.* 3, *sec.* 6; 1 *Starkie's Ev.* 1027.

2. To the point that the defendants could only avail themselves of the statute of limitations by plea, he cited, 1 *Beawes*, 177; *Watts v. Waddle*, 6 *Peters' R.* 589.

3. The parties are not confined to cases where they have *no remedy* at law. 3 *Black. Com.* 434; *King v. King*, 7 *Mass.* 496.

Longfellow, for the defendants, argued that the granting the prayer of this bill would virtually be repealing the statute of frauds. This statute requires all contracts for the sale of lands to be *in writing*. The real contract between the parties in this case is in writing. It is plain and susceptible of a reasonable construction. But the plaintiff by this bill proposes to alter, vary and destroy it, by superadding to it matter gathered from the loose and uncertain recollections of witnesses. This, the law will not permit. It excludes all parol testimony offered to explain, alter or vary written contracts. The bill

proposes to the Court to *make* a contract between the parties, and then to enforce it. But the statute of frauds is as binding upon this Court sitting as a court of chancery as if sitting as a court of law.

Against the admission of parol evidence under the circumstances of this case, he cited the following authorities. *Maddox Chan.* 405, 406; *Manning v. Lechmore*, 1 *Atkins*, 453; *Ramsbottom v. Jordan*, 1 *Vesey & Beames*, 165; 13 *Vesey*, 50; *Butler v. Cook*, 1 *Schoale & Lefroy's R.* 39; *Pyms v. Blackburn*, 3 *Vesey*, 34; *Lawson v. Lord*, *Dickens*, 346, 554; *Rich v. Jackson*, 4 *Broke's Chan.* 514; *Hunt v. Rousmanier*, 2 *Mason*, 342; *Colson v. Thompson*, 2 *Wheaton*, 341; *Dwight v. Pomeroy*, 17 *Mass.* 354.

The rules of evidence, he contended, were the same at law as in equity, and upon no principles could this testimony be admitted.

The authorities cited by the plaintiff's counsel in which parol evidence was admitted to correct a mistake in, or to explain a written contract, (with the exception of *Gillespie v. Moon*,) related to personal property. This relates to real estate. A manifest and palpable distinction exists between the cases.

The chancery jurisdiction of this Court is limited to cases where the parties have not a fair, full, and adequate remedy at law. In this case the law does afford that adequate remedy. The contract is in writing, — is plain and unambiguous, — and may be enforced at law by either party.

Daveis in reply. The principle that excludes parol testimony where there was a written contract, goes upon the ground that all the *colloquia* were reduced to writing by the contract. This is a principle of the common law, and derives no force or authority from the statute of frauds. The plaintiff's object in this case may be accomplished, without infringing in any respect upon that statute.

The general rule is admitted, that parol evidence is inadmissible to explain written contracts. But in a case in *Dutton* a distinction is drawn between the *operative* and *descriptive* parts of the contract. In regard to the latter, parol evidence is held to be admissible. This is an exception to the common

law principle. In the present case, the *description* is imperfect, and we ask leave to introduce parol evidence to perfect it.

Another case where parol evidence was admitted was *Brown v. Gilman*, before cited, where *a name* was corrected.

The case of *Naylor v. Naylor*, *Wheaton*, in opposition to the principle of *Brown v. Gilman*, is now abandoned as unsound law.

If the mistake can be corrected, it follows that parol evidence may be admitted. A mistake can never be shown but by parol.

In *Hunt v. Rousmanier*, it is true, the relief sought was the correction of a mistake by parol, and was denied. But the distinction between that case and this is clear. Where the parties have made a mistake as to the effect or legal consequences of their contract, a court of equity will afford no relief; which was the case in *Hunt v. Rousmanier*. The plaintiff seeks relief here on an equity independent of, and distinct from, a sense of the instrument. This is the ground on which relief is sought. This is the only ground upon which a court of equity can go in granting it.

It is said by the counsel for the defendants, that the rules of evidence in law and equity, are the same. This is denied. There is a very broad and marked distinction. The two systems are diverse. In one, the parties are permitted to testify, in the other, not. Here is an early, and marked difference established. Another, is found in the doctrine of *part performance*. This is a doctrine in equity, but not in the law. Again, it may be found in the doctrine of *resulting trusts*. These, may be proved by *parol* in courts of equity, but not in courts of law. Such have been the decisions in *Maine*, as to the latter; and in *New-York* and *New-Hampshire*, as to the former. Such is the doctrine in *England*.

It is confidently believed that the statute of frauds presents no obstacle to the prayer of the plaintiff. Very soon after the passage of that statute, which is understood to have been drawn by *Lord Nottingham*, a case came before him, in which he admitted parol evidence to correct a mistake in a deed. But at all events this statute is for the benefit of those who choose to avail themselves of it. The Court will not apply it *ex officio*.

It is like the privilege of pleading infancy, which a defendant may avail himself of or not. In this case the statute of frauds was not pleaded as it should have been, if intended to be relied on.

WESTON J. delivered the opinion of the Court.

The plaintiff claims relief upon the ground of mistake in the terms of a contract, entered into between himself and *Reuben Elder*, deceased; and he prays for an amendment and enforcement of the contract, according to the true intent and meaning of the parties, and for such general relief as the Court may grant. All knowledge of the existence of a mistake being denied in the answers, the plaintiff has proceeded to adduce parol proof of the allegations in his bill.

This kind of proof is objected to by the counsel for the defendants, as incompetent to alter, vary, or contradict a written instrument, plain and intelligible in its terms. That this is inadmissible at law, is a principle well settled. And it is insisted that it is a rule of evidence equally binding upon courts of equity. If the inquiry was, what contract have the parties made, this is to be ascertained by the best evidence the nature of the case admits. It is the rule at law, because calculated to elicit and establish truth. And what is best adapted to produce this effect, does not depend upon the character or jurisdiction of the tribunal before whom the question may arise. It would tend to pervert, rather than to establish, justice, if the rules of evidence were so varied in different courts, that in the one, facts were to be proved by the best evidence, while in the other, that of an inferior character might be received and substituted. We do not so understand the law. What contract the parties have actually made, must depend upon the same evidence, both at law and in equity. And if made in writing, what is written is the best evidence of this fact, which cannot be varied, altered or changed by parol testimony. But in both courts, it may be shown by parol evidence to have been tainted by fraud, and therefore not binding or operative upon the party attempted to be charged. But in a court of equity, other circumstances may in certain cases become the subject of inquiry,

not to show what contract was made ; but whether it was made or entered into by mistake or accident. Whether these inquiries have promoted the cause of justice, or whether they have not more frequently defeated it, by opening a door to fraud and perjury, or whether they may not occasion more mistakes than they correct, are questions, which it does not belong to us to decide. This branch of equity jurisdiction is of recent origin in our State ; but having been conferred upon this Court, it is to be exercised according to the rules and practice of courts of equity in that country from which we have derived our jurisprudence, except so far as they may have been changed or modified by our laws. We have jurisdiction expressly given in cases of mistake. How are they to be proved ? They must depend upon extraneous testimony. They are rarely apparent upon the face of the instrument to be affected. Although its terms may often lead to a conjecture that there may have been some mistake, the fact must almost uniformly be proved *aliunde*. It may often be made out, or rendered highly probable, by a recurrence to other written evidence ; as where the instrument executed is found not to conform to a previous written agreement, in relation to the subject matter. And yet this is not conclusive ; for it might very fairly be urged in comparing both, that the variance was designed and occasioned by the consent of the parties. Parol testimony is so generally admitted in chancery to prove a mistake, that in *Baker v. Paine*, 1 *Vesey*, 456, *Lord Hardwick* inquired, " how can a mistake in an agree-
" ment be proved but by parol ?"

It is well settled that it is admissible on the part of the defendant, upon a bill for the specific performance of a contract. The reason assigned is, that this is a class of cases in which a court of equity will exercise or withhold its power at its discretion, and that it will not interfere in favour of the plaintiff to enforce performance, where a mistake essentially affecting the contract is made to appear. *Joynes v. Statham*, 3 *Atk.* 388 ; *Rich v. Jackson*, 4 *Bro. C. C.* 514 ; *Ramsbottom v. Gosden*, 1 *Vesey & Beames*, 165 ; *Townsend v. Stangroom*, 6 *Vesey*, 328, and the cases there cited.

In *Gillespie v. Moon*, 2 *Johns. Ch.* 585, the learned Chancellor

maintains that relief may be had in chancery against any deed or contract in writing, founded in mistake or fraud. That the mistake may be shown by parol proof, and relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defence. We have looked into the cases cited by him, but are not satisfied that they sustain the doctrine to the extent which his language would seem to imply. In some of them parol evidence of mistake was admitted on the part of the defendant, to rebut an equity. In others, contracts not relating to real estate, but of a personal character, were reformed or amended upon parol proof of mistake. These cases show that this has sometimes been done in courts of equity; but under what circumstances, it is unnecessary to state, as the contract before us is one relating to real estate.

Others are referred to, where mistakes in marriage settlements have been corrected by proof *aliunde*. In all these cases, there was written evidence to amend by; either resulting from the plain intentions of the parties, although defectively expressed, or from previous instructions, or subsequent declarations, in writing. In *Rogers v. Earl, Dickens*, 294, the facts of which are reported in *Sugden's* law of vendors, 124, it plainly appeared by the settlement that the wife was to have the power she exercised in favour of her husband, but by an omission by mistake of the limitation to the wife for life, and to trustees to preserve contingent remainders, which were required by written instructions, the power could not without correction be legally exercised, to effect which the settlement was ordered to be rectified.

In *Watts v. Bullas, Peere Williams*, 60, a voluntary conveyance to a brother of the half blood defective at law, was sustained in equity against the heir at law, the Lord Keeper being of opinion that as the consideration of blood would at common law raise a use, the same consideration would in that imperfect conveyance raise a trust, which ought to be made good in equity. The authority of this case however was controverted by *Lord Hardwick*, in *Gowing v. Nash*, 3 *Atk.* 189.

In *Randall v. Randall*, 2 *Peere Williams*, 464, the husband executed a deed, in which he acknowledged a mistake in the family settlement, to correct which he covenanted that he would

stand seised of the premises in trust for himself and his wife for their joint lives, remainder in trust to the heirs of their two bodies, remainder in trust for the wife and her heirs, with a covenant from the husband to convey the premises to these uses. And the lands were decreed to be settled accordingly.

In *Barstow v. Kilvington*, 5 *Vesey*, 593, the wife, after the decease of the husband, wrote to the plaintiff, *Barstow*, who was about to marry one of her daughters, informing him in what manner she had agreed to settle the estate in question. The marriage took effect. By the legal construction of the settlement referred to in the letter, the daughter was entitled to a less portion; but the settlement was reformed according to the letter, against the heir at law of the wife. Upon a bill in equity founded upon the letter, she would have been bound to have made good the agreement as there set forth, and her heir at law coming in under her, was affected by the same equity.

Chancellor Kent further cites cases, where defects in mortgages have been made good against subsequent judgment creditors, who came in under the party bound in conscience to correct the mistake. As where A. surrenders a copyhold by way of mortgage, but the surrender was not presented at the next Court, and then became a bankrupt, this mortgage was held good in equity against his assignees. *Finch v. The Earl of Winchelsea*, 1 *Peere Williams*, 277. And so, as was held in that case, an agreement in writing to convey, upon an adequate consideration paid, is a lien in equity upon the land, against the judgment creditors of the party, although not against a mortgagee without notice. But the assignees of a bankrupt are affected by every equity, which would bind the bankrupt himself.

We do not regard the precedents in relation to personal contracts as authorities in this case, which having relation to real estate, is under the protection of the statute of frauds. That statute is not formally pleaded; but the contract actually executed in writing is set forth in the answer, and it is relied upon by the counsel for the defendants, to repel the parol proof, set up by the plaintiff to vary its terms.

Marriage settlements are little known or used in this State;

and although sometimes rectified or reformed in *England*, where mistakes have intervened, yet we have not found any case of the kind, where this has been done upon parol testimony, without written evidence to amend by; nor are we aware that it could be done, without violating the statute of frauds.

In respect to mortgages, we have a system of our own, depending on statute, which varies in many respects from the law, as administered in the English courts of equity, and in the State of *New-York*.

But the case of *Gillespie v. Moon*, itself, is relied upon as an authority in favour of the plaintiff. The defendant there had agreed to purchase two hundred acres of land, the location and bounds of which were well understood. But by mistake, clearly proved by parol, the deed embraced fifty acres more. The defendant perceiving his advantage, although he acknowledged the mistake to several persons, insisted upon holding all the land covered by his deed. This claim, so clearly against equity and good conscience, was strongly tinctured with fraud; for there is little difference in moral turpitude, between fraudulently making a deed conveying more than is intended by the parties, and attempting to hold the same advantage, where it arises from mistake or accident. Indeed fraudulent conduct is distinctly imputed to him in the opinion of the Court. The Chancellor says, "the only doubt with me is, "whether the defendant was not conscious of the error in the "deed, at the time he received it and executed the mortgage, "and whether the deed was not accepted by him in fraud, or "with a voluntary *suppression of the truth*. That fraudulent "views very early arose in his mind, is abundantly proved." If it was a case of fraud, as well as of mistake, there could be no question either of the admissibility of parol testimony, or that the plaintiff was entitled to relief. Indeed he would have been so entitled at law. But the measure of relief would have varied. At law, a fraudulent deed is entirely void. In equity, its effect may be defeated only so far as it is intended to have a fraudulent operation. But aside from the fraudulent views, which may always be imputed to a party, who would take advantage of a mistake, that alone may be regarded in

equity as an infirmity calling for relief, where it goes to the whole subject matter of a conveyance, or where it affects only a part of it. It is not charging a party upon an executory contract in relation to real estate, which cannot be enforced unless in writing; but it shows defects to defeat the operation of a written contract. It is in the nature of an injunction upon a party, not to avail himself of an advantage against good conscience. It does not make a new contract, but examines the quality, extent and operation of one formally executed by the parties. It is one thing to limit the effect of an instrument, and another to extend it beyond what its terms import. A deed by mistake conveys two farms, instead of one. If the suffering party is relieved in such a case by a court of chancery, full effect is not given to the terms of a written instrument. But the statute of frauds does not prescribe what effect shall be given to contracts in writing; it leaves that to be determined in the courts of law and equity. A deed conveys one farm, when it may be proved by parol that it should have conveyed two. Here equity cannot relieve, without violating the statute. To do so, would be to enforce a contract in relation to the farm omitted, without a memorandum in writing, signed by the party to be charged, or by his authorised agent. These are distinctions, which may be fairly taken, between the case cited from *New-York*, where the plaintiff sought to be relieved from the undue operation of a deed, which conveyed too much, and the case before us, where the prayer of the plaintiff is, that a contract in writing may be so extended by parol testimony, as to embrace more land than that contract covers. But whether this Court, sitting as a court of equity, would receive parol evidence of a mistake in a deed, to restrain its operation, it is not necessary to decide. There may be great appearance of equity in such a proceeding; but it may admit of question, whether more perfect justice would not be administered, by holding parties to abide by their written contracts, deliberately made, and free from fraud. As far as this rule has been relaxed by the clear, unequivocal, and settled practice of chancery, we are doubtless bound by it, in administering that part of our system,

but we are not disposed to adopt any new or doubtful exception to so salutary a rule.

In *Jordan v. Sawkins*, 3 *Bro. C. C.* 388; 1 *Vesey*, 402; *Rich v. Jackson*, 4 *Bro. C. C.* 514; *Clinan v. Cooke*, 1 *Shoales & Lefroy*, 22; *Woollam v. Hearn*, 7 *Vesey*, 211, and in *Higginson v. Clowes*, 15 *Vesey*, 516, the doctrine maintained is, that a party seeking the specific performance of an agreement, and proposing to introduce new conditions, or to vary those which appear in a written instrument, will not be permitted to do so by parol testimony. And in *Dwight v. Pomeroy & al*, 17 *Mass.* 303, *Parker C. J.* regards this principle as fully settled by the more recent chancery decisions in *England*, and that a few cases, bearing a different aspect, have been explained away or overruled by subsequent decisions.

Upon full consideration of the authorities, we are of opinion, that the plaintiff has not made out his case by competent proof. The bill is accordingly dismissed; but without costs, as there is reason to doubt whether the written instrument truly expresses what had been agreed between the parties.

Griffin *vs.* Fairbrother.

In an action for the breach of the covenant of *special warranty* in a deed, the allegation of the plaintiff was, that the defendant had "*no right to sell and* "*convey* in manner and form," &c.—*Held* that the two covenants were distinct, and that the action could not be maintained.

Where there is a breach of the covenant of *special warranty* no action can be maintained thereon in the name of the immediate grantee of the warrantor, if before such breach he has conveyed the land to another; this being a covenant *running with the land.*

This was an action of *covenant broken*, tried on the general issue and a brief statement in which the defendant alleged that he had fully kept and performed all his covenants in the deed declared on. The breach alleged in the declaration was in

these words: "Now the plaintiff avers that at the time of the "conveyance of the said tract of land from the said *John Grif-* "*fin* to him the said *Lovell Fairbrother*, the said *John Griffin* "*had no right to sell and convey* the same in manner and form "as is in said deed of said *John Griffin* to said *Lovell Fairbroth-* "*er* set forth; but that said *John Griffin* a long time before, to "wit, on the twenty-fourth day of *August*, in the year of our "Lord one thousand eight hundred and twenty-seven, by his "deed of that date, duly executed, acknowledged and recorded, "had sold and conveyed the same premises to one *Darius Long*, "*jr.* and covenanted in the said deed to warrant and defend "the said premises to said *Darius Long*, *jr.* against the claims "and demands of all persons; and the said *Darius Long, jr.* "by force of said deed last mentioned forthwith entered upon "and has ever since occupied said premises and still holds the "same adversely to the plaintiff. And so the said *John Griffin* "his covenants aforesaid, with said *Lovell Fairbrother*, his heirs "and assigns, hath not kept, but hath broken the same."

The deed *Griffin* to *Fairbrother*, was dated, *March* 4, 1831, —and the only express covenant contained in it, was in these words: "And I do covenant with the said *Lovell Fairbrother* "his heirs and assigns, that I will warrant and forever defend "the premises to him the said *Lovell* and his heirs and assigns, "against the lawful claims and demands of all persons claiming "by, through or under me."

To show a breach of covenant, the plaintiff read to the jury, a deed of the same premises from *Griffin* to *Darius Long, jr.* bearing date *Aug.* 24, 1827, —and it appeared that on the same day, *Long* executed and delivered to *Griffin*, a mortgage deed of the same to secure the payment of $200, being the amount of the purchase money. It was proved that the plaintiff had full knowledge of said deed and mortgage at the time he received of *Griffin* the deed declared on. It was also proved that on the 8*th day of March*, 1831, the plaintiff sold and conveyed the land in question to one *Isaac Chase*, with special warranty, for whose use and benefit, it was stated on the back of the writ, the present action was commenced.

There was a body of evidence adduced on the part of the

defendant to show that *Long* was desirous that the plaintiff should purchase the land; — that he, in the winter of 1830 and 1831, said he could not pay for the land and had given it up to *Griffin* "for good and all;" and defendant introduced a letter of the plaintiff to *Griffin*, dated *April* 3, 1831, in which it was stated that "*Long* wanted his notes and he would give up his "deed," and that he, "*Long*, was going to move down "east." — *Long* had continued to live on the premises from the time of taking his deed, and *had forbidden the plaintiff to enter.*

There was evidence that in *May* or *June*, 1831, the notes were given up to *Long* for a gun, by one *Green* to whom *Griffin* had handed them for that purpose — and this was all that *Long* ever paid for the notes or for the rent of the land, the gun being worth $12.— for some reason the deed to *Long* was not cancelled or delivered up, or any release given by *Long* to *Griffin.* It was also proved, that it was agreed between *Fairbrother* and *Griffin*, that the latter was to be at no expense or trouble in removing *Long* from the premises.

On this evidence the counsel for the defendant contended that *Griffin's* deed to the plaintiff, was only an assignment of his right and interest in the premises, and that the plaintiff well knew what that was; — that as mortgagee, *Griffin* had good right to sell and convey to the plaintiff, the notes being unpaid; and that the only covenant in the deed from *Griffin* to the plaintiff, went with the land by the deed from the plaintiff to *Chase;* that no ouster or eviction took place before he sold to *Chase;* that if the plaintiff or *Chase* yielded to any but a legal title it was in their own wrong, and there was no evidence, that it was by judgment of law; — that there was no evidence that *Long* had resisted the title of the plaintiff till after the conveyance to *Chase*, and till after the notes had been given up; but that the contrary appeared by the letter of the plaintiff to *Griffin*, and that the notes were given up with the knowledge and consent of the plaintiff — that the title of *Long* had been given up and abandoned, and that the plaintiff knew it, but that there was a fraudulent arrangement between *Long* and the plaintiff to keep up a false appearance of an existing title in *Long*, for the

purpose of subjecting *Griffin* to damages for the breach of his covenant in said deed.

The *Chief Justice*, before whom the cause was tried, instructed the jury that if they believed from the evidence that there was such a fraudulent arrangement as was contended, they ought to give nominal damages only to the plaintiff; but if they should be of opinion that the plaintiff was not a party or assenting to any such fraudulent arrangement, then they ought to give damages for the value of the premises, which seemed to be admitted to be $200.

They returned a verdict for the plaintiff for nominal damages; and to the inquiry of the Court whether they found that there was such a fraudulent arrangement as before mentioned between the plaintiff and *Long*, the foreman replied in the affirmative.

W. Goodenow, for the defendant, stated the points, and enforced the arguments made on the trial of the cause to the jury. He also cited the following authorities.

1. To the point that the deed from the defendant to the plaintiff was merely an assignment of the mortgage, and that after the assignment the amount due on it, could be legally paid only to the assignee. *Davies v. Maynard*, 9 *Mass.* 242; *Cony v. Prentiss*, 7 *Mass.* 63.

2. That the mortgagee had good right to sell and convey, he cited, *Groton v. Boxborough*, 6 *Mass.* 50; *Richardson v. Goodwin*, 11 *Mass.* 469; *Perkins & al. v. Pitts*, 11 *Mass.* 125; *Weeks v. Bingham*, 11 *Mass.* 300.

3. That the covenant in *Griffin's* deed was *a covenant of warranty*, and passed with the land to *Chase*, the assignee of *Fairbrother*, cited *Bickford v. Page*, 2 *Mass.* 460; *Emerson v. Propr's of land in Minot*, 1 *Mass.* 464; *Hamilton v. Cutts & al.* 4 *Mass.* 349.

4. He contended that there had been no eviction or ouster of *Fairbrother* by a title paramount: 1. None, in fact, the one set up, having been found to be fraudulent. And 2. there could have been none in law without first paying the mortgage

money. *Twamley v. Henly*, 4 *Mass.* 441; *Emerson v. Prop. of Minot*, 1 *Mass.* 464.

5. *Fairbrother* having purchased with a knowledge of all the facts and circumstances, he could have been entitled to nominal damages only, *if the transaction had been fair. Leland v. Stone*, 10 *Mass.* 459.

6. The plaintiff not entitled to recover because the suit is founded in a fraudulent conspiracy between him and *Long*.

Greenleaf, for the plaintiff, maintained that the action was properly brought in the name of plaintiff rather than in that of *Chase* his assignee, and cited *Bearce v. Jackson*, 4 *Mass.* 408.

The instant the covenant was made, it was broken, *Long* being in, claiming adversely as mortgagor.

The covenant was not assignable, so as to give the assignee a right to sue in his own name. *Bickford v. Page*, 2 *Mass.* 445.

This action is brought for the benefit of *Chase* in the name of *Fairbrother* — and judgment in this action would be a bar to any claim that *Chase* should set up.

The deed from *Griffin* to *Fairbrother* contains a covenant *in præsenti*, — the words so import. *Hale v. Smith*, 7 *Greenl.* 416. It is virtually a covenant that defendant had good right to sell and convey.

The deed of quitclaim was no assignment of the mortgage unless the notes were given up, and they were not.

Long was not a tenant at will to the mortgagee, but held adversely — so his conduct shows.

Mellen C. J. — Our deeds of conveyance most frequently in use, generally contain three covenants, 1. a covenant of *seisin*, and *good right to sell and convey*, which amount to the same thing. 2. A covenant of *freedom from incumbrances*. 3. A covenant of *general* or *special warranty*. A seisin *in fact* will support the *first*, though not a lawful one; but whenever it is broken, it is broken the moment it is made. The *second* may be broken when the *first* is not. The *third* is a covenant which *runs with the land*, and he in whose time it is broken, whether

the grantee or any one who claims and holds under him, may maintain an action for the breach. In the case before us the covenant in *Griffin's* deed, and as alleged in the declaration, is a covenant of *special warranty* and the *breach assigned* is, that *Griffin had no right to sell and convey the premises* in manner and form as set forth in the deed abovementioned. The defendant *never covenanted* that he had good right to sell and convey the premises. Here is no breach assigned, except of a non-existing covenant; and, thus on the face of the declaration no cause of action appears; and should a judgment be entered on the verdict, it would be reversible on error, inasmuch as no breach of the *special warranty* is alleged in any form. We might stop here, and grant a new trial; but as an amendment of the declaration might lead to further delay and expense, we will go on, and observe, that on the report of the Judge it appears, that the defendant's covenant was not broken until *after* the plaintiff made his conveyance to *Chase* on the 8th of *March*, 1831; for it appears that in *April* following *Long* stated that he was going — wanted his notes and would give up the land; but that *since* that time he had continued in possession and *forbidden the plaintiff* to enter. On these facts, and those stated in respect to *Long's* mortgage to *Griffin*, he, as mortgagee, had an undoubted right to convey his right, that is, to assign the mortgage to the plaintiff, though *Long* was in possession; and for the same reason the deed of the plaintiff to *Chase* operated as an assignment of the mortgage, or all the plaintiff's right to *Chase;* and if the acts of *Long*, since that time, amount to a breach of the defendant's covenant of *special warranty*, the action should have been brought by *Chase*, as the covenant of *Griffin* ran with the land to him. It is said this action is instituted and pursued for the benefit of *Chase;* that may be; but this does not alter the case: *Chase* should have been the plaintiff on record, had a proper breach been assigned; — and an amendment in this respect cannot aid the plaintiff. In addition to all this, the verdict has placed the plaintiff before us in this action as engaged in a collusive transaction for the express purpose of defrauding the defendant. For some reason, which seems not to have been sufficiently examined at the trial,

the instruction was given to the jury to find a verdict for *nominal* damages. We are *now* all satisfied that this was incorrect. In every view of the cause we are satisfied the verdict is wrong, and that on the facts before us the action cannot be maintained.

Verdict set aside and a new trial granted.

STANDISH *vs.* WINDHAM.

R. M. became chargeable as a pauper to the town of W. she then residing therein. The sons of the pauper being able to support her, and being called on for the purpose, refunded to said town the amount thus expended, and also gave an obligation, "to support her as long as they were able." After which she was supported by the sons *in another town* for a period of five successive years. It was *held* that by such residence she gained a legal settlement in the latter town, notwithstanding the taking and holding of said obligation by the town of W. and the support rendered by the sons in pursuance of it.

IN this action, which was *assumpsit* to recover certain expenses incurred for the support of *Rosanna Mayberry*, it was admitted that she had once a legal settlement in the town of *Windham*, and the only question in the cause was, whether she had since gained one in *Standish* by a residence there for more than five successive years. It was proved that she had resided in the latter town ever since *Nov.* 1824; but it was contended that during that time, or a part of it, she had directly or indirectly received supplies as a pauper from said town of *Standish* or from the town of *Windham*. On this point there was much evidence before the jury on both sides; and among the rest, it appeared that, in the fall of 1824, *Rosanna Mayberry*, then residing in *Windham*, became chargeable as a pauper, and that the town of *Windham* paid to the son-in-law of said pauper, five dollars for her support. The sons of the said pauper, then residing in the town of *Standish*, being of sufficient ability to maintain their mother, were then called on by the town of *Windham* to repay the amount thus expended for her, which they did; and also gave to *Windham* an obligation whereby

they engaged to support the said *Rosanna* as long as they were able; and it appeared that she had continued to live in the family of one of the sons since she became a resident in *Standish*.

All the evidence in the cause was submitted to the jury for their consideration; the *Chief Justice*, before whom the cause was tried, at the same time instructing them that, the aid of the sons in giving said writing, and of the town of *Windham* in receiving it, in connexion with the pauper's residence in the family of one of said sons, did not, in legal contemplation, amount to the furnishing of supplies, directly, or indirectly, by the town of *Windham* to the pauper.

The jury having returned a verdict in favour of the defendant town, the case was reserved for the opinion of the whole Court, on the correctness of the foregoing instructions.

Longfellow and *Boyd*, for the plaintiffs.

The town of *Windham* by coercing the sons of the pauper to give a bond to maintain her, indirectly furnished her support, and therefore her continued residence in *Standish* for five years, could not operate to fix her settlement in that town. If one town can send its paupers into another town, and enable them to gain a residence as contended for by the defendants, it would seem to be a palpable perversion of the statute. In this case *Rosanna Mayberry* was sent to *Standish* as *a pauper*, and was supported there by her sons as *a pauper*, they being answerable over to the town of *Windham*. *Watson v. Cambridge*, 15 *Mass.* 286; *East-Sudbury v. Waltham*, 13 *Mass.* 460.

S. and *W. P. Fessenden*, for the defendants, relied on the case of *Wiscasset v. Waldoborough*, 3 *Greenl.* 388, as decisive of this.

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

It is enacted in the second section of the act of 1821, *ch.* 122, "That any person of the age of twenty-one years, who "shall hereafter reside in any town within this State, for the "space of five years together, and shall not during that term "receive, *directly* or *indirectly*, any supplies or support as a

" pauper from *any town*, shall thereby gain a settlement in such " town." The only question in the cause is, whether the pauper, during the five years of her residence in *Standish*, next after her removal from *Windham* into that town, did directly or indirectly receive any supplies or support as a pauper from *any town*. From the facts reported we are clearly of opinion that she did not. The payment of the five dollars by *Windham* was prior to the commencement of the abovementioned term of five years; and while the pauper resided in *Windham;* and the sum so paid was repaid, and the obligation given by her sons, before her removal to *Standish*. How can the *protection from expense*, enjoyed by *Windham*, in consequence of the abovementioned bond or contract of indemnity, according to the legitimate use of language, be considered as *expense indirectly incurred* by that town. Suppose the sons had maintained their mother ever since her removal into *Standish*, from a sense of filial obligation and filial affection only; could *Windham* in that case be deemed to have *indirectly* furnished her supplies as a pauper? Surely not. Is the case altered by the circumstance of the written obligation, which imposed a superadded duty? Suppose the pauper were now by some means to become possessed of a handsome property, could the town of *Windham* maintain an action against her, in virtue of the 19th section of said act, and recover the amount of the expenses incurred in her support by her sons, pursuant to their contract with the town? Surely the question is too plain for further examination. The case of *Watson v. Cambridge* has little resemblance to the present case. It only decides that a bond by one man given to another to indemnify the obligee, who was chargeable with the support of a pauper, did not operate to discharge the town of her last settlement from the obligation to maintain such pauper. The case of *East-Sudbury v. Waltham* seems to have no bearing on the case before us. In *Wiscasset v. Waldoborough*, this Court decided that a bond given to the town of *Waldoborough* to support the pauper could in no view be considered as supplies furnished by the town. We think the instruction of the Judge was correct and of course there must be

Judgment on the verdict.

STURDIVANT *vs.* FROTHINGHAM.

An officer after extending an execution on real estate, stated in his return that he had caused appraisers to be sworn to appraise such real estate as should be shown them "to satisfy the execution *and all fees and charges*," *held* that it was sufficient, and the levy not voidable, though the magistrate who administered the oath, omitted the words "*all fees and charges*," in his certificate.

Nor is such levy void by reason of the officer's taxing, and causing to be satisfied in the extent, fees unauthorized by law — but the execution debtor may maintain his action against such officer to recover back the amount thus illegally taken.

In extending an execution upon the real estate of one who is *tenant by the curtesy* merely, it is not necessary that it should be by *metes and bounds*, but it may be on the *rents and profits*.

THIS action, which was *assumpsit*, was submitted for the opinion of the Court on the following agreed statement of facts. One *Thomas Beck*, by his will, which was duly proved in Probate Court in the year 1830, devised certain real estate in *Portland*, to his daughter, *Mary Chadbourne*, wife of *James Chadbourne*, in terms which of themselves it was admitted imported a fee. *Mrs. Chadbourne* had children born alive during the coverture. In *December*, 1821, *John Ulrick* recovered judgment against *James Chadbourne*, for $867, which judgment he assigned to the plaintiff, *April* 29, 1822. On this judgment the plaintiff, *July*, 1830, commenced a second suit in the name of *Ulrick*, attaching *Chadbourne's* right, title and interest, in the land in question — this was prosecuted to final judgment, and execution issued, *March* 16, 1831, and was also assigned to the plaintiff. To satisfy this execution, the plaintiff caused it to be levied on the *rents and profits* of the real estate in question — and the proceedings of the officer and appraisers in making the levy were set forth on the back of the execution. The magistrate who administered the oath to the appraisers, certified that they had been sworn, &c. "to appraise such real estate as "should be shown them to satisfy *this execution*." The appraisers' return was as follows. "Having been duly chosen and "sworn faithfully and impartially to appraise such real estate of "the within named *Chadbourne* as should be shown to us by

" the within named *Sturdivant*, the assignee of this execution, " and creditor in interest, to satisfy *this execution and fees and* " *charges*, have viewed the following described real estate," &c. " the same being shown to us by said *Sturdivant*, the creditor in " interest, as the property in which said *James* the debtor has a " life estate, the same having been devised by *Thomas Beck*, " late of said *Portland*, deceased, to his daughter *Mary*, wife of " said *James*. And we have appraised *the whole rents of the* " *premises*, at two hundred and forty dollars per annum, for the " purpose of extending this execution thereon, *and have set off* " *the whole to the said Sturdivant, to hold for the term of six* " *years and eight months*, from *April* 12, 1831."

The officer in his return on the execution, also stated, that " he had caused to be chosen and sworn three disinterested and " discreet men," &c. " to appraise such real estate as should " be shown to them to satisfy this execution and *all fees and* " *charges*."

The taxation of fees by the officer was as follows:

" Dollarage and travel,	$13,39
" Justice,	,20
" Recording Ex. and assignment,	2,50
" My extra time attending to levy, notifying parties, appraisers, &c. on two days and sundry other times,	3,00
" Appraisers' bills,	22,00
	41,09"

Ulrick, by his deed of *May* 28, 1830, conveyed all his right, title and interest to the plaintiff.

On the 12th of *March*, 1830, *James Chadbourne* conveyed all his interest in the estate, to *Frothingham*, the defendant, in trust for the wife of said *Chadbourne* and children, for the avowed object of carrying into effect the will of *Thomas Beck*. The consideration expressed in the deed was one dollar, but nothing was actually paid. *Chadbourne*, at the time of the conveyance was, and for a long time before had been, deeply insolvent. The defendant entered into the estate and

received the rents, which are sought to be recovered by the plaintiff in this action.

It was further agreed that the defendant could prove, if in the opinion of the Court the evidence was admissible, to affect the construction of the will, that *Beck* and *Chadbourne* were formerly partners in trade, and were on very friendly terms — but that in the latter part of *Beck's* life there was not a good understanding between them — that *Chadbourne* often spoke of *Deacon Beck* in terms of anger and disrespect, and that the latter disapproved the general conduct of *Chadbourne.*

Longfellow and *Greenleaf,* for the defendant, maintained that the levy of the plaintiff was invalid and passed no title in the estate to him, because :

1. The appraisers were not sworn to appraise real estate to satisfy the execution, "*and all fees and charges,*" as appears by the certificate of the magistrate who administered the oath. The requirements of the law in regard to this are explicit and imperative. *Maine stat. ch.* 60, *sec.* 27.

2. The levy should have been by *metes and bounds.* It should have been on a portion of the property during the existence of the tenant's estate, and not on *the whole* for a *term of years.* In the case of *Barber v. Root,* 10 *Mass.* 260, nothing but rents and profits could have been set off. It was entirely different from this case.

3. It does not appear in the officer's return as it should, that the estate could not be conveniently divided — this only could authorise a levy on rents and profits. It is not competent for the creditor to say this, it should be said by the officer in his return.

4. Levy void because it included *illegal fees.* An officer has no right to tax for duties other than those authorised by law. The extra time in notifying parties for which $3,00 is taxed, is not recognised by the law as a proper subject of charge. The fees paid to the appraisers also, are much beyond what the law allows. The statute fixes the compensation at one dollar a day. Here, $22,00 is charged, when the services

were all performed in one day. That for these causes, levy is void, they cited *Beach v. Walker*, 6 *Con. R.* 190.

They further contended for the defendant, that there was evidence enough on the face of the will of *Thomas Beck*, to show that he intended to give the estate to the wife of *James Chadbourne* for *her separate use*, and beyond the control of the husband; — and to show that technical terms were not essential, they cited *Ballard & ux. v. Taylor & al. Amer. Chan. Dig.* 62, *sec.* 29; 3 *Atkins*, 393; *Johnson & al. v. Thompson*, 4 *Dessesseur*, 458; *Wilson v. Ayer*, 7 *Greenl.* 207; 2 *Vernon*, 659, which is commented on in *Reeves' Dom. Rel.* 164; 1 *Peere Williams*, 316; *Piquet v. Swan*, 4 *Mason's R.* 443; *Collins v. Collins*, 2 *Paige's R.* 9; 1 *Leigh's R.* 442.

It is also competent for the Court to go out of the will to ascertain the views, feelings and motives of the testator. *Hammond's Chan. Dig.* 697, *sec.* 143; *Smith v. Bell*, 6 *Peters' R.* 68. In this case it seems there was a degree of hostility existing between *Beck* and his son-in-law, *Chadbourne*. *Beck* also knew him to be deeply involved in debt, and that anything he might devise him, would be immediately taken by his creditors. *Beck's* object was to provide for his daughter, and therefore released the debt due to him from *Chadbourne*, and devised the estate to his daughter for her separate use — in which case the husband is a mere nominal trustee, and the creditors cannot touch the estate for his debts.

But if *Chadbourne* had an interest in this estate, has he not legally conveyed it? It does not follow that the deed is *fraudulent*, because *voluntary*. So are the decisions. In this case no fraud is proved, and it is not to be presumed.

N. Emery and *Daveis*, for the plaintiff, maintained that the extent of the execution was properly on the *rents and profits*; and cited *Roberts v. Whiting*, 16 *Mass.* 186; *Chapman v. Gray*, 15 *Mass.* 439; *Barber v. Root*, 10 *Mass.* 260.

As to the other objections to the levy, it was argued that no decisions could be found to sustain them, and that they were otherwise not well founded, and cited further, *Titcomb v. The*

U. F. & M. Ins. Co. 8 *Mass.* 335; *Booth v. Booth,* 7 *Con. R.* 350; *Huntington v. Winchell,* 8 *Con. R.* 45.

As to the construction and effect of the devise to *Mary Chadbourne,* it was contended that she took an estate in fee, and that therefore the husband became tenant by the curtesy. 1 *Fonblanque's Eq.* 108. And they maintained that it was not competent for the defendant to introduce extraneous evidence to aid in the construction of the will, there being no latent ambiguity to authorize it.

The conveyance from *Chadbourne* to the defendant was fraudulent, because it was a mere voluntary settlement on the wife. *Roper on Husband & Wife,* 2, 304, *Lond. ed.* — *Woodward v. Briggs,* 7 *Pick. R.* 538; *Draper v. Jackson & ux.* 16 *Mass.* 480; *Howe v. Ward,* 4 *Greenl.* 208; *Clark v. Wentworth,* 6 *Mass.* 259.

In *Wilson v. Ayer,* cited on the other side, the husband received a valuable consideration when he conveyed. Here it was otherwise. *Frothingham* was not a creditor of *Chadbourne,* nor was he a *bona fide* purchaser.

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

Mellen C. J. — In this case several questions have been presented for our consideration, and we will consider them in their natural order. The premises, the rents of which are demanded of the defendant, were once the property of *Thomas Beck;* and the first question is, what was the nature of the estate devised by him to his daughter *Mary,* the present wife of *James Chadbourne.* It is admitted it was a *fee simple,* created by apt words and those usually employed for the purpose, and by no others. But it is urged that the testator intended the estate to be for the separate and exclusive use and benefit of the devisee and her heirs, and that it should not be in any manner under the control of the husband or liable for his debts. It is not necessary for us to decide whether the *parol* evidence, admitted *sub modo,* and relied on by the counsel for the defendant, is admissible, according to the authorities cited, in this action *at law,* to prove the alleged intention; for if admissible,

it could not produce the intended effect. It is altogether of a vague and uncertain character, and wholly insufficient to control the unequivocal and direct language of the devise. As the usual language was employed to create a fee, we must presume that if the testator intended an estate of the character suggested by the defendant's counsel, he would have used expressions of his own, such as he might have deemed proper for the purpose; but not having so done, he must be considered as knowing the rights which by law belong to a husband, in respect to real estate given by will or conveyed to her by deed in fee, and not to have designed to impair them. We are therefore of opinion that the estate or right which *Chadbourne*, the husband, had in the premises devised to his wife in fee, was liable to be seised and taken on execution for the debts of *Chadbourne*.

The next question is, whether *Chadbourne's* interest in the premises was transferred to the defendant by the deed of *March* 12, 1830, or to *John Ulrick* by the levy of his execution against *Chadbourne*, made on the 12th of *April*, 1831. The deed being made *before* the levy, if not impeachable and impeached by the plaintiff, who purchased *Ulrick's* interest or estate acquired by the levy, on the 28th of *May*, 1831, operated to pass the estate of *Chadbourne* to the defendant. Our inquiry then is, whether, on the facts before us, the deed is effectually impeached as a *voluntary conveyance*, and so void and wholly inoperative as against the creditors of *Chadbourne*. It appears that *Ulrick* was such a creditor, whose demand had existed for several years prior to the levy; of course his grantee is authorised to contest the validity and effect of the deed and impeach it as a voluntary conveyance and void. But it can be of no use to him to impeach the deed, unless the levy under which he claims, is a legal one. Its legality is denied on several grounds. It is a well settled principle that whatever is necessary to constitute a legal levy of an execution, must appear on *the return* of the officer making the levy. *Williams v. Amory*, 14 *Mass.* 20.

The *first* objection to the levy is, that it appears by the certificate of the magistrate who administered the oath to the appraisers, that they were only sworn to appraise such estate as should be shown to them to satisfy *the execution*; but not *fees*

and charges. This objection has no foundation, for the officer in his return says they were sworn to appraise all such estate as should be shown to them to satisfy *the execution and all fees and charges.*

The *second* objection is, that no reason is assigned in the return why the levy was not by *metes* and *bounds;* and that in the absence of such reason, the levy must have been in the above manner. The 27th *sec.* of *ch.* 60, of the revised statutes, prescribes the mode of extending executions on the *real estate* of a debtor; it is to be appraised and set off by *metes and bounds;* and the 28th *section* provides that where the nature of the estate is such that it cannot be so appraised and set off, the execution shall be levied upon the *rents* and *profits* of the estate. This is the only provision relating to the subject. The interest which a husband has in an estate of *inheritance* or of *freehold* belonging to his wife, is *real estate,* and falls within the provision of the 27th *section;* why then should not the execution have been levied upon the estate in usual form by metes and bounds, or some reason have been assigned to shew, *on the face of the return,* that it could not have been so levied? If the case before us is an *exception* from the *general* provision, why should not the return state it to be such, as well as any other fact essential to the correctness of the levy? *Williams v. Amory,* above cited; *Eddy v. Knapp,* 2 *Mass.* 154; *Tate & al. v. Anderson,* 9 *Mass.* 92; *Whitman v. Tyler,* 8 *Mass.* 284. In the case of *Barber v. Root,* 10 *Mass.* 26, *Barber's* wife was owner *in fee* of certain real estate, and execution against *him* was levied on the *rents and profits* of the estate, and the levy was decided to be good. *Sewall J.* in giving the opinion of the Court says, "For myself I am satis- "fied upon this point. The interest which the husband has "in the real estate of his wife, that is, in any lands or tene- "ments in which she has an estate of freehold, whether of in- "heritance or for life, is a title to the rents and profits during "the coverture." In *Chapman v. Gray,* 15 *Mass.* 486, the wife was *tenant for life,* and execution against the husband was levied on the *land and buildings* in common form and seisin delivered; and this the Court considered as a proceeding ac-

cording to law. In *Roberts v. Chapman*, 16 *Mass.* 186, the debtor was *tenant by the curtesy*, and the execution was levied in common form on the land as his freehold. The Court said the levy was correct; and that they were of opinion that the execution in the case of *Barber and Root* might have been levied *either* way; on the *land* or on the *rents* and *profits*. The above case of *Barber v. Root*, is precisely like the present, in respect to the nature of the wife's estate and the mode of levying the execution. In the case of *Chapman v. Gray*, the wife was only *tenant for life;* and in *Roberts v. Chapman*, the debtor himself was tenant *by the curtesy;* but, in *both* instances, the property levied upon was the *real estate* of the debtor; and so was comprehended in the language of the twenty-seventh section, which is a transcript of the provision in the *Commonwealth of Massachusetts* on the same subject. From this view of the practice in *Massachusetts*, and of the construction given to the section by the Supreme Court there in several instances, it would seem that the levy in the case before us would be good and valid. Had there been no construction ever given in that State prior to our separation from it, we should hesitate before pronouncing the levy on *Chadbourne's* estate or interest to be in conformity to the 27th and 28th sections of our statute, and sufficient in law. But we have frequently decided that where a statute of *Massachusetts* had received a judicial construction by the Supreme Court of that State prior to our separation, and the same statute had been reenacted in *this* State, this ought to be considered as a legislative adoption of such construction. We are therefore disposed also to adopt it, and accordingly our opinion is, that the levy must be considered as legally made, notwithstanding *this* objection, and as having transferred all the right or estate which *Chadbourne* had to and in the property levied upon, unless the same had previously passed by his deed to the defendant. The next objection is, that the levy is void in consequence of certain illegal or unauthorised fees and expenses charged by the officer in making it, which have been allowed and satisfied out of the property of *Chadbourne:* and to support this objection the case of *Beach v. Walker*, 6 *Con. R.* 190, has been cited.

That case was tried before the Chief Justice, who decided that, the illegal charges made by the officer rendered the levy void. The correctness of this decision was reserved for the consideration of the whole Court. It was argued in *June* term, 1826: but in *May* preceding, the Legislature passed a confirmatory act, which the Chief Justice, and one of the Justices, (being a majority of the Court sitting in the cause,) considered as *constitutional* and as healing the defect in the title; and the verdict was set aside. — In *Booth v. Booth*, 7 *Con. R.* 350, *one* of the objections to the levy was of the same kind as was made in the last case. *Dagget J.* considered that, *if it was a good one*, it was done away by the healing act; and as to the *other* objections, he was of opinion that they did not defeat the levy, and a majority of the Court concurred: but the Chief Justice and one of the Justices thought the return bad on *other* grounds. In *Huntington v. Winchell*, 8 *Con. Rep.* 45, two executions were levied on lands, the value of which, as appraised, exceeded the amount of the executions; in one case, *eleven cents;* in the other, *seven* cents. Both levies were held good. In all these cases we have the opinion of the Chief Justice *only*, as to the correctness of his opinion delivered at the trial on the point in question. We cannot feel satisfied as to the correctness of that decision, notwithstanding the high character and acknowledged learning of the Judge who pronounced it. The debtor, *Chadbourne*, has paid, it is said, more than the officer had a right to charge as fees and expenses, and has thus been injured to a certain amount: admit such to be the fact; the law gives him a remedy by an action of assumpsit to recover it back again of the officer; and this will do justice to *Chadbourne;* but if a levy is to be pronounced totally void for such a reason, an actual loss to the execution creditor, to the amount of thousands, may be the consequence, on account of a surplus, unauthorised charge and satisfaction of one dollar. Why should the innocent creditor be thus compelled to bear the consequences of an act unlawful on the part of the officer. In a case of this kind the Court may look forward to the consequences of such a decision as might probably go to the disturbance or destruction of hundreds of titles which have never

before been questioned. On the whole, we do not feel authorised to declare the levy void for the reason which has been urged. Our only remaining inquiry is, whether an estate passed to the defendant by *Chadbourne's* deed. The only consideration expressed in the deed is *one dollar*, and there is no proof that even *that* has been paid; and yet *Chadbourne's* interest in the property in question was appraised at $240 per annum. On these facts we cannot sanction the deed as a valid one; it was nothing more than a voluntary conveyance without any consideration, *Chadbourne* being insolvent at the time, and therefore ineffectual and void as against *Ulrick*, and *Sturdivant* his grantee, according to the case of *How v. Ward*, 4 *Greenl.* 208, and the cases there cited. We are of opinion that the defence has totally failed; and according to the agreement of the parties there must be,

Judgment for Plaintiff.

The State *vs.* Arthur N. Small.

In an indictment against A. S. as one of the Wardens of the city of *Portland*, for receiving, at a general election, the vote of a person whose name was not borne on the list of voters, it was held to be necessary to allege that the act so done and committed was "*unreasonable, corrupt* or *wilfully oppressive*."

The defendant as Warden of the 2d Ward in the *City of Portland*, was indicted for receiving at an election of Governor, Senators, and Representatives, the vote of one *Daniel Merritt*, when the name of the said *Merritt* was not borne on the list of voters for said Ward.

A verdict of guilty being returned, *Preble* and *Megquier* counsel for the defendant, moved in arrest of judgment,

1. "Because there is not in and by said indictment any of-
"fence charged or alleged against the said *Small* for which he
"is liable to be indicted, either at common law or by statute."

2. "Because it is not alleged in and by said indictment that

" the act with which the said *Small* is charged as constituting " the offence alleged against him, was "*unreasonable, corrupt* " or *wilfully oppressive.*"

The *8th sec.* of *stat.* of 1821, *ch.* 115, entitled " An Act " regulating Elections," on which the indictment was founded, is in these words: " If any person, who is by law authorised to " preside at any meeting, or to receive votes at any meeting, " which may be holden for the choosing of Governor, Sena- " tors and Representatives to the Legislature, or any town " officers, shall knowingly receive the vote of any person who " is not qualified to vote agreeably to the Constitution and laws " of this State, in choosing as aforesaid; such person so pre- " siding or receiving any vote as aforesaid, shall forfeit and pay " one hundred dollars," &c.

By *stat.* of 1831, entitled " An *Additional* Act regulating " Elections" it is provided, " that, in no case, shall any town or " plantation officer incur a penalty, or be made to suffer in " damages, by reason of his official acts, or neglects, unless the " same shall be *unreasonable, corrupt* or *wilfully oppressive.*"

Preble and *Megquier*, cited the above statutes and also the Act incorporating the City of *Portland, Spec. Laws, ch.* 248, *sec.* 9, which provides that Wardens shall preside in ward meetings with the same *powers*, &c. as moderators of town meetings, and contended that there was no provision in the law subjecting them to the same *liabilities* and *penalties.* And 2, that the indictment was bad, it containing no allegation that the act charged as an offence was " *unreasonable, corrupt* and " *wilfully oppressive.*"

Though the first statute does not contain these words, yet by the enactment of the last, the first is to be construed as if these words were incorporated into it. They constitute an integral part of the offence.

It is a general rule, that, when an offence is created by statute, the indictment must use the statute language — and the use of language deemed *equivalent* to it is not permitted.

Rogers, Attorney General.

The words of the statute are, " That if any person who is

"authorised by law *to preside at any meetings*," &c. To *him* the penalty attaches. And by the City Charter the Wardens are made the *presiding officers*.

There is no allegation in the indictment of corrupt motive, because there was no proof of its existence. But insist that no such allegation is necessary. The indictment follows the language of the 8th section, which is, "if any officer *know-* "*ingly* receive," &c. The *stat.* of 1831, containing the words "unreasonable, corrupt and wilfully oppressive" applies to general elections, and not to the election of town officers.

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

The indictment in this case is founded on the 8th section of *ch.* 115 of the revised statutes, and the alleged offence is correctly set forth in the language of the above section. The two reasons assigned in the motion in arrest of judgment, are, 1— That the defendant is not liable to be indicted for the act charged to have been done and committed by him as Warden of the second Ward: 2, That it is not alleged that the act charged to have been so done and committed by him, was "unreasonable, "corrupt or wilfully oppressive." As to the *first* objection or reason assigned in arrest, we give no opinion. Our decision is founded on the *second*. The statute of 1821, above cited, is entitled "An Act regulating Elections." It is general; extending to the election of members of Congress, Electors of President and Vice President, and all State and town officers. The act of *March* 31, 1831, is entitled "An *additional* Act regulat- "ing Elections." The fifth section of it contains, among other things, the following provision. "That, *in no case*, shall any "town or plantation officer incur a penalty, or be made to suf- "fer in damages, by reason of his official acts or neglects, un- "less the same shall be "unreasonable, corrupt or wilfully op- "pressive." The section concludes with a proviso, which, however, has no connection with the point under consideration. The last section repeals all acts and parts of acts inconsistent with the provisions of the act. Both acts relate to the same general subject, and, of course, being *in pari materia*, may properly be considered, for the purposes of construction, as one

act. The foregoing provision in the fifth section of the *last* act has essentially changed the character of the offence, described in the eighth section of the *first* act: by that section it was an offence "*knowingly* to receive the vote of any person who is "not entitled to vote agreeably to the Constitution and laws of "the State in choosing" Governor, Senators and Representatives to the Legislature or any town officer. As by the fifth section of the last statute, the *official acts or neglects* complained of, would not expose the officer to a penalty or damages, unless the same were "unreasonable, corrupt or wilfully op- "pressive," such characteristics of the acts must be *proved* to produce the conviction of the officer charged; and whatever it is necessary should be *proved*, must be *alleged*. In a word, the facts, now necessary to constitute the offence, must be set forth in an indictment. In the indictment before us, such is not the case, and accordingly no judgment can be rendered on the verdict.

Judgment arrested.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF YORK, APRIL TERM, 1833.

SHAW *vs.* WISE.

Under a sale on execution, of a debtor's "estate, right, title and interest, by "virtue of a bond or contract in writing," for the "conveyance of real "estate," in pursuance of the provisions of *stat.* of 1829, *ch.* 431, the purchaser does not acquire a *seizin* of such real estate, so as to enable him to maintain a *writ of entry*, even against a mere stranger to the title.

Such bond or obligation is a contract merely *personal*, and the "estate, right, "title and interest" accruing under it a merely *personal* right.

THIS was an action of entry upon disseizin, and was tried upon the general issue before *Parris J.* in this County, *September* term, 1832. To maintain the action the plaintiff read in evidence the record of a judgment in his favour against one *Robert Tripp*, recovered *May*, 1829, founded on a demand due in 1826; — and an execution issued on said judgment on which all the equitable right which said *Tripp* had to the demanded premises, by virtue of a bond or instrument in writing, for a deed from one *Benjamin Stanley*, was sold to the plaintiff, *July* 25, 1829, at a regular public sale by a deputy sheriff, the same having been attached on the original writ, *March* 21, 1829. The plaintiff also introduced said *Stanley* to prove that on *Dec.*

3, 1825, he gave *Tripp* an obligation for the conveyance of the demanded premises to him in fee, on the payment of $300, in semi-annual payments of $37,50 each; — that *Tripp* entered into the possession of the premises, and that the payments were regularly made by him or by the defendant with *Tripp's* money, until *March* 11, 1829, when by arrangement between *Tripp* and *Wise*, the bond was given up to *Stanley* or destroyed in his presence, *Stanley* giving a deed of warranty of the demanded premises to the defendant, taking the defendant's notes for $113, the balance due, which was subsequently paid by the defendant with money belonging to *Tripp;* — and that this arrangement was made by both *Tripp* and the defendant for the purpose of protecting the property from attachment by *Tripp's* creditors, and securing it for his benefit, he being in insolvent circumstances.

Stanley was objected to by the defendant's counsel, but was admitted.

The defendant claimed by virtue of *Stanley's* deed of *March* 11, 1829, and contended that the plaintiff was not entitled to recover even if *Stanley* was legally admissible as a witness, and the facts in the case were, as alleged to be, by the plaintiff.

But for the purpose of having the facts settled, the presiding Judge ruled otherwise *pro forma*, and directed the jury, that if they believed that a bond was given as testified; — that *Tripp* entered, and held under the bond; — that the whole consideration was paid by *Tripp* or with his money; — and that *Wise* took the deed in his name for the purpose of defrauding the creditors of *Tripp*, and at the time of taking this deed knew that the bond was given up to *Stanley* in furtherance of that object, that their verdict should be for the plaintiff; and they found accordingly, subject to the opinion of the whole Court upon the correctness of these instructions.

Hussey, for the defendant, made the following points.

1. *Tripp* had at no time a legal title in the demanded premises. — No present interest in an estate passes to an obligee by virtue merely of a bond for the conveyance of such estate. *Proprs. of No.* 6 *v. McFarland*, 12 *Mass.* 325. Our *statute* does not extend the rights under the bond.

2. But if otherwise, yet the giving up or cancelling of the bond, revested the title in *Stanley*; especially as this was prior to the plaintiff's attachment.

3. If the transaction between *Wise*, *Tripp*, and *Stanley*, was fraudulent, as alleged by the plaintiff, then he should have taken the land by *extent* and *appraisement*, instead of attempting to sell a supposed right in equity. *Bullard v. Hinkley*, 6 *Greenl.* 289; *Russell v. Lewis*, 2 *Pick.* 508; *Foster v. Mellen*, 10 *Mass.* 421.

4. If *Tripp* had an equitable interest in the land, and the sale thereof was in pursuance of law, still a *writ of entry* cannot be maintained by the purchaser of such interest. *Doe, ex dem. Bowerman v. Sybourn*, 7 *Term R.* 2; *Goodtitle, ex dem. Jones v. Jones & al.* 7 *Term R.* 47; *Doe, ex dem. Costa v. Wharton & al.* 8 *Term R.* 2; *Roe v. Lowe*, 1 *H. Blk. Rep.* 446; *Russell v. Lewis*, 2 *Pick.* 508; *Pritchard v. Brown*, 4 *N. H. Rep.* 397; *Ayer v. Bartlett*, 6 *Pick.* 71; *Poignard v. Smith*, 6 *Pick.* 172; *Walker v. Farris*, 5 *Johns. R.* 395; *Hill v. Payson*, 3 *Mass.* 559; 4 *Dane's Abr. ch.* 112, *sec.* 5; 10 *Johns. R.* 480; 4 *Dane's Abr. ch.* 114, *sec.* 3.

5. *Stanley* ought not to have been admitted as a witness, even if he had no interest in the event of the suit, as his testimony went directly to impeach his own conveyance. *Walton v. Shelley*, 1 *Term R.* 296; *North Hampton Bank v. Whiting*, 12 *Mass.* 104; *Loker v. Haynes*, 11 *Mass.* 498; *Storer v. Batson*, 8 *Mass.* 431; *Churchill v. Suter*, 4 *Mass.* 156; *Bartlett v. Delpratt & al.* 4 *Mass.* 702; *Clark v. Wait*, 12 *Mass.* 439; *Kimball v. Morrill*, 4 *Greenl.* 368; *Richardson v. Field*, 6 *Greenl.* 303.

But *Stanley* was directly interested, and was therefore inadmissible. If the deed to *Wise* be void, then the attachment of *Stanley's* creditors would hold, and the estate would go to pay his debts.

The testimony of *Stanley* should also have been rejected because it went to prove by parol, that a conveyance absolute on its face, was in fact *conditional*. *Hale v. Jewell & al.* 7 *Greenl.* 435.

J. Shepley and *D. Goodenow*, for the plaintiff, contended that *Tripp*, at the time of the attachment, had an interest in the land subject to be taken by his creditors. *Stat.* passed *Feb.* 28, 1829, *ch.* 431, gives to the creditor the right to attach "the estate, right, title and interest, which any person has "by virtue of a bond, or contract in writing, to a conveyance "of real estate, upon condition to be by him performed." The statute says nothing of the existence of the bond at the time of the attachment — it is the right and interest by virtue of the bond, which is liable. That right does not depend on the existence of the bond. If *Tripp* had lost the bond, or it had been burnt by accident, it is clear he would not have lost his rights under it; but they might have been enforced by him, or attached by his creditors under the provisions of this statute. *Barrett v. Thorndike*, 1 *Greenl.* 73; *Riggs v. Tayloe*, 9 *Wheat. R.* 483.

So the destroying, giving up, or cancelling a deed of real estate, does not divest the estate, if done fraudulently; but an attaching creditor or fair purchaser will hold as effectually as if no such transaction had taken place. *Marshall v. Fisk*, 6 *Mass.* 24; *Holbrook v. Tirrell*, 9 *Pick.* 108; *Davis et ux. v. Spooner*, 3 *Pick.* 284; *Hatch v. Hatch*, 9 *Mass.* 311; *Jackson, ex dem. Simmons v. Chase*, 2 *Johns. R.* 84; *Cutter v. Haven*, 8 *Pick.* 490; *Cutts v. U. States*, 1 *Gall.* 69. In this case the cancelling of the bond having been made to defraud creditors is to be treated as a nullity. *Meserve v. Dyer*, 4 *Greenl.* 52; *Howe v. Ward*, 4 *Greenl.* 195; *Goodwin v. Hubbard*, 15 *Mass.* 250; *Bullard v. Hinkley*, 6 *Greenl.* 289.

The statute authorising the attachment of equities of redemption is similar to this. Now if a debt honestly due be secured by a conveyance of real estate, and a bond given back, so as to make the conveyance a mortgage; and afterward the parties to defraud the creditors of the mortgagor, agree to destroy or give up the bond to be cancelled, does this destroy the equity of redemption? The creditor could not levy on the land, because the mortgage was legal and good. If in such case it destroys the equity of redemption as to creditors, they are without remedy. That it is not so appears by the case

before cited of *Jackson, ex dem. Simmons v. Chase*, 2 *Johns. R.* 84.

2. The sale of *Tripp's* right by virtue of the bond from *Stanley*, and its purchase by the plaintiff, gives him the right to maintain this action against *Wise*.

The *stat.* of 1829, *ch.* 431, before referred to, provides in 1*st sec.* that such right is to be sold in the same manner as equities of redemption of mortgaged property, and the sale is to have the same effect. The *stat.* relative to sale of equities of redemption, *ch.* 60, *sec.* 18, provides, "that all deeds made "and executed as aforesaid shall be as effectual to all intents "and purposes to convey the debtor's right in equity aforesaid "to the purchaser, his heirs and assigns, as if the same had "been made and executed by such debtor or debtors." What right then did the plaintiff obtain by his deed from the officer? All the right which *Tripp* had by virtue of the bond from *Stanley*, and the right to the possession which was in *Tripp*, who had been in from *Dec.* 1825, to *July*, 1829. The deed gave a seizin to the plaintiff and the right to the possession, and is sufficient to enable him to maintain this suit against any one, who could not show a title to the land. *Stearns on Real Actions*, 192; *Porter v. Perkins*, 5 *Mass.* 236; *Goodwin v. Hubbard*, 15 *Mass.* 212; *Willington v. Gale*, 7 *Mass.* 138; *Porter v. Millet*, 9 *Mass.* 101.

The deed from *Stanley* to *Wise* having been found fraudulent as to the plaintiff, a creditor of *Tripp*, can be of no force in the present suit. The defendant's taking possession under it by his tenant, *Tripp*, can give him no rightful claim whatever, and he is a mere trespasser. *Wise*, to use the language of the Court in *Goodwin v. Hubbard*, "having no title in him-"self, shall not be permitted to quarrel with the title of the "plaintiff, who being in by process of law may maintain his pos-"session against all who have not a legal interest in the land."

The circumstance that *Wise* was in possession by *Tripp*, his tenant, at the time of the bringing the suit, cannot avail him. The plaintiff by the sheriff's deed had the same title as if *Tripp* himself had given the deed, and he therefore could not question the right of *Shaw* to the land. It is sufficient to put de-

fendant out, whether defeasible by *Stanley* or not. A prior possession, for example, a possession from 1769 to 1776, has been held sufficient, against a person taking possession in 1795, and holding it till 1810, unless the last can show title. *Smith v. Lorrillard*, 10 *Johns. R.* 338.

The remedy by bill in equity is only between the mortgagor and mortgagee, and does not concern an intruder or stranger.

3. *Stanley* was a competent witness. If interested at all it was for *Wise* the defendant, and not for the plaintiff.

That a party to a deed, not interested, may be a competent witness to prove it fraudulent, was decided in the case of *Inhbts. of Worcester v. Eaton*, 11 *Mass.* 368; and in numerous cases since.

The rule that parties to instruments shall not be permitted to impeach them, applies exclusively to *negotiable* paper.

J. Holmes, in reply.

The case shows that the officer, in the suit *Shaw v. Tripp*, returned an attachment of debtor's *right to redeem, &c. That*, and that alone, was sold to the plaintiff. The *stat.* of *Feb.* 1829, *ch.* 431, gives to the creditor, the right of attaching the right, title, and interest, which his debtor has, by virtue of a bond or contract in writing, *for the conveyance* of real estate, — not *for the redemption* of real estate. Here is a manifest distinction, between cases arising under this statute, and cases of sale of equity of redemption under mortgages. The sale, therefore, was not according to the statute; — it is a sale of the right, title and interest of the debtor *in the land*, when it should have been of the right for a purchase under a bond, describing it. The plaintiff, therefore, took nothing by his purchase.

Again, the contract when made, was for the conveyance of real estate, which the parties could modify or annul at pleasure; no law then existed giving a right of attaching obligee's rights. Now, if this statute is to be construed as affecting the rights existing under this contract, then it is retrospective and unconstitutional. If it be retrospective, it affects *the contract*, and not merely *the remedy* upon it. But it is contended that the law was not intended to operate on contracts already made.

Then as to the title of *Tripp* in the land, it is contended that he never had any. It is not to be presumed that he was in claiming adversely to the true owner. He was in, first, under *Stanley*, and then under *Wise*. The plaintiff has admitted that *Wise* was in possession *by Tripp;* otherwise there could be no pretence for the maintenance of the action. *Wise* therefore is no mere stranger, as contended for by the counsel for plaintiff.

Then did any estate vest in *Tripp* by virtue of the obligation? The cases cited fully negative such an idea. What then could *Shaw* get by his purchase? Nothing. What had *Tripp* at the time of the attachment? If *Wise* at that time, had paid up the remainder of the sum due *Stanley*, then there was no right to attach — the title had become absolute, and the plaintiff should have attached the estate itself, and levied on it in the usual way. If it is a mortgage, or to be treated as such, then by payment of the sum due, the estate vested in *Tripp*, and there was no right *to redeem* left, which could have been attached. If it had not been redeemed, if a right to redeem still existed, then *Stanley* gets his pay twice, and that too, on his own testimony.

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

The only question in this cause, which it is necessary for us to decide, is, whether the facts disclosed on the report of the Judge, prove the seizin of the demandant on which he has counted. A person who is in possession of a piece of land, though having no other title than his possession, may maintain a writ of entry against any one who enters upon him and ousts him, without any title whatever. But as *Shaw* does not appear ever to have been in possession of the land in question, he cannot, on the above-mentioned principle of the common law, maintain the present action, even if the tenant has no title. The next question is, whether he can maintain it, in virtue of the right, title and interest which he purchased at auction of the officer, being the estate, right, title and interest which *Tripp* had, in virtue of *Stanley's* bond, to convey the real estate to him on performance of the condition of it. The statute of *February* 28, 1829, *ch.* 431, provides "that the estate, right, title and

" interest, which any person has by virtue of a bond or contract " in writing, to a conveyance of real estate, upon condition to " be by him performed, whether he be the original obligee or " assignee of the bond, shall be liable to be taken by attach- " ment, on mesne process or on execution:" the section goes on and provides that when such estate, right, title and interest is seised on execution, it shall be sold in the same manner as a right in equity of redeeming real estate mortgaged, and that the purchaser of such right or title shall have the same right of redeeming as the purchaser of an equity, and the same mode of process to obtain possession; that is, by a bill in equity. *Stanley's* bond or obligation to *Tripp*, was a contract merely *personal*, and the estate, right, title and interest which *Tripp* had in virtue of that bond or obligation, was merely a *personal* right; that is, a right to a conveyance of the land in question, on performance of the condition of the bond or obligation; but the demandant, by his purchase and deed of the officer, acquired no *seizin* of the land, for *Tripp* had none. It is perfectly clear that an obligee of *such* a bond, or contractee in *such* a contract, cannot, *merely as such*, maintain a writ of entry against any one, even a stranger; but a mortgagor in possession can maintain such an action; because, as to all persons, except the mortgagee and those claiming under him, he is considered as seised of the legal estate. The nature of the obligee's right to conveyance in virtue of such bond or contract, surely is not changed into real estate, because it is to be sold on execution in the same manner as an equity of redemption. Suppose that all vessels were to be sold on execution, as equities of redemption are by law to be sold, they would still remain mere chattels. It is evident that the Legislature viewed the subject in the light in which we have placed it, by having provided a bill in equity as the process by means of which the obligee, or those claiming under him, may compel a specific performance; that is, a conveyance of a legal title to the owner of such personal contract, on performance of the conditions of the bond or contract. We are all clearly of opinion that the present action cannot be maintained. A nonsuit must be entered.

COFFIN *vs.* HERRICK.

Whether a bond given to procure the liberties of the jail limits pursuant to the provisions of the fourth section of the act of 1822, *ch.* 209, *approved* by but *one* justice of the peace and of the *quorum*, be sufficient to justify the prison keeper in releasing the debtor — *quære.*

But the prison keeper would be justified in releasing the debtor on the giving of such bond, though it were defective, if *accepted* and *approved* by the *creditor.*

Such approval may be *express* or *implied;* — or *before* or *after*, the discharge of the debtor.

And where the creditor wrote to one of the obligors in the bond, who was a surety, as follows: "By the statute one year only is given to commence an "action [on the bond] and as that time has nearly expired, I write at this time "to give an opportunity to settle the same if you think advisable;" — it was construed to be *an acceptance* of the bond.

THIS was an action of *debt for an escape*, against the defendant, as sheriff of the county of *York.*

The case was submitted for the opinion of the Court upon the following agreed statement of facts.

On the 12th *day of August*, 1831, one *David M. Coffin*, was committed to the jail in *Alfred*, on an execution for debt in favour of the present plaintiff. After said commitment, and on the same day, the prison keeper, a deputy of the defendant, permitted *Coffin*, the debtor, to go at large on his executing a bond with surety for the liberty of the jail yard, but which bond *had been approved by but one justice of the peace and of the quorum*, and the condition of which was, that "if the said *Coffin* shall "from henceforth continue a true prisoner in the custody of the "jailer of said jail, and within the limits of said prison, until he "shall therefrom be lawfully discharged without committing any "manner of escape," &c.

On the 31st day of *August*, 1831, *Coffin*, the debtor, appeared at the jail-house in *Alfred* and took the oath prescribed in an act, entitled "an act for the relief of poor debtors," before two justices of the peace, *quorum unus*, he having previously given due notice to the creditor of his desire to take the benefit of said act.

On the 30th day of *July*, 1832, the plaintiff addressed the

following letter to *James Hopkinson*, who signed said bond as the surety of *David M. Coffin*, the debtor. "Sir, The bond "which you signed as surety for *David M. Coffin*, for the liber- "ty of the jail yard, dated *August 12th*, 1831, was not in con- "formity to the statute of *Feb. 9th*, 1822, which requires the "bond to be approved by the creditor or two justices of the "peace, *quorum unus*. This bond was approved by *Henry* "*Holmes, Esq.* only. By the statute one year only is given to "commence an action, and as that time has nearly expired, I "write at this time to give an opportunity to settle the same, if "you think advisable.

"I am, Sir, yours, &c.
"*Charles Coffin.*"

If in the opinion of the Court the plaintiff was entitled to recover upon the foregoing statement of facts, the defendant was to be defaulted; otherwise, the plaintiff was to become nonsuit.

N. D. Appleton, for the plaintiff, contended that, in this case the bond not being made pursuant to the statute, and the debtor being permitted to go at large, the sheriff was liable for an escape.

1. It is not in conformity to the requirements of the statute, inasmuch as it was not *approved* by *two* justices of the peace, *quorum unus*. *Maine stat. ch.* 209, *sec.* 4 and 9. That the sheriff is liable for an escape under these circumstances, he cited, *Clapp v. Cofran*, 7 *Mass.* 101; *Bartlett v. Willis*, 3 *Mass.* 86; *Colby v. Sampson*, 5 *Mass.* 310; *Degrand v. Hunnewell*, 11 *Mass.* 160; *Clapp v. Hayward*, 15 *Mass.* 276; *Baxter v. Taber*, 4 *Mass.* 361; *Burroughs v. Lowder & al.* 8 *Mass.* 373; *Walter v. Bacon & al.* 8 *Mass.* 468; *Cargill v. Taylor & al.* 10 *Mass.* 206; *Codman v. Lowell*, 3 *Greenl.* 52; *Palmer v. Sawtel*, 3 *Greenl.* 447; *Pease v. Norton*, 6 *Greenl.* 231.

2. The *condition* of this bond is not such as the statute requires. The 4th *sec. of Maine stat. ch.* 209, requires the condition of the jail bonds to be as follows, viz. that the debtor "*will* "*not depart without the exterior bounds of the jail yard, until* "*lawfully discharged.*" The language of this bond is, "*if the* "*said Coffin shall from henceforth continue a true prisoner in*

"*the custody of the jailer of said jail and within the limits of* "*said prison*, until he shall therefrom be lawfully discharged, "*without committing any manner of escape.*" See the cases before cited.

3. The letter addressed by the plaintiff to *Hopkinson* was not an *acceptance* of the bond. There is in the letter *no evidence* of plaintiff's *intention* to *waive* his rights against the defendant for the escape; and it would seem strange, if the very letter in which the plaintiff objects to the *validity* of the bond, on account of its *informality*, should be construed as an admission or proof of his acceptance of it. *Coffin* clearly intended to avail himself of the informality of the bond, against whoever was responsible for it. He does not pretend that there had been any breach of its conditions, and of course the surety was not liable. But the letter was probably written to the *surety* instead of the *sheriff*, through *mistake* or *misapprehension*.

4. But even if the letter may fairly be construed into an acceptance of the bond, it will not discharge the plaintiff's right of action against the defendant for the *voluntary escape* of the prisoner.

To constitute a voluntary escape, it is not essential that the officer actually intend an escape, but it may be through his carelessness. *Dane's Abr. ch.* 65, *art.* 1, 2; 2 *W. Blk. Rep.* 1048.

If an escape be voluntary in a jailer, nothing afterward will purge it;—a right of action having once accrued, it can only be defeated by release under seal, or an agreement for valuable consideration. *Ravenscroft v. Eyles*, 2 *Wilson*, 294; *Scott v. Peacock*, 1 *Salk.* 271; *Dane's Abr. vol.* 2. 644, and 633; *Brown v. Compton*, 8 *Term Rep.* 424; 2 *Wilson*, 294; *Sweat v. Palmer*, 16 *Johns. R.* 181; *Levi v. Palmer & al.* 7 *Johns. R.* 159; 1 *Saunder's R.* 35, *in note.*

All the cases show a distinction between actions on the *bond*, and those brought for an *escape*.

It is the duty of the debtor to see that all the necessary formalities are observed, to obtain the benefit sought. The creditor has no agency in the business—he can have none—and it is not for the *obligors* in the bond to take advantage of their own neglect, to avoid their own bond. See *Bartlett v. Willis*, before cited.

But in actions against the sheriff for an escape, there must be a strict compliance with the provisions of the statute by the sheriff to protect him, as the authorities all show.

D. Goodenow, for the defendant, adverted to the *object* of imprisonment for debt — argued that it was not now *vindictive*, whatever it may have been in other times — that it was not to *punish* the debtor, but to secure a disclosure upon oath — and that a *liberal spirit* should be adopted in construing the statutes relating to this subject.

He maintained that the bond was good, though approved by but one justice. The provision for the *approval* of the bond by two justices was introduced for the benefit of the debtor, to prevent oppression. And also to protect the sheriff against an action of the creditor for accepting insufficient security. *Bartlett v. Willis & al.* 3 *Mass.* 92.

In *Clapp v. Cofran*, cited on the other side, the bond was not in *double* the sum. This was a defect in the *bond itself* — but the *approval* is no part of the bond.

In *Degrand v. Hunnewell*, it is only settled, that as the laws then were, a prisoner who had not given bond must be kept "*in salva et arcta custodia*," in the *daytime* as well as the night.

"Cotemporary practice in doubtful cases, is certainly proper "to be resorted to in the exposition of statutes;" — and it is confidently believed that in every county in this State, the practice has comported with the principles contended for. Many cases of similar bonds must have occurred, and the acquiescence of those interested is strong proof of the general sense of the profession. Not one case in *Maine* or *Massachusetts*, except *Bartlett v. Willis*, can be found, where any opinion is intimated upon this question.

But though a bond given for a debtor's liberties do not strictly conform to the requisitions of the statute, it has nevertheless been held to be good. *Baker v. Haley & al.* 5 *Greenl.* 240; *Kimball v. Preble & als.* 5 *Greenl.* 353.

As to the nonconformity of the bond to the statute requirements, in the particular phraseology pointed out by the counsel for the plaintiff, it is a sufficient answer to say that, the condi-

tion of the bond is *more strict* than the statute. Certainly in this, the plaintiff has no cause of complaint.

But in this case, however defective the bond may be, it was not objected to by the plaintiff at the time it was given, hence he is bound by it.

Further, it may properly be argued that the bond was *accepted* by him; for the jailer must be considered his agent for transacting the business, and as accepting the bond for him.

It was also *accepted* by his letter to *Hopkinson*. He there set up a claim *under the bond*, and threatened a suit upon it. This was virtually an election to *accept* the bond.

The opinion of the Court was delivered at the succeeding *June* term, in the county of Kennebec, by

MELLEN C. J.— The defence in this action, on which reliance is placed, is, that the debtor, *David M. Coffin*, for whose alleged escape it is prosecuted, was lawfully discharged from prison, soon after his commitment, in consequence of his having given bond for his enlargement, pursuant to the provisions in the fourth section of the act of 1822, *ch.* 209. The above section requires that such bonds should be approved by the creditor, or two justices of the peace, *quorum unus*, for double the amount for which the debtor is imprisoned. It appears that the bond given by the debtor, and *James Hopkinson*, his surety, was approved by only *one* justice of the peace and the *quorum*. Whether *such* an approval was wholly insufficient to justify the release of the prisoner from custody, we do not now decide: for it is contended that the bond was *approved and accepted* by the plaintiff, the creditor. If such was the fact, certainly the defence is maintained. An approval by the creditor may be *express* or *implied*; it may be *before*, or *after*, the discharge of the debtor; for, if after, it is a *ratification* of the act done by the prison keeper, in releasing the debtor from his custody. In proof of the alleged approval and acceptance of the bond by the plaintiff, the defendant relies on the letter of *July* 30, 1832, addressed by the plaintiff to *Hopkinson*, the surety, about eleven months and a half, after the date of the bond. It would seem from the language of the letter, that a

copy of the bond was before the writer. In this letter, the plaintiff, after briefly describing the bond and remarking on its non-conformity to the requirement of the law, in the manner of its approval by *one* justice, instead of *two* justices of the *quorum*, he adds, "By the statute, one year only is given to "commence an action; and as that time has nearly expired, I "write at this time to give you an opportunity to settle the "same, if you think advisable." When he wrote this letter, he certainly had a *right* to approve and accept the bond, notwithstanding *one* justice only had approved it; and if he *exercised* that right, and *did* approve *and* accept it, then he was bound by that act; and if *he* was disposed to accept, and did accept the bond, it is perfectly clear that the *obligors* were bound by it; it was their deed. *Bartlett v. Willis & al.* 3 *Mass.* 86. That was the case of a bond for the liberty of the yard, and it was not approved by two justices. Defendants objected to it on this ground; but *Story*, their counsel, gave up the point. The Court said, if the plaintiff was satisfied with the sureties, it was sufficient; and that the objection could not, in any form, avail them. *Coffin*, having made his election, he must seek his remedy upon the bond, and can have none against the defendant. He cannot in such case change his mind and revive that right of action against him which he once had, but which he had waived by his acceptance of the bond. Does the letter amount to such approval and acceptance? This is a question of law which the Court must decide. The eleventh section of the act before mentioned declares, "that "no action shall be hereafter maintained for the breach of any "bond given or to be given for liberty of the jail yard, unless "such action be brought within *one year* from and after such "breach." Now, why was the letter written to *Hopkinson*, and a claim on the bond asserted against him, notwithstanding the manner in which it had been imperfectly approved, unless he had *elected* to approve the same himself, and *accept* it, knowing as he did the perfect responsibility of *Hopkinson* as a surety. Why did he mention the limited time within which an action must be commenced, unless he relied on the bond as his security? The plaintiff is a lawyer, and he must have

well known that an action against the defendant for any official act of his deputy would not have been barred under *four* years. Unless we give this construction to the plaintiff's language, we must presume that he was practising deception with *Hopkinson*, and artfully endeavouring to obtain the amount of his claim from him, knowing at the same time that he had no pretence for such a dishonest experiment. We prefer to consider him as acting, in relation to the subject under consideration, with the views and upon the principles which we have particularly stated in this opinion. Proceeding on this ground, the conclusion is, that the letter of the plaintiff must be pronounced proof of an approval and acceptance of the bond; of course the action is not maintained; and, according to the agreement of the parties, a *nonsuit* must be entered.

PHILPOT *vs.* MCARTHUR.

The death of a plaintiff during the pendency of his suit, and the insolvency of his estate, do not discharge the indorser of the writ from his liability as such.

If one plead a decree of insolvency made by the Probate Court, it should be with an averment of *prout patet per recordum*, and with a *profert* of the same.

Such a defect in pleading, however, can only be taken advantage of, on *special demurrer*.

SCIRE FACIAS, against the defendant as *indorser* of an original writ. The facts are succinctly and clearly stated in the opinion of the Court; the general question being, whether the death of *Scolly G. Usher*, the original plaintiff, during the pendency of his suit, "and the insolvency of his estate, discharged the de-"fendant from the contract created by his indorsement."

Howard, for the plaintiff, argued that it did not. The death of the plaintiff during the pendency of the suit does not abate it. *Maine Stat. ch.* 52, *sec.* 21, 22. The indorser of an original writ is surety, not for the *life* of the plaintiff, but for his *ability* for the payment of the defendant's judgment for costs,

in that action. *Maine stat. ch.* 59, *sec.* 8; *Strout & al. v. Bradbury & al.* 5 *Greenl.* 316; *Ely & al. v. Forward & al.* 7 *Mass.* 28; *Caldwell v. Lovett*, 13 *Mass.* 423; *Ruggles v. Ives*, 6 *Mass.* 495; *Gilbert & al. v. Nantucket Bank*, 5 *Mass.* 98; *Chapman v. Phillips*, 8 *Pick.* 28.

The case is like that of an indorser of a note, — liable on certain contingencies. — Or like that of a surety generally, who agrees to pay if the principal fail or avoid.

It is unlike the case of bail. Bail may *surrender* his principal and discharge himself — an indorser cannot. He may make himself a witness by surrendering — an indorser cannot. *Ely & al. v. Forward & al.* 7 *Mass.* 28; *Miller v. Washburn*, 11 *Mass.* 412. Bail is surety for the *person* of his principal — an indorser is not.

The indorser's undertaking is for *the benefit of the defendant*, and should therefore continue as long as the defendant is held to answer to the suit. Hence, if the death of the plaintiff does not defeat the action, it should not discharge the indorser. — The statute does not contemplate any such discharge, otherwise it would have provided some new pledge or security to the defendant.

Neither the Court nor the plaintiff can discharge, or change, an indorser. *Ely & al v. Forward & al.* before cited; *Caldwell v. Lovett*, 13 *Mass.* 422.

The plaintiff becoming *nonsuit* does not discharge the indorser of the writ. *Talbot v. Whiting*, 10 *Mass.* 358; *Strout & al. v. Bradbury & al.* before cited. Nor does the delay of the defendant in obtaining execution. *Miller v. Washburn*, before cited. Hence it may be inferred, that the indorser will not be discharged, though by delay or accident he may have lost his remedy over against the plaintiff.

The statute *ch.* 59, regulating the indorsement of writs, makes the indorser liable to pay costs in case of the *avoidance* or *inability* of the plaintiff. The case finds both conclusively. He *died* before judgment in his suit against the present plaintiff, and that was *avoidance*.

A return of the officer on the execution is not necessary in all cases to prove avoidance; for instance where a corporation

is plaintiff, or where the plaintiff dies pending the suit and an execution issues against his estate. *Palister v. Little*, 6 *Greenl.* 352.

The *inability* of the original plaintiff is conclusively shown by the record of his *insolvency*. *Hunt v. Whitney*, 4 *Mass.* 623.

To the point made on the other side, of the want of an averment by the plaintiff of *prout patet per recordum* in regard to the decree of insolvency, and a profert of the same, he cited, *Jevins v. Harridge*, 1 *Saund. R.* 9; *King v. Amory*, 1 *T. R.* 149.

N. Emery and *McArthur*, for the defendant.

The indorser of a writ is liable *conditionally*, and not absolutely. He is liable only in case of the *avoidance* or *inability* of his principal. And the only proper evidence of either is *the return* of an officer on the *execution*. *Ruggles v. Ives*, 6 *Mass.* 434.

If by act of God these conditions or a part of them even, cannot occur, then the indorser is discharged. *Basket v. Basket*, 2 *Mod. Rep.* 200; 1 *Rol. Abr.* 451; 1 *Cro. Eliz.* 398; 1 *Show. Rep.* 306; 1 *Dyer*, 66; *Shep. Touch.* 141. Those coercive measures contemplated by the law to enforce payment by the principal, cannot be taken, if the principal die. A man may be able to pay an execution for costs, on the adoption of those measures, when if he die his estate would be insolvent. Hence the reasonableness of his *conditional* liability. And in *Eaton v. Sloane*, 2 *N. H. Rep.* 554, it was decided that the fact of the insolvency of the principal's estate after his decease, was no proof of his inability to pay a bill of cost when alive.

After the death of the original plaintiff the suit was prosecuted by his administrator. But the condition of the indorser's liability depends upon the *plaintiff's* ability to support his action, and not upon the ability of plaintiff's *representative*.

Nor does the indorser stipulate for the good conduct of whoever may administer the estate of his principal. Nor that the estate shall be solvent. This may depend upon the amount of the allowance made by the Judge of Probate to the widow who in this case was the administratrix.

Ought this contract to be construed with more severity than that of bail? In bail the stipulation is that the defendant shall abide by and perform the judgment, yet if the principal die before judgment the bail is discharged. *Cro. Jac.* 165; *Mod. Rep.* 10, 267; *Tidd's Practice.* In the case of a bond for the faithful performance of duty by an officer (annually elected) "*while he shall remain in office,*" it has been decided to extend to *one year* only. In the case of an insurance on a vessel for a voyage, the liability of the insurers depends upon the *seaworthiness* of the vessel, upon the voyage being pursued without *deviation,* &c. But these conditions are not contained in the policy of insurance. Why should not courts be as ready in the case of indorsements of writs to supply those equitable considerations which they are ready to make in other cases?

If the original plaintiff had moved out of the State during the pendency of his suit the defendant might have required a new indorser. *Oysted v. Shed,* 8 *Mass.* 272. So the original defendant might have called for a new indorser on the death of the original plaintiff, and his neglecting to do it ought not to prejudice the old indorser.

A just construction of the indorser's liability, will not extend beyond the life of the plaintiff. *Chadbourne v. Hodgdon,* 1 *N. H. Rep.* 359.

That there should have been an averment by the plaintiff in his replication, of *prout patet per recordum,* and a profert of it, they cited, 1 *Chitty's Pl.* 32, 355, 356.

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

MELLEN C. J. — This is a *scire facias* against the defendant as *indorser* of an original writ. The declaration states that *Scolley G. Usher* commenced an action against the plaintiff; that pending the action *Usher* died; that *Sarah M. Usher,* the administratrix on his estate, became a party to the action and prosecuted the same, and that at *February* term, 1828, of the Court of Common Pleas, the present plaintiff, then defendant, recovered judgment for his costs against the goods and estate of the intestate, in the hands of said administratrix;

that the estate is deeply insolvent; that the plaintiff filed his judgment with the commissioners, which was allowed, and his dividend amounted to only *seventy-three* cents, the judgment having been rendered for $44,03: that execution on said judgment issued, and the amount of the dividend was indorsed thereon; and that the defendant was the indorser of the original writ. To this declaration the defendant pleaded ten special pleas in bar. *Three* issues in fact were joined, which have not yet been tried. In the other *seven* sets of pleadings, there are joinders in demurrer. In the argument no reliance seemed to be placed on any of the demurrers, except the *special* one joined in the seventh set of pleadings, which will be considered hereafter. The *general question* on the merits of the cause arises out of the facts set forth in the declaration, and may be considered in the same manner as though there had been a general demurrer to it; and that question is whether the death of *Scolley G. Usher*, and the insolvency of his estate, have discharged the defendant from the contract created by his indorsement. In *Ruggles & al. v. Ives*, 6 *Mass.* 494, *Parsons C. J.* observes, "If the defendant recover costs, the indorser is made "liable on the *avoidance* or *inability* of the plaintiff to pay the "costs. Whether the principal has or has not avoided, is *mat-* "*ter of record*, arising from the *return upon the execution*. Up- "on these principles, an execution must issue and be returned, "before a *scire facias* can issue against the indorser." These principles seem to be unquestionable when applied to a case where the original plaintiff is *living*, and execution can regularly issue against him; in such case the preliminary steps, abovementioned can always be taken by the defendant. Perhaps they are also applicable to a case where the original plaintiff dies *solvent;* for then execution can issue, and a return of *nulla bona* may be made, if the administrator should not show property to the officer, wherewith to satisfy the execution. But in the case of an *insolvent* estate, no execution can by law issue against the administrator, upon a judgment rendered against the goods and estate of the intestate in the hands of such administrator. This case then does not fall within the principles laid down by the Court in *Ruggles & al. v. Ives*. The law requires that the

original defendant should use reasonable diligence to obtain payment of the costs of the original plaintiff; but it does not require what is impossible; much less what is illegal. The only question, then, as we have before observed, on the merits is, whether the death of *Scolley G. Usher*, and the insolvency of his estate, have operated to discharge the defendant from all liability as indorser of the plaintiff's writ. The defendant has contended that he was discharged by the mere death of *Scolley G. Usher*, independent of the insolvency of his estate, as bail are under certain circumstances; but the contract of an indorser differs from that of bail. An indorser has no control over the action, and cannot *by any act of his own*, release himself from liability; but such is not the situation of bail. Under certain circumstances the bail may put an end to his liability by a surrender of the principal, at any time before final judgment against him on *scire facias*.

We return to the question "Do the *death* of a plaintiff and "the ***insolvency*** of his estate discharge the indorser?" The case of *Eaton and Sloane*, 2 *N. H. Rep.* 552, was decided upon the statute of *New-Hampshire*, which requires that an execution should issue against the ***plaintiff*** in the original action and be returned unsatisfied, before the indorser can be discharged; and in that case the above preliminary had never been complied with, and could not have been, as the estate of the original plaintiff was insolvent. Our statute on this subject requires no such preliminary process: the indorser is liable upon the avoidance or inability of the plaintiff to pay the defendant's costs. In the case before us he obtained all in his power out of the estate of *Usher*, under a decree of the Judge of Probate, amounting to no more than *seventy-three cents*. The present plaintiff does not ground his claim against the indorser on the *avoidance* of the original plaintiff, but the insolvency of his estate; and we cannot perceive any difference, in respect to the plaintiff, between his being unable to obtain satisfaction of his judgment on account of the insolvency of *his estate*, or of his insolvency in ***his life time***, and inability to satisfy the execution, even if he were alive now. The plaintiff's loss would be the same in both cases, with the exception of the trifling dividend above-mention-

ed. The indorsement of a writ is by law required and intended as a security to the defendant against loss, in a certain event; in the present case that event has occurred. Ought the Court so to construe the statute as to pronounce the indorser discharged from his contract by that very event which has occasioned a loss to the party, for whose benefit it was specially furnished? The Court can perceive neither the reason or justice of such a proceeding. But the counsel for the defendant has prayed in aid of the defence a well settled principle of the common law, namely, that when the condition of a bond consists of *two* parts in the *disjunctive*, and both are possible at the time of making the bond, and afterwards *one* of them becomes impossible by the act of God or the party, the obligor is not bound to perform the *other*. The reason is, the obligor never bound himself ***absolutely*** to perform *either* part. He had by the condition an ***election***, and that has been taken from him. The *disjunctive* condition was inserted for the benefit of the ***obligor***, not of the ***obligee***. But is such a case similar to the present? The indorser had no conditions to perform, dependent on his ***election.*** Besides, the statute has declared the *two events*, upon the happening of *which* or of *either* of them, the liability of the indorser was to attach. The ***alternative*** was introduced for the benefit of the ***original defendant***, now plaintiff, and not for the *indorser*, the present defendant. Over these events he had no control. We do not perceive how the principle which the counsel relies upon is applicable to the case under consideration. The act of God has not had any effect upon the statute alternative. It did not *create* the insolvency of the intestate; he was insolvent when he died. — Upon the ***general question of liability***, which has been the principal subject presented to the Court by the counsel and discussed by them, we are of opinion that the plaintiff is entitled to recover.

With respect to all the demurrers, except the ***special*** demurrer in the seventh set of pleadings, we would observe generally, that they present no question of law which can avail the defendant; and as little notice was taken of them in the argument, we dismiss the further consideration of them, and proceed to the examination of the ***special*** demurrer before mentioned.

As we have before observed, the plaintiff sets forth in his declaration among other things, the representation of *Scolley G. Usher's* estate as insolvent; that it proved to be so, and that a decree of distribution was made accordingly. The defendant in his seventh plea alleges that the administratrix "had in her "hands, and under her administration, sufficient to pay all costs "recovered by the said *Philpot* in the aforesaid action, and all "prison charges." The plaintiff in his replication reaffirms the representation of said estate as insolvent, and alleges that the same was "decreed to be insolvent," at a Court of Probate holden in the County of *Cumberland*, and that the same estate is insolvent. To this replication the defendant has given a *special* demurrer, because the plaintiff has not averred a *prout patet per recordum*, and made a *profert* of the same. "In debt "upon a judgment or other matter of record, unless when it is "stated as inducement, it is necessary, after showing the mat-"ter of record, to refer to it by the *prout patet per recordum*, "but the omission will be aided, unless the defendant demur "specially." 1 *Chit. Pl.* 355, 356; *Morse & al. v. James, Willes*, 127. In the case in *Willes*, the omission of the averment was in a plea in bar. For the above reason the replication is bad; but we must go back to the *first fault*, and that is in the plea; for the allegation in the writ, of the insolvency of the estate and decree of distribution, though without a *prout patet per recordum*, is aided and sufficient, because not *specially demurred* to. Now it is very plain that it is no answer to such a declaration, for the defendant to say that there was property in the hands of the administratrix sufficient to pay the *present plaintiff's* demand; for there were many *other* demands; and *other* creditors were entitled to a share of the property as well as the plaintiff; and the proportions of all have been settled by the decree of the Judge of Probate. For these reasons the plea is fatally defective and insufficient. The first *plea* is adjudged bad and insufficient; and all the *replications* to the other pleas are adjudged *good* and *sufficient;* for though we have stated above that the replication specially demurred to is bad, yet a *bad replication* may be adjudged *sufficient* where the *plea is bad. Ainslie v. Martin*, 9 *Mass.* 454.

BATCHELDER *vs.* SHAPLEIGH.

A *mill-saw* is not a *tool* within the meaning of *stat.* of 1821, *ch.* 95, and is not therefore exempt from attachment.

TROVER for a mill-saw. The general property in the saw was admitted to be in the plaintiff, but the defendant justified the taking as an officer upon a writ of attachment against the plaintiff, who claimed to hold it exempt from attachment, on the ground of its being a "tool necessary for his trade or occu- "pation."

It was in evidence that the plaintiff's *principal business* was that of sawing in a mill, in which he was a part owner, both for himself and for some of the other owners; — that he had been employed at that business about six months in the year for four or five years past, sawing whenever there were logs and sufficient water for that purpose. When he had no occasion to use the saw in the mill, he was accustomed to take it home to his house for safe keeping, where it was when the defendant attached it.

Upon this evidence, *Ruggles J.* who tried the cause in the Common Pleas, being of opinion that the mill-saw was not exempt from attachment, directed a nonsuit. To which opinion and direction the plaintiff tendered a bill of exceptions, which was allowed and signed, and thereupon the cause came up to this Court.

N. D. Appleton, for the plaintiff. The intention of the Legislature is said to be the fundamental rule in construing statutes. *Dane's Abr. ch.* 196, *art.* 5. What then was the object of the statute in question? Manifestly to protect from attachment such tools of poor debtors, of small value, as were indispensable to enable them to obtain a living in their respective occupations. A liberal construction should be adopted. The course of legislation latterly has been to extend and increase the exempted articles. The word *tool* should be taken in its popular sense, in which case it will embrace those utensils or instruments necessary for conducting the business of a particular occupation, and

will not be confined to the limited sense of an instrument or small article used *by the hand*. For this construction while it would exempt the blacksmith's hammer, would leave him without an anvil.

The proper limitation is stated by *Parsons C. J.* in *Buckingham v. Billings*, 13 *Mass.* 88. "This term" (necessary) "excludes from the exemption every thing without which a debtor "can work at his trade." Now, in the present case the plaintiff's *principal business* or occupation was that of sawing, it was *his trade*; and the saw was *a tool*, without which he could not "work at his trade." This case therefore is within both the letter and reason of the statute.

"Statutes in derogation of the common law should be construed *sensibly* as well as *strictly*." *Gibson v. Tenney*, 15 *Mass.* 205. The exemption of one swine from attachment extends to the swine after it is killed for food. The exemption of a debtor's tools is not limited to those used by himself but extends to those used by his journeymen and apprentices, if his trade require their assistance. *Howard v. Williams*, 2 *Pick.* 80.

Mr. *A.* then argued against the case of *Daily v. May*, 5 *Mass.* 313, as authority in this case. The decision in that case went upon the ground of a deficiency in proof that the machinery was *necessary* to the debtor's trade or occupation. Besides so far as the remarks of the Court oppose the position now maintained by the plaintiff, they were mere *dicta*, not necessary to a decision of the cause. The reasoning was also unsatisfactory and inconclusive.

Burleigh, for the defendant, cited *Buckingham v. Billings*, 13 *Mass.* 88; *Daily v. May*, 5 *Mass.* 313; 14 *Johns. Rep.* 434; *Gale v. Ward*, 14 *Mass.* 352; *Haskell v. Greely*, 3 *Greenl.* 425.

WESTON J. — We are satisfied that the mill-saw cannot be regarded as a tool, exempted from attachment under the statute. It is not an instrument worked by hand, or by muscular power; but part of a mill propelled by water. The exemption under the statute cannot be sustained to the extent claimed by the plaintiff.

Judgment affirmed.

EATON, *plaintiff in error, vs.* COLE.

A report of referees under a rule from the *C. C. Pleas*, was held not to be void, merely on account of its bearing *no date*; — and on writ of error, brought to reverse a judgment founded thereon, in the absence of all evidence to the contrary, it was presumed to have been made at the term, when it was accepted, and judgment rendered thereon.

An account filed in set-off, by a defendant, pursuant to the provisions of *stat. of* 1821, *ch.* 59, *sec.* 19, becomes a part of the action, and would be included in a submission of such action to a referee.

Where an action was brought by an administrator, — an account filed in set-off by the defendant, — and both submitted to a referee, who reported that the defendant recover a certain sum as *debt or damage*, and costs, against *the plaintiff*, instead of, against *the goods and estate of the intestate*, and judgment was rendered by the *C. C. Pleas* on such report against the *latter*, it was held to be *no error*.

THIS was a writ of error, brought to reverse a judgment of the *C. C. Pleas* against the present plaintiff, rendered on the report of a referee. The writ in the original action was sued out by the present plaintiff, in his capacity of administrator of the goods and estate of *Humphrey W. Eaton*. The defendant, *Cole*, filed his account against said intestate, in set-off, and *the action* was then referred. The referee reported in favour of the defendant, "that he recover of the said *Tristram Eaton*, admin-"istrator on the estate of *Humphrey W. Eaton*, seventy-five "cents *debt or damage*, and costs of reference," &c. The judgment of the *C. C. Pleas* on the report, was, "that said *Daniel* "*Cole* recover against *the goods and estate* of the said *Humphrey* "*W. Eaton*, in the hands and under the administration of the "said *Tristram Eaton*, the aforesaid sum of seventy-five cents "debt or damage, and costs of suit taxed at," &c.

The errors assigned were, 1, that the report of the referee had *no date*, and was therefore void; — and 2, that the judgment was not in pursuance of the report, being rendered against the goods and estate of the intestate, when the report was against the *administrator*.

Elden, for the plaintiff in error, to show that the report was void on account of the deficiency of a date, cited *Southworth*

v. Bradford, 5 *Mass.* 524; *Noyes v. Bradford*, 1 *Pick.* 269; *Wheeler v. Van Houton*, 12 *Johns. R.* 311; *Bacon, plff. in error, v. Ward*, 10 *Mass.* 141; *Skillings, plff. in error, v. Coolidge & al.* 14 *Mass.* 43.

In support of the position that the judgment should have been *according* to the report — or the report set aside, as unauthorised and illegal, he cited *Haskell v. Whitney*, 12 *Mass.* 50; *Nelson v. Andrews*, 2 *Mass.* 166; *Commonwealth v. Pejepscot Proprietors*, 7 *Mass.* 399; *Hardy v. Call*, 16 *Mass.* 530; *Hart v. Fitzgerald*, 2 *Mass.* 509; *Brooks & al. v. Stevens*, 2 *Pick.* 68; *Haines v. Guise, Yelverton*, 107; 2 *Strange's R.* 126; *Sturgess v. Read*, 2 *Greenl.* 109.

It was further argued that the latter point was not weakened by the case of *Atkins & al. v. Sawyer*, 1 *Pick.* 251. In that, it is true, judgment was entered up erroneously against the administrator, and the Court permitted an amendment; — but there the error was a mere misprision of the clerk, and by the amendment the record was made conformable to the truth of the case, while in this, the judgment is not only reversible as it stands, but would also be reversible *if amended* and made to conform to the report of the referee.

Goodwin, for the defendant in error, argued that the report of the referee was well enough though without a date. At common law no date to an award or report of referees is necessary, the day of the delivery being considered the date thereof. *Kyd on Awards*, 134.

No date is made necessary by the rule — nor is any required by the statute. No date is absolutely necessary even to a report of referees, made in pursuance of a submission entered into before a justice of the peace. *Bacon v. Ward*, 10 *Mass.* 141.

The judgment rendered on the report of the referee was in conformity to the statute. See *Maine Stat. ch.* 52, *sec.* 19, 22; *Atkins & al. v. Sawyer*, 1 *Pick.* 353.

It was also strictly legal, by rejecting as surplusage that part of the report which was *void*, being unauthorised by the submission, *viz.* the finding against *Tristram Eaton*, and his own

proper goods. *Skillings v. Coolidge & al.* 14 *Mass.* 43; *Gordan v. Tucker*, 6 *Greenl.* 247; *Commonwealth v. The Pejepscot Proprietors*, 7 *Mass.* 240; *Lincoln v. Hapgood*, 11 *Mass.* 358; *Bacon v. Callender*, 6 *Mass.* 304; *Porter v. Rummery*, 10 *Mass.* 64.

The residue of the report substantially determines the action submitted to the referee. *Maine Stat. ch.* 59, *sec.* 16; *Skillings v. Coolidge & al.* and *Gordan v. Tucker*, before cited, and *Buckfield v. Gorham*, 6 *Mass.* 445.

But a judgment will not be reversed on account of an error which is in favour of the party who assigns it for error. *Whiting v. Cochran*, 9 *Mass.* 532; *Shirley v. Lunenburg*, 11 *Mass.* 379; *Lyman v. Arms & al.* 5 *Pick.* 213; *Saunders' Rep.* 46, *note* 6.

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

Mellen C. J. — This writ of error is brought to reverse a judgment of the Court of Common Pleas rendered on the report of a referee, to whom the *action* had been referred. As the account of the defendant against the intestate had been duly filed, it became a part of the action and was thus included in the submission. In such case, *each* party becomes a *claimant* against the *other*. Each assumes the character of *plaintiff* and each the character of *defendant*. The decision of the referee proves that the estate of the intestate was indebted to *Cole*, at the time of the submission, in the sum of seventy-five cents; and for this reason, the referee reported costs in favour of *Cole*. The language of the report is not precisely technical and proper as it stands, against "the said *Tristram Eaton*, administrator "on the estate of *Humphrey W. Eaton*;" instead of, "against "the goods and estate of the said *Humphrey W. Eaton*, in the "hands and under the administration of the said *Tristram Ea-* "*ton*," as it should have been expressed. This informality in the language of the report, is corrected by the Court in their rendition of judgment; and the judgment is as it always should be, in the case of a recovery of *damages* and *costs* in an action against an executor or administrator, and as it always is render-

ed in such cases. The present action exhibits very different features from those in *Hardy v. Call*, cited in the argument; and the principles of that decision do not apply to such a state of mutual claims embraced in one submission. Though the report bears no date, it is not void on that account; and, in the absence of all evidence to the contrary, we must presume that it was duly made at the term of the Court when it was accepted and the judgment thereon rendered. On examination of the record before us, we do not perceive any error. Accordingly, the judgment is affirmed, with costs for the defendant.

HUBBARD *& al. vs.* REMICK *& al.*

A. and B. levied on the life estate of the husband, the fee being in the wife. Before the expiration of a year from the levy, the husband and wife united in conveying the fee to A. and B. to a part of the land levied on, and A. and B. thereupon conveyed their interest in the residue, to C. D. the father of the husband: — *Held* that, this did not operate as a *discharge* of the *prior* levy of A. and B., so as to let in, and perfect the title under a subsequent levy on the same land.

Held also, that the conveyance to C. D. of the reversionary interest of the wife, though without consideration, was no fraud upon the creditors of the husband.

THIS was a writ of entry, brought by *Aaron Hubbard* and *John Garvin* against *John Remick* and *Edward B. Remick*. The general issue was pleaded, with a brief statement. The demandants derived title to the demanded premises, by deed from *J. B. H. Odiorne*, who had acquired his title, by the levy of an execution against *Edward B. Remick*, on his life estate in the premises, the fee then being in his wife.

On the part of the defendants, it appeared that, *John T. Paine* and *John Trafton* had also levied on the interest of *Edward B. Remick*, in certain real estate, which included the demanded premises, their attachment being *prior* to *Odiorne's*.

Before the expiration of a year from the time of *Paine* and

Trafton's levy, *Edward B. Remick* and his wife joined in a conveyance of the fee to *Paine* and *Trafton*, of a portion of the lands levied on by them, but other than that demanded in this action. Whereupon, *Paine* and *Trafton* conveyed their interest in the residue, it being the demanded premises, to *John Remick*, the father of *Edward*.

Paine, on being called as a witness, testified that, the only consideration for the conveyance to *John Remick*, was the conveyance of the reversionary interest of the wife to himself and *Trafton*, and that their judgment and levy was thereby discharged within the year.

There was other testimony introduced tending to show that, *John Remick* paid to *Edward B. Remick* the value of the estate conveyed to him by *Paine* and *Trafton*, and testimony tending to show the contrary.

The question submitted to the jury was, whether the transaction between *Edward B.* and *John Remick* was *bona fide*, and the conveyance for a full and valuable consideration; or whether it was for the purpose of securing the property in *John Remick*, for the benefit of *Edward B. Remick*, and to secrete it from attachment by his creditors; and the jury were directed to return their verdict for the defendants in case they found the transaction between *Edward B.* and *John Remick* to have been fair and honest, otherwise for the demandants. The verdict was for the demandants.

If in the opinion of the whole Court, the demandants ought not to retain their verdict, it was to be set aside, and a new trial granted; otherwise judgment was to be rendered thereon.

J. and *E. Shepley*, for the defendants, maintained the following positions.

1. That there was nothing illegal or fraudulent, as to creditors, in the conveyances of *Mrs. Remick* to *Paine* and *Trafton*, and of the latter to *John Remick*.

2. That the case did not find any *redemption* of the *Paine* and *Trafton* levies. Neither of the parties *intending* such an effect by what they did.

3. That if the conveyances were fraudulent, still the demand-

ants were not entitled to prevail. The deeds being void, would leave the life estate in *Paine* and *Trafton*, and the reversion in *Mrs. Remick*. In a writ of entry, it is a good defence to show title in a stranger.

These positions they supported by reasoning at length, and under the first, cited the cases of *Bullard v. Briggs*, 7 *Pick.* 533 ; and *Wilson v. Ayer*, 7 *Greenl.* 208. And under the third, the case of *Wolcott & al. v. Knight & al.* 6 *Mass.* 419.

D. Goodenow and *N. D. Appleton*, for the demandants.

1. *Odiorne*, by his attachment and levy regularly made, acquired all the title of *Edward B. Remick*, in the premises. And the plaintiffs have his title. He was in the actual seizin and possession of the premises. *Maine stat. ch.* 60, *sec.* 27, 30 ; *Gore v. Brazier*, 3 *Mass.* 523.

The claim of *Odiorne*, by virtue of his extent, was good against all persons except *Paine* and *Trafton ;* and even against them, after their levies were satisfied. And the case finds that these levies were satisfied within the year.

Odiorne's levy, gave him at the time, the rightful and legal seizin and possession of the land. *Paine* and *Trafton*, it is true, had the first attachment, but they might never have obtained judgment, or levied, or might have lost their attachment before levy.

The subsequent levy of *Paine* and *Trafton*, was a mere charge or incumbrance on the land, which when removed, left *Odiorne's* extent in full force, and is analogous to the case of *Barber v. Root*, 10 *Mass.* 260; also *Clark v. Wentworth*, 6 *Greenl.* 259.

2. *Edward B. Remick* having satisfied the levies of *Paine* and *Trafton*, they had nothing to convey ; their deed, therefore, to *John Remick* was ineffectual to defeat the plaintiffs' title. *Ricker v. Ham & al.* 14 *Mass.* 137.

But if any thing passed by this deed, as between the parties to the transaction, *John Remick* paying nothing, and it being for the benefit of *Edward B. Remick*, as the jury have found, it enured to the benefit of *Odiorne* upon the principle of *estoppel. Odiorne's* rights were the same under the extent as if he

had received a deed from *Edward B. Remick;* and the extent of an execution raises an *estoppel,* as much as if the conveyance were by deed. *Fairbanks & al. v. Williamson,* 7 *Greenl.* 96; *Varnum v. Abbot & al.* 12 *Mass.* 474; *Williams v. Gray,* 3 *Greenl.* 267.

3. The deeds from *Paine* and *Trafton* to *John Remick,* as far as the transaction related to the latter and *Edward B. Remick,* was fraudulent and utterly void. 13 *Eliz. ch.* 5; *Meserve v. Dyer,* 4 *Greenl.* 52; *Howe v. Ward,* 4 *Greenl.* 195; *Clark v. Wentworth,* 6 *Greenl.* 259; *Varnum v. Abbot & al.* 12 *Mass.* 474; *Goodwin v. Hubbard & al.* 15 *Mass.* 210.

The question whether it was an estate in trust for *Mrs. Remick* was made at the trial, or not. If it was made, it was a question of fact and is found by the verdict against the defendants. If it was not made at the trial, it was the fault of the defendants, and cannot now be made. *Tinkham v. Arnold,* 3 *Greenl.* 120; *Allen v. Sayward,* 5 *Greenl.* 232.

The opinion of the Court was delivered at the ensuing *April* term in this County, by

Weston, J. — The attachment of *Paine* and *Trafton,* having been made earlier than that of the demandants, the levy of the former has the priority; and if the title thence derived was not defeated by payment within the year of the amount due to them, there could be no interest, upon which the levy of the demandants could operate. And we are satisfied from the facts, that there was no such payment.

Paine and *Trafton* severally conveyed a part of the life estate of the husband, derived from their levies, for the reversionary interest of *Mrs. Remick* in the residue. This interest was not liable to be taken by his creditors. It was subject to her disposal; her husband joining in her conveyance, to give it legal effect. It did not concern his creditors, how the consideration was appropriated. She was at liberty to bestow it as a gratuity on a friend; and no person, to whom her husband might be indebted, would be thereby defrauded. If she thought proper to have the life estate in part of the land levied upon, which was given for her reversion in another part of the estate, conveyed

to a third person, the creditors of her husband were not injured. Had it been conveyed directly to her, the freehold would, by operation of law, have again become her husband's, of which his other creditors might have availed themselves, at her expense. The conveyance to a third person protected the land from being thus appropriated; and we see nothing in the transaction, tending to defraud his creditors of any thing, of which by law they had a right to avail themselves. Whether she was to derive any benefit or not from this arrangement, did not concern them. Whether she caused the property to be conveyed to *John Remick* for his own use, whether he made any declaration of trust for her benefit, or whether she confided altogether to his sense of what might be right and equitable, are questions between them, for which neither is answerable to others. No legal right of the husband was put out of the reach of creditors. His life estate, according to its appraised value, had been once appropriated to the payment of his debts; and that was all which his creditors could legally or equitably claim. To hold the arrangement, made between the parties, a payment and extinguishment of the levies of *Paine* and *Trafton*, would defeat their lawful intentions. What was done, was in substance an exchange of the life estate in a part of the land acquired by their levies, for a fee in the residue. The demandants were not prejudiced. Their levy was superseded before; and their condition would not have been improved, if these transactions had not taken place, which it is very manifest were not intended for their benefit.

The authorities, cited for the demandants, sufficiently show that if the levies of *Paine* and *Trafton* had been extinguished by payment, their title would have been sustained; but for the reasons before stated, which are also supported by the case of *Wilson v. Ayer*, cited in the argument, we are of opinion that such was not the legal effect of what was done between the parties.

There being nothing in the facts appearing in the case, tending to defraud the creditors of *Edward B. Remick*, the verdict, returned for the demandants, is set aside, and a new trial granted.

GOULD, *plaintiff in error, vs.* HUTCHINS.

In an action brought by the clerk of a militia company, to recover a penalty for neglect to do duty therein, on the ground that the supposed delinquent had belonged to another company in the same town, which had been disbanded by the Governor and Council, and annexed to the company of which the plaintiff was clerk, it was held, to be necessary that, there be proof of the bounds of such disbanded company, and that the defendant resided within them.

Held also, that, *parol* proof was inadmissible to show such bounds — the *record* being the only legal evidence thereof.

Where by statute the Commander-in-Chief was authorized to disband a company and annex it to another in case of "refusal or neglect to choose officers when "thereto required," the mere voting for persons whom the Colonel of the Regiment might deem "wholly unfit," (such persons being legally eligible,) was held, not to amount to such "neglect" and "refusal," and consequently as furnishing no sufficient basis for the act of the Commander-in-Chief in disbanding such company.

The authority given to selectmen by *statute of March* 9, 1832, "to *define* the "limits of every company of infantry in their respective towns," was held not to be limited to that merely of *reestablishing old limits;* but to that of establishing new, by enlarging or curtailing former limits.

THIS was a writ of error, brought to reverse the judgment of a justice of the peace rendered against the present plaintiff, in an action brought by the present defendant as clerk of a company of infantry, commanded by *Oliver Adams*, to recover a military fine. The facts reported by the justice, and material to be stated, were that, *Gould*, the plaintiff in error, formerly belonged to a company commanded by one *Oliver Bourne;* that on being ordered out to choose officers, a part of them cast blank votes, and a part voted for persons whom the Colonel of the Regiment deemed, and reported to be, "*wholly unfit to hold any office.*" — Whereupon the company was disbanded by the Governor and Council, and annexed to the company under the command of *Adams*, both being in the town of *Kennebunk-port.*

There was no evidence, except by *parol*, of the bounds of such disbanded company, and that *Gould* resided within them.

After such disbanding of the company and before the time of *Gould's* alleged delinquency, the selectmen of the town, by virtue of their authority, derived from statute passed *March* 9,

1832, "defined" the limits of the several companies, in such manner as thereby to exclude *Gould* from the company under the command of *Adams*.

There were numerous errors assigned, but those only are noticed in the report of the argument of counsel, upon which the Court gave an opinion.

J. & E. Shepley, for the plaintiff in error.

1. There was no evidence that *Gould* resided within the bounds of *Adams'* company, which must be shown before he can be called upon to do duty therein.

2. He did not become a member of *Adams'* company by the disbanding of *Bourne's* and its annexation to the former.

1. Because the Governor and Council had no authority to disband such company, under the circumstances. The Colonel's report to the Commander-in-Chief, does not show such a *neglect* and *refusal* to choose officers as the statute contemplates. It is contended that, it is not necessary that every man should vote in an election of officers; if it were so, then any one of them by throwing a blank vote might destroy an election and cause the company to be disbanded. But they did vote in this case, and for ought that appears, for a man who was eligible, though not considered *fit* by the Colonel. But of the fitness and qualifications, the law has made the company the exclusive judges. The Colonel should therefore have returned the man voted for, that he might have been duly commissioned. The contingency on which the Governor could act had not happened, and the whole proceeding therefore was illegal.

2. Because it does not appear that the company under the command of *Adams* was "the oldest adjoining standing com-"pany." The Governor possesses no arbitrary power to annex a disbanded company to any that he may think proper. He can only annex it to "the oldest adjoining standing company."

3. Because, if the *Bourne* company was legally disbanded, and properly annexed to *Adams'* company, still there was no evidence that *Gould* belonged to it, by proof of the bounds of the company, and that he resided within them; except by *parol*, which is inadmissible.

4. By defining the limits of the several companies in the town of *Kennebunk-port*, by the selectmen, *Gould* has been excluded from *Adams'* company. Now this act of the selectmen is valid or it is not. If it be not valid, then the clerk has shown no bounds to the company of *Adams*, and *Gould* of course cannot be liable. If it be valid, then *Gould* is excluded from *Adams'* company, and therefore, is not liable to do duty therein.

Leland, for the defendant in error, insisted that, in the disbanding of the company formerly commanded by *Bourne*, the authority of the law had been strictly pursued. The representation of the Colonel was, that the company *neglected* and *refused* to choose officers, inasmuch as part of them threw blank votes, and part of them voted for persons wholly unfit to hold any office. This he contended was a substantial occurrence of the event contemplated in the statute. It was actually neglecting to choose, when they threw blank votes. It would be virtually neglecting to choose, to cast their votes for one *non compos mentis*, or one "wholly unfit for any office."

2. Proof by *parol* was sufficient to show the bounds of the company. If it were not so, half the companies in the State would be set afloat, having been formed in the infancy of the country, when the *forms* of law were perhaps not so strictly regarded as at the present day. Besides, it may be asked, what principle of law would be violated by the admission of parol evidence for this purpose?

3. The new location of boundaries by the selectmen, cannot affect this case. Their power to "*define*" the limits of companies, extending merely to reestablishing of old lines and boundaries. It is like the power given to selectmen to "perambulate" town lines once in five years. This confers no power to change or alter in any respect old town lines, but merely to "define," — to make plain and certain, that which was supposed to be obscure and uncertain. And so of the power of selectmen in defining the limits of companies.

The opinion of the Court was delivered at the ensuing *April* term, in this county, by

PARRIS J.—This is a writ of error, brought to reverse a judgment rendered against the plaintiff in error, in a suit against him for the recovery of a penalty for his non-appearance at a company training of a company of infantry in *Kennebunk-port*, whereof *Oliver Adams* is commanding officer, and the defendant is clerk. The record of the justice of the peace, whose judgment we are called upon to examine, purports to contain a statement of all the facts, as they appeared at the trial, and on which the judgment was rendered. The first error assigned is, that *Hutchins* was not legally appointed and qualified as clerk. The case does not shew how he was appointed and qualified. The justice's record refers to the sergeant's warrant and certificate of appointment and qualification on the back, as making a part of his report of the case; but neither warrant or certificate are furnished. We have, therefore, no means of ascertaining whether there be any error in the justice's decision upon this point.

The second error assigned is, that *Adams* was not the legal commander of the company of militia within the bounds of which the defendant below resided; and third, because the defendant below did not reside within the limits of the company purporting to be commanded by said *Adams*, nor was he liable to do military duty therein. It is not pretended that *Gould* resided within the original limits of the company whereof *Adams* is commanding officer, but that by virtue of certain proceedings of the Governor and Council, he became so far a member of that company as to be by law liable to perform military duty therein. The proceedings relied upon are a report of the standing committee of the Council on military affairs, as follows, "The standing committee on military affairs to which "was referred a communication from *Major-General Waterman* "of the first Division, accompanying a communication from *F.* "*A. Symonds, Lieut. Colonel* of the fourth Regiment, first Bri- "gade in said Division, representing that the company of in- "fantry in *Kennebunk-port*, formerly under the command of "*Captain Oliver Brown, (Bourne,)* is entirely destitute of of-

" ficers, and were ordered out on the 30th of *July* last, for the " choice of officers; but they refused to elect any officers, by " casting blank votes in part, and partly by voting for a man " wholly unfit to hold any office whatever, &c. Report, that " for the reasons set forth in said communication, &c. said com- " pany ought to be disbanded, and recommend that the Com- " mander-in-Chief be advised to cause an order to be issued " whereby said company shall be disbanded, and the members " be attached to the company under the command of *Ensign* " *Oliver Adams*, in said *Kennebunk-port*;" which report was accepted by the Council and approved by the Governor on the 16th of *March*, 1832, and a general order issued thereon on the 20th of *March*, requiring the Major-General of the first Division to " cause the foregoing order in Council to be carried into " effect."

It is by virtue of these proceedings that *Gould* is charged as liable to perform duty in the company under the command of *Adams*. Supposing these proceedings to be all correct and legal, of which we shall hereafter consider, was there any evidence shewing that *Gould* was a member of the disbanded company or resided within the limits thereof. Unless such was the fact the doings of the Governor and Council could have no effect upon him. As the plaintiff, in the case before the justice, was prosecuting for a penalty, the burden was on him to sustain all his material allegations by competent proof. He must, among other facts, shew that the person charged was a member of the company of which he was clerk, or liable to perform military duty therein. If he charged him as belonging to the company, under the general militia law, he must shew that he resided within its bounds, and was liable to enrolment. *Whitmore v. Sanborn*, 8 *Greenl.* 228. If he charged him under the proceedings of the Governor and Council, he must shew that he fell within the operation of those proceedings, that is, that he was a member of the disbanded company, and being such, was consequently transferred to *Adams*' command, and this must be shown by competent proof. The disbanded company, being a local company of infantry, was composed of persons residing within certain defined territorial limits, and neither *Ad-*

ams nor his clerk, could, by virtue of the proceedings of the Governor and Council, exercise command over any of the citizens, except such as resided within those limits and were liable to perform military duty. It was incumbent on the clerk, in sustaining his prosecution, to shew, *in limine*, that *Gould* resided within the limits of the disbanded company, and in order to do so he must necessarily shew what were those limits. Of this, as in all similar cases, there must exist record evidence. The company must have been originally established and its limits defined by an official act of the Governor and Council, and a regular succession of military orders, issued and passed down, for its organization. A copy of the record of all these proceedings is, or ought to be on the files of the company. If it be not there, it is to be found in some of the different offices through which it passed, or in the office of the Adjutant-General or Secretary of State, from which it emanated. As, from the nature of the case, record evidence of the limits of the disbanded company must exist, parol evidence is not admissible. When the record evidence is produced, the location of the bounds of the company as described in the record, and who reside within those bounds, may be proved by parol. Inasmuch as the justice certifies in his record, that "there was no evidence intro-"duced to prove what were the bounds or limits of the com-"pany referred to as disbanded," it did not appear that *Gould* resided within the limits of that company, or was liable to enrolment therein, and consequently it did not appear that he was included in the order of the Governor and Council attaching the members of the disbanded company to that commanded by *Adams*. The case of *Whitmore v. Sanborn*, is an authority directly applicable on this point.

We might rest here, but as it was stated at the bar, that there were many other cases depending on the same facts, and it was desirable that the principal questions raised at the trial should be decided, we proceed to their examination.

By the general law to "organize, govern and discipline the "militia of this State," *ch.* 164, *sec.* 6, "The Governor is au-"thorised and empowered by and with the advice of the Coun-"cil, to organize and arrange the militia, and to make such

" alterations therein, as from time to time may be deemed ne-
" cessary." Under this law the Governor and Council have power to establish new companies and define their limits, to divide old ones, and to abolish or consolidate those already formed ; but they have no power to compel the members of one company, while it exists as a company, to perform duty in another. Under the same statute, *sec.* 10, the case is provided for, where the electors refuse to fill vacancies, by neglecting or refusing to elect, when duly notified and ordered thereto. In such case, the Governor, with advice of Council, is required to appoint some suitable person to fill such vacancy. Thus stood the law until *March*, 1832, when by an additional act for organizing and governing the militia, *ch.* 45, *sec.* 5, it was provided, " that if any company shall refuse or neglect to choose officers, " when thereto required, the Colonel or commanding officer of " the Regiment to which said company belongs shall report the " fact to the Commander-in-Chief, who shall immediately dis- " band said company, and order the non-commissioned officers, " musicians and privates thereof, to be enrolled in the oldest " adjoining standing company, and they shall be held to do " therein all the duties required by law." Under which of these statutes did the Governor and Council act in passing the order of the 16th *March*, 1832 ? They do not profess to abolish the company, or make any alteration in its territorial limits, or extend the territorial limits of *Adams'* company so as to include *Bourne's*. That, and that only, were they authorised to do under the old law, and for any cause which they deemed sufficient. But they profess to " disband the company" and attach the members thereof to *Adams'* company ; what they had no power to do under the old law, but what the Commander-in-Chief, on the existence of a certain contingency was expressly required to do under the new law. The only circumstance attending the transaction tending to render it doubtful under which law the order was issued, is, that the provisions of the 5th section of the last law are to be carried into effect by the Commander-in-Chief, without the intervention or advice of the Council, which fact indicates the intention of the Legislature that the refractory company is not to be abolished, which under the old

law could only be done by the *Governor with advice of Council,* but that it was to be disbanded by the Commander-in-Chief, and the members thereof required by him to be enrolled in the oldest adjoining company, there to perform military duty until they will choose officers for the disbanded company. Supposing the order of the 16th of *March* to have been predicated on the 5th *sec.* of the additional act, does it render the members of "the "company of infantry in *Kennebunk-port,* formerly under the "command of *Capt. Oliver Bourne,*" liable to perform military duty in the company under the command of *Adams?* It is only in the case where a company shall refuse or neglect to choose officers when thereto required, or refuse or neglect to do duty as prescribed by law, that the Commander-in-Chief is authorised to disband a company and order the members to be enrolled and perform military duty in another. By the 7th *sect.* of statute *chap.* 164, the captains and subalterns of companies are to be chosen by the written votes of the members of their respective companies; thus securing to the members of each company the important right of electing their own officers; and so long as they give their votes for a person eligible to the office to be filled, they cannot be considered as refusing or neglecting to choose, although the individual voted for may not be considered as the most suitable to discharge the duties of the office. If the electors all throw blank ballots, there can be no election, and the case of neglecting to choose, provided for in the statute, would exist. If they vote for a person ineligible and who cannot hold the office, the case of neglecting to choose would exist, inasmuch as the office would remain vacant; and the true construction of the statute must be, that they neglect or refuse to fill the vacancy by the choice of a person legally eligible to the office. But it could not have been the intention of the Legislature, and the language of the statute will not bear such a construction, that, because the members of a company give their votes for a man whom the commanding officer of the Regiment may believe unfit to hold the office, that they are to be disbanded, divested of all their company privileges, and required to perform duty in another company.

Of the qualifications of eligible candidates and their suitable-

ness for office, the law, in all cases, both civil and military, makes the electors competent and final judges. The members of a company may elect very unsuitable men for officers, but it is their right under the 7th *sec.* of the law, to prefer such men if they please. The candidate whom they might believe to be the most suitable, and who in fact might be so, the commanding officer of the Regiment might deem to be a "man wholly unfit to hold "any office;" and yet they have a right to choose him under the 7th section of the militia law; and if they do so, how can it be said that they refuse or neglect to choose. It does appear by the representation on which the order of the Governor and Council was predicated, that the company voted, and it does not appear that they voted for a person ineligible or who refused to accept; and the commanding officer of the Regiment does not report that they refused or neglected to choose except by voting for a man whom he considered unfit to hold any office. We cannot believe that this presents the case on which the Legislature intended to clothe the Commander-in-Chief with a power so important, and which might be used to the great inconvenience, not to say oppression, of the citizens. A commanding officer of a Regiment might, from private feelings or personal pique, consider a person unfit to command a company, who in fact might have qualifications of peculiar excellence; and yet, if the choice of such a person is to be considered as a neglect or refusal to choose, within the meaning of the 5th section of the additional act, and the commanding officer of the Regiment may so certify it, the Commander-in-Chief is required, for the law is imperative, immediately to disband the company, and order the non-commissioned officers, musicians and privates thereof to be enrolled in the oldest adjoining standing company. We cannot so construe the law; — and believing that the communication from the Lieut. Colonel did not present such a case of neglect or refusal to choose officers as is provided for in the 5th section of the additional act, we will consider what is the situation of *Adams'* company, if the Governor and Council intended to act under the 6th section of statute *chap.* 164, which authorises them to organize and arrange the militia generally. Under that law they had full power to abolish the

company formerly under the command of *Bourne*, and extend the limits of *Adams'* company so as to include the whole of the company abolished. — If this was done at all, of which we do not find it necessary to give an opinion, it was by the order of the Governor and Council of the 16th of *March*, 1832.

By the 9th section of the additional act, before referred to, passed *March* 9, 1832, the selectmen of each town are required "to define the limits of every company of infantry, in their "respective towns, and cause the same to be recorded by the "respective clerks of said towns, and furnish the commanding "officer of said company, with a copy of their doings before the "first day of *June* then next, and the copy aforesaid shall be re-"corded in the orderly book of the company." This duty the selectmen of *Kennebunk-port* performed on the 30th of *May*, 1832, as appears by an attested copy signed by the town clerk of that town. They say, "the undersigned, selectmen of the town "of *Kennebunk-port*, in pursuance of a law of the State, have "defined the limits of the several companies of infantry in "said town, which are as follows," &c. They then particularly describe the limits of the first company by known monuments, and the limits of the second company in the same manner, and the limits of the third company as embracing all the limits of the town not included in the other two companies.

The justice reports that it was proved that *Gould* did not reside within the bounds of the company commanded by *Adams*, but was within the limits of another company, as the limits thereof were defined by the selectmen.

Now, if previous to this act of the selectmen, *Gould* had lived within the limits of *Adams'* company, could he any longer belong to that company after the selectmen had, by defining the limits of the several companies in the town, included him in another? It is contended that the selectmen had no power to do this. We have no means of knowing what power was intended to be conferred except by the language used to confer it. According to the best lexicographers, *to define* means to determine the end or limit, as, to define the extent of a kingdom or country; and by *defining* is meant determining the limits. Such we suppose, also, to be the popular meaning of the

term, and such is the unquestionable meaning of it in other parts of our statute book. For instance, by the 7th *sect.* of *chap.* 117, towns are authorised to determine the number and "*define the limits*" of school districts within the same. There can be no doubt but to "define the limits" here means to determine, to fix, or establish the limits. If such be the meaning, then the selectmen were authorised to extend or curtail the limits of a company, as they might deem it most for the interest of the militia and the convenience of the citizens.

The Legislature might think it expedient to authorise the selectmen, if they found that a person liable to military duty, could perform it with more ease and convenience in a company other than that to which he had belonged within the same town, and that it would be proper to detach him therefrom, so to change the limits of the companies as to give relief. There could be no reason to apprehend that the selectmen would act improperly, and having personal knowledge of the situation of the military companies, and the members thereof, in their respective towns, it might well be presumed that it would promote the interests of the militia and the convenience of the citizens to clothe the selectmen with this power.

The law gave them no authority to increase the number of companies, to establish new ones, or abolish old ones; that was still retained by the Governor and Council, under the old law. Neither were the selectmen authorised to interfere with the limits of companies raised at large, such as artillery, cavalry, &c. Their authority extended only to companies of infantry, which it is understood, are in every case territorial companies, that is, limited within certain territorial bounds within each town, or corresponding with the limits of the town. Unless this was the intention of the Legislature it is not perceived what could have been the object of the law.

A subsequent Legislature repealed the section under consideration, and in addition thereto, expressly annulled all alterations that had been made under it. If the section had not given the power, the alterations would have been void without the act declaring them so. The necessity of legislative action to restore the limits to what they were before they were changed

by the selectmen, could result only from the fact that such change was authorised by the ninth section of the additional act, and consequently binding until annulled by a subsequent law.

It is our wish, as it is our duty, to give such a construction to the statute as we believe, from its language, was intended by those who enacted it. But, as was said by that eminent civilian *Sir William Jones*, "such is the imperfection of human lan- "guage that few written laws are free from ambiguity, and it "rarely happens that many minds are united in the same inter- "pretation of them."

From the best examination we have been able to give this case, it is our opinion, that *Gould*, the original defendant, was not on the 13th of *September*, 1832, by law, liable to perform military duty in the company of which the original plaintiff was clerk, and, therefore, the judgment under consideration must be reversed.

HOBART *vs.* DODGE.

A note of hand written payable "*on demand with interest after four months,*" with the words "on demand" *erased*, but still legible, was held not to be due until after the lapse of the four months.

ASSUMPSIT, on the following promissory note, *viz:*

"*Boston, Nov.* 25, 1831.

"For value received, I the subscriber of *Saco*, in the County "of *York* and *State of Maine*, promise to pay *James T. Ho-* "*bart* or order, ten hundred and thirty-two dollars, fifty-one "cents, [on demand] with interest after four months."—The words "on demand" having three parallel lines drawn across them, but still remaining perfectly legible.

The writ was dated, *January* 14, 1832. *Parris J.* for the purpose of bringing the question before the whole Court, ruled *pro forma*, that the note by its terms, was not due and payable,

at the time of the commencement of the action; — and a verdict was thereupon returned for the defendant, subject to the opinion of the whole Court upon the case reported.

J. & E. Shepley, for the plaintiff.

It has long been the established law, that a note payable on demand with interest after a limited time, is a note *on demand*, and that a suit may be brought thereon immediately after it is given. *Loring & al. v. Gurney*, 5 *Pick.* 15.

In this case the note was a printed form with the words "on "demand" printed and erased. The fact of these words having once been in the note, and stricken out, is an immaterial one. The striking out was probably accidental. No parol proof is admissible to show the intention of the parties. If not accidental it might have been so done by the consent of the parties each putting his own construction upon it; the one that it was payable on demand, the other at a future day, and with the understanding of both, that in case of dispute, the law should settle it. Whatever may have have been the object, the erasure itself should have no effect in construing the note. It would be dangerous to adopt such a principle. As much so, as to receive parol proof of any kind to vary or contradict the terms of a written contract.

If the words *on demand* had remained, it is well settled that the note would be due immediately on its being given. The absence of them does not alter the effect of the note, for the *law supplies them.* A note without any time fixed for payment is *on demand.*

The words, "with interest after four months," relate solely to the time when *interest is to commence;* — that is, that if the note remained unpaid so long, interest should commence at the end of four months from date; as if nothing had been said respecting interest, none could have been recovered until *a demand* had been made which could be proved.

If the "four months" had relation to the *time of payment*, then interest would commence from the day of the date, which would be against the manifest intention of the parties.

D. Goodenow and *Fairfield*, for the defendant.

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

From an inspection of the original note at the argument of this cause, it appears to be a *printed* one, with proper blanks left for the insertion of the names of the promissor and promissee, places of abode, &c. The printed words " on demand" were erased, by three parallel lines drawn across them, leaving the words, however, as legible as they were before the lines were drawn. The only question in the cause is, whether the note became due before the expiration of *four months* from its date. The counsel for the plaintiff contends that the limitation as to time, applies only to the payment of *interest;* and that the *principal* was due *presently* or *on demand.* This construction is denied by the counsel for the defendant. The case presents two questions. 1. Whether the Court are at liberty to draw any conclusions, as to the intention of the parties, from the obliteration of the words " on demand" in the manner above described. 2. If not, what is the true construction of the note, totally disregarding those words.

1. As to this point, the plaintiff's argument is, that as those words are now *no part of the contract,* the Court cannot receive any explanations from them, any more than from any other *parol* evidence; and that *no parol* evidence is admissible in the explanation of a plain, intelligible contract. This argument deserves careful consideration. The principle of law is clear that, where a promise is unambiguous, the promissor cannot, by parol proof, relieve himself from the obligation of it, by contradicting or explaining it. Nor can the promissee, in such a case, by the introduction of parol proof, subject the promissor to greater liabilities, than the written promise has created. These principles appear to be settled. The erasure of the above-mentioned words was made for *some* purpose; and it is presented to the view of the Court by the consent of *both* parties. The defendant signed the note, as must be presumed, after the obliteration was made: because, immediately following, is the limitation of four months, and gave it to the plaintiff in the same situation in which it now appears; and the plaintiff, having so received it, has produced

it in Court as the basis of his claim, and we cannot shut our *eyes* against it, even if we have no right to take *judicial* notice of it. We cannot but see that the words "on demand" were obliterated by the consent of the parties. We admit that they are now *no part of the contract* declared on; but as *both* parties have placed the fact of erasure before us, have they not both *consented* that they might aid the Court in the true construction of the words which constitute the contract? Do they not necessarily present a *visible negative* upon the idea that the defendant or plaintiff contemplated a liability to payment under four months? Suppose the words "on demand" had not been erased, but, instead of that, the word "not" had been interlined, so as to be read, "*not* on demand," the meaning would seem plain. Does not the erasure imply the same thing? But we are not left without all light upon the subject. In the case of *Jones v. Fales*, 4 *Mass.* 245, we may find some aid upon the point before us. It was an action on four promissory notes —all negotiable. On one of the notes, made payable to *Fales* or order; near the corner, the words "Foreign Bills" were written, within brackets. Several points were made in the defence. In delivering his opinion, *Parsons C. J.* says, "The next ques- "tion is, whether these words, thus written and placed, are "a part of the promissor's contract. I do not think it ma- "terial, *whether they were a part of the original contract* or added "in *explanation of it.* For when the *promissee* took the note "*with these words on it*, he was subject to the explanation *in* "*the memorandum*, if it was one, *as much* as he would have been "bound by these words, if they were *a part of the promise.*" *Sedgwick J.* declared his concurrence in the opinion of the Chief Justice. *Parker J.* says, "I consider those words as *furnish-* "*ing evidence of the understanding* of the promissor and prom- "issee" as to the mode of payment; but he said he was satisfied that the memorandum never was intended to check the *transferable nature* of the note. The *spirit* of the decision on the point above stated seems to be applicable to the case before us. The principal difference is, that in *one* case, the meaning and intended effect of a *memorandum*, and in the *other* the meaning and intended effect of an *erasure*, was the subject of inquiry;

neither being considered as a part of the note, on the face of which, by the consent of promissor and promissee, it appeared.

2. As to this point, we do not consider the case of *Loring v. Gurney* as applicable. In the case before us we have no evidence of usage, either of a general character, or as existing in the plaintiff's store and mode of dealing in his business. In the whole sentence containing the defendant's promise there is no *comma*, which might lead to the conclusion whether the limitation of four months was intended to apply to the *interest* exclusively or to *both*; but the promise is to pay the *specified sum with interest after four months*. It is true that notes are often made payable on demand with interest after a future day. In such cases it may be fairly presumed that no *immediate payment* is contemplated, and therefore the promise of interest after a future day is perfectly consistent. As the limitation, as to time of payment, by the terms of the note, appears applicable to the *whole* promise — as well *principal* as *interest*, we do not feel at liberty to appropriate the limitation to the payment of the *interest* only.

We are of opinion that, in either view of the subject, a good defence to the action is established.

Judgment on the verdict.

LEGRO *vs.* LORD *& al.*

A creditor cannot, in legal contemplation, be defrauded by the *mere* conveyance by his debtor of property which by law is exempt from attachment.

A legal tender within the time prescribed by law, of the amount for which an equity of redemption is held under an execution sale, is sufficient to revest the property without a deed of conveyance from the purchaser.

If one who had been the owner of an equity of redemption which was taken and sold on execution, should before the expiration of a year from the sale, without consideration, convey to a son the right to redeem, and by a fraudulent arrangement between them, should furnish the means and cause the equity to be redeemed, and held in the name of the son for the benefit of the father, with the further purpose of redeeming the estate from the mortgage to be held in like manner — the creditor of the father might avail himself of the fraud by a subequent attachment and sale of the equity of redemption — as the payment or tender of payment by the son, under such circumstances would by operation of law, immediately revest the estate in the father.

THIS was a *writ of entry*, in which the demandants claimed the possession of a certain farm in *Lebanon*. It was admitted that *Benjamin Lord*, one of the defendants, owned the farm, on the 15th *day of July*, 1828; at which time he conveyed the same in mortgage to *Messrs. Hayes* and *Cogswell*. And the demandant claimed title by virtue of the sale of the equity of redemption, made on the 25th *day of December*, 1830, under an execution duly issued on a judgment in favour of *John A. Burleigh* against *Benjamin Lord*, the demandant, being the purchaser under such sale.

To avoid the effect of the foregoing, the defendants shew a sale of the same equity of redemption, to *Aaron Maddox*, on the 15th *day of April*, 1829, on an execution duly issued on a judgment in favour of *Jonathan L. Pierce* against *Benjamin Lord* — a deed of the same equity from *Maddox* to *Elihu Hayes* and *Nathan Lord*, dated, *Dec.* 12, 1829, — and a deed from the latter to *Ivory Lord*, the other defendant, dated *April* 13, 1830. In this last deed, after a general description of the farm, was the following; — "being the right of equity of re-"deeming said farm sold to *Aaron Maddox*, by *Caleb Emery*, "deputy sheriff, which we purchased of him." The defendants

also introduced a deed from *Benjamin Lord* to *Ivory Lord*, his son, dated *Dec.* 21, 1829, which was for the expressed consideration of *one dollar*, and ran thus: "All my right, title and claim "to redeem the farm in *Lebanon*, whereon I now live, from a "sheriff's sale, made in *April* last, by *Caleb Emery*, deputy "sheriff, to one *Maddox*; — and I hereby authorise said *Ivory* "*Lord to redeem said right in equity from said Maddox or his* "*assigns*, in the same way and manner as *I myself might have* "*done*, had this conveyance never been made; — and I hereby "release and quitclaim to said *Ivory*, all right and interest which "I have in said farm; — and I hereby constitute and appoint "him my attorney, to act and do every thing touching the pre- "mises, for me and in my behalf, as fully in every respect as I "myself might do."

For the purpose of showing that the equity had been redeemed from the purchasers, under the *first sale*, the demandants offered to prove by parol, that *Benjamin* and *Ivory Lord*, on the 13th *of April*, 1830, went to *Elihu Hayes* and *Nathan Lord* with an amount of specie sufficient to satisfy their claims, and that *Ivory Lord* tendered the same to them and demanded a deed; — that the deed from said *Hayes* and *Lord*, given that day to *Ivory Lord*, was made and executed to extinguish their title and effect *a redemption* of the equity and for no other purpose, and that such was the intention of all the parties. — They further offered to prove that the money tendered and paid to *Hayes* and *Lord*, was the money of *Benjamin Lord*, and that there was no consideration paid by *Ivory Lord* for the conveyance of *Benjamin Lord* to him.

But the *Chief Justice*, before whom the cause was tried, rejected this evidence, on the ground that parol proof was not admissible to control, explain or affect the deed to *Ivory Lord*; or prove any trust or use, different from that stated in the deed of *Hayes* and *Lord* to *Ivory Lord*. And the question of the propriety of this ruling, was reserved for the opinion of the whole Court. If the evidence was improperly rejected, then the nonsuit which was entered by consent, was to be set aside and a new trial granted; but if properly rejected, then the nonsuit was to be confirmed and judgment entered for the tenants.

J. & E. Shepley and *Burleigh*, for the plaintiff, cited the following authorities. *Leland v. Stone*, 10 *Mass.* 461; *Fowle v. Bigelow*, 10 *Mass.* 384; *Worthington v. Hilyer*, 4 *Mass.* 205; *Wallis v. Wallis*, 4 *Mass.* 136; *Lord Compton v. Oxenden*, 2 *Vesey, jr.* 264; *Erskine v. Townsend*, 2 *Mass.* 495; *Clark v. Wentworth*, 6 *Greenl.* 260; *Darling v. Chapman*, 14 *Mass.* 101; *Parsons v. Wells*, 17 *Mass.* 419; *Vose v. Handy*, 2 *Greenl.* 322; *Gray v. Jenks*, 3 *Mason*, 520; *Kelly & ux. v. Beers*, 12 *Mass.* 390.

N. Emery, for the defendants, cited 4 *Kent's Com.* 99 to 103; *Lockwood v. Sturdivant*, 6 *Con. Rep.* 373; 1 *Levinz.* 11; *Phillips v. Phillips*, 1 *Peere Williams*, 41; *Shephard's Touchstone*, 83; *Dexter v. Harris*, 2 *Mason*, 531.

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

In the decision of the question reserved, it is proper for us to consider the facts which the counsel for the demandant *offered* to prove, in the same manner as though they *had been proved;* and the inquiry then is, whether on all the facts thus existing, as reported, the action is by law maintainable; if so, the nonsuit must be set aside. At the argument, the counsel frankly stated that he did not contend that parol evidence was admissible to contradict or vary the facts appearing on the face of the deed from *Hayes* and *Lord* to *Ivory Lord*, or in any manner control its construction; as by shewing that the money tendered by *Ivory Lord* was the money of *Benjamin Lord*, and that, so, a resulting trust was created; but merely for the purpose of shewing a tender made to *Hayes* and *Lord*, in due season, of the sum due to them; that is, within one year from the time *Benjamin's* equity of redemption was sold and conveyed by the officer to *Maddox;* contending at the same time, that such tender, of itself, and independently of any conveyance from *Hayes* and *Lord*, at once extinguished all their interest in the *equity of redemption;* and that thereupon the same was restored to, and became the property of *Benjamin Lord*, and was therefore rightfully seised and sold the *second* time on execution to the demandant, at the suit of *Benjamin's* cred-

itor, notwithstanding the previous conveyance from *Benjamin* to *Ivory;* because, as the demandant contends, *Benjamin* then being indebted, the deed was fraudulent and void as against creditors. This appears to be the ground and the essence of the demandant's objection to the ruling of the presiding Judge, by which the parol evidence offered was excluded. — The facts of the case, arranged in order of time, are briefly these. *Benjamin Lord*, on the 15th of *July*, 1828, being then the owner of the demanded premises, conveyed the same in mortgage to *Messrs. Hayes and Cogswell.* On the 15th of *April*, 1829, the mortgager's equity of redemption was legally sold on execution and a deed thereof given to *Maddox;* who, on the 12th of *December*, 1829, conveyed the same to *Hayes* and *Lord.* On the 21st of the same *December*, *Benjamin Lord*, the mortgager, by his deed of that date, released to *Ivory Lord*, all his right, title and claim to redeem the demanded premises, "from the "sale made in *April* last;" and authorised the said *Ivory* to redeem said *right in equity* from said *Maddox* and his assigns; and also released all his, said *Benjamin's*, right and interest in the demanded premises. On the 13th of *April*, 1830, the day on which the tender was made, the said *Hayes* and *Lord* conveyed to *Ivory Lord* the "right in equity of redeeming said farm," (the demanded premises) "sold to *Aaron Maddox.*"

If the foregoing facts have not been disturbed, nor their effect destroyed by the proceedings on which the demandant relies, and the application of legal principles to them, the nonsuit must be confirmed. He claims title to the premises in question under a second sale of the *same equity of redemption*, made on the 25th of *December*, 1830, as the property of *Benjamin Lord.* Now, according to the deeds and dates before mentioned, what estate or interest of *any kind*, had *Benjamin Lord*, at that time in the demanded premises, or *legal* or *equitable* title or claim thereto? His *equity of redemption* was sold and conveyed to *Maddox* almost two years before; and his *right to redeem that equity of redemption*, it is contended, he had conveyed to *Ivory Lord*, above twelve months before; and that *both* those rights had been conveyed to, and vested in *Ivory Lord*, more than ten months before. By the 57th *section* of

chap. 60, of the revised statutes, a right in equity of *redeeming real estate mortgaged*, is made a subject of *attachment*, and of *sale on execution*, for payment of the debts of the mortgager; but the right, for one year, *of redeeming such equity of redemption*, when so sold on execution, *was not* liable to such attachment or sale, by any statute or principle of law, until *March* 4th, 1833. *Kelly & al. v. Beers*, 12 *Mass.* 387. Therefore, though *Benjamin Lord* might have been *insolvent* when he made the deed to *Ivory*, (though there was no proof, or offer of proof that such was the fact, nor does the report disclose any,) still he had an unquestioned right to convey whatever *was* conveyed by the deed to *Ivory*, without being impeached, on that account *only*, as acting the part of a fraudulent debtor. No creditor *can be*, in legal contemplation, defrauded by a mere conveyance made by his debtor of any of his property, which such creditor has no right by law to appropriate or even to touch by any civil process. This principle is perfectly plain, and its application is important in this case. It is also important to observe that the deed from *Benjamin* to *Ivory* is an *absolute* conveyance of all his right, which was the *right of redeeming* the *equity of redemption.*

In the above particular, the case at bar is distinguished from that of *Reed v. Bigelow*, 5 *Pick.* 281, cited for the demandant. In that case, the Court, speaking of *Kelly & al. v. Beers*, say, "By the equity, the mortgager's whole *legal* estate passed; but "he had a right to *redeem that equity;* and when he assigns "this right by way of mortgage," (as was the case in *Reed v. Bigelow*) "he has a right to redeem it back again by perform- "ance of the condition. This *new* right, created by the *second* "mortgage, we think *attachable*, and may be *sold* on execution." No one will doubt the correctness of the above principle, or fail to perceive the manifest distinction, in an essential point, between *that* case and the one under consideration.

We would again observe, that it is contended by the counsel for the tenant, that all the rights which *Benjamin* had, he undertook to convey, and did convey, by his deed to his son *Ivory;* that though he had no *legal* estate in the premises, he had *one equitable* right, and *Hayes* and *Lord* had *another*; and that *both*

these rights were acquired by *Ivory* and united in him on the 13th of *April*, 1830, according to the language of the two deeds. If such was the fact, and if the transaction was fair and in good faith, which terminated in this arrangement, then the cause seems clearly with the tenant; for though the right to redeem an equity of redemption is not liable to *attachment* and *sale* on execution, yet it is *assignable*, as was decided in *Bigelow v. Wilson*, cited in the argument. But it is contended that it appears from the very terms of *Benjamin's* deed to *Ivory*, that he was to act as the *attorney* and for the *benefit of Benjamin* in the redemption of the right in equity to redeem the mortgage, and that a *real sale* seems not to have been in the contemplation of the parties to that deed: — and it is further contended, that the deed was fraudulent, and that the demandant should have been permitted to introduce the evidence to prove the fraud, which, however, the presiding Judge excluded. This is a point upon which, for some time, our minds have been in a state of vibration, in consequence of the peculiar nature of the right which *Benjamin* conveyed to *Ivory*; the same not being by law attachable, or saleable on execution. We now say, as we have before said, that the *mere* conveyance of this right, unconnected with other circumstances and events, could not be a fraud on creditors; because creditors could not attach or seise it on execution. But if the money tendered and received, was the money of *Benjamin*, and the right was conveyed to *Ivory* with the intent and for the purpose of enabling him to *redeem* the *equity of redemption* in his own name, and for the further purpose of his *redeeming the mortgage* in his own name, and holding the estate secure from the creditors of *Benjamin*, and for his use; pursuant to a fraudulent arrangement made between *Benjamin* and *Ivory*, we are of opinion that the creditors of *Benjamin* may prove the fraud, one of whom is the present demandant; and such a fraud being proved, the effect must have been, that by the tender made to *Hayes* and *Lord* of the sum due, their rights at once were at an end, without a deed of conveyance from them, and the equity of redemption immediately was restored to *Benjamin*, and was lawfully seised and sold on execution and conveyed to the demandant by the officer. Such a

construction of such an arrangement, if fraudulently made for the purposes above-mentioned, is necessary to secure to honest creditors their rights, and prevent the triumph of intrigue, dishonesty and fraud.

From what we have stated, it is perceived that there must be a new trial; and to prevent further examination of any of the questions of law which have been discussed by the counsel, we would now observe that we can see nothing resembling a *merger*, as has been contended. It is difficult for us to discover the bearing, or, indeed, the meaning of the argument on this point. No doubt, as we have before observed, there was a union of the two *equitable* titles or rights in *Ivory;* at least as to all persons but creditors; but surely there is no union of the titles of the mortgagees and mortgager in the present case. The rights of the mortgagees have not been affected by any of the acts of the mortgager or his assigns or any creditor of the mortgager, either in respect to the *equity of redemption* or the *right in equity of redeeming the same.* The mortgage remains in full force: and with that title the demandant has no connection at present. "A merger takes place when there is a union of the freehold "or fee, and a term in one person, in the same right and at the "same time," — "an estate for years may merge in an estate in "fee, or for life: the merger is produced, either from the meet- "ing of an estate of higher degree with an estate of inferior "degree; or from the meeting of the particular estate, and "the immediate reversion in the same person." 4 *Kent's Com.* 98.

We are all of opinion that, for the reasons we have assigned, there must be a new trial.

Nonsuit set aside and new trial granted.

PILSBURY, *plaintiff in error, vs.* FERNALD.

In *assumpsit* on account annexed to the writ, the defendant may prove *payment*, in money or goods, or services, of all or any part of the plaintiff's account, though he may not have filed any account in *set-off*.

Where a plaintiff produced in evidence his books of account in maintenance of his action, which was assumpsit on account annexed, it was held that the defendant was entitled to the benefit of any credits found therein to him, though not embraced in his account filed in off-set.

ERROR, brought to reverse the judgment of the C. C. Pleas in an action originally commenced before a justice of the peace, and in which the present plaintiff was defendant.

The action was *assumpsit* on account annexed to the writ; to support which the plaintiff introduced his books of account and verified them by his oath. The defendant had filed an account in set-off. On the plaintiff's books were found, beside the *charges*, several items of *credit*, which were not contained in the account filed in set-off. The defendant disputed the charges, and claimed to have the benefit of the credits, and requested the Court to instruct the jury that the same should be allowed.

Ruggles, Justice, instructed the jury, that as those items were not embraced in the plaintiff's account sued in this action, nor in the defendant's account filed in set-off, they could not be allowed in this action without proof that they were received or appropriated as payment of some part or all of the plaintiff's account in suit, or so intended by the parties. But if the articles thus credited were intended, or received in payment, they might and ought to be allowed as such.

In accordance with these instructions the jury returned a verdict for the sum of *thirty-nine cents* in favour of the plaintiff, disallowing the said items of book credit.

D. Goodenow, for the plaintiff in error, cited *Fox v. Cutts*, 6 *Greenl.* 240; *Prince v. Swett*, 2 *Mass.* 569; *Hilton v. Burley*, 2 *N. H.* 193; *U. States v. Kirkpatrick*, 9 *Wheat.* 720.

J. T. Paine, for the defendant in error, contended that, as the original defendant had not filed these items of credit in *set-off*, he

could not now avail himself of them without allowing the *charges*. If he could, it would work manifest injustice. He had disputed the plaintiff's charges and as appears by the verdict a part of them were not allowed. May it not well be argued, that these very items of credit were in payment of the *charges not allowed by the jury?* If therefore the defendant be allowed the benefit of these credits, it will be a violation of the rule that the *confessions* of a party must be taken *together*.

The credit in this case could have no greater force or effect than a general receipt which could not be used without being filed.

If the credits should be allowed, nothing would appear *on the record* showing that fact; and in a suit by the defendant, the plaintiff may be compelled to pay the amount of them again. It would not be competent for him to alter or contradict the record by parol evidence. *Phil. Ev.* 237.

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

In an action on an account annexed, the defendant may prove *payment*, in money, or goods, or services, although he has filed no account in off-set, specifying the money, goods or services which were delivered and received as *payment* of *all* or *any part* of the account sued by the plaintiff. Indeed, the Judge in his instructions to the jury distinctly stated the law to be so; but he stated it in such a manner and in language so unqualified as to lead the jury to a wrong conclusion, and deprive the original defendant of his legal rights. A few words will clearly present the distinction to which we allude. The articles, to the amount of eighty-seven cents, were credited on the plaintiff's book, the benefit of this credit the defendant claimed, and he requested the Judge "to instruct the jury that he was entitled to the ben-"efit of said items and to have the same allowed." This he did not do. But he instructed them, that "they could not be allow-"ed against the plaintiff in this action, without proof that they "were received or appropriated as payment of some part, or all "of the plaintiff's account." Now it is manifest that in this instruction, the Judge meant by the words "without proof," to be understood to say, "without proof, *other than the plaintiff's*

book." The verdict is proof that they so understood him, and accordingly disallowed the credit, which threw the balance against the defendant. We are satisfied that the above instruction was incorrect. The plaintiff's book was, *of itself*, and without the aid of any *other* evidence *aliunde*, proof that the articles credited, had been received *in payment*, *pro tanto*; for it does not appear that the plaintiff had any demand against the defendant, except his book account. The credit given, therefore, is by the plaintiff's own act, an appropriation of its amount, *as payment* of so much of his account on the opposite page. At least it is *prima facie* evidence to the extent we have mentioned, and sufficient, alone, where uncontradicted and unexplained. Such was the import of the instruction that was *requested*, and such should have been the instruction *given*. For these reasons the judgment must be reversed, and a new trial had in this Court.

Donnell *vs.* Thompson.

A. holding a farm under a deed of warranty from B. was sued by C. to recover her dower therein; and during the pendency of her suit, A. sued B. on the covenant in his deed *against incumbrances*, and had judgment for *nominal damages*. After C's recovery, and the extinguishment of her right of dower by purchase by A. he brought another action against B. on the covenant of *warranty*. *Held*, that the former judgment was no bar to a recovery in the latter suit.

This action while pending in the Court of Common Pleas was submitted to the Reporter as referee. In the award certain questions of law were left open for the decision of the Court, and upon such decision being had, the case was brought to this Court, by appeal. The parties here, agreed to the report as a true statement of the *facts* in the case, and submitted the questions raised therein to the decision of the Court. The report of the referee was as follows:

"This action is brought to recover damages for the breach

of the covenant *against incumbrances*, and the covenant of *warranty*, in a warranty deed drawn in the usual form, by which the defendant conveyed to the plaintiff a certain farm in *Buxton*, for the expressed consideration of two thousand dollars. On the part of the plaintiff, it appeared in evidence that after the conveyance, one *Esther Thompson* commenced an action against the present plaintiff to recover her dower in the premises conveyed, and though her claim was contested, yet at the *April* term of the Supreme Judicial Court, 1828, judgment was rendered that she recover her dower and eighty dollars and thirty-nine cents damages and costs. The execution thereon issued was not levied or satisfied by an assignment of dower, the parties having effected a compromise by which the present plaintiff paid the said *Esther* in lieu of dower, in money, and the granting of certain privileges, what may be estimated at $105. After which judgment and compromise, this action was commenced.

"On the part of the defendant it was shown, that after the commencement of said suit by *Esther Thompson*, but before the compromise and extinguishment of the right of dower aforesaid, the present plaintiff commenced an action against the present defendant to recover damages for a breach of the *covenant against incumbrances* in the deed aforesaid, alleging as a breach, the then existing right of the said *Esther Thompson* to dower, and the commencement of a suit by her for the recovery of the same; in which suit the present plaintiff recovered against the present defendant, one dollar damages, and costs of suit taxed at $39,30, which were satisfied by a levy upon the defendant's real estate; and this former recovery, judgment and satisfaction, the defendant pleaded, and insisted on, as a b r to a recovery in this suit.

"Several witnesses were also introduced on the part of the defendant, from whose testimony it appeared; — that, the parties at the time of said conveyance were, and for many years before had been, near neighbors, the said *Esther Thompson* living with her son the defendant on the farm conveyed, and in which she claimed a right of dower. It further appeared that, before, and at the time of the passing of the deed aforesaid,

the incumbrance of the widow's right of dower in the premises was the subject of conversation between the parties in this suit, and the right distinctly admitted by both; the plaintiff declaring that he would never call on the defendant "on account of "the old lady's share or claim in the farm." It also appeared that on several occasions afterward, the plaintiff expressly recognised this agreement, if it may be called one; and repeated the declaration of his intention not to call on the defendant for any damages in regard to said right of dower. All this testimony was objected to by the plaintiff as inadmissible.

"The question as to its admissibility, and also whether the former recovery constituted a legal bar to the maintenance of this action were submitted by the referee to the decision of the Court. If these should be ruled in favour of the plaintiff, then the award was, that he should recover the sum of $105 damages, costs of reference taxed at $11,50, and costs of Court. If the former recovery was no bar, but yet the parol evidence was legally admissible, then the damages were to be one dollar only and costs. But if the former recovery was held to be a bar, then judgment was to go for the defendant for costs."

D. Goodenow, for the plaintiff, to the point that the parol evidence was inadmissible, cited *Linscott v. Fernald*, 5 *Greenl.* 496; 1 *Phillips' Ev.* 480; *Emery v. Chase*, 5 *Greenl.* 234; *Hale v. Jewell*, 7 *Greenl.* 436; *Kimball v. Morrill*, 4 *Greenl.* 368; *Richardson v. Field*, 6 *Greenl.* 37.

2. That the former judgment is not a bar. *Wyman v. Bullard*, 12 *Mass.* 304; *Outram v. Morewood*, 3 *East*, 346; *Emerson v. Proprietors of land in Minot*, 1 *Mass.* 464; *Hamilton v. Cutts & al.* 4 *Mass.* 349; *Sprague v. Baker*, 17 *Mass.* 586; *Stearns on Real Actions*, 247.

J. & E. Shepley and *Elden*, for the defendant.

1. This action cannot be maintained on the covenant of *warranty*, because there has been no *eviction or ouster by paramount title*.

The action on covenants of warranty was originally a real action — it was to recover land for land — it went upon the ground that the whole land warranted was lost, and would not

lie for a partial defect of title, or mere incumbrance. In process of time the remedy changed from a real to a personal action — but it is still necessary to show an eviction or ouster by paramount title, and not an incumbrance merely. *Marston v. Hobbs*, 2 *Mass.* 437; *Bearce v. Jackson*, 4 *Mass.* 410; *Twambley v. Henley*, 4 *Mass.* 442; *Prescott v. Trueman*, 4 *Mass.* 631. In the latter case, it is said "on the warranty there is no reme- "dy until after *eviction.*" And a *paramount right* is stated to be one, "which may *wholly defeat* the plaintiff's title." It is true that the Court in this, decide that a paramount right may be an *incumbrance*, but not the reverse, that an incumbrance is a *paramount title.* Any thing which admits the title to be good, but which "is a weight on the land, which lessens the value of it" is an incumbrance, as *dower.* When the whole title is defeated, and the *land is lost*, then there is an eviction or ouster by a *paramount title.* In *Hamilton v. Cutts*, 4 *Mass.* 352, it was decided that *eviction* was synonymous with *ouster*, and that it might be proved by parol; — but still there must be an ouster proved before the action can be maintained on the covenant of warranty.

The cases of *Chapel v. Bull*, 17 *Mass.* 213, and *Sprague v. Baker*, 17 *Mass.* 586, are not opposed to these views, although it is stated in the latter case that a mortgage may become a paramount title.

A recovery in a real action is not a breach, unless followed up by an actual ouster. *Kerr v. Shaw*, 13 *Johns.* 236.

2. Neither is this action maintainable on the covenant against *incumbrances*, because the former recovery is a bar. That suit was for the same cause of action, — it was for precisely the same incumbrance, to wit, the dower of *Esther Thompson.* The action of dower was commenced before the former suit, and no eviction or ouster has ever taken place since, and the former recovery was on the merits. It is therefore a bar. *Com. Dig. Action*, K. 3; *Smith v. Whiting*, 11 *Mass.* 445; *Le Gruen v. Gouverneur*, 1 *Johns. Cas.* 436; *Grant v. Button*, 14 *Johns.* 377; *Outram v. Morewood*, 3 *East*, 346. There is nothing in the case which shows that the former recovery was not on the merits. By the facts as stated by the referee, it ap-

pears that the plaintiff recovered in the former suit more than he was entitled to recover.

3. The parol evidence offered by the defendant was admissible. It was not offered to vary the terms of the deed, or contradict it, or set up any new contract, but to aid in estimating the damages. It was to show the value of the property and incumbrance as estimated by the parties themselves. It was to show what the plaintiff actually suffered, admitting the deed in all its terms and force. Introduced for such a purpose it violates no principle of law. *Leland v. Stone*, 10 *Mass.* 459.

It is a general rule of law that the damages recovered shall be commensurate to the injury sustained. *Rockwood v. Allen*, 7 *Mass.* 256. In this case the plaintiff has not been injured at all, the value of the dower not being included in the consideration paid for the farm.

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

Mellen C. J. — The action on the covenant of *freedom from incumbrances* was prematurely brought, and nothing but nominal damages were recovered; still it is admitted that the judgment in that action would be a good bar to a second action on the *same* covenant, for the *same* breach. But it is contended that it is no bar to the present action, founded on the covenant of *warranty*, or covenant for quiet enjoyment. This action was not commenced until after the recovery by *Esther Thompson* of her dower and damages against the present plaintiff. But her dower was not actually assigned, because it was prevented by a compromise between the parties, by which the plaintiff extinguished her title by paying her one hundred and five dollars. The question for decision is, whether the present action is barred by the former judgment. It is very clear that the two covenants are different in their character. The covenant in the *first* action is a covenant *in presenti*. That in the present case is a covenant *in futuro*, which runs with the land. The counsel for the defendant has contended that there is another marked distinction, and one of importance as applicable in the case before us; namely, that the covenant of *freedom*

from incumbrances extends merely to those claims which others have on the lands, which lessen its value to the purchaser, but are not inconsistent with his legal title; as an easement, a mortgage, an outstanding lease, a right of dower, &c. &c., but that the covenant of *warranty* extends to the *whole* title, and that no action can be maintained upon this covenant except in those cases where the plaintiff *has lost his land*, by eviction or ouster by elder and better title. Such a warranty was at common law the foundation of a voucher by the tenant when impleaded, and if he lost the land he might have judgment to recover of the warrantor, other lands of equal value; but this course of proceeding is unknown with us. In support of his position the counsel has cited several cases. In *Marston v. Hobbs*, certain general principles are laid down, not immediately bearing on the point. In *Bearce v. Jackson*, the Chief Justice observes, that to entitle a plaintiff to recover on the covenant of warranty, he must shew an actual eviction or ouster by a paramount title. In *Twambley v. Henley*, the same principle is stated, in nearly the same words; but in neither expressing, in terms, what was intended by a paramount title. In *Prescott v. Trueman*, the declaration was upon the covenant of freedom from incumbrances; at least the question before the Court arose upon a demurrer to a count upon that covenant; and the breach alleged was that the *paramount title* was in *another person*, at the time of *Trueman's* conveyance to the plaintiff. *Parsons C. J.* in delivering the opinion of the Court, after observing that an easement, a mortgage or a claim of dower is an incumbrance, observes, "And for the same reason, a *paramount* right which "may *wholly* defeat the plaintiff's title is an *incumbrance*. It "is a weight on his land which must lessen the value of it. If "it should appear to the jury who may inquire of the damages, "that the plaintiff has, at a just and reasonable price extin- "guished this title, so that it can never afterwards prejudice the "grantor, they will consider this price as the measure of dama- "ges." Now this last case only decides that in an action founded on the covenant of freedom from incumbrances, the plaintiff may recover damages for the *loss of the land*; or what amounts to the same thing, a sum of money equal to the value

of the land which he would have lost forever, had he not paid the sum to extinguish the paramount title: yet an action on the warranty, we apprehend, would also be proper in such case for the recovery of damages, as was decided in the case of *Hamilton v. Cutts*, cited by the counsel for the plaintiff. There no actual eviction by process of law had taken place, nor any ouster, because the dispossession was by consent of the plaintiff while he was tenant in possession; but in that case he submitted to a *paramount title;* and the Court observed, that there was no necessity for him to involve himself in a lawsuit to defend himself against a title which he was satisfied must prevail. There seems to be no difference in principle between *yielding up* the possession to him who *owns the paramount title*, and fairly *purchasing* that title, so far as respects the right to recover damages on the warranty.

In the two preceding cases, above cited, viz. *Bearce v. Jackson*, and *Twambly v. Henley*, it was stated that an action could not be sustained on the covenant of warranty, unless there had been an eviction or ouster by a paramount title; but still the general position thus stated is to be considered as *qualified* by the doctrine previously established in *Hamilton v. Cutts*.

Thus it is seen that none of the cases cited by the counsel for the defendant, go the length of proving the principle to be correct, that an action on the covenant of warranty can in no case be maintained, except where there is a *loss of the land warranted*, by an elder and better title. A different principle is established in the case of *Sprague v. Baker*, 17 *Mass.* 586. It was an action of covenant broken, upon a deed, containing the usual covenants against *incumbrances*, of *warranty*, &c. *White* and wife mortgaged the premises to *Morse* and *Bachelder*, and afterwards conveyed the same to *Baker*, the defendant; he conveyed the same to *Hitchings* with *warranty* and the usual covenants of seizin, of good right to convey, and against *incumbrances;* and *Hitchings* conveyed the same to *Sprague*, the plaintiff, with *similar* covenants. It was objected that the plaintiff being an *assignee* of *Hitchings*, could maintain no action against *Baker*, on the covenant against *incumbrances*, made by him; as *that* covenant was *broken* as soon as it was *made;*

and was one which did not pass with the land to the plaintiff. The Court gave no definite opinion as to the soundness of the above objection; the Chief Justice saying, "as we have no "doubt that the plaintiff is entitled to judgment upon the *other* "covenant," (the covenant of warranty.) — "The words of the "covenant are, to warrant and defend (the premises) against "'the lawful claims of all persons,' and it is agreed that before, "and at the time of the grant to *Hitchings*, there was a claim "on the land by way of mortgage; that after the assignment, "the mortgagee demanded possession of the plaintiff, or the "payment of the debt due on the mortgage, and that he, to "avoid a suit, with which he was threatened, and against which "he could not defend himself, paid the sum due on the mort-"gage. Against this claim, therefore, *Baker* has not defended "him, according to the express words of the covenant. If the "plaintiff had formally yielded possession, and immediately "after, had extinguished or purchased in the mortgage, he "might have recovered against the defendant, on the authority "of *Hamilton v. Cutts & al.* There is nothing to distinguish "the two cases but a point of form which does not affect the "merits of the question." — And we may add that the case before us differs only in a point of form from *Hamilton v. Cutts*, and *Sprague v. Baker*. This last case appears to have been decided by a full bench, and it is, in our judgment, a decisive authority in favour of the plaintiff. The language of the covenant in *Baker's* deed to *Hitchings* is the same as in the deed of *Thompson* to the plaintiff. Such being our opinion on the main question, the objection made to the admission of certain parol evidence on the part of the defendant, becomes of no importance to the plaintiff, as we do not consider the facts thus proved, of such a character as to influence the Court in their decision. The widow's judgment for her dower, is not to be impeached or affected by her declarations or any of the facts proved by parol. We are all of opinion that the action is well maintained on the covenant of warranty; and, according to the agreement of the parties, judgment must be entered for the plaintiff for $105,00 *damages*, 11,50 *costs of reference and costs of Court.*

PAYNE & *ux.* *vs.* PARKER.

Payne held an estate in right of his wife, subject to *right of dower* in his wife's mother, but which had never been demanded or assigned. *Payne* conveyed the estate to another, his wife signing the deed, which, after a general description contained the following; "*meaning* to convey all the right and "interest which *Eliza Ann Butterfield*, now my wife, *Eliza Ann Payne*, has "or ever had, in said land," "*except the right to her mother's thirds, which I re-* "*serve a right to claim at the decease of the mother of said Eliza.*" *Held*, that the exception must be construed to be of the *reversion* of the dower, and not *the dower itself;* — and that, no dower having been assigned by metes and bounds, the grantee took by his deed *two thirds* of the estate *in common and undivided.*

A deed of land held in right of the wife, is ineffectual to pass the fee simple estate, where the wife, though she sign and seal the deed, yet does not join her husband *as a party in the conveyance.*

THIS was a writ of entry wherein the plaintiffs demanded, in right of the wife, *one undivided third part* of a lot of land in *Buxton*. On the trial of this action before *Parris J.* it appeared that *Eliza Ann Payne*, one of the defendants, and formerly *Eliza Ann Butterfield*, was sole heir to *Samuel Butterfield*, who, it was admitted, was at the time of his decease sole owner in fee of the entire tract described in the plaintiffs' writ.

The tenant relied upon a deed to him, executed by the demandants, *June* 24, 1829, after the decease of *Samuel Butterfield*. In this deed the wife did not join the husband *as a party in the conveyance*, though the deed was *signed and sealed* by her. The description, &c. was in the following words: "A certain piece "of land situated in *Buxton*, in the *State* of *Maine*, and *coun-* "*ty* of *York*, being that part of the 22d lot on letter C, in the "third division of lots in said *Buxton*, being the same which "*Boaz Rich* of *Standish*, conveyed by deed to *Samuel Butter-* "*field*, since deceased; this having particular reference to said "*Rich's* deed for boundaries and extent; meaning to convey "all the right and interest which *Eliza Ann Butterfield*, daugh- "ter of said deceased, now my wife, *Eliza Ann Payne*, has or "ever had in said land, and all right to said deceased's estate, "both personal and real; *except the right to her mother's thirds,*

" *which I reserve a right to claim at the decease of the mother of* " *said Eliza.*"

About seventeen years prior to this conveyance, *Parker*, the defendant, married the widow of *Butterfield*, and moved on to the farm, of which the demanded premises constitute a part. *No dower, however, was ever assigned to the widow out of Butterfield's estate.*

After her death, and prior to the commencement of this action, *Payne* made an entry into the demanded premises in right of his wife.

If in the opinion of the Court the plaintiffs were entitled to recover, the tenant was to be defaulted, otherwise, the plaintiffs were to become nonsuit.

J. & E. Shepley, for the defendant, argued :

1. That the reservation, or part excepted in this deed, is so uncertain, and indefinite, that it can never be located, and is therefore void. *Jackson v. Hudson*, 3 *Johns. R.* 375 ; *Jackson v. Gardner*, 8 *Johns. R.* 394.

The intention of the parties could not have been to convey two undivided third parts only, for then the deed would not have embraced *the whole estate*, as it does. What was designed to be excepted was some well defined and bounded territory, and reference for such bounds is made to the thirds. The thing referred to, not being in existence, there is a failure of any description whatever. The exception is therefore void for uncertainty.

2. But if the construction of the deed should be, that one third in common is reserved, — then it is contended that the exception is void, on the ground of its repugnancy to the grant.

" If a man leases 20 acres excepting one acre, the exception " is void." *Com. Dig. F. E.* 5. *Exception.* " So if a man " grant *totum statum et inter esse suum* except the moiety, it shall " be void." *id.*

These principles are adopted, and are the ground of the decision in the case of *Cutler v. Tufts*, 3 *Pick.* 272.

It is stated in that case, that if a grantor sell *a moiety*, and then say he means *one fourth*, the restriction is void, as repugnant.

Upon the same principle, in this deed a clear grant of all title and interest, is utterly inconsistent with, and repugnant to a reservation or an excepton of one third part in common.

Nor is the case of *Sprague v. Snow & al.* 4 *Pick.* 54, opposed to this view. In that case, the description in the deed was general. In this case, the grantor conveys "*all the right and interest*," — and then follows, that, which (if the decision of the Court be in favour of the plaintiffs) must be regarded as except ing one undivided third of the whole property, and not a partic ularpiece of it, out of "*all the interest.*"

D. Goodenow, on the other side, controverted the positions taken by the counsel for the defendant, and cited *Allen v. Crosby*, 6 *Greenl.* 453; and *Fairbanks & al. v. Williamson*, 7 *Greenl.* 96.

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

Mellen C. J. — The deed on which the tenant relies is drawn very inartificially, and, considering the circumstances in which the grantor stood, in respect to the property therein described, it presents to the eye of a lawyer, a confusion of ideas, and no little ignorance of legal principles. Hence, the true construction of the deed is not unattended with some difficulties. Still, the real intention of the parties to the transaction, we apprehend, may be easily understood. As the wife of *Payne* signed the deed with her husband, she then owning the fee of the estate described, it was doubtless considered as an effectual conveyance of all the right and title thereto which she *then* had or *ever* had, except her reversionary interest and estate in that portion of the land described, which should be assigned to her mother, as her dower, she being the widow of *Samuel Butterfield*, the former owner, from whom all the property descended to *Mrs. Payne*, his only child and heir. Or, to speak in common and familiar language, the object was, not to *convey*, but to *except*, the *reversion of the widow's dower*. The questions are, whether the intention of the parties can be legally carried

into effect, and if it can, then, in what manner, consistently with legal principles.

It is very clear that, though *Mrs. Payne* signed and sealed the deed, she did not join, as a party in the conveyance, and she does not appear, as a grantor, in any part of the deed. The only way in which a married woman can convey an estate belonging to her is, by joining with her husband in a deed of conveyance, and by the use of proper terms of conveyance, effecting the object in view. Her fee simple estate, therefore, was not conveyed by the deed before us, in any part or portion of the lands therein described. *Lithgow v. Kavanaugh*, 9 *Mass.* 161. But as *Payne*, the husband, was in virtue of the marriage, seised of a *freehold estate*, in right of his wife, in the lands described in the deed, the same operated, notwithstanding the clumsy manner in which it was drawn, by way of estoppel, to convey to the tenant all the right and title as to every part and portion of the premises described, and *not legally excepted.* What will be the rights of the wife or her heirs after the death of *Payne*, is a question as to which we are not called upon to intimate any opinion.

Our next inquiry is, whether the exception in the deed is a good one. It is contended by the counsel for the tenant, that it is perfectly void, on the ground of repugnancy to the grant that precedes it.

We have already stated what must have been the meaning of the grantor in the blundering language of the exception; "except the right to her mother's thirds, which I reserve a right "to claim at the decease of the mother of said *Eliza.*" A literal construction would render the exception the merest absurdity. The grantor had no right to the "mother's thirds," and there could be none for him to claim at her decease. The true construction must be what the parties fairly intended, the *reversion of her dower.* Indeed, the counsel have adopted this construction in the argument. "An exception is ever a part of the "thing granted and of a thing *in esse*; as an acre out of a manor." 1 *Inst.* 47. "If a man makes a grant, he may make an excep- "tion out of the *generality* of the grant; but an exception of

"a thing certain out of a *thing particular*, is void; as if a man "leases *twenty* acres, excepting *one* acre." *Comyn's Dig. F. E.* 5. *Exception.* The land in the deed is described thus, "being "that part of the 22d lot on letter C, in the third division of "lots, in said *Buxton*; being the same which *Boaz Rich* of "*Standish*, conveyed by deed to *Samuel Butterfield*, since de- "ceased; this having particular reference to said *Rich's* deed "for boundaries and extent; meaning to convey all the right "and interest which *Eliza Ann Butterfield*, daughter of said "deceased, now my wife, *Eliza Ann Payne*, has or ever had in "said land, and all my right to said deceased's estate, both real "and personal, except," &c. &c.

We are not furnished with a copy of the deed referred to, nor do we know how the land is described, or the number of acres. The only facts we know, are, that the land conveyed is a part of lot No. 22, in a certain division and town, and purchased of *Rich*. According to the above definition of a good exception, how can we pronounce the exception as repugnant to the grant; — as "a thing certain out of a thing particular." The description in the deed as presented to our view, is more *general* than *particular;* it is a grant of all the wife's interest and estate which descended to her from her father. In the case of *Cutler v. Tufts*, cited and relied upon by the counsel for the tenant, there was a palpable repugnancy. The grant was of an undivided *moiety*, and by reference to another deed the *moiety* was reduced to *one fourth part*. Viewing the deed in that light, the Court said, that by reason, as well as according to authorities, the latter clause ought to be rejected as repugnant and void. But that case was different from the present in most of its particulars. In the above case the Court speak of the rule laid down by *Coke* as merely technical, which ought not to be acted upon but in the last resort, as it might force upon the Court a construction different from the intent of the parties. We apprehend, also, that the ancient principle or rule of construction as to exceptions in deeds of conveyance, is applied at the present day with less strictness and severity than formerly, so as better to carry into effect the manifest intention of the parties.

On the whole, we do not perceive in this case any principle of law, or rule of construction, which requires us to pronounce the exception in the deed we are examining, as repugnant and void. What then are the effect and operation of the exception? At the time the deed was executed, the land was subject to the *right of dower* of the widow of *Samuel Butterfield;* but no dower had then been assigned; and no one could decide in what part of the premises it would be assigned; and for that obvious reason, it was impossible for the grantor to except the *reversionary interest* of his wife by metes and bounds; and, as the *excepted* interest or estate could not be described by metes and bounds, but was necessarily *excepted* as an interest or *estate in common,* for the same reason that part or portion of the land which was *not excepted,* but *conveyed,* was necessarily conveyed *in common;* that is, *two thirds* of the land were conveyed *in common,* and *holden in common,* with the *reversion* of the widow's dower in the *other third, excepted* and belonging to *Mrs. Payne.* Such was the nature of the *estate conveyed* and the *estate excepted*; and the tenancy in common was to continue, for the reason we have given, until an assignment of the widow's dower should operate to produce a *severance* of the estate *in common:* but as there never was any assignment of dower to *Mrs. Butterfield,* the consequence is, that the property is still holden in common, and has been ever since the deed of conveyance was made.

It was urged in the argument that if there had been an assignment of dower, perhaps the part assigned might not have been *one quarter* of the land or farm, measured by acres; and yet in the present action one undivided *third part* is demanded; and for this reason it has been contended that such a construction of the exception as we have given, cannot be a correct one. It is very doubtful whether such an objection could be sustained in any case; the grantee must be considered as knowing the legal consequences which *may* follow, where such an exception is contained in the deed, and as assenting to those consequences in their application to himself. In the case before us, however, there are no facts which could lead us to the

conclusion that less than *one third* of the land described in the deed would have been assigned to the widow, as her dower, if any had been assigned.

From a view of all the peculiar facts of this case, and the application to them of legal principles, as we understand and believe they must be applied, we are all of opinion that the action is well maintained. A default must be entered and judgment thereon for the demandants.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF OXFORD, MAY TERM, 1833.

The inhabitants of PERU *vs. The inhabitants of* TURNER.

The admissions, either by acts or declarations, of the overseers of the poor of a town, cannot have the effect to *change the settlement* of a pauper from one town to another.

The town of P. by vote, agreed to accept a pauper as an inhabitant, on *condition*, that the town of T. would relinquish *all demands* against the former town. Nearly six years afterward, the latter town accepted the proposition, and tendered to the town of P. a note, that being the only demand it held against that town. This was held to be an *unreasonable delay*, and that the tender was wholly inoperative to revive the proposal and render it binding on the town of P.

THIS was an action of assumpsit, brought for the recovery of a sum of money expended by the plaintiffs for the support of *Sally Turner*, a pauper, whose settlement was alleged to be in the town of *Turner*. The general issue was pleaded and joined.

That the pauper stood in need of relief in the town of *Peru*, — that she was furnished with supplies to the extent set forth, — and that notice was seasonably given to *Turner*, and seasonably answered by that town, denying the settlement of the pauper to be in that town, were facts admitted.

For the plaintiffs, *Robinson Turner*, the father of the pauper testified, that she was forty-one years of age. — That he moved into *Turner*, in 1793, where he resided until 1810. — That, while there he occupied a farm of fifty acres, which was his own property in fee, from which he supported his family; that he had besides neat stock, and that he regularly paid taxes in *Turner*, during his whole residence there. — That, in 1810, he removed to *Livermore*, and in two and a half years afterward, removed to *Peru*, then a plantation, where he had ever since resided. — That while the pauper was between 17 and 18 years of age, she had a fall from a horse, which was followed by a fit of sickness; since which time she had been at times *deranged*, especially for the last two years. — That the pauper became 21 years of age while he lived in *Livermore*, and had not since that time lived in his family.

For the defendants, it appeared in evidence that on the 7th *of September*, 1822, *Turner* notified *Peru*, that the pauper was in distress in the former town and in need of relief, and that *Turner* had incurred expenses for her support; — alleging that her settlement was in *Peru*, and requesting the latter town to reimburse the expense and to remove her. It did not appear that *Peru*, which was incorporated *February* 5, 1821, ever returned any answer to this notice. The overseers of the town of *Turner*, however, caused her removal to *Peru*, *March* 18, 1823; and thereupon, on the 29th *of July*, 1823, the overseers of the town of *Peru*, gave a note to the town of *Turner*, for the expenses previously incurred by *Turner* for her support and removal. The note was as follows, *viz.*:

"*Peru*, *July* 29, 1823. For value received in a debt due to "the town of *Turner*, for keeping *Sally Turner*, *a pauper*, *charge-* "*able to the town of Peru*, we the undersigned, overseers of the "poor for the town of *Peru*, promise to pay the town of *Tur-* "*ner*, the sum of ninety-five dollars and five cents, in one year "from this date with interest. And by these presents bind our- "selves and our successors in office to pay the same.

"*Enoch Jaquis*, } Overseers of the poor for
"*James Lunt*, } the town of *Peru*."

Peru continued to support the pauper, when she needed it, until they set up the claim controverted in this suit.

September 18, 1823, the defendants in town meeting duly voted, that if *Peru* would adopt the pauper as their inhabitant, the town agent of *Turner* might relinquish to *Peru* the *whole* or a *part* of said note. *April* 11, 1825, *Turner* also duly voted, that their town agent relinquish to *Peru* the *whole* of said note, if *Peru* would adopt the pauper as an inhabitant of that town. And on the 28th *of May*, 1825, *W. K. Porter, Esq.* agent for *Turner*, made to *Peru* the following communication, *viz.*

"If the town of *Peru* will pass a vote, at a legal meeting of "its inhabitants, to admit *Sally Turner*, a pauper, residing in said "*Peru*, to be a legal inhabitant thereof, having inserted an art- "icle in their warrant to that effect, for calling said meeting, and "will produce to me a copy of the warrant and return thereon, "and also a copy of the vote passed at said meeting admitting "the said *Sally*, all duly authenticated, I then by virtue of au- "thority placed in me, by the town of *Turner*, hereby agree "to relinquish and give up to said *Peru* the sum of *eighty dol-* "*lars* on the note which the town of *Turner* holds against the "town of *Peru*."

September 12, 1825, *Peru* duly voted to accept the pauper as their inhabitant, if *Turner* would relinquish the *whole of their demands against Peru.* But *Turner* did not tender to *Peru* the note aforesaid until *May* 2, 1831.

Levi Ludden, who was agent for the town of *Peru* in 1828, testified for the plaintiffs, that in that year he had a conversation with *W. K. Porter, Esq.* then agent for *Turner*, respecting this pauper, and that in that conversation *Porter* told him that *Peru* must pay the note aforesaid, or comply unconditionally with his written proposition of *May* 28, 1825. The testimony of *Ludden* was objected to, but admitted by the presiding Judge.

A verdict was taken for the plaintiffs, subject to the opinion of the whole Court. If that should be, that the plaintiffs had made out their case by competent proof, judgment was to be rendered on the verdict, otherwise the verdict was to be set aside, and the plaintiffs to become nonsuit.

Greenleaf and *Porter*, for the defendants.

1. The pauper having been a lunatic, or at times insane, from the age of 17 or 18, was never emancipated from her father, but acquired a settlement with him when *Peru* was incorporated, *Feb.* 5, 1821. *Upton v. Northbridge*, 15 *Mass.* 237; *Buckland v. Charlemont*, 3 *Pick.* 173.

2. The notice to *Peru* which was not answered — the subsequent removal of the pauper, and the adjustment of the claim for her support, *estop* the plaintiffs from denying that her settlement is in that town. This case is clearly distinguishable from the case of *Turner v. Brunswick*, 5 *Greenl.* 31. It is a well known rule that a case must be understood and interpreted by the facts in that case. Now in that case there was no proof that the pauper lived in or belonged to *Brunswick*, nor was there proof as in this case, of a *removal* and *adjustment*.

The plaintiffs are also *estopped* to deny the settlement of the pauper in *Peru*, by the direct admission to that effect, by the overseers of *Peru*, in their note to *Turner*. These admissions were made under a perfect knowledge of all the circumstances of the case. *Burlington v. Calais*, 1 *Vermont Cases*, 385; *Quincy v. Braintree*, 5 *Mass.* 86; *Bridgewater v. Dartmouth*, 4 *Mass.* 273; *Abbot v. 3d School District in Hermon*, 7 *Greenl.* 118; *Maine Laws*, 2, 542.

The plaintiffs are also *estopped* by their vote adopting the pauper as an inhabitant. It is not conditional, but in effect absolute, when taken in connection with the previous vote of *Turner*. One makes a proposal, and the other accepts.

The declaration of the agent of *Turner* should not prejudice the rights of that town, if in making them he transcends his authority. *American Fur Co. v. United States*, 2 *Peters' Rep.* 358; *Gibson v. Coult*, 7 *Johns.* 391.

If it was necessary to make a tender of the note, the case finds, that one was made before the commencement of this action.

Fessenden & Deblois, for the plaintiffs, cited the following authorities. *Wilbraham v. Springfield*, 4 *Mass.* 493; *Wis-*

casset v. Waldoborough, 3 *Greenl.* 388; *Buckland v. Charlemont*, 3 *Pick.* 173; *Turner v. Brunswick*, 5 *Greenl.* 31.

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

It is proved that the father of the pauper gained a settlement in *Turner*, by a residence in that town for more than ten years, and payment of all taxes assessed upon him and his property during all that time. This point in the cause has not been contested on the part of *Turner;* of course the pauper, who was a minor when her father resided in *Turner*, gained a derivative settlement there also, and still retains it, unless she has since gained a new settlement in *Peru*, under her father, he having resided in that town at the time of its incorporation. It has been contended that she was incapable of gaining a settlement in her own right, on account of mental disability and derangement, and, of course, must be considered as an infant in this respect — we do not, however, consider the authorities cited, as applicable to the present case. She has never been a member of his family, since he resided in *Livermore*, which was prior to his removal to *Peru*. Besides, the evidence of incapacity is of a very feeble character. — The injury she sustained, happened several years since, soon after which she had a fit of sickness, and was *at times* deranged, especially *two years ago* — that is, in 1830 and 1831. There was no such permanent absence of intellect or reason as would incapacitate her to gain a settlement in her own right. Neither do we think that *Peru* is estopped to deny the settlement of the pauper to be in that town, on account of the omission to answer the notice which was given by *Turner*. We consider the case of *Turner v. Brunswick*, as decisive of this objection. We particularly refer to that case for the reasons of our opinion. We do not view the circumstance of the removal of the pauper to *Peru* as creating any distinction between the two cases, as to the principle of estoppel. It is however contended that certain transactions on the part of the overseers of *Peru*, have estopped that town to deny their liability to support the pauper. — There are many acts which the overseers of a town may do, which will bind the town, though no special authority is given by the

town for the purpose. From the necessity of the case, they may, by virtue of their office, make contracts for the support of the poor, and transact a variety of business in relation to their regulation and employment. In all which transactions, however, they are acting within the scope of their official duty; but they have no authority by their mere acts or declarations to change the settlement of a pauper from one town to another; and confess away the rights of their town, and subject it to liabilities and burdens by any of their arrangements. This is no part of their duty. Though the overseers of *Peru* gave the note for $95,05 to *Turner*, and therein acknowledged that the pauper was chargeable to *Peru*, that confession, or that act did not establish her settlement in *Peru*.

A town at a legal meeting, the warrant for calling which contained an article for the purpose, may by a vote admit a person an inhabitant of such town. Has *Peru* admitted the pauper as such? In *September*, 1823, and again in *April*, 1825, *Turner*, by legal votes, made certain *conditional* proposals to *Peru;* but the agent of *Turner*, though authorised to communicate *those* proposals to *Peru*, did not do it, but made a *conditional* proposal *less favourable* to *Peru*. This proposal was not accepted by *Peru*. Some months afterwards *Peru* voted to accept the pauper as an inhabitant, *on condition* that *Turner* would relinquish to *Peru all demands* against that town. Thus far the towns had not *agreed* on any terms of arrangement. The proposition of *neither* town had been accepted by the *other*. This vote of *Peru* was passed *September* 12, 1825. From that time there was a profound silence. *Turner* took no notice of the vote by any corporate act, but on the 21st of *May*, 1831 — almost six years afterwards — the original agent of *Turner*, tendered the note to *Peru*. Was this reply to the offer of *Peru* of such a character, and given under such circumstances, as to create a binding obligation on the town of *Peru*? or was the tender of the note so *unreasonably* delayed, as that it cannot be considered as closing any contract between the towns? In our opinion the delay was an *unreasonable* one and the tender wholly inoperative — having had no effect on the offer made nearly six years before, — why an acceptance of the offer was

not resolved upon and communicated before to *Peru*, does not appear on the report; but the motive may at least be conjectured to be, that in 1830 and 1831, the pauper became *more frequently deranged*, and the probability of her becoming more and more expensive to the town of *Turner* was evidently increasing. We consider the declarations of *Mr. Porter*, the agent, as of no importance or influence in the decision of the cause, and therefore the question, whether the testimony of *Ludden* as to those declarations was admissible or not, ceases to have any interest, and it does not require an answer.

There must be judgment on the verdict.

FARRAR *& al. vs.* EASTMAN *& al.*

A sale and conveyance of Proprietary lands by a Collector of taxes, thereto authorised by a vote of the proprietors, passed *March* 23, 1780, was held to pass no title, — *forty days* not having elapsed between the giving of the authority and the execution of it, pursuant to the *Provincial act of* 26 *Geo.* 2. *Anc. Char.*

If one receive a deed of several distinct and separate lots of land from one having no title, — cause his deed to be recorded, — and enter upon and occupy a part of *one* only of the lots, under his deed, — it will not constitute a *disseizin* of the true owner of the other lots, so as thereby to render his deed thereof to a stranger inoperative; though it be a mere release without covenants.

Whether a tenant in common can be *disseised* by a stranger claiming his interest only, — *quære.*

TRESPASS *quare clausum fregit*, for cutting trees on lot *No.* 43, in 5th division of lands in the town of *Lovell.* The defendants pleaded the general issue, and also soil and freehold in one *Levi Stearns*, under whom they cut.

To maintain the action the plaintiffs' counsel read from the records of the Proprietors of *Lovell*, the acceptance of a Report of the lotting committee, dated *Sept.* 23, 1817, by which it appeared that lot 43 was drawn to the original Right of *Benjamin Ballard.* He also introduced and read the following

deeds, *viz. Benjamin Ballard* to *Samuel Farrar*, dated *Sept.* 22, 1819, and recorded *Feb.* 23, 1821, conveying all his right to lands in *Lovell* which descended to him from *Benjamin Ballard*, the original owner. *James* and *Ruth White*, and *Thomas* and *Rebecca Harrington*, and *Elias* and *Abigail Carter*, to said *Farrar*, dated *Aug.* 11, 1819, and recorded *Oct.* 4, 1819, conveying all their right to the share of *Benjamin Ballard*, the orginal proprieter, in said *Lovell* lands. It was proved that the several female grantees were heirs at law of said *Ballard*, and the male grantors, their husbands; and that *Ballard* had been dead about forty years. The plaintiffs' counsel then read a deed from said *Farrar* to *Samuel Dwelley*, (who are the two plaintiffs,) dated *Jan.* 10, 1820, and recorded *Jan.* 23, 1821, conveying one moiety in common of said lot 43.

It was proved, that *Oct.* 4, 1819, *Farrar* entered upon said lot and took formal possession of it, and placed the initials of his own name and *Dwelley's* on certain monuments, said lot being at the time wild and uncultivated, except four acres in the possession of *Levi Stearns*.

The counsel for the defendants then read a deed from *John Knox*, as collector, to *William Knox*, of lot 43, dated *April* 5, 1780; and also a copy of a vote of said proprietors passed at a meeting held *March* 23, 1780, which was thus: "Voted, that "the collector be empowered to give deeds of the lands sold "for taxes." [On a former trial of this cause, as reported in 5 *Greenl.* 345, the foregoing vote was supposed to have been passed at a meeting held *Nov.* 10, 1779, but upon examination of the records it appeared that the meeting was held as above stated, *March* 23, 1780.] He then introduced and read the following deeds, *viz.*: *William Knox* to *Samuel Nevers*, of one half of a full Right originally granted to the heirs of *Benjamin Ballard*, dated *Dec.* 31, 1796, and recorded *Nov.* 3, 1798. *Samuel Nevers* to *Levi Stearns*, of one half of lot No. 43, dated *Feb.* 20, 1819, and recorded *Oct.* 9, 1819. *Joseph* and *Mary Brown* to *Josiah Stearns*, of three fourths of a right in Nos. 43 and 28, dated *May* 24, 1781, and recorded *March* 14, 1812. *Josiah Stearns* to *Samuel Stearns*, of all his right, being one fourth of Rights 28 and 43, dated *Dec.* 1, 1789, and re-

corded *Sept.* 19, 1811. *Samuel Stearns* to *Benjamin Webber*, of one half of Right 43, dated *Dec.* 29, 1795, and recorded *Nov.* 1, 1798. *Benjamin Webber* to *Levi Stearns*, of the same one half of Right 43, dated *Feb.* 20, 1819, and recorded *Oct.* 9, 1819.

It appeared that in the first division in 1780, *lot* 43 was drawn to *Right* 43. In the second and third divisions in 1783, *lots* 50 and 59 were drawn to *Right* 43. In the fourth division in 1792, *lot* 61 was drawn to *Right* 43. In the fifth division in 1817, *lot* 43 (the locus in quo) was drawn to *Right* 43.

It was proved that *Levi Stearns*, from 1813, had possessed about four acres of the lot in dispute, inclosed within fences; but none of the trees cut by the defendants were standing on these four acres. That *Benjamin Webber* had possessed lot 59, inclosed within fences, constantly since 1797. That *Nevers* mowed a meadow and cut the timber on lot 43 in first division. That one *Welch* occupied 5 or 6 acres of lot 61, about the year 1814. That *Nevers*, since 1804, had cut and improved on lot 50, and about 1813, had inclosed the meadow thereon within fences.

It was also proved that *Levi Stearns* never claimed any common land — that he lived on a lot adjoining, and got over on to the common land, which has since become lot No. 43 in the 5th division — and that he had cleared up the four acres *by permission of the proprietors.*

It also appeared from the Proprietor's records, that the sale of *Ballard's* Right was made *Nov.* 26, 1779. But the competency of the record to prove this fact was objected to by the counsel for the defendants.

If any of the objections made to the *defendants'* title should be considered fatal by the Court, the counsel for the defendants objected to the *plaintiffs'* title:

1. That at the time when *Farrar* took his deeds from the *Ballard* heirs, *there was an adverse seizin.*

2. That these deeds were void, because the taking of them was an act of *maintenance.*

3. That being deeds of naked release, they passed no title or seizin to *Farrar.*

4. That whatever may have been *Farrar's* title, there was an adverse seizin when *Dwelley* took his deed, and therefore no title passed to him.

If in the opinion of the Court the objections taken to *Knox's* deed ought not to prevail; or if in their opinion, either of the objections taken by the counsel for the defendants, was sustained by the evidence; the verdict, which was for the plaintiffs, was to be set aside and they were to become nonsuit; otherwise judgment was to be rendered thereon.

Longfellow, for the defendants, argued in support of the positions taken at the trial in regard to the plaintiffs' title; and in maintenance of the deed of *John Knox*, the collector, as establishing in his view, the title of the defendants, and cited the cases of *Green & al. v. Blake*, *ante*; and *Colman v. Anderson*, 10 *Mass.* 105.

Fessenden & Deblois, for the plaintiffs.

The opinion of the Court was delivered by

Weston J. — When this cause was before us, prior to the last trial, the authority of *John Knox* to sell and convey the land of delinquent proprietors, was under consideration; and it was sustained, for the reasons set forth in the opinion of the Court. 5 *Greenl.* 345. But upon examining the proprietors' records, it now appears, that the vote, under which he proceeded, in fact passed only thirteen days before the date of his deed to *William Knox*; although from an error in the copies, used at the former trial, it was supposed to have passed at an earlier period. It is apparent then, that between these dates, there could not have been time to give forty days' notice of the sale, in the manner prescribed by the provincial act of 26 *George* 2, *Anc. Charters*, 588. With every desire to uphold a transaction so ancient, which on a former occasion was carried as far, as legal principles would warrant, we feel constrained to decide, that the sale and deed of *John Knox* was not made in conformity with law.

But notwithstanding the failure of the defendant to sustain himself under that deed, several objections are taken by his

counsel to the title of the plaintiffs, predicated upon an adverse seizin. The force and effect of these objections depend upon the question, whether an adverse seizin existed, either when *Farrar* took his deeds from *Ballard's* heirs, or when he conveyed to the other plaintiff, *Dwelley*.

It may admit of question, whether a tenant in common can be disseised by a stranger, claiming his interest only. *Reading v. Royster*, 2 *Salk.* 423; *Ld. Raymond*, 829. In all cases, where there is a concurrent possession, the seizin is in him, who has the title. The possession of the other tenants in common, held for the benefit of all, would seem to defeat any attempt to create an adverse seizin, as against one. But certainly nothing short of an actual occupancy of part of the land held in common, with the claim of the right of the true owner, indicated by a deed from a party pretending title, or other equivalent notice to co-tenants and others, could have this effect.

The doctrine of disseizin, its effect and limitations, is laid down with great precision, in the leading case of the *Proprietors of Kennebec Purchase v. Laboree*, 2 *Greenl.* 275. It is there stated, that if a man enters upon a tract of land, under a deed duly registered, although from one having no legal title, and has a visible occupation of part of it only, the true owner is disseised of the whole tract. This tract must be continuous. The doctrine cannot be extended to detached parcels, of a part of one of which, the party may have actual possession. By no fair construction or intendment, could he be said to be in possession of the other parcels. It is the occupation and improvement, and not the deed alone, which creates the adverse seizin. The party entering by apparent title, and actually occupying part of the land, is deemed to be in possession of the whole tract, to which his deed extends.

The possession and occupation of all those, through or under whom *Levi Stearns* held, was of other parcels in severalty. With regard to his occupation of the four acres, part of the lot in question, it was proved to have been under no claim of right, but by permission of the proprietors. Of this lot then, when *Farrar* took his deeds of the heirs of *Ballard*, there was no adverse seizin.

On the fourth of *October*, 1819, no one being at that time in possession, claiming adversely, *Farrar* entered into and took possession of the lot in question, which had been previously conveyed to him by the true owners. Five days afterwards, *Stearns* caused his deeds of the same lot, from persons having no legal title thereto, to be registered. There followed no change of occupancy. He held the four acres before, as tenant at will to the proprietors and their assigns. A tenant or lessee may become a disseisor, at the election of the lessor. But the lessee will not be permitted to disclaim his tenure, and at his own election set up an independent title of his own, commencing by disseizin. He cannot make use of the possession, which he received at the hands of the lessor, as evidence of an adverse title. It does not appear that there was any change of circumstances, up to the tenth of *January*, 1820, when *Farrar* conveyed one moiety in common of the premises in dispute to *Dwelley*, the other plaintiff. Upon this view of the facts, there was no legal objection to the effective operation of the deeds, under which the plaintiffs claim. The possession being by construction of law in the true owner, the terms of the deeds, although they contained no covenants, and although the consideration may have been merely nominal, were sufficient to transfer and convey the land.

Judgment on the verdict.

FULLER *& al. vs.* PRATT *& al.*

At the time of the conveyance of a parcel of land, the grantee gave the grantor an instrument in writing and under seal, providing for the reconveyance of the land, *or* the payment of a sum of money, at the option of the obligor. — *Held*, that the obligation was not such an instrument of defeasance, as taken in conjunction with the deed, would constitute *a mortgage*.

But if it were a defeasance, it could not operate as such, while *unrecorded*, against any person but the original party to it or his heirs.

THIS was a writ of entry, wherein was demanded three lots of land, Nos. 10, 11 and 12, in the town of *Weld*. The demandants counted upon the seizin of their ancestor, *Samuel Rawson*, and a disseizin done by the tenants. In support of the action the demandants read a deed conveying the demanded premises, from *Jonathan Pratt*, one of the defendants, to *Joseph Holland* and *Joseph Holland, Jr.* dated *April* 11, 1821, and recorded the 13th of the same month, — consideration expressed $1200 — and derived title thereto by due conveyance to their ancestor.

The defendants offered in evidence, the following instrument in writing and under seal, *viz.:*

" *Canton, April* 11, 1821.

" This day received a deed of *Jonathan Pratt*, of three lots " of land in the town of *Weld, viz.:* numbers 10, 11 and 12, " in the 2d range, for and in consideration of the sum of $1200, " paid by our recognizance and by other demands which we " have against him — but if on final settlement there be any " balance due him, we agree to pay the balance, or give him a " deed back of the same by paying us for what we have paid " and our trouble — and further agree that we will return all " the property the above said land shall fetch besides paying us " what we have paid and have to pay. — Said *Pratt* is to im- " prove our said place the present year.

" Signed in presence of *Joseph Holland*, [L. S.]
" *Gideon Ellis.* *Joseph Holland, Jr.* [L. S.]"

The defendants also offered to prove that the conditions of the foregoing obligation were performed on their part,—that the *Hollands* were not damnified on the recognizance named, —and that there were no demands then existing other than the liability on the recognizance—contending that the instrument offered by them was a defeasance of the deed and constituted a mortgage.

But *Weston J.* who tried the cause, ruled that said instrument was not thus to be regarded. Thereupon the defendants became defaulted, it being agreed that if the whole Court should be of opinion that the deed and instrument together constituted a mortgage, the default was to be taken off, and the action stand for trial, otherwise judgment was to be rendered thereon.

N. Emery and *Fessenden & Deblois*, for the defendants, contended that the instrument offered in the defence, and the deed taken together, constituted a mortgage. The bond was a defeasance, being made at the same time with the deed, being under seal, and providing for the reconveyance of the property. The defendants should therefore have been permitted to prove that the debt secured by the mortgage had been paid, and that all the conditions had been performed. *Blaney v. Bearce*, 2 *Greenl.* 132; *Harrison & al. v. Trustees of Phillips' Academy*, 12 *Mass.* 456; *Erskine v. Townsend*, 2 *Mass.* 493; *Kelleran v. Brown*, 4 *Mass.* 443; *Taylor v. Weld*, 5 *Mass.* 109.

2. The fact that the writing of defeasance was not recorded until *April*, 1832, does not destroy its validity as a defeasance, while in the hands or possession of the original party to the bond. *Stat. of* 1821, *ch.* 36. The operation of this statute is intentionally confined to bonds of defeasance, *when assigned* by those to whom they were originally given, unless recorded in the registry of deeds at large. It does not apply where the bond remains in the possession of the *original obligee.*

The object of the statute in requiring a registry of the bond under any circumstances is to *give notice.* That object was answered in this case without any record of the bond, inasmuch as the defendants were in *possession of the land*, which was equivalent to a registry. *Holbrook v. Finney*, 4 *Mass.*

566; *Peterson v. Clark*, 15 *Johns. R.* 205; *Rice v. Rice*, 4 *Pick.* 349; *Webster v. Maddox*, 6 *Greenl.* 256; *Kent & al. v. Plummer*, 7 *Greenl.* 464; *Porter v. Cole*, 4 *Greenl.* 20; *Worcester v. Eaton*, 13 *Mass.* 371; *Chute v. Robinson*, 2 *Johns. R.* 595; *Tothill v. Dubois*, 4 *Johns. R.* 216.

Longfellow and *Carter*, for the plaintiffs.

1. The bond is not a *defeasance* because it is in the alternative to *pay money* or *reconvey*. 1 *Dane's Abr. ch.* 1, *art.* 7; 5 *Dane's Abr. ch.* 144, *art.* 10.

It is besides apparent on the face of the instrument, that the parties did not intend it as a defeasance, as *a sale* by the obligors is contemplated, and an appropriation made of the proceeds in that event.

2. But if it be a defeasance, it cannot avail the defendants anything in this action, not having been recorded pursuant to the provisions of *stat. of* 1821, *chap.* 36, *sec.* 3; 4 *Kent's Com.* 135; *Harrison & al. v. The Trustees of Phillips' Academy*, 12 *Mass.* 456; *Newhall v. Burt*, 7 *Pick.* 159.

To the point that the defendants' possession was equivalent to registry, they replied that there was no *adverse* possession by the defendants. If the transaction was a mortgage as contended for by defendants, then their possession was the possession of the mortgagee. At all events, the bond itself shows that the possession of the defendants was in subjection to the original grantee's title.

The opinion of the Court was delivered by

MELLEN C. J. — Two objections have been urged against the sufficiency of the defence on which the tenants rely, and we are of opinion that they are both well founded. The contract which the tenants have considered as a defeasance to their deed of the same date, certainly is not such an instrument; as by the terms of it, the *Messrs. Holland* were not bound to reconvey the land to the tenants; they had the election to reconvey it, or to pay to the tenants any balance which might be due to them on a settlement between the parties. The fee of the land was absolute in the *Hollands*, if they elected so to consid-

er it; and by the report it appears that they did so elect, because they conveyed the fee, which was afterwards conveyed to the demandant's ancestor. Prior to such conveyance by the *Hollands*, no bill in equity could have been maintained against them by *Pratt*, because they were not bound to convey the land, but might discharge themselves from their contract by payment in money of the balance that should be due; and for the same reason, such contract created no right which could have been attached and sold for payment of *Pratt's* debts. By the report, it appears, that the agreement was not recorded till more than ten years after its date, and after the premises were conveyed to the ancestor, *Samuel Rawson;* according to the 3d section of *ch.* 36, of the revised statutes, the bond, while unrecorded, could not operate as a defeasance against any person, but the original party to such bond or contract, or his heirs. So that if the contract had been a perfect defeasance as against the *Hollands*, still, it could not have operated as such against *Rawson.* The decision of the presiding Judge was perfectly correct. Whatever remedy *Pratt* has, must be by an action at common law, on the contract, to recover such sum of money as may be due to him.

The default must stand, and judgment be entered thereon.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF LINCOLN, MAY TERM, 1833.

KNOX & *al. vs.* SILLOWAY.

From the nature of the estate, a tenant in common of land, in the enjoyment of his legal rights, must necessarily be in possession of *the whole.*

Where one received a deed of a mill privilege, containing an express *exception* of a certain rock in the stream, which deed he caused to be recorded, and then built a dam, one end of it resting against the excepted rock, without making any *claim of title*, it was *held* that, he could not be considered by the owner as *tenant of the freehold* in the rock, in direct contradiction of the terms of his deed.

Where, in the Court below, the defendant pleaded the *general issue* as to part of the demanded premises, which was joined and a trial had thereon; and afterward in the Supreme Court, he had leave to amend by withdrawing that plea, and pleading a general *non-tenure*, on which issue was also taken, it was held that, *that fact* was not *evidence* to sustain the issue for the plaintiff as *last formed.*

A. gave a deed of a lot of land to B. which was never registered, and B. conveyed the same to C. by deed which was registered; after which B. gave up to A. the deed he had received from him, and it was thereupon destroyed; A. then conveyed to D. who knew of the fraudulent cancellation of A's first deed, and the latter conveyed to E. a purchaser for a valuable consideration without notice of the fraud; — *held* that, E. was entitled to hold against C.

An *original* deed may be received as evidence *without proof of its execution*, in cases where *an office copy* may be used.

Where the real demandant, in an action pending in the name of others for his benefit, had in his own name, after the commencement of the first named suit, recovered judgment of the same defendant, for the same premises, it was *held* that, such facts were properly pleadable *in bar*.

And such plea was further held to be sufficient, though the facts were pleaded *generally* in bar of the action, and not in bar of the *further maintenance* of the action.

THIS was a *writ of entry* brought by the demandants to recover seizin and possession of a tract of land of thirteen acres, lying in the town of *Union*, in which the demandants count upon their own seizin within twenty years and a disseizin by the defendant.

As to 10 acres, called the 10 acre lot, part of the demanded premises (excepting from the same three acres conveyed to the Cotton and Woollen Factory) the defendants pleaded the general issue, which was joined. As to an undivided moiety of three acres, called the mill lot, and all other parts of said demanded premises, not before in said pleading, nor therein after described, the defendant pleaded a general non-tenure, and issue was taken thereon.

As to the other undivided moiety of said *mill lot*, he pleaded a recovery of the same since the commencement of this action, by one *Walter Blake*, who in said plea was alleged to be the real demandant in this action; to which the demandants demurred. And as to a certain other part of said demanded premises, being a certain rock on which a mill dam is placed, the defendant pleaded a special non-tenure; on which issue was taken.

To support their action the demandants gave in evidence a deed of the demanded premises from *Josiah Reed* to *Henry Knox*, father of the demandants, dated 1797, and recorded in 1798 — and a copy of a deed which was testified by one *John Gleason* to have been copied from a deed duly executed and acknowledged, from *Moses Copeland* to said *Reed* of the same premises; and that after said *Knox's* death, which was in 1806, said *Copeland* informed said *Gleason*, that he, having found that his deed to *Reed* was not recorded, and having a demand against

said *Reed*, he had, after *Knox's* decease, taken back the deed to *Reed* and *destroyed* it, (which was testified to be after the conveyance from *Reed* to *Knox*) — and that in that way he had secured his demand against *Reed*, and thought it would be but a trifle out of the estate of *Knox*. It was also testified that said *Gleason* entered under said *Knox* and cut timber upon the lot. It also appeared that at the commencement of this action the defendant was in the possession and occupation of that part of the demanded premises called the "10 acre lot," — and also of about half of that part called the "3 acre lot," or "mill lot," separated by a fence which divided the lot — *W. Blake* being in possession of the other part.

On the part of the defendants were offered in evidence a deed from *William Lewis* to *Moses Copeland* of the 10 acres — a deed from *Moses Copeland* to *Reuben Hill* of the 10 acres, and an undivided moiety of the mill lot, dated 1812 — and the *original deed* of the same from *Reuben Hill* to *Isaac Hill*, "ex- "cepting about three acres sold to the Cotton and Woollen "Factory," dated 1821, and recorded *May* 29, 1821; — and a deed of the same, "excepting a small Island at the end of the "stone dam," part of the demanded premises from said *Isaac Hill* to the defendant, dated 1821. The last mentioned deed also conveyed to the defendant one undivided twelfth part of a mill and privilege, the dam of which rested upon said Island or rock, as it was sometimes called. It appeared that said Island was formed by flowing the water by means of the dam, and that the defendant occupied the mill and privilege his twelfth part of the time in sawing. The demandants objected to the deed from *Reuben Hill* to *Isaac Hill* going in evidence to the jury, without proof of its execution; but the objection was overruled by the Court.

One *Daggett* was then called by the demandants, who testified that, 18 or 20 years ago he was employed by *Reuben Hill* to construct a dam across the river at the lower falls, and adjacent to the said Island or rock; and while at work there, said *Reuben* spoke of having years before tried to buy said "ten "acre lot," (which he and others uniformly called the *Knox* lot,) of said *Knox*, but that he held it so high, he could not purchase

it — that he should have located the upper mill differently, ten years before, if he could have purchased of *Knox*. He also testified that *Isaac Hill* and *Samuel Hill*, two sons of *Reuben*, had charge of the business of building the dam, and they settled with him for his services.

John Gilmore, testified that, he was foreman of the jury before whom this action was formerly tried; — that *John Gleason*, then alive and since deceased, testified that *Reuben Hill*, before he received said conveyance from *Copeland*, inquired of him respecting the title, and that he informed said *Reuben* of all the facts of the conveyance to *Reed* — of *Copeland's* taking back and destroying it, after *Knox's* death, as before stated; and that he informed *Isaac Hill* of the same facts before *Reuben's* conveyance to him.

It also appeared that said *Isaac* lived with his father at the time *Daggett* constructed said dam, and when his father *Reuben* took said deed from *Copeland*, and for many years after, and had charge of his business — and also that the defendant married a daughter of said *Reuben* and lived in the same family at the time of taking his deed from said *Isaac* — and that the demanded premises were taxed in *Union* to said *Knox* from 1797 to 1806, and then to his heirs.

Jacob Ring, testified that he was a member and clerk of the said Cotton and Woollen Factory Corporation, that said *Isaac* and two or three of his brothers, living in the same neighborhood and in the vicinity of the demanded premises, were members of said corporation — that the subject of the *Knox* title to the said 10 acre lot was often discussed at the meetings of the corporation, before they took their deed of *Reuben Hill* of three acres part of the same, and before said *Isaac's* conveyance to the defendant — that said *Isaac* and the rest of the *Hills* were usually present at said meetings, but could not say that he was or was not present when said discussions were had.

There were also in evidence, a deed from *William Lewis* to said *Copeland*, and from the latter to *Blake*, of 140 acres adjoining the demanded premises and including the mill lot and mill privilege, the last of which, contained this recital, "Excepting "only half of mill privilege which now belongs to above said

" *Knox*" — which deed described the bounds of the 140 acres as " beginning at the South West corner of a ten acre lot of land " belonging to *Henry Knox, Esq.*" &c. — " till it comes to the " aforesaid *Knox's* lot; thence as his line goes to the bounds " first mentioned" — the said 10 acre lot being the demanded premises.

Isaac Hill was called, and though objected to by the demandants, was admitted to testify. He testified that, when he received his deed from *Reuben*, his father, he supposed he had a good right to warrant it to him; — that, he never knew of the said conveyance to *Reed;* — that he was not present when the Factory Corporation discussed the subject in their meetings; — that, *Gleason* did not inform him of it; and that after the former trial *Gleason* admitted he was mistaken in the man, saying it was his brother *Nathan*, whom he informed of it.

Nathan Hill, testified that, it was himself who had the conversation with *Gleason*, to which he had testified, and that *Gleason* afterward admitted he was mistaken as to the man.

Upon this evidence the counsel for the demandants contended, 1st, that the defendant occupying and improving the said mill and privilege, the dam being part of the privilege and resting upon a portion of the premises, to which the defendant had pleaded non-tenure, and having a deed of the same conveying it to him in fee, he must be considered in law as in under his deed, in absence of proof to the contrary, and that such occupation constituted him tenant of the freehold.

2. That the defendant being in possession, and occupying at the commencement of this action, a part of the mill lot in severalty under his deed from *Isaac Hill*, whose title is shown to be adverse to the *Knox* title; and *Blake*, as alleged in the defendant's plea, having recovered against him for his, *Blake's* moiety, the defendant not having any title to *Blake's* moiety must be considered as having held under his deed, against the *Knox* title; and that such possession and occupation constituted him tenant of the freehold, and that, that issue should be found for the demandants — and the Court was requested to instruct the jury in conformity with these positions.

3. He also contended that *Reuben Hill* having knowledge of the prior conveyance to *Reed*, his taking a deed with such knowledge was fraudulent, and nothing passed by the deed, and that he could pass nothing in the land to his grantee.

4. That it was not necessary that the demandants should prove actual knowledge or personal notice of said conveyance from *Copeland* to *Reed*, in *Isaac Hill* or his grantee; that the facts in evidence were sufficient in law to put him upon his inquiry into the title, and is like a change of possession, tantamount as to notice, to a recording of the deed; and that this conveyance could only be avoided, by showing that he did make reasonable inquiry respecting the title without success.

As to the first point made by the demandant's counsel, the *Chief Justice* stated to the jury, that it appeared by the deed of *Isaac Hill* to the tenant, the Island or rock was expressly excepted, and was never conveyed to the tenant; and that the mere ownership of one twelfth part in common of a certain mill and privilege on the other side of the stream and opposite said rock, and the resting of the dam belonging to said mill against one side of said rock, did not amount to such possession of the rock as to prove the defendant to have been *tenant of the freehold* of said rock, expressly against the terms of the deed above-mentioned.

As to the 2d point, the presiding Judge instructed the jury that, a tenant in common of lands in the enjoyment of his legal rights, must necessarily be in possession of the whole, — that such is the nature of a tenancy in common; — that, when one enters under a deed, he is presumed to enter and claim according to his title; that, in the present case, the tenant owned one undivided moiety of the three acres, and that if he had possessed the *whole*, it must, unless proved to the contrary, be presumed to be a possession according to his right to a moiety; but that it appeared he only *actually* possessed a moiety in pursuance of a partition by a fence, made between him and *Blake*; and that the jury could judge from the above facts, whether he ever claimed to be tenant of the freehold of more than *one moiety* of the three acres.

As to the 3d point, it being proved and admitted, that *Reuben Hill* when he received his deed from *Copeland*, knew of the unrecorded and cancelled deed from *Copeland* to *Reed*, the Judge instructed the jury that, in an action between *Reed*, or *Knox*, or *Knox's* heirs and *Reuben Hill*, his title, originating in fraud, could not be sustained; but that a subsequent purchaser under him, without notice of the above deed to *Reed*, and for a valuable consideration, could hold against the demandants. Whether *Isaac Hill* or the tenant, at the times they purchased, had, or had not such notice, and were, or were not purchasers for a valuable consideration, the Judge submitted to the jury upon the evidence in the case, adding, that the facts to prove such notice must be clear and satisfactory and not of a doubtful or equivocal character.

He further instructed the jury that, though in the Court of Common Pleas the *general issue* was pleaded as to the rock or Island, and the three acre lot, yet as the defendant under leave to amend, had heretofore amended, by pleading *non-tenure* as to the above parts of the demanded premises, the error in the first mode of pleading ought not to operate as proof to prejudice the tenant in the trial of the issues as they now appeared.

After these instructions to the jury, the counsel for the demandants requested the Judge to instruct the jury further, and as follows:

1. That if the jury should find that, at the time of the commencement of this action, the defendant was in actual possession of any part of the three acre lot, under a deed of release or conveyance to him from *Isaac Hill*, whose title was derived from *Copeland*, the issue respecting that part of the demanded premises, should be found for the demandants.

2. That if the jury should find that the defendant had a deed of conveyance of a mill, or undivided part thereof, and mill privilege, the dam resting upon the rock or Island, part of the demanded premises, and that the defendant occupied the mill, under such deed, and used and occupied the dam, that the issue as to that part was made out for the demandants.

3. That if they should find, that *Reuben Hill* conveyed the premises to *Isaac*, in order to defraud his creditors, and that

Isaac had knowledge of such intention or motive, that the conveyance was fraudulent and void as to the demandants, although *Isaac* might have paid a full consideration.

4. That after pleading the general issue as to the rock or Island and the three acre lot, in the Court of Common Pleas, and also in the Supreme Court, and a trial having been had upon such issue in this action, it was evidence to sustain the issue as to those parts on this trial.

But the presiding Judge declined giving the jury any other instructions than those before stated.

Whereupon a bill of exceptions was tendered and allowed; upon which, the case was brought forward and presented to the whole Court.

Ruggles, for the demandants.

The giving up and cancelling of the deed of *Copeland* to *Reed*, could not intercept and defeat *Knox's* title derived from *Reed*. It certainly could not thus be defeated in connection with the conveyance to *Reuben Hill*, for he was well knowing to the existence of the unrecorded deed of *Copeland* to *Reed*. The deed from *Copeland* to *Hill*, therefore, was a fraud upon *Knox*, and nothing passed by it. Nor did any thing pass by the deed of *Reuben* to *Isaac Hill*; for though he might have been ignorant of the existence of the unrecorded deed, yet *General Knox*, the father of the plaintiff, had been in possession of the lot in question, 24 years before *Isaac Hill* took his deed. At least he had a deed on record, and timber had been cut under him, which is as much possession as one can have of wild land. This would be sufficient to constitute a disseizin of any one having any interest in the land. Nothing therefore passed by the deed to *Isaac Hill*. *Marshall v. Fiske*, 6 *Mass.* 30.

2. The *recitals* in the deeds through which the defendant claims, *estop* him to deny the plaintiffs' title, and his knowledge of it. Both parties claim under *Reed*, *Lewis* and *Copeland*. These recitals were at least sufficient to have put the defendant upon inquiry. 1 *Stark. Ev.* 369; *Jackson v. Harrington*, 9 *Cowen's Rep.* 86; *Phillips' Ev.* 410; *Penrose v. Griffith*, 4 *Bin.* 231; *Goodwin v. Dennis*, 4 *Bin.* 327; *Morris v. Van*

Duren, 1 *Dal.* 67; 3 *Littell's Rep.* 447; *Bell v. Witherell*, 2 *Serg. & R.* 350; 2 *Serg. & R.* 382; 4 *Bin.* 314; *Stoever v. Whitman*, 6 *Bin.* 316; 1 *Gill & Johnson's Rep.* 270; 1 *Stark. Ev.* 304; *Dudley v. Sumner*, 5 *Mass.* 451; *Shaw v. Poor*, 6 *Pick.* 86.

3. The deed from *Isaac Hill* to the defendant conveys one twelfth part of mill and privilege, the dam of which rests upon the Island, of so much he was tenant of the freehold. The Island must have been included in the deed, from the nature of the case. Unless the end at least of the Island upon which the dam rests be granted with the mill and privilege, the latter would be entirely useless. It therefore passed by the deed, and with the possession, made the defendant, tenant of the freehold. *Cutler v. Tufts*, 3 *Pick.* 278; *Sprague v. Snow & al.* 4 *Pick.* 56; *Co. on Lit.* 183; *Shephard's Touchstone*, 77; *Doane v. Broad-street Association*, 6 *Mass.* 332; 3 *Bac. Abr.* 396; *Shep. Touch.* 96; 2 *Rolles' Abr.* 456, *B.* 20; 2 *Cro. Rep.* 427; *Bac. Abr.* 398. But if the land did not pass, still, by the deed, the defendant acquired an easement. *Remington on Ejectment*, 130, 131.

4. *Isaac Hill* was inadmissible as a witness. The tenant claimed a portion of this land under him, and he was interested to sustain his title.

Again, *Isaac Hill* was the lessor of the defendant, and liable on his implied covenants. *Smith v. Chambers*, 4 *Esp. R.* 154; *Phillips' Ev.* 49, *note*; *ib.* 226, 48; 1 *John. Cas.* 175; 12 *Johns. R.* 246; *Buller's N. P.* 232.

Isaac Hill is also interested as a *tenant in common.*

5. The deed from *Reuben Hill* to *Isaac*, should not have been admitted without proof of its execution; the copy not being produced, but the *original* deed. 1 *Stark. Ev.* 330; 5 *Serg. & R.* 314.

The reason why the witnesses should be produced, is because the parties have *agreed* that they should be the witnesses. It is a rigid rule, and cannot be relaxed, as the Court say in *Massachusetts.* It is not a mere technical objection. It was important to the demandants in this case to have the subscribing witnesses produced, inasmuch as they expected to prove by

them, that the conveyance was fraudulent. The rule of Court is in favour of the admission of *copies*, but not of originals without proof of execution. *Ross v. Gould*, 5 *Greenl.* 204. The office copy may be better evidence than the original without proof of the latter, for it may have been altered *since the registry of it.*

Allen, for the defendant, cited *Hewes v. Wiswell*, 8 *Greenl.* 94; and *Trull v. Bigelow*, 16 *Mass.* 406. His positions, and reasoning, were principally sustained by the Court and appear in the opinion.

At the next subsequent *May* term in this county, the opinion of the Court was delivered by

MELLEN C. J. — This is a writ of entry in which the demandants count on their own seizin within twenty years, and demand possession of a lot of *thirteen acres.* As to *ten acres* of the demanded premises, commonly called the *ten acre lot* (excepting that part of it which was sold to the Cotton and Woollen Factory) the defendant pleads the general issue, which is joined. As to *one* undivided moiety of three acres, called the *mill lot*, and as to all other parts of the premises demanded, he pleads a general *non-tenure.* And as to the *other* undivided moiety of said *mill lot*, he pleads a recovery of the same, since the commencement of the suit, by one *Walter Blake*, who is alleged to be the *real* demandant in the present action. Issue is joined on the plea of non-tenure, and a verdict has been returned in favour of the defendant. The above plea of recovery by *Walter Blake* was filed by leave of Court, at *September* term, 1832, and to this there has been given since the main argument, a *special demurrer* which will be more particularly noticed in the sequel.

We will in the first place examine the instructions of the Judge in relation to some of the minor questions in the cause, and dispose of them, and conclude with an examination of those of more importance as to the merits, or more interesting in their consequences as to practice; all of which have arisen in the investigation of facts under the general issue.

It is contended that the instructions were incorrect as to one undivided moiety of the *three acre* or *mill lot*, and the plea of non-tenure, as applicable to it. The defendant never pretended to have a title to more than an *undivided moiety*. On this point we think the language of the Judge was correct. It is certainly true, as stated, "that a tenant *in common* of land, "in the enjoyment of his legal rights, must necessarily be in "possession of *the whole*; that such is the nature of a tenancy in common." The defendant received a deed of a moiety in common; and, when he entered under the deed, he must be presumed to have claimed and held according to his title. Besides, he *actually* possessed only a moiety, in consequence of a parol division, made between himself and *Blake*. In either view of the facts, touching this part of the cause, we think the instruction was proper; and under that instruction, the jury have found that he never claimed to be a tenant of the freehold of more than a moiety. Thus *this* objection is at an end.

Again, it is urged that the instruction was erroneous as to the possession or tenure of the *Island* or *rock*, which seem to be used as synonymous terms. In the deed from *Isaac Hill* to the defendant, above-mentioned, the Island or rock is expressly excepted; and we have no question that the exception is a good one. *Payne & ux. v. Parker, ante.* There is no direct proof of any claim, in contradiction to the terms of the deed. He was an owner of one twelfth part of a mill on the opposite side of the stream and of the adjoining dam, which was erected about twenty years ago by *Reuben* and *Isaac Hill*, who merely rested one end of it against the rock where it still remains. Under the circumstances disclosed by the report, we are satisfied with the instruction given. The fact proved, could never be considered as sufficient proof of a tenure of the freehold of the Island or rock, by the defendant, in direct contradiction to his deed from *Isaac Hill*. This objection, therefore, is not sustained.

Another objection has been urged, in relation to this sharp point in the cause. It has been contended, that inasmuch as in the Court of Common Pleas, the defendant pleaded the *general*

issue as to the rock or Island, and the *three acre lot*, and a trial was there had upon that plea, *that fact* is evidence to sustain the issue as *it now stands*. The answer to this objection is an obvious and satisfactory one. The amendment of the plea, we presume, was made for some good reason, in the opinion of the Court which permitted it. It is not a subject of revision now. If an error had been committed in the pleading, which might be prejudicial to the defendant, that error has been corrected by the amendment, for the purposes of justice, which would at once be defeated by allowing it *now* to be considered as *a confession* of a fact which the demandants find necessary to enable them thereby to disprove the plea of non-tenure. The objection is *inter apices legis*, and cannot be allowed to have the desired operation. Such an objection, if sustained, would render all amendments useless. But the amendment has been examined by the full Court, and we are all satisfied the leave to make it was properly granted. This amended plea will be particularly examined, in the close of this opinion, as to its merits and the time when it was filed.

We have thus considered and disposed of the several objections which have been urged by the counsel for the demandants, which have respect to the special pleas in bar and the instructions of the presiding Judge as to the principles of law applicable thereto. It remains for us now to examine those which have been urged as to the ruling of the Judge in regard to the admission of *Isaac Hill* as a witness, and of the *original* deed from *Reuben Hill* to *Isaac Hill* in evidence to the jury, without the usual proof of its execution; and the alleged incorrectness of the Judge in omitting or declining to give certain requested instructions. Though the report states the facts of the case with sufficient clearness; yet it may be useful *here* to give a condensed view of them and comparison of dates, by means of which our opinion may be more intelligible, and the grounds of it more readily understood, than by reference to a long report.

One *William Lewis* was formerly the owner of the land in question, and conveyed the same to *Moses Copeland*; and both parties claim under *him*. By the evidence introduced by the demandants, it appears that, prior to the sixth of *December*,

1797, the said *Moses Copeland* conveyed the demanded premises to *Josiah Reed*, but the deed was never registered. That on said sixth day of *December*, 1797, the said *Reed*, by his deed of that date, conveyed the same premises in fee to *Henry Knox*, father of the demandants; in which deed, *Reed* states that the same were conveyed to him by *Copeland*. This deed was registered *April* 30, 1798. *Gleason* cut some timber on the land under *Knox*. The non-production of the deed from *Copeland* to *Reed* was accounted for by proof that *Copeland*, after the death of *Henry Knox* in 1806, took back the deed from *Reed* and destroyed it; and having a demand against *Reed* secured it by this arrangement. *November* 10th, 1812, *Copeland* conveyed the same premises to *Reuben Hill*, who at the time of receiving it, had full knowledge of the cancellation of *Copeland's* deed to *Reed* and the circumstances attending it. The deed to *Hill* was registered *March* 19th, 1816. *Reuben Hill*, on the 28th of *May*, 1821, conveyed the 10 acres, and *undivided moiety* of the mill lot to his son *Isaac Hill*, who caused his deed to be registered *May* 29th, 1821. And the same year *Isaac Hill* conveyed to *Silloway* the land, excepting the three acres sold to the Factory. On these facts, if duly proved on the trial, are the demandants entitled to recover, or is the defendant entitled to retain the verdict which the jury returned in his favour?

The general principles of law, applicable to the above facts, are clearly and fully stated in *Trull v. Bigelow*, 16 *Mass.* 406, *McMechan v. Griffin*, 3 *Pick.* 149, *Hewes v. Wiswell*, 8 *Greenl.* 94, as well as in many other cases. It is clear, that if *Reuben Hill* was the defendant in this case, his title deed could not avail him; but the question is whether the case before us furnishes any proof of a *scienter* on the part of *Isaac Hill*, or of *Silloway;* for if not, then they stand on firm ground, and are not affected by the fraud between *Copeland* and *Reed*, though it was well known to *Reuben Hill* — see the cases before cited. But it is contended by the counsel for the demandants, that *Isaac Hill* and *Silloway*, both, had such notice of the conveyance to *Knox*, as to defeat the conveyances under which the defendant claims. The answer to this position is, that *Reed*

never had *any* possession under his unrecorded deed: and the *only* evidence of possession of *Henry Knox*, under his deed from *Reed*, was the cutting of some timber on the land. This was no vissible act of possession. The cutting was by *Gleason* under *Knox:* but, of itself, it furnished to third persons no evidence of title or claim on the part of *Knox;* and the registry of deeds furnished none of any conveyance of the premises by *Copeland*, prior to his deed to *Reuben Hill*, except what arose from certain recitals in other deeds which will soon be noticed. The records exhibited *Copeland* as the owner, when *Reuben* received his deed, there being on record a deed from *William Lewis* to him, dated *May* 6, and registered *May* 8, 1793. What possession then was there to prevent the operation of the deed from *Reuben Hill* to *Isaac Hill* in 1821, which contains a general warranty of title, and imports a consideration paid, of three hundred dollars. So far from there having been an adverse, exclusive and notorious possession, there was not even a *visible* one by any person: and the jury have found that *Isaac Hill* had *no* knowledge of any conveyance from *Copeland* prior to his deed to *Reuben Hill.* This certainly has put an end to all inquiry on this point, so far as evidence of a *scienter* could be inferred from any possessory acts of *Knox* or his heirs. But it is said, that the *recital* in the deed from *Reed* to *Knox*, in relation to the deed from *Copeland* to *Reed*, amounted to notice to *Isaac Hill*, and also to *Silloway*, of the conveyance to *Reed;* but why should either of them be bound to look for recitals in deeds executed by persons under whom they *did not* claim, and who did not appear on the record of deeds to have any connection with *Copeland*, the person under whom they *did* claim? The authorities cited by the demandants' counsel by no means support his position. *Starkie*, 1 *vol. page* 369, says, "It has "been held that a recital of a deed in a *subsequent* deed is ev- "idence of the *former* against a party *to the latter.*" See also note on same page. "The rule of law is, that a deed, con- "taining a recital of another deed, is evidence of the recited "deed against the *grantor* and all persons claiming by title de- "rived to him *subsequently.* But such recital is not evidence "against a *stranger*, nor against one who claims by title derived

" from the grantor *before* the deed which contains the recital." According to the principles here stated, the *recital* above-mentioned, so far from being *conclusive evidence in law* against the defendant, and not proper to be referred to the jury, amount to *no* evidence whatever against him, inasmuch as he does not claim under *Reed*. With respect to the *recital* in the deed of *Copeland* to *Blake*, it does not appear that the deed was made *prior* to the year 1821, or, if it was, that it was registered before that time: of course, no conclusions can be drawn from it prejudicial to the rights of the defendant. We have thus far examined the cause upon the facts we have been considering, upon the idea that they have been legally proved. But it is contended, that in two particulars, some of the facts have been proved by inadmissible evidence. In the *first* place by the introduction of *Isaac Hill* as a witness; and 2dly, the *original* deed before-mentioned without proof of its execution. With respect to the witness we cannot perceive how he is interested in the event of this cause. It is not contended that he is so, in consequence of having entered into covenants with the defendant which ought to exclude him; nor do we see how the verdict in this cause could be evidence one way or the other, in an action between the present demandants and the witness. The objection is placed on the ground, that the relation of lessor and lessee subsisted between the witness and the defendant, and that his testimony tended to strengthen his own title. The cases cited are to that point. But no such connection or relation is proved to have existed between them. The witness owned, or at least, had a deed of *all* the Island or rock, and *half* of the mill lot, excepting the part sold to the Factory. His testimony did not and could not affect his own property.

Before proceeding to consider the objection above stated, respecting the admission in evidence of the *original* deed to *Isaac Hill*, we would merely observe, that we have answered all *other* objections, and given our opinion on all the particulars of *requested* instructions, except what are contained in the 3d request and compose the 3d point contended, namely, that *Reuben Hill*, having knowledge of the prior conveyance of *Copeland* to *Reed*, his taking a deed with such knowledge was fraud-

ulent, and that nothing passed by the deed, and so *he* could pass nothing to his grantee, though he might have paid a full consideration. Such an instruction was not given, and clearly ought not to have been given in any case, unless the grantee was also conusant of the same facts, or was a *mere* grantee, having paid no consideration; nor even *then*, in the *present* case, because none but the creditors of *Reuben*, or after purchasers from him, can be permitted to make this objection. The deed was good against all others and passed the estate to the grantee, as the demandants are not his creditors, or after purchasers from him.

We now proceed to the examination of another question. The original deed from *Reuben* to *Isaac Hill*, was duly registered on the day next following its date. We are not called upon in this case to decide, whether a party in a cause is entitled to give in evidence an *original unrecorded* deed to his grantor, (the same deed being less than thirty years old,) without proof of execution. There may be important distinctions between *registered* and *unregistered* deeds, in respect to the point we are considering, and probably there are. As we have not met with any decision, bearing directly on the point presented by the objection, we shall give the reasons on which our opinion is founded, distinctly and at large. The 34th Rule of this Court, established *April Term*, 1822, is in these words, "in all ac- "tions 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*." This Rule is in unison with immemorial usage in *Massachusetts*. The Courts of this State have uniformly observed it; and it is believed that a similar practice has long prevailed in most, if not in all the *New-England States*. It is a departure from the principle and practice in *England*, occasioned by a well known distinction in respect to the custody of title deeds. In that country, title deeds accompany the title which they pass. The purchaser receives the documentary evidence of his title, and is entitled to hold it, while he continues

to hold the estate. Having the *original* conveyances in his possession, he has no occasion to make use of *copies*. But with us the universal practice is for every man to retain possession of his own title deeds. Our rule above-mentioned and our practice conforming to it, are founded upon the presumed fact that none of the deeds under which a party claims, except the deed from his immediate grantor, are in his possession or under his control; hence he may give in evidence copies duly certified by the register of deeds, except in the cases specially named in our rule. A rule of law has long existed in respect to the proof of deeds, which bears a strong resemblance in principle to the rule as to the use of copies of deeds. "If a deed or other instru-"ment, when produced, appear to be thirty years old, no fur-"ther proof is requisite. Since, after that time, it is to be *pre-*"*sumed* that the attesting witnesses are all dead." And the party producing the deed, has the full benefit of the presumption, though the witnesses are living. 1 *Stark.* 343. And he need not call the attesting witnesses. *ib.* — In the case of *Marsh v. Colnett*, 2 *Esp. R.* 665, a deed more than thirty years old was offered in evidence without proof of execution, and though objected to, was admitted. One of the subscribing witnesses was then in court; but *Mr. Justice Yates* declared, that he would not break in upon the rule and require the witness to testify to the fact of execution.

The effect of the rule and practice which we are now considering is, to admit the *facts* stated in the *copy* of a deed to have the same influence upon the minds of the jury, as the facts stated in the *original* deed to the party producing it would have, after due proof of its execution. It dispenses with proof of execution in *all* cases but one, namely, the case of a deed to the party himself. It has been supposed that the case of *Woodman v. Coolbroth*, 7 *Greenl.* 181, has indirectly decided the question we are now examining; but such is not the fact; it has merely decided that where a party has, according to our rule and practice, a legal right to use an attested *copy* of a deed, he is not deprived of that right, because he happens to have the *original* deed in his possession. In the above case, *Coolbroth* offered to read the copy of a deed from the demandant

to one *Winslow*, under whom he claimed, which copy was rejected, and he then produced the *original*, which was admitted and he had the benefit of it, but the Court set aside the verdict and granted a new trial. The ruling of the Judge deprived the defendant of a right which was valuable to him. In the case before us, the counsel for the defendant happened to have in his possession at the trial the *original* deed from *Reuben* to *Isaac Hill*, and not the copy. As soon as the objection to its admission was made, he could in half an hour have had it registered, and have procured a *copy*, duly certified and ready in Court; and such could not have been rejected by the Court, according to their own rule, and their own decision in *Woodman v. Coolbroth*, notwithstanding the counsel had the original in his hand. Now, by what magic has a *copy* from the registry acquired *more* solemnity and virtue than the *original;* and why is it entitled to more credit in a court of justice? Why is not a *registered, unproved original* deed as good, as safe, and as satisfactory evidence, as a certified *copy* of such *unproved original*, or rather, as a *certified copy* of the *record*, which is no more than a *copy* of the *original?* Is not the supposed distinction the merest phantom? Where is the sound sense of such a distinction? Of what possible use or importance is it in its application to any one? Who can ever be injured by its abolition in practice? Certainly not the objector, because a *copy* may readily be produced, which dispenses with the proof which he demands? While the above-mentioned rule and practice are permitted to continue — which are found as *useful* as they are *acceptable* — would not the asserted distinction, if sanctioned in a court of law, be justly considered a blemish, and something as unintelligible as it seems to be unmeaning? However, we do not place our decision of the present question merely upon the grounds we have thus been stating, but in connection with *another* fact which has been mentioned, namely, that the deed had been duly registered. Had it not been so registered, probably our minds would have been conducted to a different conclusion, notwithstanding the course of reasoning which we have been pursuing. We now proceed to a further view of the subject.

It must be remembered, that in the above-mentioned cases, in which *certified copies* are admitted in evidence, they are admitted, not because the registry of the *original* deed is *full* and *conclusive* proof of the legal execution of it, but because it is *presumptive* and *prima facie* proof that the *original* is what it appears to be, namely, a fair and perfected contract, inasmuch as the person claiming under it has voluntarily placed it on the public records of the county. The Court, therefore, for these reasons and in these cases presume the original deed to have been duly executed, and thus throw the *onus probandi* upon the other party, who, if he can, may impeach the deed as a *forgery*, or show that it was never delivered and perfected by the grantor. He has the same means of obtaining possession of the *original* as the party has who introduces the *copy*, and may thus avail himself of all accessible means of disproving and defeating it. The production in Court of a *copy* duly certified, is proof that the *original* has been registered, and thus displayed to the public eye. Does not precisely the *same fact* appear to the Court on inspection of the *original*? On the back of the deed in question is the certificate of the register that it has been registered on his records. Having the same fact proved as clearly to the Court in one case as in the other, why should not the presumption that the original was duly executed be as influential in one case as the other, and produce the same effect in both, as *prima facie* evidence in the cause, for the purpose and to the extent before mentioned? We are not able to discern any difference. Now, as a party is not bound to prove the execution of the deed of his immediate grantor to himself, if thirty years old, even though the subscribing witnesses should be present in Court, why should he be held to prove the recorded *original* deed *to* his immediate grantor, because it happens to be in his possession and in Court, when a *copy* of it is legal evidence without any such proof? The *reason* on which *both* the before-mentioned rules are founded, does not exist in *either* of the cases we have just stated; yet the rule is admitted to have the same operation and influence as though such reason did exist in full force. As we are not bound by any legal decision on the point before us, we can

discover as little reason, as we feel inclination to extend the limits of merely technical learning, so far as to include the present case, and sustain the objection of the counsel for the demandants. It savors *too little* of sound common sense, and *too much* of unnecessary refinement and useless distinction. It seems to be based on the idea that, in legal contemplation, a *shadow* is of more value than a *substance*, and entitled to more respectful consideration by the Court, when thus presented as a subject of judicial decision.

After maturely examining the question, we are satisfied that the ruling of the Judge was correct in admitting the original deed without proof of its execution ; and that a course of practice, in accordance with this decision, can injure no man's rights, but on the contrary, will advance the cause of justice ; — may save much needless expense and trouble, and render the rule of Court consistent in relation to its consequences. From a view of all the questions submitted, the Court are of opinion that none of the objections which have been urged, and which we have been considering, can be sustained.

It now remains for us to examine the merits of the plea which was mentioned in the commencement of this opinion, as filed by way of amendment under leave of Court, the particulars of which it is proper here to notice. When this cause was argued upon the exceptions taken to the rulings and instructions of the Judge at the trial, upon which our opinion has just been given, it was not particularly noticed that no issue had been joined upon the above-mentioned plea, as to one undivided moiety of the mill lot, in which plea the defendant states a recovery of the same by *Walter Blake*, for whose use and benefit the present action is brought. Since the above argument, the demandants have demurred specially to said plea, and the merits of it, having been submitted without any formal argument, we have carefully examined it, and now proceed to give our opinion. The substantial allegation of the plea is, that *Blake*, the *real* demandant in this action, and for whose use it was brought, on the 8th of *December*, 1825, commenced an action against the defendant for the said moiety of said mill lot, and that such proceedings were had in the action, that at

the term of this Court, held here, on the third *Tuesday* of *September*, 1828, the said *Blake* recovered judgment for the premises then demanded, that on the 21st of *March*, 1829, he took out his writ of possession on said judgment, by force of which he became seised of said premises, *prout patet per recordum.* The above facts are pleaded *in bar of the action*, as to the demanded moiety; and we think they were *so* pleadable. *Banker v. Ash*, 9 *Johns.* 250. The learned author of the treatise on the pleadings and practice in *Real Actions*, *page* 164, says, "Although a demandant had a good cause of action at the "time of commencing his suit, yet his estate may be afterwards "determined or his right of action otherwise destroyed by his "own act. In such a case the fact should be pleaded in bar of "the further maintenance of the action." He has furnished no form of a plea in *abatement* in such a case. Thus the *first* cause of demurrer seems not to be well assigned. The *second* is, that the facts are pleaded *generally* in bar, and not in bar of the *further* maintenance of the action. From the nature of the plea, and the time when it was pleaded, it could not be a bar, except to the *further* maintenance of the action as to the moiety in question. It could not possibly have any respect to the period between the date of the writ and the time when it was pleaded. Why then should the plea be adjudged bad, even on a special demurrer, because it does not state in express terms that limitation which the law imposes? The plea distinctly states those facts which demonstrate that it is relied on in bar of the *further* maintenance of the action as to the moiety. The act abolishing special pleading in this State and substituting *brief statements* in place of special pleas, was passed on the 30th of *March*, 1831. The present action was commenced some years prior to that time and special pleas in bar filed; but the plea we are now examining was not filed till *after* the act was passed, namely, at *September* term, 1832: and though this Court has *permitted* special pleas in bar to be filed in cases commenced *before* the act was passed, where counsel preferred it, still the *right* of a defendant, in such actions, to avail himself of the benefit of the act, if he be inclined so to do, has not been denied. We are not aware that we have since

the above statute was passed decided any cause on demurrer, upon mere *informality* in pleading. In the case of *Potter v. Titcomb*, 7 *Greenl.* 301, a special demurrer was given to the surrejoinder; but the Court did not examine its merits, but decided the cause in favour of the defendant on the ground of a *substantial* defect in the replication. If the facts stated in the plea before us, are such as to bar the plaintiffs from the *further* maintenance of the action as to the moiety of the mill lot, we ought to give effect to them and consider the plea in the nature of a *brief statement*, filed, as it was, after the act of abolition was passed, rather than defeat its object by deciding against the plea on the *merest point of technical learning*. The statute was made to do away such niceties, and enable parties to arrive at the merits of a cause without the observance of them. A good plea in bar does not differ from a brief statement; except it is not, or need not be so particular. The law requires no particular form. A plea in bar, good *in substance*, is no better than a good brief statement. It would be doing violence to the meaning and spirit of the act to sustain the above objection to the plea. We therefore are of opinion that this *second* cause of demurrer is not well assigned.

The *third* and *fourth* causes assigned, may be considered together. The plea ought not to deny the alleged *disseizin* of the demandants nor the defendant's *seizin* at the time the action was commenced. The plea, from its nature, has no connection with those facts; or, at least, it does not rely upon them; both may be admitted to be true, in perfect consistency with the plea. But it is stated in the last clause of the *third* cause assigned, and also in the *fourth* cause assigned, that the defendant does not deny his possession at the time of plea pleaded, or that *Blake* entered and expelled the defendant. The facts thus stated seem to contradict the record; for the plea avers the recovery of judgment by *Blake*, and his sueing out his writ of possession, and then states, "*by force of which* the "said *Blake* became seised of said premises, as by the record "thereof now remaining in said Court appears." If *Blake* did become seised by force of his writ of possession, why did he not in some proper form traverse that fact, instead of admit-

ting it by his demurrer? But it *is* admitted that he became *seised* by force of the writ of possession, and, of course, before the return day of the writ; consequently, the defendant could not *also* be seised at the same time. Even if both had afterwards continued in possession, that would not alter the case, for where the possession is mixed, the law considers the *seizin* to be in him who has the *right;* and in the present case the judgment which *Blake* recovered established the right in him. But there was no *mixed* possession; *Blake* became seised, and that terminated the seizin of the defendant. We might go one step further and say, that if no writ of possession had ever issued, still, the judgment gave *Blake* a *right of entry*, and to become *seised*, if he could peaceably; — and the plea states that *he did become seised* of the premises, which fact is not denied. The *fifth* cause assigned is virtually disposed of already by the opinion, as given above, that a plea *in bar*, stating the demandant's entry and seizin *since the commencement of the action*, is good, though not since the *last continuance*. We are all of opinion that the plea in bar is good and sufficient; and that there must be judgment on the verdict. But the defendant is to tax no costs prior to *May* term, 1833, at which term the amended plea was filed.

HATHORN *vs.* STINSON *& als.*

It is the duty of the Court, to charge the jury upon the law applicable only to the facts proved, but not to answer abstract questions, not arising in the case on trial.

Where one being the owner of a mill and dam, and also of certain land above, which was flowed by such dam, sold the mill, with all its privileges and appurtenances, he could not afterward compel the grantee of the mill to remunerate him for the injury caused by such flowing; — and in such case the grantee of the mill would have the right to continue the dam so as to raise the same head of water, as the grantor had been accustomed to raise before the grant.

If one, liable to damages for flowing the land of another, acquire a title to the land flowed, the right to recover damages for such flowing is absolutely *extinguished*, and not merely *suspended*; — so that upon the unity of title being afterwards destroyed by conveyance or otherwise, the right to compensation for the injury of flowing would not thereby be revived.

Whether the flowing of lands, for the support of mills *any length of time*, will afford presumptive evidence of a *license* — *quære*.

THIS was a complaint under *stat.* of 1821, *ch.* 45, for flowing the complainant's land, and was tried before the *Chief Justice*, at the *Dec. Term*, 1832. The respondents pleaded the general issue and filed a brief statement. To maintain the issue on his part, the plaintiff introduced a deed of lot No. 49, in the town of *Woolwich* (it being the land flowed) from *Jonathan Eames, Jr.* to *John Hathorn*, dated *October* 20, 1777; and then deduced his title through a great number of *mesne* conveyances from the latter to himself. Lot No. 49, owned by the complainant, and the flowing of which was complained of, was bounded on, or included a part of, *Neguasset* pond in the town of *Woolwich*. The mills of the respondent stand on a stream issuing from said pond, and on the lot below and adjoining No. 49.

It was admitted that the whole land where the dam, mills, pond and lot No. 49 are, was once owned by a proprietary in common and undivided. The title of the plaintiff to the land flowed, and of the respondent to the mills on the stream below, were also admitted. The deeds, introduced by the respondent, (which were twenty in number,) exhibited several names among both

grantors and grantees which were also found in the deeds of the plaintiff through which he claimed title.

The plaintiff introduced several witnesses; *Solomon Walker*, testified that he knew the land and that it had been flowed by the defendant's dam. *John Shaw*, testified that he knew the land flowed — had known it since 1775 or 6, and that it had been flowed during the whole of that period. That there had been a dam and mills where the defendants' now stand as long ago as he could remember — that in 1775 or 6, there were two saw mills and a grist mill — a saw mill and grist mill called *Paine's* mills, and a saw mill on the east side called *Farnham's* mill — that the *Stinsons* have flowed for 50 years, and that the mills were old when he first knew them. That the dam was rebuilt 40 or 50 years ago and raised 18 or 20 inches — and that the dam before that was high enough to flow the land — that there was no complaint of flowage until after the fish ways were made, nor till recently.

The defendant then introduced his deeds aforesaid, *Joseph Paine* being among the grantors. Also a vote passed at a Proprietors' meeting, *Aug.* 27, 1776, authorising *Cadwallader Ford*, and such as might join, *to erect a saw mill upon the interest of the Proprietary*, &c. A vote at another meeting, *June* 11, 1754, granting to *Joseph Paine*, miller, "ten rods "square of land adjoining to his grist mill there, for a house "lot, to be as far above as below ye said mill."

A special act of the Legislature, passed *January* 24, 1828, entitled an act authorizing the owners of the falls and mill privileges on *Neguasset* falls to erect a dam thereon.

John Shaw, being again questioned, testified that he knew *John Paine, Moses Paine, Thomas Paine, Hannah Paine, Sarah Paine* and *Elizabeth Smart*, whose maiden name was *Paine*, — that they were the reputed children of *Joseph Paine*, and that they occupied and carried on the mills for many years, until they sold and conveyed to the *Stinsons*. That as many as 50 or 60 years ago the dam was rebuilt, when one end was carried lower down, — perhaps 8 or 10 feet.

Solomon Walker, being again called by the plaintiff, said that

the dam, he believed, was raised from 16 to 20 inches, thirty years ago — that the raising of the dam made no difference as to the flowing of the plaintiff's meadow — that it was flat and low and always flowed.

William F. Gilmore, called by the plaintiff, testified that, there had been no difference in the flowing of this meadow for forty years last past — that the dam would flow it six feet deep — that the dam was no higher then, than it was as long ago as he could remember, and that he could recollect it before the fish ways were built, which was as early as 1791. That the plaintiff's meadow was low, and a low dam would flow it.

The defendant then called *Zebadiah Farnham*, who testified that, he had known the dam for 50 years — that it was not so high now as it was then — that there is a larger waste way now than formerly — and that a dam of four feet will flow the plaintiff's meadow two feet.

Abner H. Wade, testified that he had examined the plaintiff's meadow the present season, when the gates of the dam were all up, so as to present no obstruction to the water, and found the meadow covered with water from three to eleven inches — that this was the 28th *of June*, when the water was as low as at any time during the season.

Samuel Trott, testified that, he knew the old dam prior to the renewal of it by *S. Walker* — that about 18 years ago it was cut down from 20 to 24 inches — and that since that time it has not been so high as it was before said rebuilding. That the present dam does not flow so much of the plaintiff's meadow as the dam did 35 years ago — and that he had a good opportunity to judge from its effect upon his tan-yard.

William Foye, testified that, he was 84 years of age — that he was well acquainted with the premises 73 years ago — that there was then a saw mill and grist mill on the west side of the stream, owned by *Joseph Paine*, and a saw mill on the east side, occupied by *John Gilmore*, ancestor of one of the defendants. That *Joshua Farnham*, (one of the remote grantors of the defendants,) was the son of *Daniel Farnham* — that he frequented the mills in summer and winter, and that the dam was high enough to carry the mills well. That the Indians

about that time appeared there, and killed a number of persons in that vicinity and took a number of others captive, and wholly interrupted the settlement of that part of the country for many years — that there was a garrison near the mills which protected them and the persons employed therein — that there were no other mills near there at that time, people coming to them from *Topsham*, *Brunswick*, *Wiscasset*, &c.

Morrill Hilton, testified that, he knew the mills 68 years ago — that he had not seen the dam for 10 or 12 years, but that then, it was no higher than it was 50 years ago. He also testified to the same facts, stated by *William Foye*.

Benjamin F. Tallman, called by the plaintiff, testified that, on the 22d of *August*, 1832, he found no water on the plaintiff's meadow, and that there was at the same time two and a half feet at the defendants' dam — that on the 30th of the same month there was 15 inches of water on the plaintiff's meadow.

Andrew Bailey, called by the plaintiff, testified that, the present dam against the sluice was 7 feet in height, and was a slope dam.

Daniel Hathorn, also called by the plaintiff, testified that, the fish ways are not so large as they used to be, — that when the dam is full, the water flows six feet on the plaintiff's meadow.

The defendants' counsel contended, and requested the presiding Judge to instruct the jury, *First* — that if, while the *Proprietors* were owners in common of the land where the dam, mills and pond are situated, and the lands adjoining the same, including what is now lot No. 49, *they*, in order to raise a head of water to propel mills, erected, or authorised and caused to be erected, a dam, and subsequently granted and conveyed the dam and mills and land under the same, with the privileges and appurtenances thereto belonging; and after that granted and conveyed said lot No. 49, that the grantees of the latter took and held it, subject to the right of the owners of the dam and mills, to keep up the same and flow the water as it had been previous to the grant or conveyance of the dam and mills by the Proprietors, without any claim for a payment of damages.

Second — that if the same facts existed as supposed in the first request, (with the exception that the Proprietors granted

and conveyed No. 49 *before* they conveyed the dam, mills and land under them, and privileges and appurtenances,) in such case, the grantee of No. 49 took and held it without any right to claim damages for flowing the water as it had been before the conveyance of No. 49.

Third — that if the dam, and mills and land, and No. 49, were owned by the same person or persons, and such owners conveyed the dam, and mills and land, and privileges and appurtenances, and afterwards conveyed No. 49, the grantee of No. 49 would have no right to claim damages for keeping up the water by the dam as it had been before the conveyance of No. 49.

Fourth — that if the same facts existed as supposed in the third request, (with the exception that the conveyance of No. 49 was before the conveyance of the dam, &c.) the grantee of No. 49 would have no right to claim damages for the continuance of the dam and pond, as they were before the conveyance of No. 49.

Fifth — that if the same facts existed as supposed in the third and fourth requests (with the exception that the same person was owner of a part in common instead of the whole) and conveyances were after made, that the grantee of No. 49 would have no right to damages for said flowing as aforesaid.

Sixth — that lot No. 49 being by the plan bounded *by the edge of the pond,* extends only to the margin of the pond, and does not embrace any land under water, when the pond is no higher than it was when lot No. 49 was created by survey and plan.

Seventh — that lot No. 49 being by the original plan by which it was created, bounded by the margin of the pond, the owner of No. 49 can claim no damages for the pond being kept up to the height it was when lot No. 49 was created by the survey and plan.

But the presiding Judge declined giving the several instructions as requested, and gave them the following, viz. 1. That where the same person is owner of a mill-dam, and also of a tract or parcel of land which is overflowed by water, raised and thrown back upon it, by means of such dam, if he should sell

and convey to A. B. the parcel flowed, reserving to himself, his heirs and assigns, the right to continue such dam and flowing without payment of damages, in such case, neither A. B. nor his heirs or assigns could maintain a complaint under our statute, against the grantor of A. B. his heirs or assigns; but if no such right is reserved in the deed to A. B. then, though he purchases the land, subject to the right which the statute gives the grantor, to continue the dam and the flowing, yet he purchases it also with the right to recover damages for such flowing, which our statute in express terms gives to the owner of the land, whoever he may be. That the liability to damage and the right to recover compensation are inseparable, unless separated by special contract.

He also instructed them, that, when in the course of conveyancing, devise or descent, the same person is, for a time an owner, both in the dam which causes the flowing and in the land flowed, the right to recover compensation is *suspended* only during such ownership in both the dam and the land injured. Having laid down these general principles, he called the particular attention of the jury to the evidence relating to the time when the lot No. 49 was drawn, and became property in *severalty;* all the records of the Proprietors having long since been lost. And the jury, in answer to a written inquiry on this point, returned a written answer, with their verdict, that the lands of the Proprietors were divided in the year 1740. In a similar manner he called their attention to the subject of the *mill* mentioned in the deed of *Hutchinson & al.* to *Savage*, dated *Feb.* 26, 1734, and also of *Paine's* mills, and the authority under which they were erected — and they certified that the *former* mill was not built by or under the authority of the Proprietors, and that the *latter* was not built by or under the authority of the Proprietors *before the division* in 1740. He further instructed the jury, that, as lot No 49 was bounded on the river, it extended to the *thread* of the river, whether in its *natural* width, or as raised and widened by means of the mill-dam. And further, that as every man had a legal right to erect a mill-dam on his own land and flow the land of his neighbour, no grant or license from the owner of the land flowed could be

presumed from length of time, or at least from the length of time proved in the present case.

He also instructed them, that the act of the Legislature of 1828, respecting the fishery and sluice ways, could have no effect to change or impair the rights of the complainant in the present prosecution.

The jury further certified, that the mill-dam had not been raised higher than it was formerly. If the foregoing instructions were correct, and those requested were in substance given or properly withheld, the verdict, which was for the plaintiff, was to stand as the basis of further proceedings; if otherwise, the verdict was to be set aside and a new trial granted.

Allen and *Sprague*, for the defendants, said they were aware that the case of *Tinkham v. Arnold*, 3 *Greenl.* 120, would be urged as conclusive against the defendants — but they insisted that it was not conclusive upon the point raised in this case. The ground the Court go upon in that case is, that, the statute granting a right to use, and the owner not having the power to prevent it, no prescriptive right could be acquired *to the land.* There the prescriptive right of using, &c. was only considered as to how far it affected the *title to the land.* It is not, therefore, a conclusive authority in this case. No such claim is set up by the defendants. But it is contended that they have acquired *a right to flow* by *prescription,* having exercised that right for a period of 100 years.

Again, the mills and dam, and lot No. 49, were all originally owned by the same persons, by the Proprietors. While thus owning they conveyed the mills and dam, and afterward, No. 49. The first conveyance granted the right to flow, and the grantees of the latter took it subject to all legal incumbrances. Or if the conveyance of No. 49, were first in order of time, it would make no difference in the result. The grantees took it subject to the rights then existing of the owners of the mill — subject to the right to flow. *Oakley v. Stanley,* 5 *Wend.* 523; *Leonard v. White,* 7 *Mass.* 6; *Clement v. Durgin,* 5 *Greenl.* 9; *Stevens v. Morse,* 5 *Greenl.* 46; *Blake v. Clark,* 6 *Greenl.* 436.

By the conveyance of the mill with its privileges and appurtenances, every privilege would pass which was necessary to the operation of the mill, and which had before belonged to it. Whatever is necessary to the enjoyment of a thing, passes by the grant of that thing. *Incidents* are granted by *implication* with the *principal.* As flats with a wharf. A right of way over the grantor's land to a house in the middle of his field conveyed by him.

They further contended, that it was not competent for the jury to find when a division took place — that is matter of deed or record — in either case it was a question for the Court — and the verdict of the jury thus far at least was wrong.

The counsel also argued against the correctness of the instructions, in regard to the boundaries of the plaintiff's land, insisting that he was limited to the margin of the pond. The principle of grants extending to the middle of rivers is inapplicable to tide waters or to any considerable expanse of water. In this case by all the conveyances and by the Proprietors' plan it is denominated *a pond* — and the deed of the plaintiff bounds him *by the pond.* He is, therefore, limited *to the margin,* and no part of the land passed which was covered with water; — Or if it did pass, the plaintiff took it as it was, *covered with water,* and subject to the rights of the mill owners to flow it.

Mitchell, for the plaintiff, relied on the provisions of *Maine Stat.* of 1821, *chap.* 45. This statute gives an *absolute right* to any and all persons, to erect dam, mills, &c., and flow the lands of others — reserving to those others a right of redress for any injury sustained. This, it is apprehended, extends to all cases where the ownership of the mills is in one, and of the lands flowed, in another. Hence no right can be acquired by a user, or prescription; the parties must look to the statute for the origin and extent of their rights. *Tinkham v. Arnold,* 3 *Greenl.* 120.

If it were otherwise, a sufficient time has not elapsed by which such right could be acquired — for no time runs in this respect until after an appropriation of the land by the owner — and there is no proof of such appropriation till after 1789. *Wadross v. Wadross,* 3 *Con. R.* 373; *Cooper v. Barber, Taunt.*

R. 99; *Angel on Water Courses,* 71 ; *Vandeberg v. Van Bergen,* 13 *Johns.* 212.

A right to flow can only be acquired by deed or matter of record. It cannot be acquired by *prescription,* nor by *implication,* under a deed. *Thompson v. Gregory,* 4 *Johns.* 81 ; *Angel on Water Courses,* 208.

The boundary of the plaintiff's land is the thread of the river, though it may be so enlarged in a portion of it, by artificial means, as to acquire the character of a pond. There are no authorities in support of the position taken on the other side — nor has the practice been in accordance with it.

But this question has been settled by the jury, and is not now open to the defendants — that is, whether the plaintiff is in possession, and owner of the land *described in his complaint.*

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

Parris J. — As the jury have found that the lands of the Proprietors were divided in 1740, and that no mill had previously been erected by them, or under their authority, there were no facts in the case justifying the first and second requests of the defendants' counsel. The Court are to charge the jury upon the law applicable only to the facts proved, but are not bound to answer abstract questions not arising in the case on trial. If the mills had been erected by the Proprietors previous to the division of their common property, so that the mill site and land flowed had not at that time become the separate property of any individual, the request of the defendants' counsel would have been pertinent, and it would have been the duty of the Court to have given the law, arising from those facts, to the jury.

The third request is, " that the Court would charge, that if " the dam, and mills and land, and No 49, were owned by the " same person or persons, and such owners conveyed the dam, " and mills, and land and privileges and appurtenances, and *af-* " *terwards* conveyed No. 49, the grantee of No 49, would have " on right to claim damages for keeping up the water by the dam, " as it had been before the conveyance of No. 49." The facts

are that the mills stand on a stream running southwardly or southwestwardly from *Neguassett* pond in the town of *Woolwich*; that lot numbered 49, which is now owned by the complainant, and on which he alleges the injury to have accrued by the flowing, is bounded eastwardly by the pond, or includes a part of the pond; — that the mill stands below No. 49 on the adjoining lot, and that this mill site was occupied as such, in 1734, and has been so occupied ever since, and that the mill dam has not been raised higher than it was formerly. The respondent offered proof tending to shew, that upwards of fifty years ago, the mill site, mill and privilege, and lot No. 49 were owned by the same person, and that such person conveyed the dam and mill, and land and privileges and appurtenances, still retaining No. 49, and that he afterwards conveyed No. 49 to a different grantee. Upon this proof, the respondent moved for the instructions contained in his third request. If these instructions were properly withheld, or if they were substantially given, there is no ground for disturbing the verdict on this point. — Were they properly withheld?

What would pass by the terms dam, mills, privileges and appurtenances? It is a principle of law, that where a thing is granted, the grant implies a right to all the means of enjoying it, so far as the grantor was possessed of those means. 1 *Saund.* 322, 323. — The use of any thing being granted, all is granted necessary to enjoy such use; and in the grant of a thing, what is necessary for the obtaining thereof is included. *Co. Litt.* 56. Where the principal thing is granted, the incident shall pass. *Co. Litt.* 152. — *Com. Dig. Grant, E.* 9. — In the construction of a grant, the Court will take into consideration the object which the parties had in view, and the nature of the subject matter of the grant.

From the proof reported in the case, it appears that the meadow, now owned by the complainant, has been flowed ever since the first mills were erected on the site where the respondant's mills now stand, which was, probably more than one hundred years ago; — that the oldest witness examined, who could recollect seventy-three years ago, knew that, at that time, there was a dam there high enough to raise a sufficient head of water

to carry two saw mills and a grist mill well, and that the dam has always been high enough to flow the meadow owned by the complainant; — that the meadow was flat and low and always flowed, and that a dam thirty inches in height would flow it. — This has been the situation of the mill and dam ever since the site was first occupied, and of course it was thus when it belonged to the same person who owned the meadow flowed, being part of No. 49. While in his possession, the dam was kept up to the same height as it now is, and consequently, the meadow must have been flowed as it now is. — He, being the owner of the meadow as well as the dam, had a right to flow without being answerable for damages.

The mill could be of no use without a head of water sufficient for its operation, and that head could not be supplied, without continuing such a dam as would cause the meadow to be overflowed. — It was indispensably necessary to the enjoyment of the principal thing granted, and if, at the time of the conveyance of the mill and its privileges and appurtenances, the grantor was the owner of all the land flowed, we think that both upon principle and authority, the grantee acquired a right to continue the dam so as to raise the same head of water as the grantor had been accustomed to raise previous to the grant, provided that was necessary for the useful operation of the mill. — In *Blaine's Lessee v. Chambers*, 1 *Serg. & Rawle*, 169, the Court decided, that a devise of "a grist mill and ap- "purtenances," carried with it what was actually used as an appurtenant by the testator in his lifetime; and *Yeates J.* said, "by these words, every thing necessary for the full and free en- "joyment of the grist mill, and requisite for the support of the "establishment, such as a dam, water, the race leading to the "mill, a proper portion of ground before the mill for the un- "loading and loading of wagons, horses, &c. as used by the "testator would pass, for without these appurtenances the "grist mill could not be worked." — In *Pickering v. Stapler*, 5 *Serg. & Rawle*, 107, *Chief Justice Tilghman* says, "the wa- "ter right was appurtenant to the mill and passed by the word "appurtenances. This," says he, "appears so plain, that he "who denies it should show the authority on which he rests

" his opinion. No such authority has been shown, but on the " part of the defendant cases were produced, showing that priv- " ileges of the kind in question pass by the name of appurte- " nances."

In *Leonard v. White*, 7 *Mass.* 6, the question was, whether, under a grant of a mill with all the privileges and appurtenances thereto belonging, the soil of a way passed, which had been immemorially used for the purpose of access to the mill from the highway. The Court held that the soil did not pass but that the way, as an easement, might be appendant or appurtenant to the mill. — In *Blake v. Clark*, 6 *Greenl.* 436, the Court go farther and decide that the term, " mill," may embrace the free use of the head of water existing at the time of the conveyance, as also a right of way or any other easement, which has been used with the mill, and which is necessary for its enjoyment. — In *Taylor v. Hampton*, 4 *McCord*, 96, the question now under consideration seems to have been considered as settled, that the pond is an appurtenance of the mill, and the purchaser has a right to keep up the water to the height to which it was raised at the time he purchased, even though the consequences were the overflowing of the grantor's land. That was a case of very considerable magnitude, and was argued by some of the most able counsel in the State, yet although the question we are now considering was involved, and was of vital importance to the plaintiff, it was not even taken by the counsel, and the Court assumed it as settled, and as the starting point in their examination of the case. — *Oakley v. Stanley*, 5 *Wend.* 523, was precisely like the case before us. — In that it was decided, that the right to overflow adjoining premises of a *grantor*, to the extent necessary for the profitable employment of a water privilege conveyed, in the manner in which it existed and had been used previous to the grant, passes to the *grantee* as necessarily appurtenant to the premises conveyed. The Court say, there can be no question but the grantee acquired an absolute right to maintain the dam at the height at which it was when he purchased from the grantor, and that he or his grantees are not responsible to the grantor or those who hold under him for

any injury which the adjoining premises may receive from an overflow of water produced by the dam. — In *Strickler v. Todd*, 10 *Serg. & Rawle*, 63, it was decided, that by conveyance of a mill, the whole right of water enjoyed by the grantor, as necessary to its use, passes along with it as a necessary incident; and the grantor cannot, by the conveyance of another lot of ground through which the stream passes, impair the right to the use of the water already vested in the first grantee. — It is unnecessary to extend this opinion by giving a summary of other corroborating cases. We will merely refer to *Whitney v. Olney*, 3 *Mason's Rep.* 280; *Wetmore v. White*, 2 *Caines' Cases in Error*, 87; *New Ipswich Factory v. Batchelder*, 3 *N. Hamp. Rep.* 190; *Jackson v. Vermilea*, 6 *Cowen*, 677; *Nicholas v. Chamberlayn*, *Cro. Jac.* 121; and *Swansborough v. Coventry*, 9 *Bingham*, 305.

From the view we have taken of this part of the case, we are of opinion that the instruction was properly requested. — Our next inquiry is, was it substantially given. The first instruction given was, " that where the *same* person is owner of " a *mill-dam* and also of a *tract or parcel* of land, which is " overflowed by water, raised and thrown back upon it, by " means of such dam, if he should sell and convey to A. B. " the parcel flowed, reserving to himself, his heirs and assigns, " the right to continue such dam and flowing without payment " of damages, in such case neither A. B. nor his heirs or as- " signs, could maintain a complaint under our statute against " the grantor of A. B., his heirs or assigns." — Of the correctness of this instruction there can be no doubt. — The statement of facts upon which it was given supposes an express reservation to the grantor, of the right to flow, in which case the grantee would clearly have no right to compensation for injury occasioned by the flowing. — The charge proceeds, " but if no " such right is reserved in the deed to A. B. then, though he " purchases the land subject to the right which the statute gives " the grantor to continue the dam and the flowing, yet he pur- " chases it also with the right to recover damages for such flow- " ing." We are not disposed to question the correctness of this part of the charge, but it is predicated on a different state

of facts from those supposed in the request under consideration and which the defendant contends he had proved. The facts assumed in the charge are, that the grantor conveyed *the premises flowed,* but retained the mill and dam ; — the facts claimed to have been proved, and on which the instruction was requested are, that the grantor conveyed *the mill, dam, privileges and appurtenances,* but retained a portion of the tract flowed. — In the latter case, we think the right to keep the dam to the same height it was continued by the grantor, and of course, to flow as much of his land as he was accustomed to flow, passed as an incident to the mill, necessary for its useful enjoyment, and that the grantee acquired an easement in so much of the grantor's land, as would be flowed by continuing the head of water at the mill at its usual height. — But the grantor's rights in the former case would depend upon a very different principle, which it is not necessary should be discussed or decided at the present time, as the facts proved do not require it. — The charge proceeds, " that where in the course of conveyancing, devise or " descent, the same person is, for a time, an owner, both in the " dam which causes the flowing and in the land flowed, the " right to recover compensation is *suspended* only during such " ownership in both the dam and the land injured." We think, in such a case the right to recover compensation is entirely *extinguished,* and that the owner may, by conveyance, again separate the title, without receiving the right to recover compensation. He may do it by express reservation, as is contemplated in the first branch of the charge in this case ; or he may do it, as the defendant contends was done in this case, by conveying the mill, &c., and the right to flow would follow as an easement, and consequently the right to recover compensation would not be revived. Or if he so conveyed as to entitle the purchaser of the lot flowed to compensation for the injury sustained by the flowing, it would not be a revival of any *suspended* right, but a creation of a new one, having its origin in the grant, and in facts existing subsequent thereto, but in no way depending upon the situation of the estate at any time prior to, or during the unity of possession. As in the case of easements or servitudes ; if the proprietor of the land or tene-

ment for which the easement or service was established, acquire the property of the land or tenement which serves, and afterwards sells it again without reserving the service, it is sold free, for the easement or service was extinguished by the unity of possession, and is not re-established to the prejudice of the new purchaser. *Domat's Civil Law, lib.* 1, *sect.* 6, *tit. Services.*

We do not perceive that the instructions moved for in the defendant's third request were either expressly or substantially given, and believing the law to be as the Court were requested to instruct the jury, a new trial must be granted. It is, therefore, unnecessary to discuss, at length, the other questions arising in the case.

The instruction "that as lot No. 49 was bounded on the riv-"er, it extended to the thread of the river," is undoubtedly correct. It was urged in argument that this principle did not apply to natural ponds and large collections of water, and that the boundary of lot No. 49 was a natural pond of two hundred rods in width, even before any flowing or obstruction by dams. How far such a state of facts would render the principle of law involved in this part of the charge inapplicable, we are not called upon to decide, as the case before us does not shew the existence of the facts. The law of boundary, as applied to rivers, would, no doubt, be inapplicable to the lakes and other large natural collections of fresh water within the territory of this State. At what point its applicability ceases it is unnecessary now to consider, as the case does not call for it. Again, it was urged in the argument, that the complainant could not recover, because, by the terms of the conveyance, under which he held, he was limited by the margin of the pond, as kept up by the dam; and the counsel supposed a case, where a grantor conveys by boundaries designated on a plan, and contended that by these boundaries the grantee must be governed. No doubt he must. The grantor has a right to prescribe such limits to his grant as he pleases. If he bounds by a river, the grant extends to the channel; but he may bound by monuments, which will limit his grant to the bank, or at any other point he pleases. *Dunlap v. Stetson*, 4 *Mason's R.* 349. We have not before us any evidence that the grant of No. 49 was in express terms, or

by reference to any plan or designated monuments, limited to the margin of the pond.

As to that part of the charge which relates to presumption of grant or license, we forbear to enter into a discussion of the question it involves.

This Court have decided, in *Tinkham v. Arnold*, 3 *Greenl.* 120, that the flowing of lands for the support of mills for any term of time, furnishes no presumptive evidence of *grant.*— Whether it may not amount to presumptive evidence of *license* remains to be settled. Here is a case where mills have been standing and water flowed, as at the present time, for one hundred years, and no claim for damages ever been asserted until the present suit. The party complainant has himself, been in possession of lot No. 49, under title, upwards of thirty years, during all which time the flowing has been uninterruptedly continued to the prejudice of his rights, if he had any. He and his grantors have seen the dam raised and lowered, repaired and rebuilt, without manifesting any opposition, or asserting any claim either to compensation for flowing, or to the land itself, and whether such facts, although not sufficient to raise a presumption of grant, may not afford presumptive evidence of license, so as to bar his claim to damages, is a question entitled to grave consideration. *Clement v. Durgin*, 5 *Greenl.* 14. We are aware that the law giving to mill owners a right to flow the land of others, which is a departure from the principles of the common law, has been viewed with some degree of jealousy, and that the policy of continuing its provisions has been doubted. *Stowell v. Flagg*, 11 *Mass.* 368. It is not our province to judge of the expediency of the law, but to administer it according to its fair interpretation. By it, the right to flow is granted, and also the correspondent right to damages. But where the flowing is under a license, or a grant of easement, the right to damages, under the statute, is barred.

ROBINSON *vs.* ROBINSON.

Sundry individuals raised by voluntary subscription among themselves, a sum of money to erect a building for an Academy, and then held a meeting, at which they chose one of their number an agent, "to employ workmen, pro- "cure materials," &c. who hired the plaintiff to labour in the erection of said building. *Held*, that, he thereby bound *all the subscribers*, including himself, and that an action might be maintained against all the subscribers *jointly;* — but that if sued *alone* he could only avail himself of the non-joinder of his co-subscribers by pleading it in abatement.

ASSUMPSIT, on account annexed to the writ, for labour done and performed on the building erected for an Academy in *Newcastle*. It was admitted that the work had been done, and that the sum charged was reasonable, but the defendant denied that he was liable to pay it.

To maintain the action the plaintiff read the following memorandum: —

"*Newcastle, Aug.* 15, 1829.

"$148,13.

"Due *Nathainel Robinson* for work on the new "*Academy* building in *Newcastle*, one hundred and forty-eight "dollars and thirteen cents.

"*Ebenezer D. Robinson*,

"Agent for the subscribers."

"(Errors excepted)."

It was also further proved or admitted, that at a meeting of the trustees of Lincoln Academy, *May* 1, 1828, a vote was passed, directing the removal of the Academy to *Newcastle*, whenever a building of a certain description should be there erected and presented to the Institution. Whereupon certain individuals, *May* 24, 1828, by writing under seal, after reciting the above vote, covenanted "to pay the sums voluntarily placed "by them against their respective names, unto *Ebenezer Farley*, "*Esq.* whom they had duly elected their Treasurer for this "purpose, and to any other person who may succeed said "*Farley* in said capacity, one half in three, and the remainder "in six months." The defendant was one of said subscribers

to the amount of $25. The whole sum subscribed was about $1500, which had been paid to said *Farley*, the treasurer. After said subscription, the subscribers met and organised by choosing a chairman and clerk, and a committee of three of the subscribers to direct as to the materials, form and manner of building, and to superintend generally the erection of the building. At the same meeting the defendant was chosen an agent to employ workmen, purchase materials, and generally carry on the work. Afterwards the defendant employed the plaintiff as master-carpenter to do the work charged in the account annexed. At several times during the progress of the building, the plaintiff drew orders on the defendant *as agent of the subscribers*, and on the completion of his work, received from the defendant the memorandum aforesaid.

The defendant never gave any notice to the plaintiff who were the subscribers, or how much was subscribed. But in *Sept.* 1831, before the commencement of this suit, the plaintiff called on the defendant with the memorandum aforesaid and requested payment, when he replied, that there were no funds to pay the same — that a sufficient sum had not been subscribed to pay for all the work done on the building. And on being further inquired of as to the names of the subscribers, he replied that he could not state who they were, as he had no control over the paper.

Upon these facts it was agreed, that if in the opinion of the Court the action was maintainable against the defendant, the nonsuit which had been entered by consent, was to be taken off, and the defendant defaulted, otherwise the nonsuit was to stand.

Sheppard, for the plaintiff, argued that the defendant was liable on the ground, 1. that he contracted with the defendant to do the labour, without disclosing *at the time* who was his principal, — and afterwards refusing to give the names of the subscribers when expressly inquired of to that effect. *Maure v. Hefferman*, 13 *Johns. R.* 58; *Rathbon v. Rudlong*, 15 *Johns. R.* 1.

2. Because he transcended his authority, by incurring expen-

ses beyond the amount of the funds — this makes him *personally liable.* *Gill v. Brown*, 12 *Johns. R.* 385 ; *Pothier on Contracts*, 1, 41 ; *Comyn on Con.* 1, 248 ; *Sumner v. Williams*, 8 *Mass.* 162 ; *Abbot on Shipping*, 100 ; *Schimmelpennick v. Bayard & al.* 1 *Peters*, 264 ; *Arpidsan v. Ladd*, 12 *Mass.* 173.

The memorandum may be a mere certificate or evidence of an *insimul computassent.* But if it be any thing more, it is the promise of the defendant, and the word *agent* is used merely as *descriptio personæ.* *Long v. Colburn*, 11 *Mass.* 97 ; *Damon v. Granby*, 2 *Pick.* 345.

If the defendant say that the action should have been against all the subscribers, the reply is, that it is too late for him to avail himself of that objection, he should have pleaded it in abatement.

Allen, for defendant, contended that, the defendant contracted as the *agent* of the subscribers. He had no intention of charging himself, nor had the plaintiff, any intention at the time to charge him. The plaintiff well knew in what capacity the defendant was acting, as appears by the orders which he drew while he was performing the work. If the defendant was authorised to sign the memorandum produced by the plaintiff, then surely he is not answerable on it personally. If he was not authorised to sign it, then the action should have been a special action on the case and not *assumpsit.*

To show that the defendant was not liable under the circumstances of this case, he cited the following authorities : *Bainbridge v. Downing*, 6 *Mass.* 253 ; *Mann v. Chandler*, 9 *Mass.* 335 ; *Tippets v. Walker*, 4 *Mass.* 595 ; *Emerson v. Providence Hat Manufactory*, 12 *Mass.* 237 ; *Odiorne v. Maxcy*, 13 *Mass.* 178 ; *Williams v. Mitchell*, 17 *Mass.* 98.

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

It appears that the defendant was one of the persons who signed the subscription paper, and subscribed $25 towards accomplishing the object expressed therein ; and that afterwards, and before the plaintiff commenced working on the building, at a meeting of the subscribers, he was chosen an agent " to " employ workmen, purchase materials, and generally carry on

" the work ;" and that the defendant afterwards employed the plaintiff as master-carpenter, and he performed the work for which he seeks payment in this action. Having the above-mentioned authority, the defendant, by the contract made with the plaintiff, bound all the subscribers, and himself among the rest ; and the plaintiff might have maintained an action against all the subscribers *jointly ;* for they were all *joint promissors ;* instead of doing which, he commenced the present action against *only one* of the subscribers. The action might have been defeated, if the defendant had pleaded *in abatement* the non-joinder of the *other* subscribers, as co-defendants ; but he has lost the opportunity of availing himself of this objection, by pleading the general issue. The principles above stated are perfectly clear, and their application is familiar in practice. When the parties examined their accounts, on the 15th of *August*, 1829, and the certificate of the amount due to the plaintiff was given to him, the defendant still acted as agent of the subscribers. It is perfect justice that the plaintiff, who has done the labour, should be paid for it. It may operate hardly on the defendant to be compelled to pay the whole sum due, still, as one of the joint contractors, he was liable, and each was liable for the whole. It may be unfortunate that he lost his opportunity to defeat the action, still, he must blame himself ; and if he has any remedy against the other subscribers for contribution, he must resort to that or bear the loss himself. We are all of opinion that the action is maintained. A default must be entered according to the agreement of the parties.

Defendant defaulted.

HATCH, *plaintiff in review, vs.* DENNIS.

In an action on a promissory note of hand, brought by the indorsee against the maker, the latter, to show payment, was permitted to prove the declarations of the payee, made *before the note was indorsed*, the note when indorsed, being *over due.*

In a suit pending in the Court of Common Pleas the defendant agreed by memorandum on the docket, that "*one trial should be final on his part.*" On trial, the defendant had judgment from which the *plaintiff* appealed. *Held*, that after a trial in the Supreme Judicial Court, in which the plaintiff prevailed, the defendant might maintain a writ of review, notwithstanding the agreement.

THIS was an action of *assumpsit*, founded on two promissory notes signed by *Hatch*, the original defendant, payable to one *Clark*, or order, and by him indorsed.

In the Court of Common Pleas it was agreed by *Hatch*, and entered on record, that *one trial should be final on his part.* A verdict was returned, and judgment entered thereon, in favour of *Hatch*. *Dennis* appealed to this Court, and upon the trial on the appeal, a verdict was returned and judgment entered thereon in favour of *Dennis*.

On opening the present cause (in review) for trial, the counsel for *Dennis* objected to proceeding in the trial, contending that the agreement aforesaid made by *Hatch* in the Court of Common Pleas, had precluded him from maintaining this writ of review; and that though the action had been continued one term, the objection was still open to them. But the *Chief Justice*, who presided at the trial, overruled the objection.

In defence of the action it was proved, that the notes declared on were *over due* when they were indorsed; and *Hatch* then offered to prove certain declarations of *Clark*, made before the transfer of the notes, that the notes had been paid before they were negotiated. The counsel for *Dennis* objected to this evidence, and the presiding Judge excluded it, on the ground that *Clark* was a good witness for the defendant and should have been produced. And these two questions were reserved for the decision of the whole Court.

Allen, for the plaintiff in review, contended that the agreement of *Hatch* was intended merely to apply to the Court of Common Pleas — and then only in case the verdict should be *against* him. But, however the agreement may be considered, it was rendered a nullity by the *appeal* entered by *Dennis*. If not, then the objection should have been made the *first term*.

He also maintained, by reasoning at some length, that, the defendant should have been permitted to prove the declarations of the indorser, and cited, *Bridge & Eggleston*, 14 *Mass.* 245; *Peabody v. Peters*, 5 *Pick.* 1; *Stockbridge v. Damon*, 5 *Pick.* 223; *Sargeant v. Southgate*, 5 *Pick.* 312.

Sprague, for the defendant in review, insisted that the agreement of *Hatch* was in the way of the prosecution of this suit. It was not an agreement to be confined to the Court of Common Pleas, but was a *record* agreement, and of course must accompany the suit wherever it goes. And this fact, that it was a part of the *record*, is a sufficient answer to the allegation that an objection should have been made the first term.

Proof of the declarations of the payee was properly rejected. To admit such evidence would open a wide door for fraud. Persons might easily collude and avoid their contracts. But what authority is there in favour of admitting it? The cases cited from *Pickering* go merely as to the effect of facts when proved, and not as to the mode of proof. The case of *Bridge & Eggleston* does not go the length of the doctrine set up here. Besides, there is a manifest distinction between that case and this. In that, there was a fraudulent conspiracy. Nothing of that kind is pretended here — or if there be, that it was brought home to the knowledge of the present holder. An essential ingredient in the decision of the Court in *Bridge v. Eggleston*, was that, the knowledge of the fraudulent intent of the grantor was brought home to the grantee, so that he thereby participated in it; otherwise evidence of the declarations of the grantor would not have been received. Such also, was the decision in *Clark v. Waite*, 12 *Mass.* 439.

But distinguishable as the case of *Bridge & Eggleston* is from this, it may well be questioned whether it is to be sus-

tained. If it has not been overruled, yet it has never been cited with approbation by the Courts.

PARRIS J. at the ensuing *May* term in this county, delivered the opinion of the Court.

Hatch, having agreed in the Common Pleas, that one trial shall be final on his part, would have been precluded from making any further defence to the action, if the judgment of that Court had been against him. But the trial, which he had agreed should be final as to him, resulted in his favour. He had, therefore, no occasion to defend further, unless called so to do by *Dennis*. *Hatch* was willing that the trial should be final. He made no movement to disturb the judgment. *Dennis* was the dissatisfied party. He appealed and called upon *Hatch* to defend further in this Court, and it would be wholly inconsistent with any reasonable construction of the agreement, to suppose that the parties intended that the plaintiff might prosecute by appeal and the defendant not be permitted to defend. It would be placing *Hatch* completely in the power of the other party. If he, *Hatch*, failed, his agreement would conclude him. If he succeeded, *Dennis* would avoid the judgment by appeal; and if *Hatch* is not allowed to defend in the appellate court, in consequence of the agreement, his rights are thereby wholly concluded. If the intention of the parties had been, that one *verdict* against *Hatch* should be final, it would have been so expressed. We cannot thus construe the language of the agreement as written.

The next question relates to the admissibility of the declarations of *Clark*. An indorsee without notice, and for a valuable consideration, is, in general, not affected by the transactions between the original parties. But when he takes a note under circumstances which might reasonably create suspicion, as when it is negotiated after the time of payment has elapsed, he is considered as identified in interest with the payee, and may, in an action against the maker, be met with every defence of which the maker could have availed himself in an action by the payee. The instrument still retains its negotiable character, and may be passed by indorsement, or if previously indorsed, by delivery

only, and is distinguishable from a mere chose in action, inasmuch as the holder may maintain an action in his own name. But the maker, on proof of its having been negotiated after it became due, is entitled to the benefit of any payments, which he has made previous to its transfer. He may prove the same facts in defence against the indorsee that he might have proved if the action had been in the name of the payee. In the latter case the proof could not come from the testimony of the payee, for being a party to the suit, the defendant could not avail himself of that evidence. But when the action is brought in the name of the indorsee, the payee, not being a party to the record, and not interested for the defendant, is a competent witness to prove certain facts necessary for the maker's defence, not, however, relating to the original validity of the instrument. If he be a party to the record and a party in interest, his admissions are evidence. If the instrument declared on be not negotiable, the action having been brought in the name of the payee, but for the benefit of his assignee, the admissions of the payee subsequent to the assignment, are not to be received as evidence, because, at the time of making them, he had no interest in the subject matter; but if made previous to the assignment, they may be received, because he was then admitting against his own interest, and being a party to the record, the defendant cannot make use of him as a witness. This is the principle recognised in *Hacket v. Martin*, 8 *Greenl.* 77. But where the instrument declared on is negotiable and transferred by indorsement, although not so transferred until after it has become due and payable, yet there may not be the same reason for receiving in evidence the declarations or admissions of the payee, made before the transfer, by indorsement, as there is for receiving the admissions of the payee of an instrument not negotiable; the former being a competent witness not being a party to the record, while the latter, being a party, must be excluded; and it is a general principle that the sayings and declarations of one who is a competent witness in a cause, are not to be admitted as evidence to charge another, upon the general ground, that they are but hearsay evidence, and not the best which the nature of the case affords.

But there are exceptions to this rule. *Starkie*, in his treatise on evidence, says, "an admission by the owner is some- "times evidence against one who claims title through him," 2 *Stark.* 48; and a number of cases are to be found, both in American and English reports, where the declarations or admissions of the payee of a negotiable note, made while the note remained in his possession, were received as evidence for the maker in a suit against him by an indorsee, it having been first proved that the note was indorsed after it became due. — Such was the case of *Pocock v. Billings*, first reported in 2 *Bing.* 269, where the admissions were received, and the verdict set aside and a new trial ordered, because it did not appear that the note was over due when indorsed. At the second trial that fact appeared, and the question of the admissibility of the payee's declarations, made while he held the note, was again raised, and upon argument they were held to be admissible. The same doctrine is recognised in *Shaw v. Broom*, 4 *Dowl. & Ryl.* 730; in *Beauchamp v. Parry*, 1 *Barnw. & Adol.* 89, and in *Smith v. De Wruitz*, *Ryan & Moody*, 212; *Graves v. Key*, 3 *Barnw. & Adol.* 313.

Roscoe, in his late treatise on evidence, says that the declaration by the payee of a note, payable *on demand*, the note being then in his possession, that he gave no consideration for it to the maker, is not admissible in an action by an indorsee against the maker, the payee being alive, and he cites *Barough v. White*, 4 *Barnw. & Cresw.* 325. On looking into that case it will be found that it turned upon the question whether the note was over due when it was indorsed, and the Court all held that it was not, and consequently that the declaration of the payee was inadmissible. But it was said in the course of the opinion, that where the party making the declarations can be identified with him against whom they are offered, the declarations are admissible as evidence; — precisely as was said by *Bayley J.* in *Beauchamp v. Parry*, before cited, that the indorsee of a note cannot be affected by the declaration of the payee, unless it be shown that he is identified in interest with him, as if he took it without consideration, *or after it was due.* When the indorsee is thus identified, or in other words, when he takes

the instrument subject to all the equities, which existed between the maker and payee, at the time of the indorsement, the current of English decisions shew the declaration of the payee, while he held the instrument and adverse to his own interest to be admissible as evidence in favour of the maker. The only case found in the English books where a different doctrine was holden is *Duckham v. Wallis*, 5 *Esp. Rep.* 252, where *Lord Ellenborough*, at Nisi Prius, rejected the declarations of the payee, though made against his own interest previous to the indorsement of the note. The case went off upon another point, and the question was not presented to the full court. From the recent cases in the King's Bench and Common Pleas, before cited, it would seem that the ruling of *Lord Ellenborough* is not now considered as law in *England*.

Mr. Dane, in his abridgement of American law, says, "the "declarations of the payee of a note, made *before* he has in- "dorsed it, may be given in evidence in an action by the holder "against the maker, otherwise, if made *after* he has indorsed "it." 9 *Dane*, 301.

We are not inclined to go to this extent in receiving the declarations of the payee, although *Mr. Dane's* general position is supported by respectable American authorities. — In order to let in the declarations, we think it must be first shown that the plaintiff is identified in interest with the payee, and according to the English cases he is so identified when it appears that he took the note after it became due, or without consideration.

In *Pocock v. Billings, Ryl. & Moody* 127, *Best C. J.* in receiving the declarations of a former holder of a bill made during his possession, likened the case to that of declarations made by the owner of an estate during his possession. — In such cases the admissions of a tenant in possession, against his title, are not only evidence against him but those who claim under him. In *Jackson v. Bard*, 4 *Johns.* 230, *Thompson J.* in delivering the opinion of the Court, said, "the declarations "of *Smith*, under whom the defendant claimed while in pos- "session of the premises, as to his title, were admissible against "the defendant. These declarations would have been good "against *Smith*, and are also competent evidence against all

" who claim under him. This principle has been repeatedly " recognized both in our own and in the English courts." In *Norton v. Pettibone*, 7 *Connect. Rep.* 319, *Dagget J.* says, in delivering the opinion of the Court, " the declarations of a " person, while in possession of the premises, are always admis- " sible, not only against him, but against those who claim under " him." In *Weidman v. Kohr*, 4 *Serg. & Rawle*, 174, *Tilghman C. J.* said, " there can be no doubt but the declarations of " the person under whom the plaintiff derived his title, made " during the time when he owned the land claimed by the " plaintiff, are evidence. Nothing is stronger than the confes- " sion of the party interested against himself. But the confes- " sions of the same person, made after his interest had ceased, " would not have been evidence. This is the settled distinc- " tion." In none of these cases was the question raised whether the grantor was or was not a competent witness, and it does not appear that he was rendered incompetent by reason of any covenants in his deed. In a more recent case in the Supreme Court of *Pennsylvania*, it was decided that the declarations of a person while holding the legal title to an estate, that he was merely a trustee for another, who paid the purchase money, are admissible in evidence against those claiming under him, although he be, at the time such declarations are offered in evidence, within the reach of the process of the Court, and capable of being examined as a witness. *Gibblehouse v. Stong*, 3 *Rawle*, 437. The applicability of this principle to personal, as well as real actions is also recognised in *Snelgrove v. Martin*, 2 *McCord*, 241. The Court say, " were this not the " rule, a debtor could not be safe in taking the receipt of his " creditor. For instance, the obligee of a bond might give loose " receipts or acknowledge the bond paid in full; but if he after- " wards assigned the bond, the assignee would hold it inde- " pendent of such acknowledgment of receipts. In a word, " there could be no reliance placed in a settlement with a " debtor, or arrangement with the owner of an estate, as he " would have merely to assign the one or convey the other in " order to get rid of his own acts."

This was an action by the indorsee against the maker of a

promissory note, and the declarations of the payee, before indorsement, were received as competent testimony to invalidate the note in the hands of the indorsee. See also *Hale v. Smith*, 6 *Greenl.* 419 — and the cases there cited.

Where a negotiable note is transferred by indorsement before it arrives at maturity, the holder for a valuable consideration takes it free from all the equities existing between the maker and payee; and inasmuch as actual payment to the payee before indorsement would not be a valid defence, so any evidence tending to prove that fact, whether arising from admissions of the payee or otherwise would be inadmissible. Of the intimations of the learned Chief Justice, who delivered the opinion of the Court in *Webster v. Lee*, 5 *Mass.* 334, and *Barker v. Wheaton*, *ibid.* 512, that a negotiable note paid by the maker to the promissee previous to its arriving at maturity and before indorsement, is *functus officio* and cannot be negotiated, and that the promissor can defend himself by proving a payment prior to the transfer, we are not unaware. That question was not distinctly presented in either of these cases, and the law seems to be now settled that the holder of negotiable paper, who receives it fairly in the way of business can recover upon it though it has been paid, if he received it before it fell due. But not so if he received it afterwards. It is then considered as dishonoured or discredited, and is not favoured by that commercial policy which sustains the circulation of negotiable paper; and of course the peculiar doctrines of the mercantile law do not apply.

Upon a careful examination of all the cases bearing upon this question, which we have been able to examine, including that of *Whitaker v. Brown*, 8 *Wend.* 490, we think the weight of authority is in favour of admitting the declarations of the payee, when made under such circumstances as they were in the case before us, and accordingly the verdict must be set aside and a new trial granted.

PEARCE & *al. vs.* NORTON.

A. and B. by contract in writing, agreed to sell a vessel to C. for $1030, the latter to receive her at that time, and to pay for her by furnishing his notes, one for $530, payable in 6 months, and one for $500, payable in 12 months, indorsed by J. B. or such other security as should be satisfactory to A. and B. and upon which the latter were to give C. a bill of sale. And C. therein promised on his part to furnish the said notes or security within 60 days, or to return the vessel and pay for her use. C. took the vessel and sailed her nearly two years, when she was lost, he not having furnished the notes or security agreeably to the stipulations in the contract, and having received no bill of sale. *Held*, that the loss was the loss of C. — and that A. and B. might recover of him, in a suit brought on the contract, the agreed price of the vessel.

And this, notwithstanding A. and B. more than a year after the alleged sale, made oath at the Custom-house that they were the only owners, and that C. was master.

THIS was an action of assumpsit to recover the price of a vessel, and was founded on the following special agreement between the parties.

"We agree to sell the schooner *Honor & Amy*, to Capt. *Jon-*
"*athan Norton* of the town of *St. George*, in the State of
"*Maine*, for one thousand and thirty dollars, to receive her as
"she now lies at the wharf in *Gloucester*, and to pay for her
"in the following manner: to give us his notes of hand for
"$530, payable in six months from the first day of *May*, 1826,
"without interest, and also a note for $500, payable in twelve
"months from the same date as the first named note, interest
"after six months; the said notes to be indorsed by *Mr. James*
"*Bartoe*, or such other security as shall be satisfactory to us,
"and on the delivery of the notes aforesaid, we agree to give
"the said *Norton* a good and sufficient bill of sale of the said
"schooner. And the said *Norton* on his part agrees, within
"60 days from the 13th day of *May*, 1826, to produce to us
"the above named notes of hand or other satisfactory security
"for the payment of said schooner, or to surrender her up to
"us in *Gloucester*, paying for her use a reasonable compensa-
"tion. In witness whereof we have signed duplicates of this

" agreement, and which we agree shall be binding upon us for " the same, although it may not be technically correct.

" Dated in *Gloucester, May* 13, 1826.

" *Jonathan Norton,*

" *William Pearce & Sons.*"

It was in evidence, that the defendant took the vessel at the time of the execution of the agreement, and sailed her at his own expense, coastwise, until *January*, 1828, when she was lost on *Cape Porpoise;* though he did not furnish the security agreeably to the foregoing stipulations.

The defendant proved, that in *June*, 1827, he was at *Gloucester*, the place of the plaintiffs' residence, with the vessel; and that one of the plaintiffs at that time took the papers, being a temporary register, to the Custom-house, and took a new enrolment for her, and made oath before the Collector, that he with the other plaintiffs were the sole owners, and that the defendant was master.

The defendant's counsel contended that the making oath as aforesaid, and taking out a new enrolment after the time limited for executing the contract, was evidence of the fact of their accepting the vessel, and an estoppel in law upon the plaintiffs to deny that the vessel was theirs; and that if there was a subsequent sale of her to the defendant, yet the plaintiffs could not recover in this action.

On this point the Chief Justice, before whom the cause was tried, instructed the jury that the facts referred to above were not conclusive upon the plaintiffs, and that they were not estopped to deny their ownership; that the plaintiffs were not bound to make a bill of sale before security given, and that they might consider the plaintiffs as holding the vessel for their security for the purchase money; and that it was competent for them, notwithstanding the transaction at the Custom-house, to find that the defendant was the owner, and if he was the owner at the time she was lost, the loss was the defendant's, and he was liable on the contract declared on for the sum therein named and interest; and the jury found accordingly. And in pursuance of special instructions from the Court, the jury also certified in writing, that upon the evidence in the cause

they found that the vessel at the time she was lost was the property of the defendant.

To which opinion and directions of the Court the counsel for the defendant took exceptions, which were duly signed and allowed.

Ruggles, for the defendant, contended, that the contract declared on did not amount to an *actual sale*, but was a mere contract *to sell*. The language of the contract is, "agree to sell," not "have sold." By the contract the defendant was to do one of two things — to furnish the security required — or to deliver up the vessel and pay for the use of her. The latter he has done. In *June*, 1827, he was at *Gloucester* with the vessel, and delivered her up to the plaintiffs, who caused the papers to be changed at the Custom-house, and who then made oath that they were the true owners. This was an acceptance on their part, and they are thereby estopped now to deny their ownership.

Allen, for the plaintiffs, maintained that there was *a sale* — the price was agreed on — and the vessel was put into the defendant's possession, where she remained until lost. And though some of the terms may not have been complied with by the defendant, it does not lie with him to take advantage of that omission.

The plaintiffs are not estopped to deny their ownership. The doctrine is of long standing that the ownership may be in one person for certain purposes, and in another person for other purposes. *Taggart v. Loring*, 16 *Mass.* 336; *Reynolds v. Toppan*, 15 *Mass.* 370; *Colson v. Bonzey*, 6 *Greenl.* 474; *Weston v. Penniman*, 1 *Mason*, 306.

The defendant, by retaining the vessel, beyond the time named in the contract, elected to keep her.

Ruggles, in reply, stated that, he did not question the principle, that the legal ownership may be in one person for certain purposes, and in another for other purposes. But this is not a question between one setting up a claim for supplies furnished, and one alleged by him to be the owner — but between two, each alleging the other to be the owner.

In the case of *Weston v. Penniman*, the Custom-house title and all the papers and proceedings were in perfect consistency with the agreement of the parties — with the contract.

Here the contract had been broken and rescinded when the vessel went to *Gloucester*, and the plaintiffs took oath that they were owners and the defendant merely master.

If in this case there was no actual sale, the vessel not having been returned, the amount of damages, if the plaintiffs are entitled to any, would be *the value of the vessel*, and therefore the verdict should not stand, it having been rendered for the amount of the purchase money, which may or may not be the true value.

WESTON J. delivered the opinion of the Court.

The defendant agreed to purchase the vessel in question for a stipulated sum, to be paid in six and twelve months. He was to receive her on the day of the date of the contract; and it was in evidence that she did on that day go into his possession. A sale and delivery appears to have been contemplated by the parties, the defendant agreeing to furnish at a future day satisfactory security, in which case he was to receive from the plaintiffs the formal evidence of title. The defendant thereafterwards made use of the vessel at his pleasure and treated her as his property, until she was lost while in his employment. He did not furnish the security required; but retaining the vessel, he might be considered as justly indebted to the plaintiffs in the amount of the purchase money. The formal and legal title was to remain in them, until they were furnished with other security. This was expressly agreed. It was then substantially a purchase by the defendant, the plaintiffs holding the legal title by way of mortgage, or until otherwise paid or satisfied. The agreement itself, together with the conduct of the parties, may well justify that construction. The oath taken by one of the plaintiffs at the Custom-house, in *June*, 1827, and the new enrolment there received, is in perfect accordance with this view of the case. If the plaintiffs had then accepted possession of the vessel, the contract of sale would have been rescinded or vacated; but the defendant continued in possession as before,

and the vessel remained subject to his control and management. What was transacted at the Custom-house, was not regarded by either party as interfering with the right of the defendant to treat the vessel as his own.

But whether we consider the defendant as the purchaser or not, the plaintiffs have a right to recover under the contract. The defendant agreed within sixty days to furnish the security, or surrender the vessel. He did neither. The new papers taken a year afterwards, the possession remaining with the defendant, did not amount to a surrender of the vessel. If the defendant is to be treated as a purchaser from the day of the contract, the plaintiffs are entitled to the price stipulated; if not, the failure on his part to surrender the vessel as agreed, would entitle them to the same measure of damages, as that price was the fair value, at which she was by mutual consent estimated.

Judgment on the verdict.

Pejepscot Proprietors *vs.* Nichols.

If in a writ of entry, the issue being on the disseizin of the demandant by the defendant, the jury return a verdict, "that the defendant has held quiet possession of the demanded premises for more than 20 years," — such verdict cannot, by any legal intendment, be considered as establishing the alleged fact of disseizin. — *Semble.*

When the defendant pleads several pleas to the same count; or since the act of *March* 30, 1831, under the general issue places his defence on several distinct grounds, if he obtain a verdict on any one issue, or any one of such distinct grounds, he will be entitled to judgment, though the other issues, or other grounds of defence are decided in favour of the plaintiff.

A verdict will not be set aside for *uncertainty*, as to matter *not essential to the gist of the action*, if it find the *material matter* in issue with sufficient certainty.

Entry *sur disseizin.* The premises demanded was the southerly half of lot No. 10, in *Lisbon.* Plea, the general issue. On trial, the general title was admitted to have been in the de-

mandants. The defendant's counsel then read the following deeds, *viz.: John Dain* to *John Dain, Jr.* conveying the demanded premises, dated *May* 5, 1816, and recorded *May* 9, 1829; and *John Dain, Jr.* to the defendant, dated *March* 4, 1822, and recorded *Sept.* 15, 1830.

There was much evidence introduced by the defendant in regard to the possession and occupation of the lot in question by himself and those under whom he claimed. Among other matters it was testified by one witness that in 1827, he was on the lot, and found it partly fenced across, the fence being however very poor, and in some places merely the remains of a fence; but no where, was it sufficient to stop cattle — that *Nichols*, the defendant, was there, and said "it was only a pos-"session fence, and would answer his purpose."

The counsel for the defendant contended, 1. That the defendant had acquired a good title to the demanded premises by disseizin. — 2. If not, that the action was not maintainable, as there was no proof that the defendant was in possession of the premises, or any part thereof at the time of the commencement of the action.

All the evidence as to both points was left to the jury, with instructions as to the facts necessary to constitute a disseizin.

The counsel for the demandants requested the *Chief Justice*, who presided at the trial, to instruct the jury that, the recording of the defendant's deed a short time before the action was commenced, with his aforesaid declarations as to his fence, were *sufficient* evidence of his being in possession when the action was commenced, unless said evidence was in some way explained or contradicted. But the Judge declined giving such a *definite* instruction. The jury returned a verdict in favour of the defendant, in the following words: "The jury find "that the defendant has held quiet possession of the demand-"ed premises for more than 20 years at one time after the year "1783. The jury further find for the defendant upon the "ground that he was not in possession of the demanded prem-"ises at the time of the commencement of this action."

The demandant's counsel filed a motion for a new trial predicating it on the following reasons. 1. "Because the verdict

"does not find the issue joined by the parties, and which was "submitted to the jury."

"2. Because the facts that they have found, are immaterial."

"3. Because the jury have not found that the tenant either "did or did not disseize the said demandants, which was the "only issue submitted to them."

"4. Because the finding of the jury is contrary to the evi- "dence in the case, and against the weight of evidence."

Allen, for the demandants.

1. The verdict does not find the only issue joined, which was whether the defendant had disseised the demandants. The verdict finds that the tenant held quiet possession of the premises 20 years after 1783. This might be — but it does not find that this possession was adverse to the demandants — and if not, it was no disseizin, and no bar to this action. *Maine stat. ch.* 344, *sec.* 2 says, "the jury shall on the evidence consider "*not only* the question *of title*, but whether the defendant held "possession," and return their verdict accordingly. This is in order that in a future action, the demandant might not be defeated by any objection to the title. If the jury find the plaintiff's title to be good, then they are to consider whether the tenant was in possession. Still the verdict ought to find the issue. In that case the plaintiff would have a good cause of action but for the fact of the defendant's not being in possession; and if the plaintiff should attempt to take possession and should be resisted by the tenant, he could give in evidence the former verdict finding and establishing the title in him. If on the other hand the evidence warrants the jury in finding that the plaintiff has no title, or that the tenant has acquired a title by disseizin, they ought so to find; and then it is immaterial about their considering the question of possession; for whether the tenant be, or be not, in possession, the plaintiff has no right to recover.

The verdict cannot be construed beyond what its language naturally imports. It does not find that the defendant held quiet possession in his own right, or adversely. It does not

find that he ever claimed title. He might have held by lease, or as tenant at will, or by sufferance.

The verdict therefore in this respect is insufficient, and cannot be sustained. *Holmes v. Wood*, 6 *Mass.* 1; *Gerrish v. Train*, 3 *Pick.* 124. It is a general rule that the verdict must follow the issue, and the judgment must follow the verdict.

2. The instruction requested ought to have been given. The tenant introduced the deeds from *J. Dain* to *J. Dain, Jr.* and from the latter to himself. The last deed was recorded *Sept.* 15, 1830, and the writ in this case was dated *Nov.* 25, 1830. The giving and taking of this deed, and recording it, is tantamount to livery and seizin at common law. *Higbee v. Rice*, 5 *Mass.* 352; *Pray v. Pierce*, 7 *Mass.* 381; *Knox v. Jenks*, 7 *Mass.* 488; This, together with the declarations of the defendant relative to his possession fence, ought to be taken as conclusive evidence of his possession at the commencement of the action, if unexplained and uncontradicted.

3. But if the verdict is to be construed as virtually saying that the tenant had disseized the plaintiff, then it is contended, that is is wholly unsupported by the evidence.

Mitchell, for the defendant.

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

MELLEN, C. J. — In this case the demandants have moved for a new trial on two grounds. 1. The alleged insufficiency and incorrectness of the verdict. 2. The refusal of the presiding Judge to give a requested instruction to the jury.

On the *first* ground the reasons assigned are, 1. that the verdict does not find the issue joined by the parties, and submitted to the jury. 2. Because the jury have not found that the defendant either *did*, or *did not* disseise the demandants, which was the only issue submitted to them. 3. Because the facts which they have found are immaterial: and 4. Because the verdict is contrary to the evidence and against the weight of evidence. The cause was tried on the general issue. The first three of the above reasons may be examined together.

The alleged disseizin of the demandants by the defendant, for any period of time, is not expressly, and in terms, found by the jury; and perhaps cannot, by any legal intendment, be considered as established by the verdict; but they have expressly found that, at the time of the commencement of the action, the defendant was not in possession of the demanded premises. The fact of possession was not admitted by the general issue being pleaded, as was formerly the law in this State. That principle was changed, or rather abolished by the statute of *March 8th*, 1826, *ch.* 344. Now, on the general issue, according to the provision of the second section, "the "jury shall on the evidence, consider, not only the question of "title, but whether the defendant holds possession of the same "(premises) or any part thereof, *and return their verdict ac-* "*cordingly.*"

If the jury upon the evidence, could not on their oaths find that the defendant had committed any disseizin; or, if he had, and they were satisfied that it had, in any manner, been purged and done away, prior to the commencement of the action, as was evidently their opinion, then they could not have found any fact, decisive of the action, except that which they have found; and such finding is correct and proper according to the provision of the act of *March 30th*, 1831, for abolishing special pleading. The only question then, as to the points under consideration is, whether the omission of the jury to find the affirmative or negative of the alleged disseizin, in the *formal* issue joined, is of such a nature as to require the Court to set aside the verdict and grant a new trial. It is certainly a correct principle of the common law, that a verdict which finds *part* of the issue, and nothing as to the *residue*, is insufficient for the whole; as if an information for an intrusion be brought against one for intruding into a messuage and 100 acres of land, upon the general issue the jury find against the defendant *the land*, but say nothing of the *house*. *Co. Litt.* 227. So if *two* are charged and *one* is found guilty, and the verdict is silent as to the *other*. 21 *Vin. Ab.* 431, 432. In the case before us there is no *such* omission. The finding of the jury has reference to the whole of the demanded premises, and disproves the defen-

dant's possession : and there is but one defendant. Nor is this like the case of two pleas and issues, *one* of which is found for the *plaintiff*, and there is no finding whatever, as to the *other*. Such a verdict would be inconclusive and bad ; for, had the other issue been found, it might have been found for the *defendant*, which would, of course, have entitled him to judgment. In the case before us, if the jury had found, in addition to what they have found, that the defendant *did* disseise the demandants as they have alleged, or that he *did not*, what effect could have been produced by a finding of the fact *either* way ?

It is a settled principle that where the defendant pleads several pleas to the same count, or, under the general issue, in virtue of the before mentioned act of *March* 30, 1831, places his defence on several distinct grounds relied on ; if he obtains a verdict on any one issue, or any one of such distinct grounds, he will be entitled to judgment, though the other issues are found, or other grounds of defence are decided in favour of the plaintiff. Now, the jury by their verdict have decided and found a fact in favour of the defendant, which constitutes a substantial defence, if it was properly decided and under correct instructions, why should the verdict be pronounced fatally defective ? why is not the present case one to which the maxim may be safely applied, *utile per inutile non vitiatur*. *Mr. Dane*, vol. 6, page 236, says, that " another rule is, if the verdict " do not find the *material* matter in issue, with proper certainty, " it is bad ; for there is not any sufficient foundation for the " Court to give judgment on ; otherwise, if *only* uncertain as to " *matter not essential to the gist of the action.*" The two statutes before referred to, have so changed the course of proceeding as to render it highly expedient, if not absolutely necessary, in many cases for the verdict to be broader than the issue, and to find facts in addition to it. For instance, in an action of replevin the defendant *must* plead the general issue — *noncepit*, which issue must be joined, though the only question to be tried may be, whether the plaintiff is the owner of the property replevied. In such a case the jury must find the *formal* issue in favour of the plaintiff ; but they must also find that the pro-

perty replevied at the time of the taking, belonged to the plaintiff, if such is proved to be the fact. The case before us furnishes another instance of the necessity of extending the verdict beyond the terms of the issue. These are novelties made necessary by the statutory provisions we have mentioned, which seem to render common law principles not perfectly applicable to the case under consideration. For the reasons we have thus assigned, we think the objections to the *form* of the verdict cannot be sustained on any sound principles. Neither do we perceive that the finding of the jury is against evidence, or the weight of evidence. The words in the act of *March* 8, 1826, "whether the defendant holds possession," have been construed to mean *actual* possession, either in person or by a tenant. *Jordan v. Sylvester*, 7 *Greenl.* 335. There was no proof of *such* possession for nearly six years before the date of the writ.

On the *second* ground, the question is, whether the verdict ought to be disturbed because the presiding Judge declined giving the requested instruction, mentioned in his report. The deed from *Daine, junior*, to the defendant, was registered upwards of two months before the commencement of the action. Was the registry of that deed, unexplained or uncontradicted, taken in connection with the defendant's declarations as to his possession fence, which were made six or seven years before, *sufficient* evidence to prove *actual* possession of the premises by the defendant, more than two months *afterwards*, or at any previous time? We have several times decided, that when a grantee enters into open and actual possession, though of only a *part* of a tract or parcel of land, under a *recorded deed*, purporting to convey the same to him by plain and intelligible boundaries or description, such possession and improvement, uncontrolled by other evidence, constitutes a disseizin of the true owner as to the *whole*; but a recorded deed *alone* does not constitute a disseizin; nor is it, of itself, any evidence of the *actual possession* of the grantee. We think that such registry, in connection with the declarations as to the fence, were not *sufficient* evidence of such possession in the present case, and that therefore the requested instruction was properly withheld.

The consequence is, that there must be

Judgment on the verdict.

Stinson & *al. vs.* Snow.

The return of an officer on a writ as to the service of it, is conclusive on the parties in the suit, and cannot be contradicted except in an action against the officer for a false return.

Assumpsit, on a promissory note of hand. The defendant pleaded in abatement that the summons mentioned in the return of the officer was *in hæc verba*, setting it out; by which it appeared that the defendant was summoned to answer to *William J. Farley*, and not to *the plaintiffs*, — and averred that the officer neither gave the defendant in hand, or left at his usual place of abode, any *other or different summons* in said action, than the one set forth. The plaintiffs in their replication, set out the officer's return in these words, — "By virtue "of this writ I have attached a chip, the property of the with- "in named *Snow*, and at the same time gave him a summons "in hand for his appearance at Court according to law," — and concluded with an averment that the defendant was estopped from denying the truth of the return. To this there was a demurrer and joinder.

Barnard, for the defendant.

The officer returns that he "gave a summons in hand for "his appearance at Court according to law." The plea does not contradict the return. He does not say that *the summons* was "according to law," but that he gave it according to law, that is, that he did his duty by giving a summons in hand fourteen days before Court. That was his whole duty in respect to the service. The words, "according to law," are surplusage. If not, they mean only that he has done all that the law required of him as an officer.

The form of the *writ* and of the *summons* is *prescribed by statute*. They are both presumed to issue from the Clerk's office. The summons accompanies the writ. The officer must deliver it whether it be such as the statute requires or not, he is not made the judge any more than he is of the writ itself. The sufficiency of both is a question for the Court to decide.

And a party is not estopped by the return of the officer, except as to such matters as are within the compass of his duties as prescribed by law. It is no part of his duty to certify that the summons is legally sufficient, but only that he gave *a summons*. The error in this case, was the error of the party in not accompanying his writ with a *sufficient* summons in form. It was no fault of the officer. It was not his duty to correct the errors in form or substance in either the writ or summons. Indeed, he is prohibited from so doing by *stat.* of 1821, *ch.* 89, *sec.* 5.

The plaintiffs, reply the return of the officer as an estoppel. In *Guild v. Richardson*, 6 *Pick.* 369, the Court say, that an estoppel must be certain to every intent. Therefore, if a thing is not *expressly* and *precisely* alleged, it will be no estoppel. "The doctrine of estoppel is to be received in *great strictness*, "and no fact is to be taken by *inference*." But if the return in this case is to estop the plea, it must be by "*inference*" only. The strictness in regard to estoppels applies with great justness and force where they are resorted to, *to shut out the truth*, as in this case, but where they come *in aid of truth*, as recitals of deeds, or title, proved by other evidence to have existed, they are justly regarded with favour.

Allen and *Farley*, for the plaintiffs, relied on the return of the officer as estopping the defendant from averring the facts stated in the plea, and cited *Slayton v. Chester*, 4 *Mass.* 478; *Bott v. Burnall*, 9 *Mass.* 99; *same v. same*, 11 *Mass.* 165; *Winchell v. Stiles*, 15 *Mass.* 232; *Bean v. Parker*, 17 *Mass.* 601.

The opinion of the Court was delivered by

MELLEN C. J. — The sufficiency of the plea in abatement is not contested, provided the defendant is not estopped to plead the facts which compose it: if he *is* so estopped, then the plea must be adjudged insufficient, and he must answer over to the merits. In the replication, the plaintiff sets forth, *in hæc verba*, the officer's return on the writ in the action, and distinctly relies on the return by way of estoppel.

A *writ of attachment* is directed to the *proper officer*; the *summons* to appear and answer to the action, is directed to the

defendant. To make a legal service of *such* a writ, it is necessary for the officer who undertakes to serve it, to *attach* some of the defendant's property, and deliver *such* summons to him, or leave it at his last and usual place of abode, or else arrest the body of the defendant. In the case before us, there was no arrest. In performing *both* the acts, which constitute a legal service of the writ, namely, *attaching* property and leaving the *summons*, the officer serving it, acts under the authority of the writ; and, without that authority, he cannot lawfully perform *either* of those acts. If he should have a writ against A., and, intending to leave at his last and usual place of abode, a summons to him to answer in *that* action, should by design or mistake, leave a summons directed to B., or a summons directed to A., but to answer to a *different plaintiff*, it is evident that in neither of those cases, would he act under the *authority* given to him by the *writ*, but, without *any* authority. Now, by inspecting the officer's return, as set forth in the replication, it appears, that in making the service, that is, in making the attachment of property, and leaving the summons at the last and usual place of abode of the defendant, he acted *by virtue of the plaintiffs' writ*. This is expressly stated; and what is expressly stated in the return, unless it is mere matter of law, cannot be contradicted, except in an action against the officer for a false return. We may further observe, as a matter of almost universal practice, that officers in their returns on writs of attachment, seldom, if ever, *describe*, in any manner, the *summons*; the language usually is, after stating the attachment, "and gave *a summons* in hand to the defendant," or "left *a* "*summons* at his last and usual place of abode." If the Court should sustain the plea in abatement in this case, it would probably lay the foundation for hundreds of writs of error, where judgment has been rendered on default, and the returns of service were not more descriptive and definite than that in the present case. For the reasons we have given, we are all of opinion that the return is an estoppel upon the defendant;— and we adjudge the

Plea in abatement insufficient.

Dodge *vs.* Kellock.

In debt on a recognizance entered into before a justice of the peace, conditioned for the prosecution of an appeal, the declaration should contain an averment that the recognizance had been returned to, and entered of record in, the Court of Common Pleas. And the omission thereof being matter of substance, the defendant may avail himself of it by *general demurrer*.

This was an action of *debt*, commenced in the Court of Common Pleas, on a recognizance entered into before a justice of the peace for the prosecution of an appeal, payment of costs, &c. The plaintiff stated in his declaration that, though judgment in said suit had been rendered in his favour by the Court of Common Pleas for costs, &c., yet that the defendant had never paid the same. But the declaration contained no averment that *the recognizance had been returned to, and made a part of the record in the Court of Common Pleas.*

There was a general demurrer to the declaration, which was joined.

Barnard, for the defendant, cited the case of *Bridge v. Ford*, 4 *Mass.* 641; and *Harrington v. Brown & al.* 7 *Pick.* 232.

Farley, for the plaintiff, contended that the case of *Bridge v. Ford*, was not analogous to the present, inasmuch as *that* was for not entering an appeal, while *this* is for the non-payment of the cost accruing after the appeal. Here also, judgment was rendered in the Court of Common Pleas in the appealed case, which could not have been done, unless the recognizance had been returned to, and made a matter of record in said Court. Profert of the record of said judgment is made in the declaration, by which it appears that the recognizance was so returned and recorded.

But this objection if it have any weight, should have been set forth in a *special*, not a *general* demurrer. *Dole v. Weeks*, 4 *Mass.* 451.

The opinion of the Court was delivered by

WESTON J. — In *Bridge v. Ford*, 4 *Mass.* 641, cited in the argument, which was debt on a recognizance, entered into before a justice of the peace, conditioned for prosecuting an appeal, it was held essential that the recognizance should appear to have been returned, and entered of record in the Common Pleas. The recognizance declared on, contains no averment to this effect, although it is of a similar character. It is said that this case is distinguishable from that, as there the appeal was not prosecuted, which was done here, and judgment rendered upon the appeal. Hence it is insisted that the recognizance was returned, and that it would so have appeared, upon an inspection of the record. But we are satisfied that the averment of this fact, which is essential to the liability of the defendant, should have been distinctly and affirmatively made in the declaration; and that is matter of substance, of which advantage may be taken on general demurrer. The declaration is therefore bad as it stands; but may be amended upon motion, on payment of defendant's costs.

SEDGLEY *vs. The inhabitants of* BOWDOINHAM.

By the terms of an act dividing the town of B. and incorporating a part of it as the town of R. the latter was required to support their proportion of all paupers then belonging to said town of B. which it was agreed was 5–13ths. By a second act, the legislature undertook to change the proportions of expense between said towns, relieving the new town from much of its liability as established by the act of incorporation. After the passage of the last, and prior to any judicial construction of it, J. S. contracted with the town of B. to support *the poor of said town* for one year, he having *all the income and benefit* belonging to them during said term. And he accordingly supported them, including the 5–13ths belonging to the town of R. according to the first act, and received the sum stipulated in the contract. Afterward the second act was decided to be unconstitutional, and the town of B. in a suit brought for that purpose, recovered of the town of R. 5–13ths of the expense for supporting the poor during the year of J. S's. contract. The Court *held*, that J. S. was not entitled, by the terms of his contract, to the sum thus recovered by the town of B.

THIS was an action of *assumpsit* for money had and received, and came to this Court on exceptions filed to the opinion of *Whitman C. J.* in the Court of Common Pleas. On the trial in the Court below, the plaintiff read in evidence a bond dated *March* 7, 1825, given by him to the defendants, a part of the condition of which was as follows: "The condition of this ob- "ligation is such, that whereas the said *Robert Sedgley* has "taken the paupers of the said town to support for *one year* "from the 7th day of *May* next, for the sum of three hundred "and forty-seven dollars, — and he is to have all the *income* "*and benefit* that belongs to said poor for the term of said year, "— and he is to indemnify the town of *all kind of pauper ex-* "*penses* whatever for said year," &c.

It further appeared in evidence, that in *Feb.* 1823, there was a division of the town of *Bowdoinham* by legislative enactment, and a part thereof was incorporated by the name of *Richmond;* — one of the provisions of the act of incorporation being, that *Richmond* should maintain its relative proportion of the paupers then supported by *Bowdoinham,* which was admitted to be *five thirteenths.*

Feb. 15, 1825, an additional act was passed by the legisla-

ture, after notice to the town of *Bowdoinham*, materially changing the proportion of liability as established in the act aforesaid, lessening that of *Richmond*.

At the *May* term, 1828, of the Court of Common Pleas, *Bowdoinham* commenced an action against *Richmond*, to recover the latter's proportion of expense for supporting the paupers aforesaid, during the years of 1825 and 1826, as established by the first act. This suit was contested by *Richmond*, but unsuccessfully, and *Bowdoinham* recovered the amount claimed.

It was agreed that all the paupers of *Bowdoinham*, including the above *five thirteenths*, were supported by the plaintiff during the year 1825; and that the defendants had paid him the sum named in the bond, to wit, $347, refusing to pay him the sum received of the town of *Richmond* as aforesaid, by way of reimbursement, for supporting said *five thirteenths* in 1825. — And for the recovery of this sum, the present suit was instituted.

Upon the foregoing facts *Whitman C. J.*, in the Court below, was of opinion that the action was not maintainable, and directed a nonsuit, to which opinion exceptions were filed and allowed.

Allen, for the plaintiff, argued that a reasonable construction of the bond would have required the plaintiff to support only the paupers belonging to *Bowdoinham*, not those belonging to *Richmond*, the language being, " having taken *the pau-* "*pers of the said town.*" But that if the construction should be otherwise, still the plaintiff is entitled to recover the amount received by the defendants of *Richmond*, under the provision of the bond which gives to him, " *all the income and benefit* " that belongs to said poor for the term of said year."

In regard to the construction of the contract he argued further, that it was manifest the plaintiff was to *take the place of Bowdoinham* for that year in reference to the poor. He was to indemnify the town from all pauper expenses, and was to have all the advantages belonging to the town. The sum therefore recovered by the defendants of *Richmond*, for the

expense incurred by the plaintiff in supporting the poor of *Richmond*, should be considered as recovered for the plaintiff's use. Such an effect may reasonably be supposed to have been contemplated by the parties. By the first statute *Richmond* was liable to 5–13ths — these, *Richmond* might take *numerically*, or such as would be *equal* to 5–13ths — it was probable that they would do one or the other, and this would be fairly anticipated by both the parties. If *Richmond* had *then* taken *home* 5–13ths (which they would have done but for the law of 1825,) no question would have arisen; — the plaintiff would have been relieved from their support and *Richmond* would have borne it, but *Bowdoinham* would have gained nothing by the transfer. *Bowdoinham* would then as now have paid $347. *Richmond* would have supported 5–13ths and the plaintiff 8–13ths, the latter deriving the sole benefit of the transfer.

The defendants' construction of the contract is attended with this absurd consequence. If *Richmond* take their share of the paupers and support them at home, the plaintiff is relieved. If they support them in *Bowdoinham*, they pay for their support, not however to him who would be relieved if they supported their poor at home, but to *Bowdoinham* who has incurred *no additional* expense by reason of the paupers being kept in that town.

Again, suppose *Richmond* had taken home their 5–13ths, would *Bowdoinham* have had a right of reduction from the $347 which they had agreed to pay the plaintiff? If not, then the plaintiff, who alone has been subjected to increased expense by their not doing so, ought to have the benefit of the sum recovered by *Bowdoinham*.

That *Richmond* would take and support at home their 5–13ths might fairly have been presumed at the time this contract was made, — for the second act, though passed, had not been published, and ultimately proved to be a nullity by the decision of this Court.

But the defendants have expressly assigned to the plaintiff all the remedy they have over against *Richmond*. By the contract the plaintiff is to have "*all the income and benefit that be-*

"*longs to said poor.*" This would include pensions should the paupers be entitled to any, — or claim upon the State had there been any State paupers as formerly, — or claims against other towns if he should discover that any of the paupers had a legal settlement there. Why not then include also the present claim?

Suppose, on the other hand, an additional number of paupers should have been unexpectedly thrown on *Bowdoinham* during the plaintiff's year, would the defendants have been liable to an increase of the sum of $347? Surely not. The rights and remedies then between them, ought to be mutual and reciprocal. *Saco v. Osgood*, 5 *Greenl.* 237.

Bowman, for the defendants.

What was the effect of the first statute and the settlement under it, between *Bowdoinham* and *Richmond*? Until the paupers belonging to *Richmond* had been removed there, they must be considered as belonging to *Bowdoinham*. This was the case at the time the contract between these parties was entered into. The paupers being thus fixed there, the plain and obvious terms of the contract, required the plaintiff to support them.

But further, by the last act, the liability of supporting these paupers, was transferred to *Bowdoinham*. At the time of the making the contract, the parties must have known of the passage of this act, and must have contracted in reference to it. If the law was constitutional, the plaintiff must have well understood that he was bound to support all the paupers. If supposed to be unconstitutional, would he have bought a lawsuit without making any allusion to it in any way in the contract?

The unconstitutionality of that act has been established, but that decision can have no effect upon the contract between these parties. — It settles the rights and obligations of the *two towns* as to this matter alone.

The argument on the other side drawn from the absurd consequences which would result from our construction of the contract, in case of a removal of the paupers from *Bowdoinham* by *Richmond*, may be answered by denying the right of *Rich-*

mond to cause any such removal—the supposed case therefore can never exist. *Bowdoinham* is to support the paupers, and *Richmond* is to pay 5–13ths of the expense.

He argued further that the "*income and benefit*" spoken of in the bond, related merely to the *labour*, &c. of the paupers, and not to any such case as the claim presented in this action.

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

MELLEN C. J. —By the 5th section of the act of *February* 10th, 1823, incorporating the town of *Richmond*, formerly a part of the town of *Bowdoinham*, it is enacted "that the said town of "*Richmond* shall be held to support their proportion of all pau- "pers, now supported, in whole or in part, by *Bowdoinham*." The section then directs how the proportion was to be ascertained, in obedience to which it was ascertained *Bowdoinham* was to pay *eight* thirteenth parts, and *Richmond five* thirteenth parts of such expense. By the act of *February* 5th, 1825, the Legislature undertook to *change* the proportions of expense, as ascertained under the former act; and to relieve *Richmond* from the liabilities thus existing, and declared that from and after the first day of *May* then next, *Richmond* should be holden to support all paupers who resided, on that day, within the limits of the town of *Richmond*: and that the liabilities and obligations of each of said towns, as to all others who might become chargeable, should remain as though the special provisions of the act of 1823 had never existed. If this last act had produced its intended effect, the liabilities of *Richmond* would have been essentially lessened, it is said, to one quarter part, at most, of the established proportion. But this Court has pronounced the last act unconstitutional, in the case of *Bowdoinham v. Richmond*, 6 *Greenl.* 112. The claim of the plaintiff in this case is resisted on the ground that he by his bond, dated *March* 7, 1825, bound himself to support the *paupers of Bowdoinham* for a certain sum, for one year, being the *same* year, in which he supported them, and for a part of which expense, he has brought this action. It is admitted that the sum mentioned in the condition of said bond, as the agreed compensation, has been paid by the defendants to the plaintiff, so that the only

question in this cause depends, for its decision, on the construction of the bond. It bears date about one month after the unconstitutional act was passed. When *Richmond* petitioned the Legislature to pass the last act, *Bowdoinham* was duly notified; but gave themselves no concern about it. *Sedgley* is one of the inhabitants of *Bowdoinham.* Such being the facts, both parties must be considered as having knowledge of the passage of the last act; but they could have had no knowledge that its provisions were unconstitutional, for that was not decided until 1830. What, then, must be considered to be the law, in reference to which, the condition of the bond was made, and the parties to the bond acted in making their contract? We think they must be deemed to have made their contract, in reference to the last act, and the state of the respective liabilities of the two towns, in relation to the support of paupers, as established by that act. The plaintiff by his bond engaged to support, for one year, *the paupers of the said town* for $347; but he was to have the *income* and *benefit* that belonged to said poor for the term of one year, and was to indemnify the town from all kind of *pauper expenses whatever* for said year. What is the true meaning of *income* and *benefit* belonging to said poor, as used in the foregoing sentence? We apprehend, they mean the benefit of their labour and assistance during the year. At any rate, it can never be construed to mean any portion of the money received by *Bowdoinham* of *Richmond,* which is claimed in this action, as has been contended by the plaintiff's counsel; for such money is not *a benefit belonging to any of the paupers,* but to the town of *Bowdoinham.* By the bond, the plaintiff agreed to support *the paupers of that town* for one year, for a certain sum; which means *all* their paupers, according to the last act, in reference to which he contracted; that sum he has received and is not entitled to demand any more. The action cannot be maintained. The exceptions are therefore overruled.

Judgment for defendants.

SCHWARTZ *vs.* KUHN *& al.*

Where one entered upon a part of a tract of land under a deed of the whole, from one having no title, and afterward received a deed from the *disseisee* of a large part of the same tract, the Court *held*, that it was a question for the consideration of the jury, whether the disseisor did not *intend* thereby, to yield and abandon his *possessory* title to the *whole tract*, on thus obtaining a perfect title to a *large part* of it.

TRESPASS, *quare clausum fregit.* The plaintiff derived title to the *locus in quo* from *William Sullivan*, by deed dated *Feb.* 5, 1822; and the principal question in the case was, whether at said time, *Sullivan* was so seised, as to be legally capable of conveying a good title. In regard to which it was proved, that in 1799, one *Eugley* entered upon a tract of land including the *locus in quo*, and lived upon and occupied a part of the tract under a deed from *Jacob Benner*, *recorded in* 1812, but no part of the *locus in quo* was *actually occupied* by him. It was also proved, that in *October*, 1808, *John Gleason*, as the attorney of *Henry Jackson*, then the owner of a large tract of 5000 acres, including the *locus in quo*, and under whom said *Sullivan* derived his title, entered upon said large tract and surveyed the same, and made a *formal entry* on it, and took possession thereof. And said *Jackson* in the same month entered and took possession in person, and gave notice to several of the settlers. But it did not appear that there was an entry on the land then in possession of *Eugley* in particular, or that notice was given to him. It further appeared that on the 8th *of August*, 1815, *Eugley* received a deed from *Sullivan* of a large part of the tract on which he had entered under *Benner's* deed, not however including the *locus in quo* — and on the 16th *of Sept.* 1830, *Eugley* conveyed the whole to *Kuhn*, the principal defendant.

The jury were instructed, that the entry by *Gleason* and *Jackson* in 1808, was sufficient to purge the disseizin committed by *Eugley*, and that the deed of *Sullivan* to the plaintiff, passed a good title to the *locus in quo*. They accordingly re-

turned a verdict for the plaintiff, which was to be set aside if this instruction was not correct.*

Allen and *Reed*, for the defendants, cited *Prop. Ken. Pur. v. Laboree*, 2 *Greenl.* 275; *Higbee v. Rice*, 5 *Mass.* 344; *Green v. Liter & als.* 8 *Cranch*, 250; *Stearns on Real Actions*, 42.

E. Smith, for the plaintiff, cited *Langdon v. Potter & al.* 13 *Mass.* 219; *Codman v. Winslow*, 10 *Mass.* 146; *Stearns on Real Actions*, 384; *Brown v. Porter*, 10 *Mass.* 100.

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

As both parties claim under *Sullivan*, both admit his original title. The case finds, that though the deed from *Benner* to *Eugley* of the large tract included the *locus in quo*, and though *Eugley* entered on the land, and has ever since lived on the westerly part of it, yet he was never in the *actual* possession of the *locus in quo*. Of course, *Sullivan* was not disseised of any part of the large tract, except that part which *Eugley* held in *actual* and *exclusive* possession, until his deed from *Benner* was registered in 1812. Then a disseizin of *Sullivan* commenced. Therefore, no entry by *Jackson*, in 1808, was *necessary* to enable him to convey to the person under whom *Sullivan* held. We need not inquire whether such entry was sufficient to purge the disseizin, provided *Jackson* had then been disseised, because he was not disseised as to the *locus in quo*. For this reason, the instructions of the Judge, as to the legality and sufficiency of *Jackson's* entry may be laid out of the case as wholly immaterial in the decision of the cause. After *Eugley's* deed was registered, it is clear that *Sullivan* could not convey to a third person any part of the tract described in *Benner's* deed, so long as the disseizin continued, which was created by the registry of that deed and *Eugley's* open and permanent possession of a part of the tract conveyed by the deed. *Prop.*

* A question was raised in regard to the construction of *Sullivan's* deed to the plaintiff, but the Reporter not having been furnished with a copy of the deed or the plan referred to as making a part of the case, is unable to make a more full report than the foregoing.

Ken. Purchase v. Laboree, 2 *Greenl.* 275, and cases there cited; *Little v. Megquier*, *ib.* 176; *Gookin v. Whittier*, 4 *Greenl.* 16. Still, he might well sell and convey all or any part of the tract above-mentioned to *Eugley*, the disseisor, without violating any principle of law or public policy, and therefore, by *Sullivan's* conveyance to him, he acquired an indefeasible title to the land described in the deed. As to this there can be no question; but under certain circumstances, the transaction might have legally been followed by other consequences, in reference to the *residue* of the tract conveyed by *Benner's* deed, which deserve serious consideration, but seem not to have received it. Now, if by the above arrangement between him and *Sullivan*, the *intention* was, that the *possessory title* of *Eugley* in the *whole tract*, should be yielded and abandoned to *Sullivan*, for the sake of obtaining from him a *perfect legal title* as to a *large part* of the tract, the effect would have been to give complete operation to *Sullivan's* deed to *Schwartz*, *which unquestionably, in its description, embraces the locus in quo.* There are many reasons for presuming this to have been the true character of the above-mentioned arrangement. In the case of *Fox & al. v. Widgery*, 4 *Greenl.* 214, it appeared that *Storer* was supposed to be sole owner of the *whole* tract of land, whereof partition was prayed — being in possession and claiming the *whole;* but, in truth, the title to a part of it belonged to the heirs of *Titcomb.* In this situation of things, *Widgery*, the ancestor of the respondent, levied his execution in due form on the whole tract as the estate of *Storer.* Afterwards, *Widgery* purchased the title of six of the heirs, and applied to another heir to purchase his. The Judge who tried the cause, ruled that *Widgery's* acceptance of those deeds and application for a deed from another, amounted to a waiver of all possessory claims, and put an end to any supposed disseizin of the true owners: and that after he had purchased of *six* heirs of *Titcomb*, he must be considered as holding in common with the *seventh* heir. On a question reserved, the Court set aside the verdict, saying, "The question, whether it was in fact or in- "tended to be a waiver or abandonment of those rights," (acquired by the supposed disseizin) "was one proper for the con-

" sideration of the jury, and which, as such, should have been " submitted to their decision, it being a question of intention." A title by disseizin is not a subject of favour in a court of law, and the character of the transaction above-mentioned, as to the conveyance from *Sullivan* to *Eugley*, seems not to have been considered by the Court and jury, but their attention was distinctly drawn in another direction by the instruction of the Judge as to the legality and effect of *Jackson's* entry, which instruction, though unimportant in respect to the *real merits* of the cause, as we have before stated, we are satisfied was incorrect: Such being the situation in which the parties stand before us, we think that the question of *intention* in making the arrangement between *Sullivan* and *Eugley* should be submitted to a jury in order to ascertain whether *Eugley's* disseizin was thereby purged and completely done away, as to the whole of the tract conveyed to him by *Benner*, according to the decision in *Fox & al. v. Widgery* — accordingly, the verdict is set aside and a new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF KENNEBEC, JUNE TERM, 1833.

HALL *& al. vs.* WILLIAMS.

H. instituted process against W. and F. in the Superior Court of *Georgia*, founded on an alleged joint contract. F. not being within reach of process, no service was made upon him. W. appeared, pleaded the general issue, which was joined, and a verdict was thereupon rendered in favour of H. and judgment entered up against W. and F. *both*. Afterward, the same Court on motion of H. and after notice to the attorney of W. who had been employed in the defence of the action, (W. himself having left the State some years before, and not having returned,) permitted an amendment of the record, by striking out the name of F. and entering up judgment against W. alone. In a suit against W. founded on the *amended* judgment, it was *held:*

That, the original judgment was erroneously entered up against F. and could have no binding efficacy in the Courts of this State. As *amended*, this Court was bound by the Constitution and laws of the *U. States*, to give "full faith and credit" to the record.

That, where the error in making up a judgment, is in the Court, it cannot be amended at a subsequent term *on motion;* — *aliter* where the mistake is that of the Clerk.

That, the absence of the defendant from the State, could not limit the authority of the Court with regard to the amendment. After their jurisdiction over

the cause had once attached, they could not be ousted of it, by the change of domicil of one of the parties.

That, notice to the attorney of the defendant, before granting the amendment, was not indispensable; but was a matter entirely within the discretion of the Court.

THIS was debt on a judgment rendered by the Superior Court of the State of *Georgia*. *Nul tiel record* was pleaded with a brief statement, and issue joined thereon. The plaintiffs adduced in evidence, an exemplification of the records of the Court in *Georgia*, by which it appeared that original process was commenced by the plaintiffs against the defendant and one *Abijah Fiske*, former copartners in business under the style of *E. Williams & Co.*, *May* 4, 1824. That, judgment was rendered against *both*, *February* 12, 1825, though *Fiske* had had no notice of the suit, being at the time out of the reach of process.

It further appeared on trial, that the defendant had been a citizen of *Georgia;* but that, in *June*, 1824, he established his domicil in *Augusta* in this State, and that he had not since that time been within the limits of the State of *Georgia*. Nor did it appear that he had, since that time, had any property in that State, or any agent or attorney there, except the attorney who had defended the suit, and he having no special power or authority whatever.

It further appeared by the record, that the same Court, *January* 19, 1829, on motion of the plaintiff's counsel, permitted an *amendment* of the record, by striking out the name of *Fiske*, and entering up judgment *nunc pro tunc*, against *Williams* alone; alleging it to have been done, after notice to *W. W. Gordan*, the defendant's attorney.

In *February*, 1825, *Williams* appeared and answered to the action, and after trial a verdict was returned in favour of the plaintiffs, on which the judgment was rendered which formed the basis of this action.

A verdict in this case was taken for the plaintiffs, subject to the opinion of the whole Court, on the report of the presiding Judge. If the record relied upon, should be held competent and sufficient evidence to maintain the action, judgment was

to be rendered on the verdict. Otherwise, to be set aside and the plaintiffs to become nonsuit.

Allen, for the defendant.

1. The original judgment was valid and binding on *both* of the defendants or on neither. It was entire, and cannot be good as to one, and not as to the other. *Richard & al. v. Walton*, 12 *Johns.* 434.

2. The subsequent record, and amendment of *Jan.* 1829, are entirely inoperative against the defendant, for various reasons: —

1. The defendant had years before removed from the State, and had not then returned — nor did he in any way receive notice of the plaintiff's petition or motion, and of the intended action of the Court thereon.

2. Nor had he any attorney in that State. *Gordan*, who was the attorney in the original suit, had no authority to act as such beyond the termination of the suit. When judgment was made up, his attorneyship ceased. It is true that the relation of attorney to the *plaintiff* may continue after judgment, for the purpose of levying the execution, &c. — but it is otherwise with the *defendant's* attorney. The mere recital in the record of *Gordan's* being attorney is no evidence of the fact, unless he appeared and acted as such, which does not appear.

3. The defendant being out of the State, and having no agent or attorney, or property there, the Court in *Georgia*, in 1829, had no authority to make the amendment.

That a judgment rendered by a Court in any one of the States against a person not a citizen of that State, and having no estate, agent or attorney therein, is void in another State, is not now to be questioned. *Bissel v. Briggs*, 9 *Mass.* 462; *Hall & al. v. Williams & al.* 6 *Pick.* 232, and cases there cited.

4. But aside from the circumstance of the defendant's absence from the State, and having no property or agent there, the alteration in the record was a material one, and could not be legally made. 1 *Bac. Abr.* 105, *tit.* "*Amendment of Judgment.*"

It was not a mere misprision of the clerk, though in that case the defendant would have been entitled to notice. The law requires the plaintiff to *sign* judgment. This was done in 1825, and the record made up. There cannot, therefore, be any misprision of the clerk. *Dig. of Laws of Georgia*, 2, 211; 1 *Com. Dig.* 336, *tit.* "*Amendment of Judgment.*"

This alteration was material and prejudicial to *Williams*. *Before* the alteration, the goods of *Fiske* in that State might have been liable, and might have been seised. *After* it, *Williams* must sue for contribution, and the judgment to which *Fiske* was no party would not bind him. 3 *Bos. & Pull.* 254; 16 *Johns.* 109; *Story's Pleadings*, 2*d ed.* 374; *Jacob's Law Dic. tit. Amend. of Judgt.* 90; *Tidd's Prac.* 861; *Vin. Abr. Judgt.* I. *a.*

If the court in *Georgia* could make this amendment four years after judgment rendered, and when the parties had left the State, there is no limitation of time when it may not be done.

The constitution of the *United States*, it is true, requires that full faith shall be given to records of one State by other States. But how can full faith and credit be given to a record which gives contrary certificates of the same fact? One is a judgment against *two* — the other a judgment against *one*.

No principle of comity or public policy calls upon this Court to respect this altered judgment, especially when the court which rendered it, must have supposed that the defendant was present by his attorney, when in fact he had no attorney.

Sprague, for the plaintiffs.

There having been no service on *Fiske* in the original suit, the judgment entered up against him and *Williams* both, was by *mistake*. It should have been against *Williams* alone — and the judgment thus made up, stood as if it had included persons who were not named in the writ, and in no way connected with the process. *Dennett v. Chick*, 2 *Greenl.* 191; *Tappan v. Brewer*, 5 *Mass.* 196; *Hall & al. v. Williams & al.* 6 *Pick.* 232.

The constitution of the *United States* says, that full faith

and credit shall be given, to the records of one State by other States. Therefore, it is not a matter of inquiry here, whether the amendment was correctly made or not. The record is certified here as the judgment in that case — it is the only judgment in that case. And it is not competent for this Court to look into the anterior proceedings, to see by what means the court in *Georgia* arrived at the result it did. It would be revising the decisions of that court — and decisions too, in regard to the statutes of that State. This cannot be done. It never has been decided that any question is open in regard to the decision of another State, not even that of *jurisdiction*. *Mills v. Duryee*, 7 *Cranch*, 481; *Hampton v. McConnell*, 3 *Wheat.* 234; *Commonwealth v. Green*, 17 *Mass.* 546.

This judgment, is a domestic judgment, to all intents and purposes; and no plea can be received, which would not have been received by the tribunals of *Georgia*.

But if the jurisdiction is to be inquired into, it is contended that sufficient jurisdiction appears in the case. This judgment now produced, is such as it ought to be. *Williams* having been an inhabitant of *Georgia*, there was service of process upon him — there was an appearance by him — a trial had — and a verdict rendered against him.

Maintain that the court had power to make this amendment — and that too, without notice to the defendant or his attorney. *Atkins v. Sawyer*, 1 *Pick.* 351; *Crofton v. Ilsley*, 6 *Greenl.* 48; *Close v. Gillespie*, 3 *Johns.* 526.

Amendments are allowed in other cases where quite as much authority is claimed. For instance, in the return of an officer on an execution, after a levy has been made. In which case the amendment is made *nunc pro tunc* — it has a retroactive effect, and establishes the validity of the levy.

So the courts permit town clerks to correct records. If they can do this, can they not permit or direct their own clerk to amend their own record?

Again, it is contended that, if it be necessary that the defendant or his attorney should have notice before such amendment be made, that the record finds it. *Gordan*, the attorney,

had notice. He was not discharged by the rendition of judgment. *Stimpson v. Sprague*, 6 *Greenl.* 470; *Dearborn v. Dearborn*, 15 *Mass.* 316.

By the record it appears that *Gordan*, at the time, was the attorney of the defendant, and that fact is not now to be contradicted. Whatever appears on record is conclusive. Besides, it is to be presumed that the court in *Georgia* had proof that *Gordan* was the attorney of *Williams*.

The amendment of the record in the mode adopted, is the only one, in which the justice of the case could be reached — the only way, in which the plaintiffs could reap the benefit of their verdict.

But if the original judgment in 1825, is to stand, and the amendment to be disregarded, even then, this suit may be maintained. *Fiske* is not an inhabitant of this State, and therefore, need not be joined. And again, want of proper defendants should be pleaded in abatement, which has not been done here.

The opinion of the Court was delivered at the ensuing *June* term, in this county, by

Parris J. — The first section of the fourth article of the constitution of the *United States* provides, "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 general laws, prescribe the manner in "which such acts, records and proceedings shall be proved, "and the effect thereof." In pursuance of this power, an act was passed prescribing the mode of proof, and declaring "That "the said records and judicial proceedings, authenticated as "aforesaid, 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 State from whence the said records "are or shall be taken."

The construction of these constitutional and statute provisions has been the subject of consideration in the highest courts of several of the States, as well as the Supreme Court of the *United States*; and, although the language is general and might

apply to all judicial proceedings, of however unique or informal character, yet, the better opinion seems to be, that the judicial proceedings of courts in the several States are not entitled, under the provisions aforesaid, to this faith and credit in other States, unless the court had jurisdiction of the subject matter of adjudication; as where the defendant had been a party to the suit by an actual appearance and defence, or at least, by having been duly served with process, when within the jurisdiction of the court which rendered the judgment.

The case at bar is debt on a judgment rendered by the Superior Court of the State of *Georgia*; — to which the defendant has pleaded *nul tiel record*. The plaintiffs adduced in evidence an exemplification of the records of said court duly certified, containing a judgment corresponding with that declared on.

From the whole record it appears, that the plaintiffs originally declared in assumpsit against the defendant and one *Abijah Fiske*, as late partners under the firm of *E. Williams & Co.*; — that the usual process was issued thereon requiring the defendants to appear and answer, but that the service was made on *Williams* only, the other defendant not being in the country; — that *Williams* appeared by his attorney and pleaded to the suit, but no appearance was ever entered for *Fiske*, or any notice taken of him, as a party, in the course of the trial. The issue made up between the plaintiffs and *Williams* was put to a jury, who returned their verdict in favour of the plaintiffs, and the judgment now declared upon was rendered upon that verdict. If the case stopped here there could be no doubt of the plaintiffs' right to recover. — It would clearly fall within the cases of *Bissell v. Briggs*, 9 *Mass.* 462, and *Borden v. Fitch*, 15 *Johns.* 121.

But the record shews that the judgment was originally entered up against both *Williams* and *Fiske*, and that subsequently, on motion of the plaintiff, and after notice to *Williams'* attorney, who originally appeared in defence of the suit, the judgment was amended and entered up against *Williams* alone. For this reason, as the defendant contends, the judgment has lost its conclusive character, and is not to be received in the

courts of this State, as entitled to full faith and credit under the constitution and law of the *United States*. If the suit had been originally prosecuted in the courts of this State, what should have been the course of proceeding in order to have secured the plaintiffs a judgment of such incontrovertible verity, as to insure its reception as conclusive evidence in the courts of the other States in this Union?

The plaintiff has a demand, arising out of a partnership transaction, against two or more, who are jointly liable. He brings his action against them all, and if some of them reside without the jurisdiction of the court, having no usual place of abode within the State at which a summons may be left, nor any property liable to attachment, he causes his writ to be served only on the defendants within the State, and if he sustain his action, he must take his judgment only against those who were served with the process; he can have it against no other. *Tappan v. Bruen*, 5 *Mass.* 196. Even where the action was upon a bond, and the officer making the service certified that one of the defendants had no last and usual place of abode in his county, a motion to dismiss the action was overruled and the court directed it to proceed. *Call v. Hagger*, 8 *Mass.* 423. This has been the immemorial practice in *Massachusetts*, and has been continued by the courts in this State, without any inconvenience or injustice to the defendants. For if all the debtors are included in the process and judgment, the creditor may satisfy his execution out of the estate of whichever he pleases. If, therefore, the plaintiffs had prosecuted their suit in *Georgia*, with reference and according to the law of this State and the practice of our courts, he would have proceeded in issuing his process precisely as he has; he would have declared against both *Williams* and *Fiske*, and if the officer had returned that *Fiske* was not within his jurisdiction, the suit would have proceeded against the defendant only, who was served with the process. It did so proceed. To this course the defendant assented by pleading the general issue, thereby waiving all cause of abatement, if he had any. This issue, made up between the plaintiffs and defendant, was put to the jury, and their verdict returned thereon. The judgment should have followed

the issue and verdict. Thus far there was no irregularity in the proceedings. They were substantially such as would have been had in a like case under our laws and practice. But, by a paper in the record, it appears that the judgment was originally entered up against both defendants, and subsequently amended. It is very clear that the amended judgment is the one that the Court should have rendered upon the verdict, and the only one they could legally render upon the whole case, according to the course of procedure at common law. By the amendment, a mistake, which was made either by the clerk or attorney, has been corrected. It is not perceived that the defendant can suffer injury by this amendment, or any inconvenience, other than what he would have been subjected to, if the proper judgment had been originally rendered. Still, if it be such an irregularity as to destroy the conclusive character of the judgment, he has a right to avail himself of it.

It was urged upon us, in argument by the plaintiffs' counsel, that, under the law of the *United States*, we are to give the same force to this judgment, as would be given to it by the courts of *Georgia*, and that we are not to inquire whether the court from which the record comes had or had not the right to alter their record and their judgment; — and the cases of *Mills v. Duryee*, 7 *Cranch*, 481, and *Hampton v. McConnel*, 3 *Wheat.* 234, were relied upon as authorities. To a certain extent, we admit this position to be sound. But suppose the Superior Court of *Georgia* should undertake to amend the record of a judgment by adding the name of an entire stranger, as defendant, one who neither resided himself, or had any property within the State; — who had no notice of the suit, and had never submitted to the jurisdiction of the court. Could we be called upon to enforce such a judgment against the new party? — should we listen to the suggestion that the judgment was binding in *Georgia*, because the highest court of judicature there had so adjudged it, and that therefore, under the law of the *United States*, it was binding here, and in every other State in the Union.

Any court would be slow to believe that the constitution and law of the *United States* imposed upon the State judiciaries an

obligation so dangerous in its consequences, so directly at war with fundamental principles; or that the very respectable tribunal, which decided *Mills v. Duryee*, and *Hampton v. McConnel*, ever contemplated such a case as falling within the principles of these decisions.

These cases required no such construction. In both of them the defendants were within the jurisdiction of the courts whose judgments were questioned, had notice to appear, and did appear and made defence. The language of the opinion delivered by the court must be taken in reference to the facts in the case decided, and the particular question under consideration. In the case supposed, we would not hesitate to pronounce the judgment utterly void; a mere nullity; an attempt to subvert the first principles of justice, and not deserving the name of a judgment; and the power of this Court would be invoked in vain to carry it into execution. But the exemplification of the record before us presents a very different state of facts. The defendant was within the State when the jurisdiction of the court attached; had personal notice of the suit; appeared, defended, went to trial, and a verdict was found against him, which rendered him individually liable for the whole sum. No appearance of unfairness in the record; none suggested in the argument. The defendant is not injured by the amendment. If the judgment had remained as originally entered, he would have been liable for the whole, if that judgment had been valid, as a joint judgment may be collected of either of the judgment debtors, but as it was rendered, if the plaintiffs had enforced payment of the defendant, he could not have used the judgment as evidence against *Fiske* in a suit for contribution. True, if the judgment had been properly rendered against *Fiske*, the record would be, *prima facie*, evidence of his legal liability to contribute; but when the very record would shew that *Fiske* was not an inhabitant of *Georgia*, had never been served with notice of the suit, nor submitted himself to the jurisdiction of the court by appearing or making defence, the judgment, as it regards him, becomes a nullity, and cannot have any effect as evidence against him. — The defendant, then, loses none of his rights against *Fiske* in consequence of the amendment; —

neither are they in any way impaired or rendered more difficult to be enforced. If the debt be one for which *Fiske* is legally bound to contribute, the defendant has his remedy as perfectly under the amended judgment, as he would have had under that first entered up.

Whether a court has the power to order an amendment of the record of a judgment at a subsequent term, is a question upon which there are many decisions, both in the American and English Reports. In *Cradock v. Ratford*, 4 *Mod.* 371, an application was made to amend a judgment which had been signed twenty years. On its revival by *scire facias*, it appeared that the judgment had been originally entered up, "that the aforesaid *Thomas* might recover," instead of "the aforesaid *Arthur*." The court was moved that the roll might be brought in and amended, it being only the fault of the clerk. — The defendant's counsel urged that it was not amendable, being an error in judgment, which must be considered as an act of the court, and not of the clerk. But the court said, these amendments have frequently been made, and they directed the amendment accordingly. In *Hanckford v. Mead*, 12 *Mod.* 384, a similar amendment of judgment was ordered, and *Gould J.* said, he remembered a case where the like fact was amended, on motion after twenty years; — probably referring to *Cradock v. Ratford*. *Short v. Coffin*, 5 *Burr.* 2730, was an action against an executor. The judgment was rendered by mistake, *de bonis propriis*, and upon a motion for leave to amend by making it *de bonis testatoris*, the court were of opinion that the amendment ought to be made, it not being an error in point of law, but a mere mistake of the clerk. In *Smith v. Fuller*, 2 *Str.* 786, the defendant was found not guilty as to part, but no judgment was rendered for him. The court ordered the record to be amended by the verdict, and the judgment to be entered, even after error brought, and the record removed, and the want of judgment objected for error. *Com. Dig. Amendment, R.*

In *Atkins v. Sawyer*, 1 *Pick.* 351, the court directed that a judgment entered against A. as administrator, instead of against the goods and estate of the intestate might be amended by another part of the record, upon motion. — In *Close v.*

Gillespie, 3 *Johns.* 518, the court permitted an amendment to be made, *nunc pro tunc*, though a subsequent judgment had been entered up against the defendant, on which a preference was claimed on account of the defect in the first judgment. *Spencer J.* in delivering the opinion of the court, says, "There "can be no doubt but an amendment is proper and ought to "be granted. The court of K. B. in *England* have permitted "amendments rendered necessary by the mistake of one of "their attornies. — I cannot discover any difference as to "allowing amendments, whether the mistake has happened "through the omission of an attorney, or by that of a clerk. "Both are equally officers of the court." — In the *Bank of Newburgh v. Seymour*, 14 *Johns.* 219, the Supreme Court of *New-York* permitted the record of a judgment to be amended by adding the name of a defendant. — The plaintiff moved for leave to amend the record of the judgment, by inserting the words "and *Lemuel Smith*," after the words "*Wright Seymour*," and by adding the letter *s* to the word defendant, wherever it occurred in the record, and that the judgment be entered *nunc pro tunc* against *Smith*. — The plaintiff's attorney read an affidavit stating that the omission of *Lemuel Smith*, in making up the judgment, was by mistake of a clerk in his office. The court granted the rule, saving to all persons the rights they might have, *bona fide*, acquired, either in the real or personal estate of *Smith* from the time the judgment was rendered against *Seymour*, until the time of granting the amendment inserting *Smith*. In *Mechanics' Bank v. Minthorne*, 19 *Johns.* 244, the clerk made a mistake in assessing damages on a promissory note, which was not discovered until after the judgment was entered up, and the defendant had paid the amount of the judgment to the plaintiff's attorney, and satisfaction thereof had been entered. The court, at a subsequent term, ordered the entry of satisfaction, and all the proceedings in the cause, after interlocutory judgment to be vacated, and the clerk's assessment of damages, the record of the judgment, and the satisfaction thereof to be annulled and cancelled, and the damages to be re-assessed by the clerk. — See also *Chichester v. Cande*, 3 *Cowen's R.* 39, and *Hart v. Reynolds*, *ibid.* 42, *note*,

where an amendment *nunc pro tunc* was granted after a lapse of more than six years subsequent to the entering up the original judgment. In *Hammer v. McConnel*, 2 *Hammond's Rep.* 31, *Hammer* brought an action for goods sold and delivered to *J. & A. McConnel*, as partners in trade; — process issued against both, but as to *John*, was returned not found. *Alexander* appeared and pleaded to the action separately. The verdict was returned as against both, and a joint judgment was rendered thereon. At a subsequent term, the plaintiff moved for leave to amend the judgment by striking out the name of *John*. The defendant moved to set aside the verdict and judgment as irregular, and award a *venire facias de novo*; — and also, in the event this motion should be overruled, he moved for a writ of error. — The court say the verdict in this case is a substantial finding for the plaintiff. The issue was between the plaintiff and *Alexander*, and upon that issue alone the jury could decide. There is no difficulty in understanding how *John* was connected with the case, and it is perfectly easy to see how it happened that his name was included in the verdict. It was a mere formal error. It was the duty of the clerk to record the verdict according to the parties at issue, and to have entered the judgment in the same way. As a mere clerical error, it is still amendable. The amendment was accordingly allowed. In *Crofton v. Ilsley*, 6 *Greenl.* 48, this Court permitted the record of a judgment to be amended, while an action of debt was pending on the judgment, whereby the action was wholly defeated.

These are strong cases in support of the decision of the Superior Court of *Georgia*. — In the argument of the case at bar, it was urged by the defendant's counsel, that the first judgment was entered up erroneously by the mistake of the plaintiffs' attorney, who, according to the course of proceedings in *Georgia*, is required to sign the judgment; and that the court has no power to grant amendments, except to heal the mistakes of their clerk. Whether this was the mistake of the clerk or attorney we are not informed, but if of the latter, the cases from the *New-York* reports are directly applicable and justify the amendment. Wherever the error is in the court, as a matter of judgment or express direction, it cannot be amended on motion;

the law has pointed out another course, and that must be pursued. But whenever the judgment is erroneously entered up, by the mistake of the clerk or other officers of the court, it seems to be well settled by the enlightened judiciary of *New-York*, that it can be corrected on motion, if there be any thing on the record by which the amendment can be made. There was no difficulty on this point in the case before us. The whole process shews that the judgment should have been against *Williams* only.

We are not called upon to decide whether we should have granted such a motion, or have turned the party round to another remedy. All that is now required of us, is to determine whether the proceedings in the Superior Court of *Georgia*, were so irregular as not to be entitled to that full faith and credit, contemplated in the fourth article of the Constitution of the *United States*. We think they come fairly within that provision, and that the judgment, being properly authenticated, is to have full faith and credit given to it in the courts of this State. We have not noticed the absence of *Williams* from the State of Georgia, at the time the amendment was made. The case shews that the attorney who conducted his defence was notified. But even if he had not been, the jurisdiction of the court having attached, and been assented to by the defendant by appearing and pleading to the merits, the court were not to be ousted of their jurisdiction over the case by his removal or change of domicil. It was not a case in which notice was indispensable. The court might order it, or not, at their discretion.

A judgment had been rendered against *Williams*, and there was no motion to amend the record so far as it related to him. Another name had been inserted by mistake; — by the amendment that mistake was corrected, and the record made to speak the truth. As such we are bound to receive it, and to give it effect.

The inhabitants of Clinton *vs.* Fly.

By contract in writing between the inhabitants of the town of C. and one A. R., it was agreed on the part of the latter, that he would suitably maintain his father and mother, and an idiotic brother, during their natural lives; for which, the said inhabitants agreed to give him the use and occupancy of a certain farm, during the lives of the father and mother, and at their decease, to give him a deed, conveying all the right, title and interest of said inhabitants in the same. *Held*, that the contract was not *assignable;* it not having been made with A. R. and *his assigns*, and creating, as it did, a *personal trust.*

This was a writ of entry, in which the demandants counted upon their own seizin, and upon a disseizin by the tenant. The general issue was pleaded and joined. The defendant admitted that he was in possession of the demanded premises, and claimed to occupy them in virtue of an agreement made between the plaintiffs and *Abraham Roundy, Jr.*, and an assignment of the same by the latter, to the tenant.

The contract was as follows, *viz.:* "Memorandum of an "agreement made the 3d day of *Nov.* 1827, between *Abra-* "*ham Roundy, Jr.* of the one part, and *Thomas Brown, Jo-* "*seph Clark*, and *Hobart Richardson*, duly authorized by the in- "habitants of *Clinton* at the annual meeting for this purpose, "on the other part — witnesseth — The said *Abraham Roundy,* "*Jr.* agrees and engages on his part, to support and suitably "maintain, his father, mother, and brother *David*, during their "natural lives, in consideration of the covenant hereinafter ex- "pressed, *viz.:* The said *Brown, Clark* and *Richardson*, in "behalf of said inhabitants, agree that said *Abraham* shall "have the occupancy and income of that part of the farm on "which he now lives and occupies, and which the said inhabi- "tants have by deed or lease, and at the decease of his father "and mother, shall have a deed conveying all the right, title "and interest the inhabitants of said town now have by deed "in the farm aforesaid, provided he shall maintain the persons "aforesaid.

"The parties further agree, that at the expiration of two "years from this date, two suitable men shall be selected to de-

" cide and say what sum of money in addition to the income " of the farm, the said *Abraham* shall receive. The men se- " lected shall also say, what sum of money the said *Abraham* " shall pay the said town for the farm if his father and mother " shall decease prior to two years. And it is also agreed that " every two years, so long as the said *Abraham's* father and " mother shall live, this agreement shall be adjusted as provid- " ed above. It is also agreed that the overseers of the poor for " the time being, shall allow the said *Abraham*, what they may " think necessary to aid him in the support of the family afore- " said.

" *Abraham Roundy, Jr.*
" *Hobart Richardson,*
" *Thomas Brown,*
" *Joseph Clark.*"

This agreement, in *Feb.* 1829, for a valuable consideration, was assigned by *A. Roundy, Jr.* to the defendant.

But it was insisted by the counsel for the demandants, that the defendant could derive no interest from the agreement, it not being assignable in its character. But *Weston J.* intending to reserve the question, and for the purpose of settling other facts in the cause, overruled the objection.

It appeared that the elder *Roundy*, with his family, had for many years lived in the house and on the farm demanded in this action, which he had formerly owned, but which, prior to the agreement aforesaid, he had conveyed to the demandants. Provision had been made by the defendant for the support of *Roundy* and his family at that house; but he becoming dissatisfied with the defendant, who with his family resided in the same house, on the 13*th of Nov.* 1829, removed with his family to another place; where assistance has been afforded them by the demandants; who called upon the tenant to support the *Roundys* at their new residence, and to refund to the demandants, the expenses by them incurred, which he declined doing.

It was insisted by the counsel for the demandants, that the tenant was bound to support the *Roundys* where they chose to reside, or the demandants chose to have them reside, if no needless expense was incurred. But for the purposes of that

trial the Judge instructed the jury that it was a fulfilment of the tenant's duty under the contract, if he supported, or was ready to support and suitably maintain the elder *Roundy*, his wife and son *David* at the house on the demanded premises.

It appeared that prior to the bringing of this action, the demandants had notified the tenant that, the same would be brought, unless the tenant would enter into a personal and express contract to do what *Roundy, Jr.* had undertaken.

If the contract before mentioned was not in the opinion of the whole Court assignable; or if the tenant was bound to support the *Roundys* where they chose to reside, or the demandants chose to have them, if no needless expense was incurred; the verdict, which was for the tenant, was to be set aside and the tenant to be defaulted — unless the Court should be of opinion that the demandants before the commencement of their action, should have called upon the tenant to give up the premises, and that the notice before stated, was not sufficient for this purpose.

R. Williams and *Wells*, for the demandants.

1. The contract was not assignable. If in its nature it could be so, it contains no words imparting such a quality. But it is not assignable, because the trust thereby reposed in *Roundy, Jr.* was a *personal trust.* It is no more assignable than indentures of apprenticeship, to which it may be likened. *Hall v. Gardiner & al.* 1 *Mass.* 171; *Davis v. Coburn*, 8 *Mass.* 299.

These cases are analogous in principle to the one under consideration. *Roundy, Jr.* was probably selected for this purpose by the Selectmen of *Clinton*, on account of his personal qualifications. The trust is personal, and can no more be assigned than the trusts of a guardian or trustee. *Bac. Abr. tit. Assignment.* Or of a license to cut timber on another's land. *Emerson v. Fiske*, 6 *Greenl.* 200.

2. The demandants had a right to say *where Roundy* and his family should be supported. *Wilder v. Whittemore*, 15 *Mass.* 262; 5 *Dane's Abr.* 498.

If *Roundy, Jr.* or his assignee claimed the right of maintaining the elder *Roundy* and family at any particular place, they

should have secured such right in the contract. The law in no other case will permit the obligor to say *where* his contract shall be performed; and there is no reason why this should be considered an exception.

3. The defendant can derive no title under the contract, even if it be assignable. It cannot be construed to be a lease for years, for it has no certain *ending*. *Co. Litt.* 46, *a*. If it create a tenancy at will, then the assignment would terminate it. *Co. Litt.* 57, *b*. It is neither a deed or lease, and conveys no interest in the land. *Roundy, Jr.* could not have maintained trespass against any one, even though he had performed all the conditions of his agreement.

4. The demand was sufficient before bringing the suit. *Porter v. Hammond*, 3 *Greenl.* 188.

Boutelle and *Sprague*, for the tenant.

1. The contract is assignable. There is nothing in the case showing that it was a mere *personal* trust in *Roundy, Jr.* No more so than it is in the case of overseers of the poor. The contract was merely *to support*. It had nothing to do with *instruction*, moral or otherwise. And therein it is wanting in any analogy to the case of indentures of apprenticeship. In the latter, the skill of the master, his aptitude at instruction, his moral character, &c. would all be taken into consideration when entering into the contract. But in the case under consideration, the expenditure of one's substance for the support and maintenance of the family was all that was contemplated.

2. But if the contract be not assignable, still it is not competent for the demandants to avail themselves of that circumstance in this action. 7 *T. R.* 454; 3 *Keeble*, 319; 1 *Ld. Raym.* 683; 1 *Strange*, 10.

The objection has been *waived* by the demandants. They not only made no objection to the assignment, but asked the defendant to take upon him the same obligation that *Roundy, Jr.* had assumed.

3. The defendant had a right to say *where* the elder *Roundy* and his family should be supported. They were *paupers*. There is a provision in the agreement that the *overseers of the*

poor for the time being should provide support, &c. Now if a person contract to support the poor of a town, has he not a right to select his own place for doing it?

4. In this case there has been neither *entry* nor *notice*. The case finds, it is true, that *prior* to the bringing of the suit notice was given to the defendant. But this is not sufficient. It might have been given only *one hour* before bringing the suit; which would be insufficient, the defendant being entitled to a *reasonable time.*

The opinion of the Court was delivered by

WESTON J. — The elder *Roundy* had conveyed the farm in controversy, then his property, to the demandants. It does not appear that any trusts were declared, or that the demandants had entered into any express stipulations with *Roundy* on their part. From the course pursued by them, they appear to have understood that the property was designed to be appropriated to the support of *Roundy*, their grantor, and his wife, both advanced in years, and of *David*, their son, who was idiotic and helpless. The demandants confided to *Abraham Roundy, Jr.* another son, the charge and obligation, of maintaining his father and mother, and brother, for which he was to have the income, and ultimately the fee, of the farm in question.

It has been found that property best serves the uses and purposes for which it is designed to give it an assignable character, and there are very few interests, possessing an exchangeable value, to which the law does not annex this quality. But there are exceptions, where an interest has been acquired upon the ground of personal confidence. Of this kind are indentures of apprenticeship, where a delicate trust, affecting the morals, character and happiness of the apprentice, is confided. And we are constrained to regard the contract made with *Roundy, Jr.* under whom the tenant claims, as falling within the same principle. The relation in which the parties stood, and the nature of the duties to be performed, very clearly show that there were reasons for the selection by the demandants of the son, in the contract made, which could not apply to a stranger. It was suitable and proper that the happiness and comfort of the

old people and their unfortunate child, should be consulted. It is fair to presume that it would be most acceptable to them to be supported by a member of their own family. If the contract is held assignable, they are liable to be transferred, at the convenience and pleasure of successive assignees, whether they possess or not, the temper and qualities, which would enable them satisfactorily to fulfil the trust. The contract was not made with *Roundy, Jr.* and his assigns; and creating, as we think it did, a personal trust, we cannot regard it as assignable. The verdict is accordingly set aside.

Tenant defaulted

Folsom *vs.* Mussey.

In an attempt to charge an agent for negligence in not securing and collecting a debt, the jury may inquire whether he has been guilty of negligence *to the prejudice of the principal.* For to omit to do that, which if done would have been fruitless and unavailing, can in no proper sense be denominated negligence.

This was *assumpsit*, on a note of hand, given by the defendant to the plaintiff for $653 43, dated *July* 1, 1828, payable in nine months without interest. The writ also contained a count for money had and received for $300.

The defendant resisted the payment of the note, and relied upon the following circumstances, of which he offered proof.

The defendant was a wharfinger, and had received lumber from time to time of the plaintiff for sale. By the course of their dealings, he sold sometimes for cash, and sometimes on credit, and in either case, gave the plaintiff credit on his book for the amount so sold: it being understood however, that he was not to be his debtor therefor, until the amount was actually received.

On the 10*th of June*, 1828, the defendant sold of the plaintiff's lumber to one *George Houdlette*, who had been solicited

by the plaintiff to make the purchase, to the amount of $478 56, and took his negotiable note therefor, running to the plaintiff or his order, payable in 90 days. The term of credit given was justified by usage. For the proceeds of this sale among others, the plaintiff was credited on the defendant's books.

On the day of the date of the note in suit, the plaintiff wishing to make arrangements to prevent his property being sacrificed, and to preserve it for the benefit of his creditors; and to prevent the defendant from being charged as his trustee, desired the defendant to estimate the value of the lumber on hand and credit him therewith, and in that way to add it to the other items of credit, including the amount of lumber sold to *Houdlette*, then to strike a balance and give him his, the defendant's, note therefor. Which was accordingly done, and the note in suit was given. It being at the same time agreed however, that the defendant should not be any the more liable in consequence of giving said note, but that he should account for what he should actually receive of the items so credited and nothing more. The defendant then having the *Houdlette* note for $478 56, proffered it to the plaintiff, who declined to receive it, preferring that it should remain with the defendant who lived near to *Houdlette;* and the same was indorsed to the defendant in blank.

The lumber, estimated as aforesaid, was sold by the defendant, and produced $28 77 more than the estimate when the note was given.

By a new account between the parties, commencing some time after the note was given, and terminating in *July*, 1829, kept separate and distinct from the other transactions, and in which were various items of debt and credit on the defendant's books, it appeared that there was a balance due to the plaintiff of $17 69.

The plaintiff claimed to recover the above balance under the money count; and also contended that if the defence relied upon was made out, still he was entitled to recover also the excess on the sale of the lumber over the estimate.

The note against *Houdlette* fell due *Sept.* 8, 1828, but it was proved that he had no property that could be attached after that

period, with the exceptions hereafter mentioned, although he continued in extensive business until the winter of 1829—30. It did not appear that the defendant made any effort to collect the note until *Nov.* 18, 1828, except that he went to *Houdlette's* residence in *October* preceding, when he did not see him, but was told by *Houdlette's* son, that his father had no property that could be attached. It was also testified by *Joseph Young*, that he had, as deputy-sheriff, unsatisfied executions against *Houdlette*, to a large amount, from the time said note became due, until he died, and was never able to obtain any thing upon them.

On the 18th of *Nov.* the defendant hearing that *Houdlette* had been sued, caused a writ to be made and attempted to secure the debt, by a trustee process, which however proved of no avail.

On the 27th of *Nov.* he employed an agent to get security for this and several other debts due to himself and to other persons, amounting in the whole to $1000, and gave directions to attach a vessel and a cargo of lumber on board, unless he could get certain personal security, payable in four months, but with discretionary powers to do the best he could. The brig *Emeline* then laid in the river, of which the said *Houdlette* was supposed to be the owner, but of which *James Conner* testified he in fact owned no part, either of the brig or cargo. And *Edward Houdlette*, the son of said *George Houdlette*, testified that the last cargo which he knew of purchased by his father, was the lumber bought of the defendant in *June*, 1828, which was immediately shipped.

The agent employed, took a negotiable note for the whole of the above debts, signed by the said *Houdlette* and one *Converse Lilly*, payable to the defendant in six months. This, the agent testified was the best he could do; and he then believed it a prudent exercise of the discretion reposed in him. This note the defendant accepted, making no other objection thereto, than to the term of credit, his object being to procure the note to be discounted at some bank, which could not be done for so long a period. *Lilly* was then reputed to be a man of large property, and his note was considered good.

This note arrived at maturity, *May* 27, 1829. It did not ap-

pear that the defendant made any effort to collect it, except that in *September* following, a person at his request called on *Houdlette*, and informed him that the defendant wanted payment, and received some assurance that it should soon be paid.

On the 12*th of October* following, the defendant called on *Houdlette*, and by an arrangement with him, gave up the note which the defendant then held, and took four other notes, each signed by *Houdlette* and *Lilly*, payable on demand, to the persons to whom the lumber sold to *Houdlette* originally belonged.

One of these was taken to the plaintiff for $250 or $260 — one to the defendant himself for about the same amount, and one to *Joseph Southwick*.

The defendant had before advanced to the plaintiff, of the *Houdlette* money, which was indorsed on the note in suit, $127,09, and also a sum sufficient to cover the balances aforesaid of $28,77 and $17,69, which the defendant had wholly lost.

On the 13*th of January* following, it being then known that *Houdlette* and *Lilly* were both deeply insolvent, the defendant caused the three last mentioned notes to be put in suit, and on the writ in favour of the plaintiff there was attached an equity of redemption on certain real estate, mortgaged by *Lilly* to the *Gardiner* Bank, *May* 6, 1829, to secure the payment of $1000. Judgment was recovered at the *August* term of the Court of Common Pleas, 1830, in favour of the plaintiff, for $263,16 debt; — execution issued, and said equity was sold thereon for the whole amount of said execution and all fees; which was paid partly in cash, and partly by a good note, payable to the defendant in one year.

The actions in favour of the defendant and of *Southwick* were prosecuted to judgment; and the executions which issued thereon, were levied on other real estate, supposed to belong to *Houdlette* or *Lilly*, but which ultimately proved not to belong to either.

There was no direct evidence that the plaintiff was advised by the defendant of the proceedings before stated. But there was evidence that he was frequently at *Gardiner*, the residence of the defendant, in the summer and fall of 1828, and afterwards.

Stephen Webber, the clerk of the defendant, testified, that the plaintiff frequently spoke to him of *Houdlette's* failure, and of his loss thereby.

The action against *Houdlette* and *Lilly* was prosecuted in the name of the present plaintiff, and there was no evidence that it was not directed by him.

In *May*, 1831, the parties had an interview, a few days prior to the commencement of this suit, when the defendant told the plaintiff that he had realized nothing from the *Houdlette* debt, and that he himself had sustained considerable loss by *Houdlette's* failure. *Cyrus Kendrick* testified, that he was present at that time to assist the defendant, whose sense of hearing was much impaired; that the defendant then requested the plaintiff to give up his note and come to a settlement, which he, hesitating to do, *Kendrick* narrated to him their original agreement, as he had understood it from the plaintiff, and as it is stated in the first part of this report. That, the plaintiff did not deny the truth of any part of the statement, but in answer to a question, then put to him by *Kendrick*, whether he intended to hold *Mussey* for the payment of the note, replied, that he was not prepared to answer that question then — that his business was that day very urgent at *Augusta*, but that he would come down the next day and settle the business. This he did not do, but caused an action to be instituted on his note.

The defendant then introduced much testimony to prove that, although *Houdlette* and *Lilly* might have the reputation of possessing property, and although the former had the appearance of doing an extensive business, yet that they were really possessed of no visible or attachable property at any period after the notes on which they were at any time liable, were due; and that the defendant never had it in his power at any time, by process of law, to get payment or security. On this point, evidence to show *Houdlette's* ability was also introduced by the plaintiff.

In relation to the right in equity attached and sold on the execution in the plaintiff's favour, it appeared, that prior to the mortgage to the *Gardiner* Bank, an attachment had been

made of the same premises by one *Sampson*, who obtained judgment at the *Sept.* term of the Supreme Judicial Court in the county of *Lincoln*, and extended his execution on the premises in *October*, 1831. This attachment was unknown to the Bank, to the defendant, and to the purchaser of the equity, and did not come to their knowledge, until the time of the levy of *Sampson's* execution. But the officer at the time of the sale of the equity on the plaintiff's execution, repeatedly declared, that there was no other incumbrance on the premises, than the said mortgage — and in *Nov.* 1831, the purchaser notified the officer, and also the defendant, that they would be required to repay the money given for the equity. No notice of this was given to the plaintiff. The defendant expressed his readiness to do this, and since the commencement of this action did repay it.

The defendant produced testimony to show that the plaintiff had procured a considerable reduction of his debts in *Boston*, by representing that he had sustained a loss by *Houdlette's* failure; and testimony was introduced by the plaintiff to explain the transaction.

In order to show what became of the *Houdlette* debt, originally due to the plaintiff, the defendant produced an assignment of part of the judgment, *Southwick* against *Lilly*, and *Southwick's* certificate that his judgment was too large by about $103; and he proved that at the time of his taking the four notes, *Oct.* 12, 1829, he had not his accounts or minutes with him, and wrote the notes only from recollection of the sums due to each. He also offered an assignment from himself to the plaintiff of the excess of the *Southwick* judgment.

The defendant had never made any charge against the plaintiff, or made any demand upon him for costs or expenses attending this transaction, although he had paid considerable.

It appeared that *Houdlette* died in *May*, 1830, wholly insolvent, and *Lilly*, it was proved, possessed no property.

Much other testimony was introduced by the defendant to prove the trouble and expense he had been at in the business, and to prove that nothing had been omitted by him which would have secured, or tended to secure, any of said debts.

Upon these facts the counsel for the plaintiff contended, that there had been a failure of due diligence on the part of the defendant in the business confided to him, and if so, it was not to be permitted to him to say, that such diligence would have been unavailing. *Weston*, the presiding Judge, instructed the jury that if satisfied of the truth of the facts set up in defence, they ought to find for the defendant; unless it appeared to them that there had been negligence or a want of diligence on his part to the prejudice of the plaintiff; and if so, that they should find such sum in damages against the defendant as would indemnify the plaintiff for the injury he had sustained.

The counsel for the plaintiff further insisted that the defendant had adopted and assumed the *Houdlette* debt by discharging the execution, and receiving in satisfaction thereof a sum of money and a note running to himself, payable in a year. That he had made the debt his own by not giving information to the plaintiff, and denying that the *Houdlette* debt had been secured. And that the subsequent repayment to the purchaser of the equity, under the circumstances of the case, could not impair or defeat the plaintiff's right, flowing out of these transactions.

On the other hand, the counsel for the defendant insisted, that the presumption was violent that the plaintiff was fully informed of the state of his action, and the proceedings under it; and that if he had not directed the suit, the attorney was then present, and could be called to say who employed him. That no demand having been made by the plaintiff on the defendant, of the money received by mistake, he had a right to return it to the party justly reclaiming it; and that no action without such demand, could be maintained for this money, even if it had been rightfully received.

The presiding Judge left all these facts and circumstances to the jury, instructing them that if they believed it was the defendant's intention to assume the *Houdlette* note to himself, they would find for the plaintiff, and that these transactions were evidence of such intention.

The jury returned their verdict for the defendant. If the jury were not properly instructed, the verdict was to be set

aside, and a new trial granted; otherwise, judgment was to be rendered thereon.

G. Evans, for the plaintiff, insisted that the Court should have instructed the jury, that if they were satisfied of the truth of the facts, there had been such gross negligence in this case as precluded the defendant from setting up this defence.

1. No attempt having been made by the defendant to collect the note, when *Houdlette*, at the time it fell due, was doing a large business, and *Lilly* reputed to be a man of wealth, he should be concluded thereby. And the Court should not have left it to the jury to say whether diligence in this respect could have been of any advantage to the plaintiff or not; but the instruction should have been, that the defendant was liable to the plaintiff in damages if he had been guilty of negligence. For whether due diligence could have collected the note or not, can never be known; that could only be determined by the experiment, by the actual attempt to collect, which was not tried in this case.

2. The defendant also made himself liable by his neglecting to inform the plaintiff, from time to time, of the progress of the transaction, and by his fraudulent concealment of an important fact. The defendant declared he had never received any thing of *Houdlette*, when he had in fact received the whole amount of the execution, on a sale of the equity.

3. The defendant made himself liable, and the Court should so have instructed the jury, by his so intermingling the debt of the plaintiff with the property of others, that he can never have it again, being incorporated into *Southwick's* judgment which is not susceptible of division.

4. The Court should not have permitted the jury to judge of the *intention* of the defendant, to appropriate the note to himself and thereby make himself liable to the plaintiff or otherwise. The intention of the defendant had nothing to do with the question. If he had been guilty of *actual negligence*, it was of no importance to the plaintiff what he *intended*.

As to the liability of agents, he cited *Greely v. Bartlett*, 1 *Greenl.* 178; *Langley v. Sturdivant & al.* 7 *Pick.* 214; *Clark*

v. Moody & als. 17 *Mass.* 150; *Paley on Agency*, 42, 44, 60; *Selden & al. v. Beale*, 3 *Greenl.* 178.

5. As to the balance of $17,69 found due to the plaintiff by the defendant's books, this grew out of business and transactions distinct from and entirely *unconnected with the note*. This the plaintiff was entitled to recover at all events, and so the jury should have been instructed.

Allen, for the defendant.

The opinion of the Court was delivered by

WESTON J. — The jury have found that the defendant, in relation to the business confided to him, had been guilty of no negligence to the prejudice of the plaintiff, or by which he had suffered loss. To omit to do that, which if done would have been fruitless and unavailing, can in no proper sense be denominated negligence. The jury were upon this point properly instructed; and it was their province to pass upon the facts. Although the defendant had done his duty to the plaintiff, as the jury have found, yet he might have assumed to himself the *Houdlette* debt, and the Judge was requested to rule at the trial, that this was the inference necessarily to be drawn from the facts. The defendant was endeavouring to secure his principals. His proceedings from time to time were directed to that object. The security from *Lilly* was not divided precisely as it ought to have been; but it all turned out to be of no value. We perceive nothing in the facts conclusively proving that the defendant made, or intended to make, the *Houdlette* debt his own. He was not bound to take that hazard upon himself. He was required only to be faithful to his trust; and the jury have settled all the facts in favour of the defendant.

Judgment on the verdict.

WHITE *vs.* ERSKINE.

J. S. sold and conveyed to N. M. and at the same time took back a mortgage to secure the payment of the purchase money. Subsequent to which, but prior to the registry of the mortgage, N. M. conveyed without consideration, and with notice, to J. Y., and J. Y. to *Erskine*, the defendant. J. S. died, and his heir quit-claimed to N. M. who thereupon conveyed to White, the demandant. *Held*, that the conveyance of the heir did not operate as *an assignment* of the mortgage, she having no authority to make one; — and that, if it had *any* operation, it was to *extinguish* the mortgage and lien created under it; — and that, the title of N. M. thus perfected would immediately enure to J. Y., his grantee, and through him to the defendant.

THIS was a petition for partition of certain lands, in which the petitioner claimed *one half*. The plea of the respondent was *sole seizin* in himself. Both parties claimed under one *Levi B. Erskine*, who on the 9th of *February*, 1810, conveyed one undivided half of the premises to *Josiah Stebbins*. The latter died prior to *April* 20, 1830, on which day *Laura A. Stebbins*, his sole heir, conveyed by quit-claim, one undivided half of the premises to *Nathaniel Moody*, who at the same time conveyed the same half to *White*, the petitioner. The petitioner relied upon the evidence in this opening to maintain his title.

The respondent then produced a warranty deed of the whole premises from *Josiah Stebbins* and *David Otis*, to whom *Levi B. Erskine* had conveyed the other moiety, dated *March* 26, 1818, recorded *April* 22, 1823, to *Nathaniel Moody* — and a deed of quit-claim from said *Moody* to *Joseph Young*, dated *April* 22, 1823, recorded *April* 25, 1823 — and a deed from said *Young* to *Erskine*, the respondent, dated *Oct.* 30, 1829, and recorded *Nov.* 3, 1829.

The petitioner then produced a deed of mortgage from said *Moody* to said *Stebbins* and *Otis*, of the same date of their deed to him, recorded *May* 6, 1823, given to secure the payment of the consideration money — and offered to prove that the conveyances from *Moody* to *Young*, and from *Young* to the respondent were without consideration and fraudulent as against the mortgage of said *Stebbins* and *Otis* — and that, at the time

of the taking of said deeds, both *Young* and the respondent knew of the existence of said mortgage.

He also offered further to prove that, the conveyance from *Laura A. Stebbins* to *Moody*, and from the latter to the petitioner was one transaction, he, the petitioner, being the purchaser of said *Laura's* right for a full consideration, and that said deeds were designed to convey to the petitioner the interest of said *Laura*, and that the deed was made to said *Moody* solely for the use of the petitioner.

But *Weston J.* being of opinion that by the rules of law, the conveyance from said *Laura* to *Moody*, enured directly to the use of said *Young* and his grantee, rejected the evidence.

Whereupon the petitioner became nonsuit, with leave to have the same taken off, and the petition restored, if in the opinion of the whole Court, the evidence was admissible, and would avail in law to maintain the title of the petitioner to the moiety of the premises claimed by him.

G. Evans argued for the petitioner.

The general principle is not disputed, that where one conveys without title, and afterwards purchase, such purchase shall enure to the benefit of his grantee. But this is only where there have been general covenants of warranty, and not where the conveyance is by quit-claim merely. *Jackson v. Peck*, 4 *Wend.* 300.

This principle applies too, only where the conveyance was for a good and valuable consideration, which was the case in *Fairbanks v. Williamson*, 7 *Greenl.* 96 — see also *Somes v. Skinner*, 3 *Pick.* 52; *Varnum v. Abbott & al.* 12 *Mass.* 474. It does not apply where the conveyance was fraudulent. *Ricker v. Ham & al.* 14 *Mass.* 137. In this case the conveyance by *Moody* to *Young* was without consideration and fraudulent.

Further, if *Moody* had a *good title* at the time of his conveyance to *Young*, this would also, prevent the enuring of an after purchase to him — and such was the fact.

If it do not enure, as contended for by the respondent, then *Moody's* conveyance to the petitioner is valid and passes a good title, while his conveyance to the grantor of the respondent is

void and passes nothing. The deed to the petitioner was for a good and valuable consideration — that to the grantor of the respondent was without consideration and fraudulent. And the petitioner, being a *bona fide* purchaser, has a right to show the fraud in the first conveyance. *Somes v. Brewer*, 2 *Pick.* 84.

The conveyance of *Laura A. Stebbins* should not be construed as an *extinguishment* of the mortgage, but as an *assignment* of it merely; — this the Court may ever do when the justice of the case requires it. *Barker v. Parker & als.* 4 *Pick.* 506; *Bullard v. Hinkley*, 5 *Greenl.* 272.

The conveyance from *Laura* to *Moody*, and from *Moody* to the petitioner, was one transaction, and conveyed to the petitioner a good title. *Moody* was the mere channel of transmission, without interest. He therefore could not have conveyed to any one but the petitioner without committing a fraud upon him. *Spear v. Hubbard*, 4 *Pick.* 143. Nor could it have been attached as his estate before he had conveyed to the petitioner.

Sprague, for the respondent, cited *Jackson v. Hubbs*, 1 *Cowen*, 617, and was sustained by the Court in the positions taken by him in the argument.

The opinion of the Court was delivered by

MELLEN C. J. — The facts of this case, necessary to a decision of it, and in chronological order, are these. On the 26th of *March*, 1818, *Josiah Stebbins* and *David Otis*, being owners in common of the lands described in the petition, by purchase from one *Levi B. Erskine*, conveyed the same to *N. Moody*. The deed was registered *April* 22d, 1823. On the same 26th of *March*, 1818, the said *Moody* conveyed the same to *Stebbins* and *Otis* in mortgage, to secure payment of the purchase money. The mortgage deed was registered *May* 6th, 1823. On the 22d of *April*, 1823, *Moody*, by deed of quit-claim, with special warranty, conveyed the same premises to *Young*, who caused his deed to be registered on the 25th of the same *April*. *Young*, on the 30th of *October*, 1829, conveyed the same to *Erskine*, the respondent. *J. Stebbins* having deceased, his only child and heir, *Laura A. Stebbins*, on the 20th of *April*, 1830, by quit-claim deed, conveyed one *undivided moiety* of the premises

to the said *Moody*, who on the same day conveyed the same to *White*, the petitioner. The petitioner offered to prove that the conveyances from *Moody* to *Young* and from *Young* to the respondent were made without consideration, and that all the three knew of the existence of the mortgage deed, though the same was not registered until fourteen days after *Moody's* deed to *Young* was executed, and that therefore the same was fraudulent as against the mortgage. For the purposes of this decision we are to consider the above facts, which the petitioner *offered* to prove, in the same manner as though they *had been proved*. On this ground, it is clear, that the conveyance so made to *Young*, did not, and could not prejudice the title of *Stebbins* and *Otis as mortgagees;* but still, *Moody* had a legal right to convey what title he had, that is, his *equity in redemption:* and *his* knowledge of the mortgage could not prevent the operation of his deed, nor could *Young's* knowledge have that effect. Both those conveyances, therefore, were operative and conveyed to the respondent, *Moody's* equity of redemption. But the petitioner contends, that the deed from *Laura A. Stebbins* to *Moody*, and *Moody's* deed to him, of *April* 20th, 1830, have operated to convey to the petitioner the fee simple of the undivided moiety of the premises, which is the portion in controversy. It is very clear that the deed of *Laura A. Stebbins* did not operate as an *assignment* of the mortgage; for as *heir* she had no authority to assign it. *Smith & al. v. Dyer*, 16 *Mass.* 18. — If it had any operation, it was to extinguish the mortgage, and relieve the moiety from the lien upon it, which had been created by the mortgage. On this conveyance the petitioner relies. Now, admitting that the fee simple estate in the moiety, was thus reconveyed to *Moody*, the legal effect was, that the title instantly enured to the benefit of *Young*, under whom the respondent claims, as the presiding Judge decided; because *Moody* in his deed to *Young*, covenanted to warrant and defend the premises to him, his heirs and assigns, against the claims of all persons claiming under him or his heirs. The mortgage deed was made *prior* to the conveyance to *Young;* and the claim of the petitioner is under the heir of *Stebbins*, one of the mortgagees. According to the authorities cited by the counsel

for the respondent, and well settled principles of estoppel, the title derived from *Laura A. Stebbins* and conveyed to *Moody* by her, enured to *Young*, and through him to the respondent. But if nothing passed by her deed to *Moody*, what could have passed by his deed to the petitioner in 1830, when all the right which he had in 1823, was conveyed to *Young* and by *Young* to the respondent, both of which deeds were on record on the 3d of *November*, 1829. In any view of the cause, we do not perceive any principles on which the petitioner can succeed. Accordingly, the nonsuit is confirmed.

Judgment for defendant.

LUNT *& al. vs.* WHITAKER.

P. conveyed to L. by mortgage bill of sale, a horse, to secure a just debt and further advances. P. took a formal delivery, but the horse remained in the possession of L. he using and treating it as his own, and his neighbours not knowing of any change in the property. Afterwards P. sold the horse to W. *bona fide*, for a full consideration, and without notice of the mortgage. *Held*, that the property in the horse still remained in L. and that he might reclaim him.

TROVER for a horse. Plea, the general issue. The plaintiffs to prove their property in the horse, produced a mortgage bill of sale from one *Aaron Plummer*, of the stock upon a farm, including the horse in question, made to secure the payment of a debt which it was admitted was justly due, and as security for further advances. The bill of sale was dated *December* 7, 1827. On the 11th of the same *December*, one of the plaintiffs went to *Plummer* and received a formal delivery of the stock mentioned in the bill of sale, and marked the horns of some of the cattle with the initials of his name. The stock remained in *Plummer's* possession and use as before the sale, and it was not known to any of his neighbours that there had been any change

of the property, until *April*, 1828, when what remained was taken possession of by the plaintiffs.

In *January*, 1828, *Plummer* sold the horse to the defendant, as his property, *bona fide*, for a full consideration, and without notice of the plaintiffs' claim.

If upon these facts the Court should be of opinion that the plaintiffs were entitled to recover, judgment was to be entered on the default for an agreed sum; otherwise, the default was to be stricken off and a nonsuit entered.

R. Williams, for the defendant, admitted that sales like this have been held good against *attaching creditors*. But this case presents a different question. It is, which one of two honest *purchasers* shall suffer. Contend, that the plaintiffs by permitting their vendor to hold, use, and in all respects treat the property as his own, have thereby enabled him to do wrong — to work an injury. — Who shall suffer for that wrong? An innocent person, or he who has furnished the agent with the means of working the injury? The latter. *Powell on Mort.* 37, 38; *Young v. Austin & al.* 6 *Pick.* 280.

In the cases decided in this Court and in Massachusetts, protecting sales where the possession remained in the vendor, the sales were attempted to be avoided by *prior* creditors, not by those who had been induced to give the credit in consequence of such possession.

Where one has parted with his property through a fraud practiced upon him, he may reclaim it from the fraudulent purchaser, and from his prior creditors, but not from a subsequent *bona fide* purchaser. Applying this principle here, why should not the defendant, who is a subsequent *bona fide* purchaser, be protected in his purchase? *See Buffington v. Gerrish*, 15 *Mass.* 156; *Seaver v. Dingley*, 4 *Greenl.* 306; *Gilbert v. Hudson*, 4 *Greenl.* 345.

Possession in the vendee should follow the sale. The public should have some notice of a change of property. In case of a mortgage of real estate, the possession of the mortgagor is consistent, because his possession is secured by law — and the public cannot be injured because the mortgage is to be *re-*

corded. The possession of real estate affords but a slight indication of ownership, and therefore the law requires that there should be a record of the deed, or notice, actual or implied, to one claiming to hold as purchaser, notwithstanding the mortgage. *Hussey & al. v. Thornton*, 4 *Mass.* 405; *Smith v. Dennie*, 6 *Pick.* 262.

In England, if the mortgagee permit the mortgagor to retain the possession of the title deeds, and the mortgagor obtain further advances upon the land, the first mortgage shall be postponed. *Pow. on. Mort.* 59 — 62.

In case of mortgage of a ship at sea — it is held to be good, provided possession be taken as soon as the ship returns. *Portland Bank v. Stubbs & al.* 6 *Mass.* 422; *Badlam v. Tucker & al.* 1 *Pick.* 389.

Where there have been two sales, both *bona fide*, he shall be protected in his purchase who first obtains possession. *Lamb v. Durant*, 12 *Mass.* 52; *Lanfear v. Sumner*, 17 *Mass.* 110.

These principles applied to the present case, will go to sustain the purchase and title of the defendant.

Boutelle, for the plaintiff, cited *Brinley & al. v. Spring*, 7 *Greenl.* 241; *Marshall v. Fisk*, 6 *Mass.* 24; *Ricker v. Ham & al.* 14 *Mass.* 137; *Lanfear v. Sumner*, 17 *Mass.* 110.

PARRIS J. delivered the opinion of the Court.

The conveyance from *Plummer* to the plaintiffs, on the 11th of *December*, of the horse and other property mentioned in the bill of sale, was a mortgage to secure the payment of sundry sums due on note and account, and also as security for further advances.

By this conveyance, the right or property passed to the plaintiffs and they acquired the legal title and power of disposing of it, subject only to the condition or right of redemption. The case of *Young v. Austin*, 6 *Pick.* 286, turned upon the point, that the property in the slate had never passed, there having been no delivery, or separation of the quantity contracted for, from the general mass, in which it was included. But that case has no applicability to the one before us. The whole of the

personal property mentioned in the instrument of conveyance, was delivered and some of it was marked with the initials of the plaintiffs' name. It seems to be settled that, as between the parties, a mortgage of personal property is valid, although there had been no actual delivery. There is, however, no necessity for discussing that question, as the case does not call for it. There was a sufficient delivery of the whole property, and, no doubt, such, as in cases of absolute, honest sale, would enable the vendee to hold against a subsequent purchaser, ignorant of the former conveyance.

Neither is there any thing in the case tending to shew actual fraud in the transaction; any intention to secrete the property from existing creditors, or to defraud subsequent creditors or purchasers.

There is no intimation that the sum secured by the mortgage was not actually and justly due; or that there was any such difference between the value of the chattels mortgaged and the sum secured, as to cause even a suspicion of fraudulent intent. The whole arrangement, on the part of the plaintiffs, was *bona fide*, and such as would have passed to them the property in the horse, even if the sale had been absolute, notwithstanding the vendor had continued the possession. That would be evidence of fraud, but not conclusive, in cases of absolute sales. The continuance of the possession might be so explained as to render it perfectly consistent with honesty in both parties. — Such has uniformly been the law in this State and *Massachusetts*, and is understood now to be recognized as sound, both by the English courts, and in the courts of some of the largest States in this Union. *Martindale v. Booth*, 3 *Barnw. & Adolph.* 498; *Hall v. Tuttle*, 8 *Wend.* 375; *Bissell v. Hopkins*, 3 *Cowen*, 166.

In *D'Wolf v. Harris*, 4 *Mason*, 534, *Story J.* says, "The "general rule, upon transfers of personal property, is, that pos- "session should accompany and follow the deed. But, if by "the terms of the contract itself, or by necessary implication, "the parties agree, that the possession shall remain in the ven- "dor, such possession is consistent with the deed, and does "not avoid its operation in point of law, unless it be in fact

" fraudulent. Now, in cases of mortgages, the possession of " the mortgagor, at least, until a breach of the condition, is " perfectly consistent with the terms of the deed, and the in- " tention of the parties."

In the *United States v. Hooe*, 3 *Cranch*, 89, *Marshall C. J.* says, " The difference is a marked one between a convey- " ance which purports to be absolute, and a conveyance which, " from its terms, is to leave the possession in the vendor. If, " in the latter case, the retaining of possession was evidence of " fraud, no mortgage could be valid." In the learned note to *Bissell v. Hopkins*, 3 *Cowen*, 205, it is said, " Whichever way " the decisions may tend upon the question of possession in the " vendor, after a voluntary, direct and absolute bill of sale, no " doubt can be entertained at this day, that a continued posses- " sion in a mortgagor of chattels is not, *per se*, evidence of " fraud, either as to *purchasers* or creditors."

The reason for a distinction between an absolute conveyance and a mortgage is, that in the latter case, it comports with the legitimate, fair object of the transaction, that the mortgagor should retain possession of the chattel mortgaged until forfeiture; and this is the characteristic difference between a mortgage and a pledge. It being consistent with the nature of the conveyance that the possession of the chattel mortgaged should remain with the mortgagor, no presumption of fraud arises from that circumstance, until after a forfeiture.

Perhaps it would be better to provide by statute, as has been recently done in *New-York*, that every mortgage of goods and chattels shall be presumed to be fraudulent, and void as against creditors and subsequent purchasers, unless the same be accompanied by immediate delivery, and be followed by an actual and continued change of possession of the thing mortgaged; or, as in *New-Hampshire* and *Maryland*, that no transfer of goods of which the mortgagor shall remain in possession, shall be effectual, unless it be in writing and recorded.

But we have no such statute; — and inasmuch as the property in the horse passed to the plaintiffs by the mortgage, it was not in the power of *Plummer* to make a second sale to the defendant without the plaintiffs' consent. If the sale to the

defendant had been with the plaintiffs' knowledge and they had interposed no claim to the horse, nor given the defendant any information of their mortgage, our decision would have rested on another principle of law, and would probably have been different. But there is no intimation of such facts in the case. Every thing appears to have been fairly conducted on the part of the plaintiffs, and although the defendant purchased in good faith, and without knowledge of the plaintiffs' mortgage, yet he purchased what *Plummer* did not own, and had no right to sell, and consequently could not convey. Every purchaser of goods and chattels is supposed to rely upon the vendor's implied warranty as to title, and it behoves such purchaser to be satisfied of the soundness of the title, or the ability of his warrantor to make it good.

The defendant may, perhaps, suffer in this case unless his vendor is of sufficient ability to answer for his defect of title; and it may be true that he will suffer in consequence of the horse having remained in the possession of the mortgagor. But we are not permitted to accommodate the law, so as to comport with our own wishes in the various cases that come before us. The hardship of any particular case, if hardship exists, ought not to be allowed a moment's conflict with the landmarks of the law.

OTIS *vs.* LINDSEY.

The taking of *compound interest* is not *usury*.

ASSUMPSIT on a promissory note of hand for $72, 36, given by the defendant to the plaintiff in payment of two smaller notes which had been standing some years, and for a small sum of money lent. It appeared that in ascertaining the amount for which the new note should be given, the sum due on the old notes was computed upon the principles of compound in-

terest. This the defendant insisted was usurious, and the right of the plaintiff to recover was resisted upon that ground.

A verdict was returned for the plaintiff subject to the opinion of the whole Court upon the question.

A. Belcher, for the defendant, argued that the taking of compound interest was usury, and cited *Doe v. Warren*, 7 *Greenl.* 48.

It is taking more than *six per cent.*, which is unlawful.

Suppose one loan a sum of money and reckon interest on principles of compound interest and put it into the note payable on time, without interest — is not this *usury*? If not, then the statute may always be avoided. If it be, then the note in this case is usurious.

In the case of *Doe v. Warren*, this Court decided that compound interest could not be recovered. But shall parties be permitted to evade the decision of the Court by putting the illegal interest into the note?

Otis, for the plaintiff, cited the following authorities: *Kellogg v. Greenleaf*, 2 *Mass.* 568; *Le Grange v. Hamilton*, 4 *D. & E.* 613; *Doe v. Warren & al.* 7 *Greenl.* 48; *Maine Bank v. Butts*, 9 *Mass.* 49; *Lyman v. Morse*, 1 *Pick.* 295, in note; *Cro. Chas.* 263; *Cowper's R.* 115; 2 *Black. R.* 792; *Fire Ins. Co. v. Sturges*, 2 *Cowen*, 664; 2 *Hen. Blk. R.* 144; 1 *Buller's N. P.* 17; *Eaton v. Bell*, 5 *B. & A.* 34; *Kelley v. Walker*, 2 *Anstruther*, 495.

The opinion of the Court was delivered by

MELLEN C. J. — The note declared on in this case is clearly *not usurious*. *Compound interest* is not *usury*. In the note before us, nothing more than *lawful* interest was cast upon interest which had become due. No law prohibits such a transaction. *Ord on Usury* 36; *Hamilton v. Le Grange*, 2 *Hen. Bl.* 144; 4 *T. R.* 613, *S. C.*, *Doe v. Warren*, 7 *Greenl.* 48. Though, according to this last decision, such *interest* upon *interest* is not recoverable on the ground that by *operation of law* it becomes *principal* and bears interest. Yet, after interest has accrued, the parties may, by settling an account, or by a new

contract, turn it into principal. That was done in the present case. It is true that the interest on the old notes was not payable annually, but still, if at the end of each year, a note had been given for the interest on each of those notes, and carrying interest, surely they might all have been recovered; and why should the principle be different, because the *same amount* of interest was all cast at *one time*, and inserted in the new note, now in suit. It is only a different and more simple process, by which the same result is produced. The defence is wholly unsubstantial.

Judgment on the verdict.

DAVENPORT *vs. The inhabitants of* HALLOWELL.

A warrant calling a town meeting contained an article in the following words, *viz.*: "To see what measures the town will take to provide a workhouse, "*or* house of correction, for the reception, support and employment of the "idle and indigent, and such other persons as by law be liable to be sent to "such house, for the purposes aforesaid, and for the *superintendance* of the "same." *Held*, that this was sufficient to authorize a vote, empowering the Selectmen to contract with some person to support the poor for one year — such town having practiced for several years the making of similar contracts, under the authority of similar articles.

A contract made by the Selectmen under the following vote, *viz.*: "That the "Selectmen receive sealed proposals for the maintenance of the poor for one year," "and that they contract with some suitable person for that period, and "report at the adjournment of the meeting," is binding on the town, though it provide for the relief of paupers belonging to other towns, falling into distress and needing relief in said contracting town — and though it make provision for the payment of the expenses of litigation respecting the paupers of said town.

Such contract would be obligatory upon the town without a formal *acceptance* thereof by vote.

Where a town, having contracted with an individual for the support of the poor of such town, for one year, for an agreed compensation, afterward refused to permit him to perform his contract, and he brought *assumpsit* to recover dam-

ages for thus preventing his performance of the contract, whereby he might have earned the stipulated sum, it was *held*, that he well might pursue his remedy in this form of action.

A town has the legal power of making a contract for the support of its poor, *prospective* in its terms.

THIS was an action of *assumpsit* to recover damages for the breach of an agreement made, as alleged, by the defendants with the plaintiff for the support of the poor of the town of *Hallowell* for one year. Plea, the general issue. In support of the action the plaintiff introduced the records of the town of *Hallowell*, by which it appeared that a meeting of the inhabitants of said town was held, *March* 15, 1830. In the warrant calling said meeting, the 7th article was in the following words, *viz.*: "To "grant such sum or sums of money as shall be thought neces- "sary for the maintenance of the poor, and other necessary "town charges the present year." *Article 9th* was, "To see "what measures the town will take to provide a workhouse or "house of correction, for the reception, support and employ- "ment of the idle and indigent, and such other persons as may "by law be liable to be sent to such house for the purposes "aforesaid, and for the superintendance of the same."

At the meeting on the 15th of *March*, the following vote was passed, *viz.* "Voted, that the Selectmen receive sealed "proposals for the maintenance of the poor for one year from "the thirteenth day of *May* next; and that they contract with "some suitable person for that period, and report at the ad- "journment of this meeting." The meeting was adjourned to the *26th of April.*

In pursuance of the foregoing instructions, on the *24th of April*, the Selectmen (who had been chosen at the meeting on the 15th *March*,) contracted with the plaintiff to support the poor of said town for one year from the *13th of May*, for the sum of $900, he giving bond with sureties in the penal sum of $2000, for the faithful performance of the contract on his part.

At the adjourned meeting on the *26th of April*, the Selectmen reported to the town the agreement they had entered into with the plaintiff, and the bond they had taken; whereupon the inhabitants voted *not to accept said agreement*, but to

contract with one *Ebenezer Freeman* for the support of the poor for the same period.

It was admitted that the plaintiff had offered to perform his part of the agreement, but was not permitted to do so by the defendants.

It appeared that for the three preceding years there was a vote of acceptance of similar contracts, under similar articles; but for five years next before that period no such vote of acceptance appears on the records of the town.

The counsel for the defendants contended, 1. That neither the 7th or 9th articles warrant the contract. 2. That by the former practice of the town *acceptance* by them was necessary to complete the contract.

3. That the vote only authorized the Selectmen to contract who were actually in office on the day when it passed.

4. That the condition of the bond was larger than the power given by the vote.

5. That towns have no right to make such *prospective* contracts.

6. That performance having been prevented by the defendants, *assumpsit* was not the proper remedy.

A verdict was taken for the plaintiff, subject to the opinion of the whole Court on the foregoing objections. If either of them should be considered as fatal to the action the verdict was to be set aside, and the plaintiff to become nonsuit, otherwise judgment was to be rendered thereon.

Clark, for the defendants.

1. Neither the 7th or 9th article in the warrant calling the town meeting of the 15*th March*, authorized the making of this contract.

These articles were so general in their terms, that no notice was thereby given to the inhabitants of the town, that the making of any such special contract was contemplated.

The *appropriation* of money, is quite a different thing from *raising* it. These articles were for *raising* it, whereas the contract was for appropriating it. *Blackburn v. Walpole*, 9 *Pick.* 97.

2. From the former practice of the town *acceptance* by them was necessary to complete the contract. This must have been understood by the inhabitants, and the plaintiff among the rest, when the vote was passed requiring the Selectmen to report to the adjourned meeting. This had been the *usage*. *Stevens v. Reeves*, 9 *Pick.* 198; *Phelps & al. v. Townsend*, 8 *Pick.* 392.

3. The condition of the bond was larger than the power. The authority granted in the vote is, for the Selectmen to receive sealed proposals for the maintenance of *the poor* for one year, &c. This can only apply to the poor who resided in, or properly belonged to the town. It cannot be construed to embrace cases of paupers belonging to other towns needing support in the town of *Hallowell*. But the contract provides for the maintenance of the latter. It also provides for all the litigation in regard to the poor, which was exercising a power not conferred by the vote, and the whole proceeding is therefore void. *Snow v. Perry*, 9 *Pick.* 539.

4. Towns have no right to make such contracts. — Certain duties are imposed upon towns, such as making roads, supporting the poor, &c. But provision should be made for these duties as the cases calling for their exercise occur. They have no right to make a prospective contract providing for indemnity for the non-performance of a duty that may never occur.

5. By the vote, those Selectmen only were authorized to contract who were Selectmen at the time the vote passed. In this case, the Selectmen who have undertaken to contract, were chosen after the passing of the vote conferring the authority to act in this matter. The use of the term, *Selectmen*, was merely to designate the individuals who were to act as the committee, and not for the purpose of empowering them in their official capacity.

6. Performance having been prevented by the defendants, *assumpsit* is not the proper remedy. It should have been *case*. *Lawes on Pleading in assumpsit*, 8, 13, 35.

Sprague, for the plaintiff, to the last point, cited *Hoyt v. Wildfire*, 3 *Johns. R.* 518; *Lawes on Plead.* 11. His answers to the other objections raised by the defendants were fully sustained by the Court.

The opinion of the Court was delivered by

MELLEN C. J. — The object of the present action is, to recover damages against the defendants, for depriving the plaintiff of the benefits of a contract he alleges he had made with them, for the support of their poor, for a certain time, by refusing to permit him to execute the contract on his part; which he says is in violation of their promise. It appears that the Selectmen, who were also overseers of the poor of the town of *Hallowell*, made a contract with the plaintiff to support the poor of that town for the term of one year, commencing on the 13th of *May*, 1830, for the sum of nine hundred dollars. In order to ensure the faithful performance of the contract on the part of the plaintiff, the defendants required of him a bond, with sureties, which was accordingly furnished; but the obligation of the town to pay the nine hundred dollars, depended on the contract as above stated. The defendants contend, that the contract was made without any legal authority, and that, of course, they are not bound by it; and, if they are bound by it and are liable in damages to the plaintiff, such damages cannot be recovered in an action of *assumpsit*. This *last* objection we will consider in the *first* place. Notwithstanding the authorities which have been cited by the counsel for the defendants, seem at first view to sustain, or at least to countenance the objection, we apprehend that they do not decide the question. It is true that, where *one* party to a contract refuses to permit the *other* to perform it, and thus entitle himself to those advantages he might have realized from its performance, no action can be maintained against the refusing party *on the contract* as a basis, on which to recover the *agreed compensation;* but the remedy to recover damages for the injury sustained by such breach and refusal is by a special action — setting forth the circumstances particularly. In some cases this has been an action in nature *of tort;* in others, an action of *assumpsit*. In the case before us there seems to be nothing resembling a tort; the only act of the town has been a refusal on their part to permit the plaintiff to take the charge and superintendence of the poor, according to the agreement of the Selectmen, and by supporting them through the year, to earn the stipulated sum of nine hundred

dollars. Independently of the *contract* of the Selectmen, the plaintiff could have no remedy against the town of *any* kind; more than he could against any *other* town in the county. We perceive no objection to the maintenance of the present action, if, on the merits, the action is sustainable.

The next question is whether the town is bound by the contract made by the Selectmen and overseers. We do not, on this occasion, mean to go into an examination, as to the extent of the authority which overseers of the poor possess, *merely* in virtue of their office, and independent of any *express* authority given to them by the town; but shall confine ourselves to the inquiry whether the votes of the town authorized them to make the contract with the plaintiff. The 7th article in the warrant for calling the town meeting to be holden on the 15th of *March*, 1830, is in these words, *viz.*: "To grant such sum or "sums of money as may be thought necessary for the mainte- "nance of the poor, and other necessary town charges, the pre- "sent year." For several preceding years the town had acted, on the subject of the poor, under articles in the warrants, for the annual meetings, in precisely the same language. The 9th article was, "to see what measures the town will take to provide "a workhouse, *or* house of correction for the reception, sup- "port and employment of the idle and indigent, and such other "persons as may by law be liable to be sent to such house for "the purposes aforesaid, and for the superintendence of the "same." At the meeting, held under the said warrant and article, the town voted, "that the Selectmen receive sealed pro- "posals for the maintenance of the poor for one year from the "thirteenth day of *May* next; and that they contract with some "suitable person for that period, and report at the adjournment "of this meeting." Under this vote the Selectmen acted in making the contract; and, having made it, on the day of adjournment, the town voted, under the 7th article, to raise money for the support of the poor and other necessary town charges for the year. It is worthy of special notice, that though the defendants now contend that, under the above article, the Selectmen had no right to make the contract in question, yet, after refusing to accept it, the town, at once proceeded to accept the

proposal of *Ebenezer Freeman*. Surely, the town, in open meeting, had no more authority, by a vote, to close a contract with *Freeman*, under the authority of the above article, than the Selectmen had, as agents of the town and in behalf of it, to close a contract with *Davenport*. It shews the understanding of the town, and their construction of the article. This article may be considered as referring to, and authorizing the town to avail itself of the provisions contained in the first section of the act of *February* 28th, 1829. The language of the section is, " that " the Selectmen of any town in this State, which *has* erected, " or *may hereafter* erect a house of correction, or *shall have* ap- " propriated *any poor house* for *that* purpose, may appoint a " board of overseers of such house of correction, to consist of " seven, five or three able and discreet persons, whose duty it " shall be to appoint some suitable person for a master or keep- " er thereof, *except* when the *poor house has been* or *shall be* ap- " propriated for *that purpose:* in which case the *overseer of the* " *poor house* shall be *master* of such *house* of *correction*," &c. &c. The foregoing section, in connection with the ninth article in the warrant, we consider as having authorized the Selectmen to make the contract for, and in behalf of the town, (unless some of the other objections which have been urged are sustained) and thereby to constitute the house of *Mr. Davenport*, as the *poor house* for the year above-mentioned, and *Davenport* as the *overseer* of it, and *master* of it as the *house of correction.*

The next objection in the order of time is, that the Selectmen who made the contract, were not those intended by the ninth vote *One* answer to this objection is, that the Selectmen *for the time being* answer to the description in the vote; and *another* is, that the persons who made the contract had been chosen Selectmen on the 15th of *March* preceding. Another objection is, that the condition of the bond given by *Davenport* is broader than the power given by the vote. The answer to this is, that by the terms of the condition he was not bound to do more than the town would have been bound to do, provided no contract had been made with *any one* for the maintenance of the poor during the year in question; nor, are we to presume, was the town, by the terms of the contract, bound to pay him

a greater sum than would have been expended by the town, had no contract been made. Another objection is, that *Mr. Davenport* was not a *suitable* man for overseer of the poor house. The answer is, that by the vote, the Selectmen were constituted the judges of his suitableness. Another objection is, that towns have no right to make such a *prospective* contract. How then could they make such a contract with *Freeman?* From necessity *prospective* contracts must be made, or the poor of our towns would be destitute of food, and raiment, and the common comforts of life. The last objection is, that the contract was never *accepted* by the town. *One* answer is, that by the terms of the vote, under the authority of which the contract was made, it did not require any acceptance, in order to make it obligatory on the town. The Selectmen were clothed with full powers to make the contract; and it is evident that the object in view in requiring a report by them to the town, was, that it might be known what sum ought to be raised for the support of the poor for the year ensuing. *Another* answer is, that the town has not considered a vote of acceptance as essential. It is true, that in the years 1827, 1828 and 1829, votes of acceptance were passed; but in the five next preceding years, no such votes were passed, or deemed of any importance. We have thus examined and answered all the reasons and arguments urged in support of the motion for a new trial, and all that remains is, to render

Judgment on the verdict.

CROWELL *vs.* GLEASON.

Articles of the peace having been preferred by A. against B., the latter was arrested on a warrant and carried before a magistrate; while thus under arrest, C., the brother of A., proposed to pay B. a certain sum of money and procure the prosecution against him to be stopped, (his sister, the complainant, having her fears quieted,) if he, B., would convey to him, C., a certain parcel of land. B. declined accepting the offer. C. then increased the sum; when B., after taking advice, and deliberating upon the matter, acceded to the proposition, and executed a deed of the land to C. *Held*, that here was no such *duress by imprisonment*, as would enable B. to avoid the deed.

Nor could it be avoided under these circumstances, on the ground that it was not given *freely* and *voluntarily*.

To constitute duress by imprisonment, the original restraint or detention of the person must have been unlawful, or there must have been an abuse of legal process.

In a suit brought by C. against B. to try the title to the land in question, the complaint and warrant in the criminal prosecution, and other evidence, may be introduced to show that the prosecution was not colorable or fraudulent.

In such suit, the acts and declarations of the constable who served the warrant, are not admissible as evidence against C. unless it appear that they were adopted by him, or were done or said in pursuance of a common object.

Where one has preferred articles of the peace against another, for which he has been arrested and an examination had; if, before the magistrate shall have adjudged sureties of the peace to be necessary, the accused has succeeded in quieting and allaying the apprehensions of the complainant, who thereupon intimates a wish to withdraw the prosecution, the magistrate may properly enough permit it, the process having been instituted expressly for the personal benefit of the complainant, though in the name of the State.

TRESPASS, *quare clausum fregit*. The close described in the plaintiff's writ, was about two acres of land, situated in *Waterville*, with a house and barn thereon. The defendant pleaded *soil and freehold* in himself.

To maintain the issue on his part the defendant shew title in one *Smith*, a conveyance from him to one *Lloyd*, and from *Lloyd* to himself; the last, dated *March* 7, 1828.

The plaintiff relied upon a deed from the defendant to himself, dated *April* 15, 1828.

The defendant contended that the deed from himself to the plaintiff, was not made voluntarily, but obtained by duress through fear, and by threats on the part of the plaintiff.

It appeared, that on the day of the date of the deed from the defendant to the plaintiff, the defendant was under arrest, on a warrant issued on the complaint of a *Mrs. Smith*, the sister of the plaintiff. And it was insisted that the plaintiff procured this prosecution, and made use of it to coerce the defendant to give the deed in question.

Asa Redington, Jr. a witness for the defendant, testified, that two or three days before the date of the warrant, the plaintiff called on him and complained of the defendant's aggressions on his sister, *Mrs. Smith*, and spoke of it as a State prison offence. That he, the witness, soon after called on *Mrs. Smith*, and satisfied himself that she was well justified in preferring articles of the peace against the defendant. That he accordingly received her complaint, and issued a warrant thereon, which was served by *Joseph Warren*, a constable, and brother-in-law of the plaintiff. He further stated that he was requested to take the examination, and attended at *Mr. Warren's* house for that purpose. That there was much conversation there between the plaintiff, the defendant and others. That the plaintiff said he wished to have his sister quieted, who lived in the house on the premises in question; and to effect this object, he offered the defendant to pay him all he had given for his purchase of *Lloyd*, and interest, and a compensation for his trouble; and that the prosecution should be stopped. This, the defendant declined. The witness then wrote a deed for the consideration of $28, which the defendant refused to execute. The plaintiff then offered more, to wit, $50, and to pay the expenses of the prosecution, which were supposed to be about $5 more. This offer the defendant accepted. The deed was then executed, and a note given for $50, from the plaintiff to the defendant, payable in thirty days. The witness further stated, that though it was not distinctly stated at this time, yet the understanding all along was, that the prosecution should be dropped. The witness added, that the defendant in the whole transaction was moderate, slow and deliberate, and went out several times; that no threats were made by the plaintiff.

Hiram Warren, a witness for the plaintiff, also present at the same time, testified, that the defendant, before he executed the

deed took the advice of the magistrate, who was a gentleman in the profession of the law.

Thomas Kimball, testified, that at the tavern, which was near the place of examination, and prior thereto, but on the same day, *Gleason* appeared distressed and in tears.

With a view to ascertain whether legal process had been abused to serve the plaintiff's purposes, *Weston, J.* who presided at the trial, received in evidence the complaint and warrant before mentioned, together with the testimony of *Mrs. Smith*, the complainant, *Patty Smith*, her daughter, and *Mrs. Pullen*, both of whom were present on the occasion of which *Mrs. Smith* complained. All this testimony was objected to by the counsel for the defendant. From this testimony, if believed, and the witnesses were not impeached, it appeared there was nothing colorable or fictitious in the prosecution.

The counsel for the defendant offered to prove certain acts and declarations of *Warren*, the constable, pending the prosecution, which it was insisted were harsh and oppressive, and tended to aid the improper views imputed to the plaintiff. But the presiding Judge ruled them inadmissible, unless done or said in the presence of the plaintiff, or proved to have been procured or adopted by him, or, unless upon proof of some conspiracy between him and *Warren* to injure the defendant.

The Court instructed the jury that if there was a just foundation for the prosecution, which seemed warranted by the evidence; the plaintiff being the brother of the complainant, was justified in interfering in her behalf; that if any arrangement was made which allayed her apprehensions, she had a right to withdraw the prosecution, which was instituted for her protection. And that if her doing so, upon the advice, or by the procurement of the plaintiff, operated as an inducement in the mind of the defendant to make the conveyance, it did not present a case of duress, nor was the deed thereby rendered invalid or inoperative.

The jury returned a verdict for the plaintiff. If the testimony admitted ought to have been rejected; or that which was rejected ought to have been admitted; or if the jury were not

properly instructed, the verdict was to be set aside and a new trial granted; otherwise, judgment was to be rendered thereon.

Wells, for the defendant, argued that the deed of the defendant to the plaintiff was void, because it was not made *voluntarily*, and cited the following authorities: *Watkins v. Beard*, 6 *Mass.* 506; *Starkie on Ev.* 2, 481; *Smith v. Jordan*, 15 *Mass.* 113; *Somes v. Skinner*, 16 *Mass.* 348; *Chase v. Dwinal*, 7 *Greenl.* 134; *Jeremy's Chancery*, 393.

In the case under consideration, the defendant was complained against for a criminal offence — the warrant lay upon the table before the parties — and the plaintiff's proposition to the defendant, substantially was, "if you will give me a deed con-"veying certain land, I will give so much money, and this pro-"secution shall stop — otherwise it will go on and you know "the consequences."

Now, how can it be pretended that if the defendant signed the deed under these circumstances, the signing was *voluntary*. And it is of no consequence whether the process by which he was imprisoned was lawful or otherwise. In either case, if he was operated upon by threats, and the deed was not made *voluntarily* and *freely*, it is void.

2. The complaint and warrant were improperly admitted as evidence to the jury. The plea of the defendant was soil and freehold in himself, and the question was whether the defendant's deed was made voluntarily or not. The evidence was impertinent. The complaint is not legal evidence to go to the jury for any purpose except to justify the magistrate. It is indeed no evidence even in the prosecution in which it was made; it is the mere foundation of the prosecution. But in this case it was permitted to go to the jury as *evidence*.

3. The inquiry whether the defendant was guilty of the offence alleged in the complaint was improperly permitted. It was not pertinent testimony, and was calculated to operate in the minds of the jury injuriously to the defendant. If the defendant had alleged that the prosecution was fictitious and fraudulent, then perhaps the evidence might have been gone into, in order to have met and repelled such allegation. But

such was not the case here; the defendant did not pretend that the prosecution was colorable.

4. The acts and accompanying declarations of *Warren* were admissible. It was contended that the plaintiff and officer were engaged in a common object, that is, to procure a conveyance of this land. The defendant therefore wished to show his acts and prove his declarations. Whether there was any connection or conspiracy between the plaintiff and the officer was a question for the jury. *McKenny v. Dingley*, 4 *Greenl.* 172; *Bridge v. Eggleston*, 14 *Mass.* 245; *Sherwood v. Marwick*, 5 *Greenl.* 295.

It is sufficient if the evidence be such as to produce a fair and reasonable presumption of the facts put in issue. 1 *Phil. Ev.* 140, *in notis.*

A concert may be proved by a concurrence of acts and adaptation to the same object. 2 *Stark. Ev.* 399, 401, 407.

5. The taking of the deed under the circumstances was improper and illegal, because it was compromising a criminal prosecution or compounding an offence. 4 *Black. Com.* 135, 363, 364; *Maine Stat. ch.* 7, *sec.* 5.

Boutelle and *Sprague*, in arguing for the plaintiff, took positions which are sustained in the opinion delivered by the Court,— commented at length on the cases cited by the counsel on the other side, distinguishing them from this case; — and cited the following additional authorities. 5 *Dane's Abr. ch.* 144, *art.* 1, *sec.* 4. *Worcester v. Eaton*, 11 *Mass.* 268; and the same case in 13 *Mass.* 371; 2 *Stark. Ev.* 42, 43, 44; 1 *Chitty's Crim. Law*, 4 — 6.

The opinion of the Court was delivered by

WESTON J. — The deed, under which the plaintiff holds the premises in question, is attempted to be avoided on the ground, that it was obtained by duress, by threats, or by imprisonment, or upon an illegal consideration, or because not executed freely and voluntarily.

It does not appear from the evidence to have been extorted by threats of any kind. To constitute duress by imprisonment,

the original restraint, or detention of the person, must have been unlawful, or there must have been an abuse of legal process. At the time the deed was executed, the defendant was under arrest, and in order to ascertain the character of the transaction, it became important to determine, first, whether the arrest or imprisonment was legal in point of form, and, secondly, whether it had a lawful foundation, or whether it was got up to oppress the defendant, and to aid the designs of the plaintiff upon his property. In this view, the complaint and warrant were properly admissible in evidence. They were essential to show the lawfulness of the arrest. Without them, duress by imprisonment would very clearly have appeared, which the plaintiff had an undoubted right to repel, by showing that the requirements of law had not been violated in the prosecution, to which he had lent his countenance and support. The facts upon which the complaint and warrant were founded, were examined, and we are satisfied properly, to ascertain whether there was any thing collusive or colorable in the proceedings. The plaintiff was warranted in interposing for the protection of his sister, who had just cause of complaint. As her kinsman, it was lawful for him to aid her in the pursuit of her legal rights, without being liable to the charge of maintenance, or of officiously meddling in an affair, which did not concern him.

The acts and declarations of the constable were not legal evidence against the plaintiff, unless it had appeared that they were adopted by him, or done or said in pursuance of a common object. Of this, there is no evidence whatever. The plaintiff was a relative of the constable; but he is not thereby implicated or made responsible for his acts. It might render it more probable that they would be engaged in a common object, but there must be other evidence than the relationship to render the one accountable for the acts and declarations of the other. The testimony rejected had a tendency to prove that the officer conducted harshly, and had it appeared that the plaintiff had also conducted harshly or oppressively, there would have been such evidence of a common object as might have rendered this testimony admissible. But there is no proof of misconduct on the part of the plaintiff, nor was it proposed to

show any privity between him and the constable, or any assent to what was said or done by him. In *Bridge v. Eggleston*, 14 *Mass.* 245, where the question to be determined was, whether a conveyance of real estate was or was not fraudulent, the acts and declarations of the grantor, prior to the date of the deed, were received to show fraud in him, but expressly upon the ground that there was other evidence tending to show fraud also in the grantee. And it was distinctly decided by the Court, that without the latter, the former would be entirely unavailing.

In *Burdett v. Colman*, 14 *East*, 163, there was no objection to the testimony in regard to the conduct and cries of the mob. *Sir Francis* had declared his intention to yield only to superior force. The mob had interposed in his favour. There was no evidence that he expected or desired their assistance; but he resisted the peaceful execution of the warrant, with which the sergeant at arms was charged; and they manifested a disposition to aid him in the stand he took. Under this aspect of things, the question was, whether the sergeant at arms had exceeded his authority in calling in the aid of the military. And whether there was any privity between *Sir Francis* and the mob or not, their conduct fully justified a resort to an armed force, as a measure of precaution. In *Sherwood v. Marwick*, 5 *Greenl.* 295, there was evidence that the defendant was concerned in the procurement of the false register, of which the other party concerned, *Sutton*, had made a fraudulent use, in his transactions with the plaintiff, and this was such evidence of privity between them, as might properly go to the jury, in determining whether the defendant was implicated or not, by the acts and doings of *Sutton*.

But it is contended that it was not legally competent for the complainant, or the plaintiff, acting in her behalf, to withdraw her prosecution, and to waive further proceedings thereon. — When criminal process has been instituted to bring an offender to justice, public policy requires that it should not be terminated by any understanding between the complainant and the accused, but that it should be pursued until withdrawn by the proper authority, representing the State. But the process re-

sorted to in the case before us, was of a peculiar character. Although in form in the name and behalf of the State, it has the effect of a civil preventive remedy, for the protection of an individual. It is based on his apprehension of danger, which must be shown, however, to have had a reasonable foundation. Now, if before the magistrate, after a hearing, has adjudged sureties of the peace to be necessary, or has required them at the hands of the accused, he has succeeded in quieting and allaying the apprehensions of the complainant, and friendly relations being established between them, the complainant intimates his wish to withdraw a process, afforded expressly for his benefit and the magistrate permits it, we are not aware that the dignity, honour or policy of the law is impaired by such a course. The process has done its office. The benign purpose of the law has been answered. And in accordance with this view of the subject, the prosecuting officer of the government never does in practice press the accused further, when advised that the complainant is satisfied.

In the case before us, the complainant perceived that by the adjustment, there would no longer arise any conflict of claims or rights between them, and being satisfied that she should not be further molested, she acceded to the arrangement proposed; and we are not prepared to pronounce this course of proceeding unlawful.

But if it was, an executed contract cannot upon this ground be disturbed. The law does not interpose for either party, in transactions founded upon an illegal consideration. If such contract be executory, the law will not lend its aid to enforce it, or if executed, to defeat or avoid it. This principle was fully considered in the case of *The inhabitants of Worcester v. Eaton*, 11 *Mass.* 368, and it is in point to show that if the adjustment of the prosecution had been illegal, the deed in question could not be avoided.

It is however insisted that the deed is void, because not given freely and voluntarily, and it is urged, that it cannot be so regarded, if the giving up of the prosecution operated in any degree upon the mind of the grantor. In point of fact the grantor took time to deliberate, asked and received advice, rejected

some propositions, and finally acceded to the terms upon which the business was concluded. These facts afford no evidence that his judgment, or the freedom of his will, was disturbed by the absorbing apprehension of danger. In all human conduct, the preponderating motive determines the will, but if not operated upon by unlawful acts on the part of others, which may constitute a moral compulsion, the mind may be said to act freely. An imprisoned debtor conveys land to his creditor to procure his enlargement; in the eye of the law he acts freely, there being in the case no unlawful restraint or imprisonment. In the case of *Watkins v. Baird*, 6 *Mass.* 506, cited for the defendant, it is stated by *Parsons C. J.* that although the imprisonment be lawful, yet unless the deed be made freely and voluntarily, it may be avoided by duress. Under what circumstances a deed so given might be held not to have been made freely and voluntarily, he does not state. If the imprisonment be lawful in form, but founded upon an abuse of process, it constitutes duress, as was decided in that case. Such imprisonment is held to be unlawful. But if it be lawful, an instrument executed to obtain enlargement cannot be avoided on the ground of duress. And in the case last cited, the Chief Justice says, if a man "supposing that he has a cause of action against an-"other, by lawful process cause him to be arrested and impris-"oned, and the defendant voluntarily execute a deed for his "deliverance, he cannot avoid such deed by duress of imprison-"ment, although in fact the plaintiff had no cause of action." A deed so made is made voluntarily, in his sense of the term, although it may have been founded in misapprehension and mistake. We are all of opinion, that none of the objections taken, by the counsel for the defendant, can be sustained.

Judgment on the verdict.

PAGE *vs.* PLUMMER *& al.*

Though *stat.* of 1822, *ch.* 209, prescribes *the mode* of notifying a creditor of the intention of an execution debtor, to take the poor debtor's oath, yet such creditor, by himself, or attorney, may *waive his right to such notice.*

And where the written return of notice, was of one given to the *attorney,* parol evidence will be received to show that he was *authorized* to receive it by the creditor.

THIS was an action of *debt on bond,* with condition as prescribed by the act for the relief of poor debtors. The breach relied on by the plaintiff was, that the debtor did not surrender himself according to the condition of the bond.

The defendants produced a certificate of two justices of the *quorum* that they had administered the poor debtor's oath to the execution debtor. Also a written acknowledgment of *notice,* signed by *John Otis, Esq,* attorney to the plaintiff.

Briggs Turner, a witness for the defendants, testified that *Plummer,* the execution debtor, requested him to procure from the plaintiff a written acknowledgment of notice; and that on application to him he said he was willing that *Mr. Otis* should acknowledge notice, which he accordingly did.

The testimony of this witness was objected to, but *Weston J.* admitted it. If the opinion of the whole Court should be that from this evidence, so far as it was competent, the defence had been maintained, the plaintiff was to become nonsuit, otherwise the defendants were to be defaulted.

Otis, for the plaintiff.

The mode of notifying a creditor, where a debtor is about to procure his release from imprisonment by taking the poor debtor's oath, is prescribed by statute. This mode must be pursued strictly. *Commonwealth v. Metcalf,* 2 *Mass.* 118; 2 *N. H. Rep.* 152.

The statute says, that the notice must be served on *the creditor.* In this case it was not.

The testimony of *Turner* was improperly admitted. It was introduced to aid and give effect, to a defective return of

notice. This is in violation of a familiar principle, that oral testimony shall not be received to explain a record or matter in writing. *Jenner v. Jolliff*, 6 *Johns. R*; 10 *Johns. R.* 248.

If the party rely upon the written return of notice, he must rely upon it altogether — he cannot alter, or add to it, by parol testimony. The return in this case shows a service of notice on the *attorney* merely.

The justices before whom the oath was administered, could not legally proceed to administer it, the return showing merely a service on the attorney. It was not competent for them to receive evidence of the consent of the creditor.

Sprague, for the defendants, was stopped by the Court.

MELLEN C. J. — The plaintiff agreed to accept of the notice given to his attorney; and though it was not the *statute notice*, yet his conduct amounts to a waiver of all objection to the want of it. There is no pretence for sustaining the action.

Plaintiff nonsuit.

HOWARD *vs.* HUTCHINSON.

It is not necessary that, the laying out of a town way, by the Selectmen, under the provisions of *stat.* of 1821, *ch.* 118, *sec.* 9, should be preceded by either a written or verbal request for that purpose.

In the laying out of such road, the Selectmen are bound to give notice to the owner of the land over which they are about to make such location, even though, by a reservation in his title deed, he be not entitled to damages.

The act of locating, should *precede* the issuing a warrant, calling a meeting of the inhabitants to act upon the subject.

Where the proprietors of a township of land, in 1761, in laying it out into lots, caused range-ways of eight rods in width, to be designated on the plan, as "left for roads;" and afterward, in 1825, the range-ways not having been used for roads, they convey one of them to A. H., reserving a right in the town, to lay out a road over said range-way, without being subject to the payment of damages, it was *held*, that, such original appropriation, and subsequent reservation, conveyed no interest in the soil of said range-way, to the town; — and that in laying out a road over it, the Selectmen were bound to conform to the statute provisions on the subject.

Howard *v.* Hutchinson.

THIS was an action of trespass *quare clausum fregit*, for cutting down and carrying away trees from the range-way in the rear of front lot, No. 47, in the town of *Sidney*, according to *Winslow's* plan.

The general issue was pleaded and joined. A brief statement was also filed by the defendant, in which he justified as a surveyor of the highways, for the town of *Sidney*, representing the *locus in quo* as a highway, duly laid out as such by the Selectmen, and accepted by the inhabitants of said town, and that said highway was assigned to him.

To prove the laying out of this highway, the defendant produced the records of the town of *Sidney*, — the competency of which for this purpose, was objected to by the counsel for the plaintiff; and this question among others, was reserved by *Weston J.* who tried the cause.

It did not appear that the plaintiff had notice, at and before the laying out and acceptance of the road; and it was insisted by the defendant's counsel, that, in regard to range-ways of this description, and especially considering the terms of the plaintiff's deed, no notice was necessary.

It appeared that the warrant for calling the meeting at which the laying out was accepted, was dated the 27*th* of *February*, while the actual laying out by the Selectmen was not until the 7*th* of *March* following.

The plaintiff derived title from the *Proprietors of the Kennebec Purchase*, through the deed of their agents, *Thomas L. Winthrop*, *James Bridge* and *Reuel Williams*, dated *Oct.* 26, 1825. It conveyed a part of the range-way in the rear of the first tier of lots, and contained a reservation in favour of the town of *Sidney*, and the county of *Kennebec*, to lay out a road over such range-way, without being subject to the payment of damages to the grantee.

"It appeared that in 1761, the tract of country now comprised within the limits of the town of *Sidney*, and adjoining the *Kennebec* river, was divided into lots by the direction of the *Proprietors of the Kennebec Purchase*, at that time the owners of the whole tract. The division was made, and plan returned by one *Winslow*. The plan represented three ranges

of lots; the first range lying upon the river, and extending back one mile; the second including the second mile from the river, and the third range including the third mile, so that each range was one mile in width. It was understood that there was no actual survey, except on the river, and that all the other lines of the three ranges were laid down without reference to known monuments or actual admeasurement. The plan represented a vacant space of eight rods in width, between each of these ranges, as left for roads; but as there had been no actual examination, or laying out of the roads, the surveyor, in addition to his return, added, that the reservations for roads were to be altered according to the convenience of the settlers."

By conveyances of the Proprietors as early as 1764, they described the front lots as fifty rods on the river, and three hundred and twenty rods in length; — and the lots in the second range, as commencing at a point, one mile *and eight* rods from the river; thus excluding the range-ways.

The road in question, was run out and marked by the Selectmen, in *March*, 1827. The defendant, by direction of the Selectmen, cut down the trees in the road, in *June*, 1829. Afterwards, and some time in the fall of 1829, the Selectmen directed the defendant, as surveyor, to remove the trees, wood and stumps, and for that purpose to make sale of the same. One *Palmer Branch* became the purchaser, agreeing in consideration thereof, to remove the wood and cut down the stumps, so that the road might become passable in the winter. Afterwards said *Branch* offered the bargain to the plaintiff, who declined it. *Branch* then concluded to act under the defendant, and proceeded, with and under him, to remove the wood. The plaintiff afterwards on the same day, sent some men who removed a part of the wood for him; but the principal part of it was removed by the defendant. The plaintiff also, *after* the location, stated that if the road could be permitted to remain till a certain time, he himself would clear it out.

On the whole evidence, the presiding Judge ruled, that the road was not legally laid out, reserving the question for the decision of the whole Court.

The jury returned their verdict for the plaintiff. And it was agreed, that if the opinion of the Court should be that, the road was legally laid out, and the defendant justified in what he did, the verdict was to be set aside and a general verdict entered for the defendant; otherwise, judgment was to be rendered for the plaintiff upon the verdict returned.

Sprague, for the defendant, insisted, 1. that no notice to the plaintiff in the laying out of this road was necessary. The statute requires it only in the laying out of county roads. In *Harlow v. Pike*, 3 *Greenl.* 438, the Court thought it was required by the necessity of the case. The reason assigned was, that, the owner of the land being entitled to damages, on the appropriation of his land to public uses, he ought to have notice, that he may protect his constitutional rights. But this case does not come within the reasoning of that. Every reason for extending the construction of the statute, fails in this case. Here the land had been designated, marked out, appropriated, for public purposes. It had been for a great length of time, well known as a way reserved. Here, too, the owner had actually received pay for his land. Lands adjoining range-ways sell for more, and their real value is enhanced in consequence of such reservations. But further, after the Proprietors had laid out these range-ways, it might be considered as an offer to the town, which the latter might accept at any time. They could not retract it after having sold and bounded lots upon these ways. So that if they had sold this range-way to the plaintiff unconditionally, it could have availed him nothing, the Proprietors not having it in their power to retract their offer. But they did not sell unconditionally — there is a reservation in the deed to him of the right to locate roads over any part of the range-way without the payment of damages. This of itself, operates as a *perpetual notice* to him. He saw by the plan that this land had been set out for public purposes — that the Proprietors had in fact sold it — and he took a deed containing a reservation for a more particular appropriation of it, without creating any claim on his part for damages. There was, therefore, no necessity for a particular notice.

To show that the Proprietors had no right to shut up the

range-ways and retract the offer that they might be considered as having made to the town, and that what they had done operated as covenants that the ways do exist, he cited *Parker v. Smith*, 17 *Mass.* 413; and *Emerson v. Wiley*, 10 *Pick.* 310.

But if notice was necessary, the right to it on the part of the plaintiff was waived. After the location it seems he stated, that if the road could be permitted to remain until a certain time, he himself would clear it. This, it is contended, was clearly a waiver of right to notice.

2. This action is trespass *quare clausum fregit* — the gist is the breaking — if that is justified, all is justified. If in an action for breaking and carrying away, the breaking be justified, but not the carrying away, the action cannot be maintained. *Ropps v. Barker & al.* 4 *Pick.* 239; *Kingsbury v. Pond*, 3 *N. H. Rep.* ; 3 *Stark. Ev.* 1471. Therefore, if the road be located properly, the carrying away of the wood, though wrong, will not enable the plaintiff to prevail in this action.

To show that this was a legal highway, he cited *State v. Kittery*, 5 *Greenl.* 254; *Maine Stat. ch.* 118, *sec.* 9, 13.

It being a highway, *Hutchinson*, as a citizen of the town, had a right to be there, and to cut down and remove obstructions, independently of his official character. As a surveyor, he was not only authorized, but bound to open it. *Wood v. Waterville*, 5 *Mass.* 294.

In the location of county roads, the commissioners may allow time to the owner of the land to take off the wood. This is to be taken into consideration in estimating the damages. But in the case of town ways there is no such provision. If the owner is not entitled to take off the wood, then it is taken by the public, for public purposes, the moment the road is located. When the public take the land, they take it as it is, the wood therefore should be included in the estimate of damages.

But if, by analogy, the Selectmen should be considered as having the right to allow time for the taking off the wood — the same right that the County Commissioners have, then it is contended that the plaintiff had a time allowed him — he agreed to do it, but did not — and has therefore forfeited the wood to the use of the road.

As to the surveyor's authority, he cited further, *Craige v. Mellen*, 6 *Mass.* 16.

R. Williams, for the plaintiff, insisted that in this case there was no legal location of a road.

1. There was no application *in writing* to the Selectmen to lay out the road, as there should have been. *Maine Stat. ch.* 118, *sec.* 9, 10, 11.

2. The laying out of the road and a return should have preceded the issuing a warrant to call a meeting of the inhabitants to see if they would accept. *Harlow v. Pike*, 3 *Greenl.* 440; *Kean v. Stetson*, 5 *Pick.* 494.

3. Again, there was *no notice to the plaintiff* of the laying out of the road, at the time, or before it was laid out and accepted. That this is fatal to the proceedings, is decided in *Harlow v. Pike*, before cited.

4. But if the road were legally laid out and established, the defendant would not be justified in taking away the wood as he did. The soil and trees remained the property of the plaintiff, subject only to the right of the public to make the road and pass and repass over it. *Perley v. Chandler*, 6 *Mass.* 454; *Stackpole v. Healy*, 16 *Mass.* 33; *Robbins v. Borman*, 1 *Pick.* 122; *Alden v. Murdock*, 13 *Mass.* 256.

The counsel for the plaintiff also replied at length to the arguments urged on the other side, but the opinion of the Court renders it unnecessary to notice the reply more particularly.

Parris J. at the ensuing *June* term in this county, delivered the opinion of the Court.

The defendant justifies as surveyor of highways, contending that the place where the trespass is alleged to have been committed, is a highway, duly laid out as such by the Selectmen of the town of *Sidney*, and adopted by the inhabitants of said town, as required by law; and that whatever he did, was done in the exercise of his lawful authority. The plaintiff contends that the road was not legally laid out, for various reasons. — 1st, Because there was no application in writing to the Selectmen, previous to their proceeding, and that the Selectmen are not authorized to act, except upon written request.

The act directing the method of laying out, and making provision for the repair and amendment of highways, *ch.* 118, *sec.* 9, authorizes and empowers the Selectmen of the several towns to lay out town or private ways for the use of such town only, or one or more individuals thereof, or proprietors therein. But no such town or private way can be established until the same has been reported to the town at some public meeting of the inhabitants, held for that purpose, and by them approved and allowed. We find nothing in the statute requiring any application as the basis of the proceedings of the Selectmen. The authority to them is general to lay out such town ways, as they may deem for the convenience of the town; and whenever they may judge a town way necessary, we do not perceive any thing to restrain them from proceeding, unsolicited, to adopt the usual measures preparatory to its establishment. If they neglect to do it, the statute has pointed out the mode by which the subject may be brought before the Court of Sessions; and in such a case, it is necessary that there should have been a written request to the Selectmen, as well as a refusal or unreasonable delay to lay out, to give the Court jurisdiction of the case. It has no power to cause private ways to be laid out, except in cases of refusal by the Selectmen on written request. The 10th section of the statute expressly limits the power to such cases. But there is no such limitation in the 9th section. The authority conferred upon the Selectmen by that section is general, and we do not perceive but they may proceed to lay out a town way upon a verbal request, or without any request, if they deem the convenience of the town requires it. The next objection to the legality of the road is, that the plaintiff was owner in fee of the land over which the road was laid, and that he was not notified of the laying out by the Selectmen. Although the statute does not expressly require that the Selectmen should give notice of the intended location of a town way, to those over whose land they are about to lay it, yet this Court decided in *Harlow v. Pike*, 3 *Greenl.* 438, that it is necessary to the legality of such way, that due notice be previously given by the Selectmen to all persons interested in the location, in the same manner as a committee of the Court of Sessions are bound to

do. But it is answered, in reply to this objection, that the plaintiff had no legal claim to damages, and consequently had no interest to protect; that notice to him would have been an idle ceremony, and not required by the spirit, or falling within the reason of the decision of *Harlow v. Pike.*

From the report of the facts in the case, it does appear, that the plaintiff holds the premises subject to the right of either county or town to lay out a road over the same, without claim for damages. In the deed under which he derives title, that right is expressly reserved. He does not, however, hold under the town, but under the Proprietors of the Kennebec purchase. — The town of *Sidney* never owned the fee, and, as a town, has no greater rights over or upon the land included in the plaintiff's deed, in consequence of the reservation therein contained, than it would have had if no such reservation had been made. The town has the right, by law, through its proper functionaries, to lay out and make roads over any land within its limits; and, notwithstanding this reservation, no easement is acquired by the town or any of its inhabitants over the plaintiff's land, until a road is laid out in pursuance of the provisions of law. Inasmuch as the plaintiff is not entitled to any damages for the easement, whenever the town may choose to enforce its rights, it is contended that he has no such interest as entitles him to notice previous to the laying out. The Court did give as a reason why notice was necessary in *Harlow v. Pike,* that those through whose land a town way is laid, are always more or less affected by such location, because they are entitled to damages occasioned thereby. That, indeed, is one way in which they may be affected, but it may not be the only way, and the Court lay it down as a general principle applicable to all cases, that those who are interested in the location are entitled to notice. — Was not the plaintiff interested in this laying out. We think the facts shew him to have been deeply so. In the first place, the right of way was to be taken and enjoyed without any equivalent to him from the town. It was all important then to him to postpone the laying out, and this he might do by convincing the Selectmen that there was no necessity for opening such a road, that the convenience of the people did not require

it, and that the interest of the town would be injured rather than promoted thereby. Moreover, his rights and interest might be seriously affected by the manner of laying out, and the facts shew a forcible illustration of such a case. The plaintiff's deed, which contains the reservation, conveys to him a strip of land eight rods in width and fifty rods in length. — The road laid out by the Selectmen, and accepted by the town, is four rods in width, extending the whole length and directly through the centre of the plaintiff's lot; thus leaving him, unincumbered by the road, two rods only on each side. The case does not state, but it is probable that the tract of fifty rods by eight, lies contiguous to the plaintiff's farm. Whether it be so or not, it is manifestly important to him, if the town must have a road over the whole length of this narrow strip of eight rods only in width, if one half of it must be appropriated as an easement for the public accommodation, that it should be so taken as to leave the other half in a body, rather than divide it into two narrow strips of only two rods in width each; or if the whole made a part of the plaintiff's farm, that the road should be taken from the exterior part, so as to leave the residue still connected with the farm. Is it not reasonable that the owner, whose land is to be thus cut up and rendered worthless, should have notice, that he might have an opportunity of resisting such a measure at every step, and by every legal and proper means? Common justice would seem to require that he should; and that, although the road might be laid without compensation for damages, yet that he had remaining an interest of no less magnitude, to have it so laid as not to render useless any portion of his remaining land. The party interested has a right to be heard before the Selectmen, upon the propriety of laying out *any* road over his land, and, provided they proceed to lay it out, as to the most suitable place for its location, having regard to his own interest and convenience, as well as the convenience of the town. The Selectmen are to exercise their judgment upon these questions, and the party interested, if he can have an opportunity to be heard, may be able to present such facts and arguments as will influence their judgment in his favour; but if he fail, he has then a further right to be

heard before the town in the nature of an appeal from the decision of the Selectmen. 5 *Pick.* 494. It is preposterous to say that the owner has a right to be heard upon every question touching his interest, and yet deny him notice of the time and place of hearing. The right to notice necessarily follows from the right to be heard.

In *Harlow v. Pike*, the Court say, "when the legality of a "town way comes in question, there must be proof offered that "the Selectmen gave due notice to all individuals interested in "the location;" not confining it merely to the interest arising from the right to damages, but extending it clearly to every immediate interest, such as the owner of the soil must have, even if his right to damages has been relinquished. The Court say further, "a principle should be adopted which will apply to "all owners; and we know of none so just and fair, and equi-"table, as that which requires the Selectmen to give notice to "the owners of land over which a town way is about to be "laid, in the same manner as a committee of the Court of Ses-"sions are bound to do." If it is incumbent on such a committee to give notice, as it clearly is, it is equally or more important that Selectmen should give notice, as they have more enlarged and extensive powers. The committee have no authority to adjudicate upon the necessity or common convenience of the road; — that is all settled by the Court, from which they derive their appointment, and previous to its being made. Their duty is imperative to lay out. But the Selectmen, in regard to town ways, are to determine upon the expediency and necessity of the road. Their power, in this respect, is similar in its nature to the power exercised by the Court of Sessions in adjudicating upon the necessity of a public highway. They then lay out; and in this part of their duty they exercise similar powers to those entrusted to a laying committee by the Court of Sessions. We apprehend the case is not to be found where such a committee were excused from giving notice to the owner of land over which they laid a road, because there was in his deed a reservation of right to roads, for the town or county, free from damages, or where in such a case of omission their doings were held valid.

But there is another objection to the legality of this road entitled to consideration. The warrant for calling the town meeting, at which the laying out was accepted, was dated the 27th of *February*, and the laying out by the Selectmen was not until the seventh of *March* following. The statute contemplates, first, a laying out by the Selectmen, and then the calling a meeting of the town for the purpose of considering their report. Now, if the Selectmen may issue their warrant for a meeting, previous to laying out, they may defer the laying until the day previous to, or the same day of the town meeting, and if their act of laying the road is valid without notice to the owner of the land over which it is laid, it then follows that he is to have no notice except what is to be derived from the warrant for calling the meeting. But how many individuals there are in every town that never see a warrant for town meeting. When the season arrives for the annual meeting for transacting town business and the choice of town officers, they perhaps make inquiry and attend; but meeting after meeting may be holden, at other seasons of the year, without their knowledge. If a road can be laid out the day previous to, or the same day of the meeting at which it is accepted, without any notice to the owner of the land, except what he may derive from a warrant for town meeting, how hazardous it may be to the interest of the citizens. Even if such short notice should be given, in many cases it would be unavailing. The owner might be absent, or sick and unable to make preparations to present his case before the town, whose decision is to be final, and thus his rights would be jeoparded, perhaps foreclosed, without any fault or neglect on his part. But if the statute be so construed, as to require the laying out to be completed previous to issuing the warrant for the meeting, as from the phraseology seems to have been intended, then a reasonable time must intervene before the appeal is to be heard by the town, and the party appealing, instead of being taken by surprise, will have opportunity to prepare his case, so that it may be more thoroughly understood. If he is notified of the intended laying out, he may not be able to decide whether he shall object or not, until the actual location. He may be satisfied to have it *here*, but the Selectmen

may lay it *there*, where it will be ruinous to his interest. Shall the statute be so construed that he may be compelled to pass immediately from the Selectmen to the town meeting, without any opportunity to make preparation for the exhibition of his case to those who are finally to decide upon it? It may be necessary for him to have other lines run, other routes examined, and testimony taken for the better understanding of his case; and when in controversy between man and man, for the most trifling sum, the law gives, at least, seven days for the preparation of the defence, can it be that it will permit the rights of realty to be encroached upon, and a perpetual servitude created without any notice, or a notice so short as to answer no beneficial purpose. We think not; and we are supported in this opinion by the language of the Court in *Keen v. Stetson*, 5 *Pick.* 494, where it is said by *Parker C. J.* in delivering the opinion, that, "it is clear, that the report of the Selectmen is to be made to a meeting to be regularly notified "and warned after the act of laying out," &c. The language of the statute favours this construction; it corresponds better with individual security, without impairing or prejudicing public rights or general convenience.

We do not perceive in the case any evidence of waiver of notice by the plaintiff. There is no intimation that he either knew of the laying out by the Selectmen or acceptance by the town, but the report of the Judge expressly states to the contrary; and from what is admitted as the testimony of *Perry*, it would seem that no notice was given to the plaintiff of what had been done until *December* succeeding the laying out, which was in *March*. His offer to *Perry* to cut and clear the logs away and make a winter road upon certain conditions, is no waiver of notice or confirmation of the road, notwithstanding any irregularities or omissions in the laying out. If he had actually cleared out the road and opened it for the public, it might then perhaps have been too late for him to have contested the validity of the laying out; at any rate, he could have maintained no action. But he forbore to do this, and cut out a winter road on the exterior line of his lot, three rods in width, embracing one rod of the road as laid by the Selectmen,

and two rods to the westward of it, which had been, by the laying out, separated from his farm. Whether he performed what he understood to be his promise to *Perry*, or not, it is not material to inquire. It is manifest that he was disposed to acquiesce in the opening a road for the accommodation of the town, by including as a part of it, the two rods in width, which had been excluded by the Selectmen; but that he did not acquiesce in the laying out or opening the road through the centre of his eight rod strip; and unless his conduct amounted to acquiescence, there can be no presumption of waiver of notice arising from it.

We will now consider the rights of the town arising from the original laying out, division and sale of the lots. It appears that in 1761, the tract of country now comprised within the limits of the town of *Sidney*, and adjoining the *Kennebec* river, was divided into lots by direction of the Proprietors of the Kennebec purchase, at that time the owners of the whole tract. The division was made and plan returned by one *Winslow*. The plan represents three ranges of lots; — the first range lying upon the river and extending back one mile, the second including the second mile from the river, and the third range including the third mile; so that each range was one mile in width. It is understood that there was no actual survey, except on the river, and that all the other lines of the three ranges were laid down without reference to known monuments or actual admeasurement. The plan represents a vacant space of eight rods in width between each of these ranges, as left for roads; but as there had been no actual examination or laying out of the roads, the surveyor, in addition to his return, adds, that the reservations for roads are to be altered according to the convenience of the settlers. The town road, which is the subject now in litigation, was laid by the Selectmen on one of these reservations, or range-ways, as they are now called, in the rear of front lot No. 47, which reservation had never been previously occupied as a road or way of any kind, either by the town or individuals.

Whatever rights might have been acquired by the owners of adjoining lots, it is clear that the town of *Sidney* acquired

no right of soil in these reservations. The fee either remained in the original proprietors, or passed with the grant of the lots adjoining. We do not say that a grant or conveyance of land bounded on a public highway would not carry with it the fee to the centre of the road as a part or parcel of the grant, when there were no words in the conveyance that indicated a different intention. That is a question which it will be time enough to answer when a case shall have arisen in which it may be distinctly presented. In the case before us, it is manifest that it was not the intention of the Proprietors that any part of the reservation in the rear of front lot No. 47 in the first range should belong to the second range, it being clearly excluded from that by the terms of the grant. The conveyance, by the Proprietors of the Kennebec purchase, of front lot No. 47, and the corresponding lot in the rear of it in the second range, to hold in severalty, was in 1764 to *James Bowdoin.*

After describing the front lot as fifty rods in width on the river, and three hundred and twenty poles in length, answering to the width of the first range, the conveyance proceeds with the tract on the second range, and commences at a point one mile *and eight poles* from the *Kennebec* river, thus excluding from the grant of the tract on the second range, the eight rod reservation as delineated on *Winslow's* plan. The fee of any part of the range-way did not, therefore, pass with the adjoining tract on the second range. But if the conveyance had been such that the fee in the range-way had passed with the adjoining lots, it would not relieve the defendant. In that case the plaintiff, as owner of front lot No. 47 would own to the centre of the range-way, including two rods in width of the tract on which the trespass is alleged to have been committed. If the fee did not pass with either lot by the conveyance, then it remained in the Proprietors, and is now in the plaintiff under conveyance from them. If the plaintiff owns the fee, what right has the town to disturb him in its enjoyment. If the Proprietors had expressly covenanted with their grantees for a right of way according to the reservation on *Winslow's* plan, it would not have given to the town of *Sidney*, as a town, any rights in such ways, or imposed upon them any obligations to repair, or

have rendered them answerable in damages for injuries sustained by individuals by reason of neglect to repair. Certainly not, until the road had been opened and become a public highway by *user*. The town could not open a road under a grant of way to individuals. It must resort to the statute for its authority, and the requisites of the statute must be pursued, or the town gains no rights in such a case. If then an express grant of way to individuals will not of itself give rights to the town, clearly an implied covenant would not do it; and the defendant has not contended that the reservations on the plan, and conveyances referring to them by the Proprietors, amounted to any thing more than a grant of way to the individual purchasers of adjoining lots. We do not decide that it amounts to that; but if it did, we are clearly of opinion that it gives the town no rights in or over the range-ways; unless on a regular laying out of a town or private way, it may, perhaps, bar the Proprietors and their grantees from recovering damages. When the acts were committed of which the plaintiff complains, and for which he now seeks redress, no easement over this range-way had ever been claimed by the town or adjoining occupants, for nearly seventy years; no road had been opened or travelled through it; and the defendant, as surveyor of highways, had no legal authority to enter thereon for the purpose of constructing a town road, unless such road had been legally laid out by the Selectmen and accepted by the town, according to the provisions of the statute. That not having been done, the ruling of the Judge must be sustained, and judgment entered on the verdict.

SMITH *vs.* TILTON.

A bill of sale, though *absolute* in its terms, was held to be *conditional*, on the *parol* proof introduced by *both* parties.

IN this action, which was *trover*, for a yoke of oxen, it was admitted, that the oxen originally belonged to the plaintiff, and that the defendant had converted them to his own use.

To prove property in himself, the defendant produced a bill of sale from the plaintiff, of the same oxen, dated *May* 12, 1829. He also produced a note of hand of the same date, from the plaintiff to him, for $50, which *he offered to give up to the plaintiff.*

The plaintiff then called *Asa Cutting*, who testified that, when the bill of sale and note were given he was present and heard the bargain. That the consideration for them was a loan of $50, from the defendant to the plaintiff. That the bill of sale was given to secure the payment of the note, and that the oxen were formally delivered to the defendant. That it was agreed that they were to remain with the plaintiff, and that when the defendant could wait no longer for his money, he was to give notice to the plaintiff, and if the latter did not repay the money within a reasonable time thereafter, the defendant was to sell the oxen, pay himself, and return the surplus, should there be any, to the plaintiff.

John G. Whitehouse, also called by the plaintiff, testified to the same effect.

The testimony of both these witnesses was objected to, as varying the effect of the bill of sale, which was absolute; but *Weston J.* before whom the cause was tried, admitted it.

It was further testified by these witnesses, and *Simeon Branch*, that the oxen remained in the possession of the plaintiff — and that in the winter following, they were several times borrowed by the defendant, as the property of the plaintiff, to use in getting wood, &c. — but that the last time he borrowed them, which was in *February*, 1830, he did not return them.

It further appeared, that on the 2d of *March* following, the

oxen then being in the possession of the defendant, the plaintiff tendered to him $52,50, in payment of the note and interest, the sum being sufficient for that purpose, and demanded the oxen, but the defendant refused both to receive the money and give up the oxen.

It was proved by the defendant, that prior to this period, the plaintiff had said, that he had sold the oxen to the defendant, and that he had a right to take them when he pleased.

Robert Cornforth, a witness for the defendant, testified that in *January*, 1830, he bargained with the defendant to purchase the oxen in question, for $60, or a yoke the defendant had at home, for $50, it being agreed that he was to have a year's credit, paying interest. That he went with the defendant to the plaintiff, who then had the oxen in possession. That the defendant preferred that the plaintiff should let the oxen in question be sold to the witness, and urged him to consent to it. That the plaintiff replied, that the defendant might as well give him further credit as to give it to the witness, and said that he had agreed to wait upon him till *March*. This the defendant admitted, but said it was upon certain conditions, with which the plaintiff had not complied. The plaintiff then wanted the difference between what he owed the defendant upon his note, and the sum that the witness was to pay for the oxen, to which the defendant would not consent, whereupon the plaintiff refused to let the witness have the oxen. *Cornforth* further testified, that the defendant thereupon told the plaintiff, that he must pay him his money within a week or give up the oxen in controversy, to supply the place of the yoke he had at home, which he should let *Cornforth* have.

The counsel for the defendant, contended that, if the contract was originally such as the plaintiff's witnesses stated, he could not maintain trover for the oxen; but should have brought his action for the overplus received by the defendant beyond the sum due him from the plaintiff. But the Judge instructed the jury that, if such was the contract, the defendant's lien upon the oxen was extinguished by the tender, and that he had no right there afterwards to retain or sell them. It was further insisted by the counsel for the defendant, that it was compe-

tent for the parties to vary the original contract, and that the facts testified to by *Cornforth* might be deemed evidence of a new contract, giving, in the contingency which happened, a right to the defendant to take the oxen absolutely as his own. The Judge instructed the jury that the parties might so vary the contract, but that it did not appear to him that proof of such variance, or of a new contract, was fairly deducible from the testimony of *Cornforth*, of which, however, they would judge for themselves.

If the testimony objected to, ought not to have been admitted, or if the jury were not properly instructed, the verdict, which was for the plaintiff for the value of the oxen, was to be set aside and a new trial granted, otherwise judgment was to be rendered thereon.

Wells, for the defendant.

1. The testimony of the plaintiff's witnesses ought not to have been received because it varies or contradicts the terms of the bill of sale. *Mease v. Mease*, *Cowp. R.* 47; *Dow v. Tuttle*, 4 *Mass.* 414; *Brigham v. Rogers*, 17 *Mass.* 571; *Rose v. Larned & al.* 14 *Mass.* 154. A deed, absolute on the face of it, cannot be shown to be conditional by parol. *Flint v. Sheldon*, 13 *Mass.* 443; *Hale v. Jewell & al.* 7 *Greenl.* 435; *Robinson v. McDonald*, 2 *B. & A.* 134. And this rule applies as well to simple contracts in writing as to specialties. *Stackpole v. Arnold*, 11 *Mass.* 27; *Gardiner Manufacturing Co. v. Heald*, 5 *Greenl.* 381; *Barber v. Brace & als.* 3 *Conn. R.* 9. The vendor is estopped to say he never sold the goods mentioned in the bill of sale. *Chapman & al. v. Searle, Admx.* 3 *Pick.* 38.

2. The oxen were the property of the defendant, and therefore he was not a tort-feasor. They were in his possession in *February*, when by virtue of the bill of sale, and under the terms of the special agreement, he refused to return them. — The property in the oxen then *vested* in the defendant, of which he could not be divested by the tender afterward in *March*.

3. The jury should have been instructed to deduct the sum tendered from the value of the cattle at the time of the conversion. *Jones v. Rogers*, 15 *Mass.* 399; 8 *East*, 168.

4. The plaintiff should have brought *assumpsit* and not *trover*.

Allen and *Boutelle*, for the plaintiff.

1. The introduction of the bill of sale and *note* by the defendant, under the circumstances, and the offer to give up the note, was an admission that the sale was a *conditional* one.

But if it were not so, the evidence which went to show that fact, was properly admitted. Parol evidence may be received in certain cases, to show that the whole of a contract was not reduced to writing, but that it was made with certain conditions or limitations expressly agreed on by the parties, but not contained in the writing, when the action is between the original parties. *Barker v. Prentiss*, 6 *Mass.* 430; *Field v. Nickerson*, 13 *Mass.* 138; *Storer v. Logan*, 9 *Mass.* 155.

It may be admitted in this case, on the ground of an exception to the general rule — that in all cases between the original parties the consideration may be inquired into. *Nason v. Wing*, 7 *Greenl.* 22; 1 *Paige's Rep.* 202; *James v. Johnson*, 6 *Johns. Chan. Rep.* 417; *Folsom v. Mussey*, 8 *Greenl.* 400.

This may also be considered as falling within the range of that class of cases, in which the additional terms, in part, constitute a new agreement, the former written one, being incorporated into it. 3 *Starkie's Ev.* 1048; *Munroe v. Perkins*, 9 *Pick.* 298.

The acts and declarations of the defendant, show what the contract was in this case. He recognized the plaintiff's right to keep possession of the oxen, and to use them, and claimed no other interest in them than a lien to the extent of his debt. These are sufficient and conclusive upon him. *Munroe v. Perkins*, 9 *Pick.* 298; 4 *Serg. & Raw.* 241; *Gerrish v. Sweetsir*, 4 *Pick.* 374; 1 *Johns. Chan. Cas.* 119.

The defendant most unequivocally admitted the plaintiff's rights, by *borrowing* the oxen of him so late as *February*. This affords a sufficient answer to the pretence that, before that time, the property in them had vested in the defendant.

That the plaintiff had adopted the proper remedy by tendering the amount of debt and bringing *trover*, they cited *Parkes*

v. Hall, 2 *Pick.* 206; 1 *Bulstrode*, 29; *Ratcliffe v. Davis*, *Yelverton*, 178; *Jarvis v. Rogers*, 15 *Mass.* 389.

Sprague, in reply. No case can be found, where *parol evidence*, under the circumstances of this case, has been admitted. It is said that it has been admitted where the whole of the contract had not been reduced to writing. But there it has always been, where the matter added was perfectly consistent with what was written, which is not the case here.

The pretence that there was a *subsequent* agreement including and modifying the first, has no foundation. The testimony offered was, that *at the time* the bill of sale was given, it was agreed that it should be conditional. It was an offer to prove by *parol*, that a contract was *different* from what it was *written*.

Cases have been cited to show, that the *consideration* may be inquired into though the contract is in writing. True, but the *promise* cannot be altered by parol — nothing but the *receipt*.

But if the testimony was admissible, still the plaintiff is not entitled to maintain this action. When the defendant took the oxen to sell, the debt was extinguished. When he had a right to *sell*, he had a right to *take* for that purpose; and having taken and sold, he is no longer liable for the *oxen*, but for the *surplus* merely, beyond a satisfaction of the defendant's claim, from the proceeds of sale; and for this, *assumpsit* should have been brought, and not *trover*.

The opinion of the Court was delivered by

MELLEN C. J. — The defendant contends that the oxen in question, though once the property of the plaintiff, had been conveyed by him to the defendant *absolutely*, as appears by the bill of sale. The plaintiff says they were conveyed *conditionally*, and as *collateral* security for the payment of the $50. In *Jewett v. Reed*, 5 *Greenl.* 96, this Court decided that where *both parties* proved that a bill of sale, though absolute in its terms, was intended only as collateral security for a debt due; and all was done in good faith, the transfer was a mortgage. In the case before us the *defendant* introduced the bill of sale, and also the $50 note, both of the same date, and offered to give up the note. He also introduced *Webster* as a witness, who

testified that *both* parties acknowledged, or stated, that the oxen were put into the hands of the defendant as *security* for the payment of the $50. The same fact was also proved by the plaintiff, though objected to. Admit that it was not admissible, still it would be no ground for disturbing the verdict; for the proof of the fact by the defendant himself was sufficient. All the evidence in the cause discloses that the contract was not, when made, intended as a *sale*, but a *mortgage*. Why else was the note offered in evidence with the bill of sale, and also offered to be given up. The defendant introduced evidence to show that after the bill of sale and note were given, the parties had varied the terms of the original contract by a subsequent one. It was contended, that by the proof introduced for that purpose by the defendant, he had a right to retain the oxen as his own absolute property, if the note should not be paid on demand; and that in *January*, 1830, the defendant demanded payment within one week, or that the oxen should be delivered up to him. Under the instructions of the Judge on this point, the jury were at liberty to return a verdict for the defendant; but it seems that they did not repose confidence in the proof adduced to establish this defence.

Why then is not the plaintiff entitled to recover on the facts which the verdict has established? It appears that on the 2d of *March*, 1830, the oxen then being in possession of the defendant, the plaintiff tendered to him the sum of $52,50, in payment of the note and interest, being sufficient for that purpose, and then demanded the oxen. The question was pertinently asked in the argument by the plaintiff's counsel, "If "the demand of payment of the note, made in *January*, 1830, "entitled the defendant to hold the oxen as his own absolute "property, why did he borrow them of the plaintiff in *Febru-* "*ary* following?" Is not this proof that he did not *then* consider them as his? There is no proof of any act on *his* part, *after* that time, and *prior* to the tender; so that when the tender was made, the absolute property of the oxen was vested in the plaintiff and the action is maintained.

The objection made to the verdict, as to its amount, on account of the non-deduction of the sum tendered, from the

sum found as damages, seems not to be regularly before us. No particular instruction was given or requested; nor is the objection in any mode reserved for our consideration. Accordingly, and for the reasons above given, there must be

Judgment on the verdict.

The Inhb'ts of LEEDS *vs. The Inhb'ts of* FREEPORT.

Where a minor whose parents were dead, became chargeable to the town in which he had his legal settlement; and by his consent, the overseers of the poor bound him out as an apprentice to learn a trade in another town, where he was residing as such apprentice on the 21st day of *March*, 1821, it was *held*, that his settlement became fixed in the latter town pursuant to the provisions of *Maine Stat. ch.* 122, *sec.* 1.

Whether the business of *farming* comes under the appellation of "*a trade*," within the true intent and meaning of *stat.* of 1820, *ch.* 122, *sec.* 6. — *dubitatur.*

IN this action, which was *assumpsit* to recover for supplies furnished a pauper, the following facts were agreed by the parties.

Moses Welch and family, the paupers described in the plaintiffs' writ, fell into distress in the town of *Leeds*, in *Dec.* 1831, and were supplied with necessaries to the amount of $37,87. The regular notice and answer was given and returned, and the only question in the case was, whether the legal settlement of *Moses Welch* was in the defendant town, or otherwise.

It was agreed that, said *Welch* was born in the town of *Freeport*, *June* 16, 1805, the legal settlement of his parents being in that town at the time — that in the year 1808, the father of said *Moses* died, when the family was broken up; the death of the mother following in a year or two afterward, neither leaving any property. — That, in *April*, 1811, the said *Moses* was on expense of one shilling per week to the town of *Freeport*, — and that, on the 6th of *May*, 1811, by consent of said *Moses*, he was bound out by the overseers of the poor of said town,

to one *Daniel Fogg* of *New-Gloucester*, a *farmer;* the indentures being in the usual form. That he lived with, and had his only place of residence at the house and in the family of the said *Fogg*, from said 6th day of *May*, 1811, to the 4th day of *November*, 1823, when the indentures were cancelled at the request of said *Moses*, and by the consent of said *Fogg*, and the overseers of the poor of the town of *Freeport*. — After which, and during a part of the winter and summer following, he worked with said *Fogg*, on wages. — He then left *New-Gloucester*, and did not return to tarry or labour, until 1828, when he returned with a family, and remained there until 1830. — It was agreed that he had never lived in *Freeport* since *May* 6, 1811.

If on these facts it should be the opinion of the Court, that the plaintiffs were entitled to recover, the defendants were to be defaulted and judgment entered for the $37,87, and costs — otherwise, the plaintiffs were to become nonsuit, and the defendants allowed their costs.

Sprague and *A. Belcher*, for the plaintiffs.

The settlement, which it is admitted the pauper once had in *Freeport*, has never been lost and a new one acquired in any other town.

His residence in *New-Gloucester* on the 21st of *March*, 1821, did not establish his settlement in that town according to the true intent of *stat.* of 1821, *ch.* 122, *sec.* 1. It was not intended to embrace a case of residence by any minor under articles of apprenticeship. *Charlton v. Stockbridge*, 15 *Mass.* 248; *New-Chester v. Bristol*, 3 *N. H. Rep.* 71. Certainly, not of a minor who, as a pauper, had been bound out by the overseers of the poor. During the whole period of the apprenticeship he may be considered as having *received supplies* from the town of *Freeport*, and the case, therefore, would fall within the *exception* of the *stat.* before cited, fixing the settlement of all persons in the towns wherein they resided upon a certain day. 7 *Greenl.* 499, *Appendix.* He had not the legal power to gain a settlement by residence, while a minor, not having been emancipated. The instant he ceased to be under the control of his

parents, he became subject to the control of the overseers of the poor of *Freeport*. After the binding out, the master had a control over him by virtue of the indentures, and the overseers of the poor of *Freeport* also retained a supervisory power, they being bound by statute to see that the covenants in the indentures were performed. There was, therefore, in this case, no emancipation. *Taunton v. Plymouth*, 15 *Mass.* 203.

R. Belcher, for the defendants, maintained that the pauper was *emancipated* by the death of both his parents. — That, he thereby became capable of acquiring a settlement in his own right — and did acquire one in *New-Gloucester* by virtue of his residence there on the 21st of *March*, 1821. In support of the several positions taken, he cited *Lubec v. Eastport*, 3 *Greenl.* 220; *Sidney v. Winthrop*, 5 *Greenl.* 124; *Fairfield v. Canaan*, 7 *Greenl.* 90; *Knox v. Waldoborough*, 3 *Greenl.* 454; *Bowes v. Tibbets*, 7 *Greenl.* 457; *Sumner v. Sebec*, 3 *Greenl.* 223.

He further contended that, the pauper gained a settlement in *New-Gloucester* by setting up his trade there within a year after the termination of his apprenticeship.

He also denied the power of the overseers of the poor to bind out a pauper child to learn the art of *farming*, contending that it was not a "trade," within the meaning of the statute.

Parris J. delivered the opinion of the Court.

As the pauper gained a derivative settlement in *Freeport* from his father, that settlement continues under the first section of the general pauper law of this State, *ch.* 122, providing that all settlements already gained by force of the laws of *Massachusetts* previous to the separation, or otherwise, shall remain until lost by gaining others in some of the ways pointed out in the general law aforesaid.

It is incumbent on the town of *Freeport*, in sustaining their defence, to show that he has thus lost his settlement, in that town, which he derived from his father.

It is contended in defence, that the pauper gained a settlement in *New-Gloucester*, by serving an apprenticeship and setting up his trade therein. The statute provides that "any mi-

" nor who shall serve an apprenticeship to any lawful trade, for " the space of four years in any town, and actually set up the " same therein within one year after the expiration of said term, " being then twenty-one years old, shall thereby gain a settle- " ment in such town."

The case finds that the pauper was bound as an apprentice, in *New-Gloucester*, to learn the trade of a farmer. We much doubt whether the business of farming comes under the appellation of a trade, within the true meaning of the statute.

But if farming could be considered as a trade, so that an apprentice to a farmer, to learn the business of farming, and setting up the trade and continuing it, as the statute provides, for one year, could gain a settlement, still the defence in this case is not sustained.

The pauper was to serve his master under the indentures until the 9th of *October*, 1825, when he arrived at twenty-one years of age. He left, by consent of his master, in *November*, 1823, and although he was occasionally in *New-Gloucester*, in the year 1824, yet it is expressly stated that he did not work there, after the summer of that year, until the autumn of 1828, when he returned with a family. The statute requires that he shall set up the trade within one year after the expiration of the term, being then twenty-one years old. This the pauper did not do. If the term is to be considered as ending when he left his master in *November*, 1823, no setting up of a trade could avail then, for he was still a minor but about nineteen years of age. If it be contended that the term did not expire until he became of age, then he did not set up his trade in the town within one year, for he became of age in *October*, 1825, but was not employed in any business in *New-Gloucester*, from the summer of 1824, until the autumn of 1828.

This branch of the defence, therefore, would wholly fail, even if *Welch* had been an apprentice to a trade within the meaning of the statute.

It is further contended, that the pauper lost his settlement in *Freeport*, by being in *New-Gloucester*, and residing and having his home there on the 21st of *March*, 1821, the time of the passage of our general pauper law. The following is the clause

of the statute relied upon. "Any person resident in any town "at the date of the passage of this Act, who has not within "one year previous to that date received support or supplies "from some town as a pauper, shall be deemed to have a set- "tlement in the town where he then dwells and has his home."

That this branch of the statute was intended to embrace minors, under certain circumstances, as well as persons of full age, is manifest from the phraseology of the paragraph immediately preceding it, which provides that a residence of five years shall give a settlement, provided the person thus residing be of the age of twenty-one years. The change of language indicates the intention that the one case shall be limited to persons of full age, the other not, — and such is the construction which this Court has given it in *Lubec v. Eastport*, 3 *Greenl.* 220. This Court has decided also, that it does not, in all cases require the exercise of volition to gain a settlement under this provision of the statute.

In the case just cited, the Court say, "The act of 1821 "operated on thousands, to fix their settlement in towns in "which they respectively dwelt and had their home on the day "of its passage, without any volition on their part, and even "without their knowledge. The want of understanding and "power of volition in the pauper would not seem to furnish "any objection to his capacity to gain a settlement in a town, "by his dwelling and having his home there when the act was "passed." — In *Sumner v. Sebec, ibid.* 222, the point upon which the decision turned was, whether the pauper was emancipated at the passage of the act. She resided in *Sumner*, her parents in *Sebec*. It was contended that she, although a minor, gained a settlement in *Sumner*, because her parents had emancipated her. The Court, however, held that the facts proved did not amount to emancipation, and that her settlement followed her father's. — It is evident from the case, that if emancipation had been proved, the decision would have been that she gained a settlement in her own right, in consequence of dwelling and having her home in *Sumner*.

In the case before us there was a clear emancipation. Both parents had been dead for more than ten years, and the pauper

had resided in *New-Gloucester* for nearly the whole period; had not resided, neither does it appear that he had even been within the limits of *Freeport* for upwards of nine years.

In the language of the statute, he *resided* in *New-Gloucester*, he *dwelt* there, and *Fogg*, his master, with whom he lived, says his home was there at his, *Fogg's* house, from *May*, 1811, to *November*, 1823. If his home was there, the statute fixes his settlement there, and he consequently thereby lost the settlement which he derived from his father in *Freeport*.

In *Sidney v. Winthrop*, 5 *Greenl.* 123, the Court decided that the pauper had her home in *Sidney*, although she was *non compos* and was supported there by her grandfather whose home was in *Winthrop*.

In *Holyoke v. Haskins*, 5 *Pick.* 20, the Court decided that a person *non compos*, whose derivative settlement was in *Boston*, and who owned real estate there, changed her domicil by being removed to *Natick*, although she was there supported by her guardian, an inhabitant of *Boston*; — that the domicil of a person *non compos mentis*, under guardianship, may be changed by the direction or with the consent of the guardian. The doctrine, that a guardian may change the domicil of his ward, is also recognized by *Story* in his late Treatise on the Conflict of Laws.

These cases shew that it does not require volition as indispensably necessary to establish a domicil or home, and that it may be done for those who have not the power of volition, by their friends or guardians.

It has been urged that *Welch* is to be considered in the light of a pauper during his residence in *New-Gloucester*, and the case of *Southbridge v. Charlton*, 15 *Mass.* 248, has been adduced as an authority, that where a pauper is supported in another town, different from that in which he has a settlement, it will not change his settlement.

It would be most unreasonable if it did. That case arose upon a division of the town of *Charlton*, and the pauper had a derivative settlement in that town from an ancestor whose settlement was acquired by owning real estate in the old town.

The Court decided that, although the pauper had been sup-

ported by *Charlton* within the territory that constituted the new town, yet inasmuch as he derived his settlement from those who belonged to the old town, he should be chargeable there also.

If *Welch* was chargeable to *Freeport* when the overseers bound him to *Fogg*, by that act the town was relieved, so far as *Fogg* was able to relieve it, from all accountability concerning the apprentice, and the overseers were divested of all authority over him. *Fogg* was entitled to his labour and his earnings, was answerable for his support, his instruction and his acts, so far as a master is answerable for the acts of his servant.

Welch, before he left his master, was liable to taxation in *New-Gloucester;* to be enrolled in the militia there, was entitled to receive instruction in the public schools there, and without doubt was included in the number on which was based the representation of the town in the legislature.

We do not consider him in the light of a pauper, after the binding out, but rather like an apprentice or servant bound by a guardian; and that the overseers are, *ex officio*, by the sixth section of the act, constituted the guardian for the purpose of binding out. They are authorized to bind out the children, not only of those parents who have actually become chargeable, but children whose parents shall be thought by the overseers to be unable to maintain themselves, although not chargeable. It was under this provision that *Welch* was bound. His parents, being dead, were unable to support and maintain him, and the statute vested in the overseers the power of binding him out. A very different power from that which is given to them by the 8th section, granted for different purposes and to be exercised in a very different manner. That applies to persons of full age, idlers and such as are liable to be sent to the house of correction, and it was in relation to this class only, that the observations of the Justices of this Court applied in their answer to the Governor and Council of *June* 1831. The inquiry was made only concerning such, and the reply is applicable to no others.

At the time of the passage of the act, *Welch* was seventeen years of age, fully able then and for many years previous, to

earn his support. So far from receiving supplies in any way as a pauper, at that time, he was abundantly able to provide for himself; and we think it would be doing violence to the obvious and true meaning of the statute to consider him as having a home in *Freeport*, or as receiving supplies or support as a pauper from that or any other town on the 21*st* of *March*, 1821.

According to the agreement of the parties, the plaintiffs are to become nonsuit.

SPAULDING *vs.* SMITH.

Where the defendant pleaded in abatement, the non-joinder of his co-partner, it was held that, such co-partner was not a competent witness for the defendant, to prove the fact of the partnership.

ASSUMPSIT, to recover the amount alleged to be due for the services of *Jeremiah Spaulding*, the plaintiff's minor son, while in the defendant's employ. The defendant pleaded in abatement the non-joinder of one *Amaziah Jones*, who he alleged was a co-partner, and that the promise if any was made, was made by him and said *Jones* jointly, and that he was still alive and within the jurisdiction of the Court. The plaintiff in his replication denied the co-partnership, and alleged that the promise was made by the defendant alone, and upon this, issue was joined.

The defendant to maintain the issue on his part, offered the deposition of the said *Jones*, in which he deposed, that he was a co-partner with the plaintiff, — that *Spaulding* was hired on their *joint* account, — that he so understood it, and received a portion of his wages from the deponent.

To the admission of this deposition, the plaintiff's counsel objected, on the ground of the deponent's interest in the suit. The *Chief Justice* of the Court of Common Pleas where the

cause was tried, ruled that it was inadmissible, and a verdict was thereupon rendered for the plaintiff. The cause was brought to this Court on exceptions taken by the defendant to the ruling of the Judge aforesaid.

D. Williams, for the defendant, argued that the witness was not interested in the event of this suit. It was a matter of perfect indifference to him which prevailed. If the defence succeed, then he will be answerable to the plaintiff for his proportion of the debt. If the plaintiff recover, then the witness will be answerable to the defendant for contribution. When the interest of a witness is balanced, his testimony is admissible. *York & al. v. Bluff*, 5 *M. & S.* 71; *Lockhart v. Graham*, 1 *Str. R.* 35; *Hudson v. Robinson*, 4 *M. & S.* 475.

He denied that the defendant would be liable to pay any part of the cost. Such have been the decisions in case of cosureties. *Leavenworth v Pope*, 6 *Pick.* 419; *Dawson v. Morgan*, 9 *B. & C.* 618.

But even if liable to pay a part of the cost he is still admissible as a witness. *Iderton v. Atkinson*, 7 *D. & E.* 476; *Burt v. Kurshaw*, 2 *East*, 458.

Boutelle, for the plaintiff, cited the following authorities; 2 *Starkie's Ev.* 5; 3 *Starkie's Ev.* 1084; *Young v. Bairner*, 1 *Esp. Rep.* 203; *Goodacre v. Breame, Peake's Cases*, 175; 1 *Phillips*, 48; *Hubbs v. Brown & al.* 16 *Johns. Rep.* 70; *Scott v. McLellan & al.* 2 *Greenl.* 199; *Anderson & al. v. Brock*, 3 *Greenl.* 243; *Whitney v. Cook*, 5 *Mass.* 139.

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

The only question is, whether *Jones* was a competent witness for the defendant to prove the fact stated in the plea in abatement. The defendant avers that *Jones* and he were copartners at the time the action was commenced. Should the plaintiff recover, the costs would be a charge on the joint fund, and *Jones* would be bound to contribute his proportion of their amount. He is therefore interested to defeat the present action and avoid the costs, and then they may relieve themselves from all liability to the plaintiff by a payment of the simple

debt only. On this ground we think *Jones* was properly excluded. The principles conducting us to this conclusion are in accordance with the decisions cited by the counsel for the plaintiff, which are to be found in several elementary works of established character, and considered of unquestioned authority. The cases cited by the defendant's counsel, when examined, are found not to be at variance with those principles.

The exception is overruled.

Judgment for the plaintiff.

FULLER *Judge, vs.* YOUNG.

Where the heirs of one who died intestate, supposing that all the debts had been paid by the administrator, divided the real estate among them; after which, one of them cut wood and timber on the lands to a large amount; it was *held*, in a suit against the administrator, on his bond, brought by a creditor, that it did not constitute waste in the administrator; and that he was not required to account for the value of the wood and timber cut, though such estate ultimately proved to be deeply insolvent, and though the administrator was one of the heirs, and participated in the division.

THIS was an action of debt on an administration bond, given by the defendant as administrator of the goods and estate of *David Young*. The bond was in the form prescribed by law.

The defendant pleaded the general issue, with a brief statement alleging a general performance of the condition.

The material facts in the case appeared to be these, *viz.:* On the 11*th of Jan.* 1827, the defendant duly returned into the Probate office an inventory of the estate of his intestate, wherein the real estate, including a *timber* tract at $1800, was appraised at the sum of $3937, and the personal at $1134. After the return of the inventory, and some further progress in the settlement of the estate, and when it was supposed that all the debts had been paid, a division of the estate of the intestate took place among the heirs, of whom the defendant was

one. The division was by deed, the grantees entering into possession of their respective shares. The timber tract was conveyed to *Jonathan Young* and others of the heirs, whom he afterwards bought out. The consideration expressed in the deed was $1600.

Subsequent to this division, *viz. Jan.* 21, 1830, *Green*, for whose benefit this action is prosecuted, commenced an action against the defendant as administrator, on a bond given to said *Green*, as Sheriff of the county of *Lincoln*, by the intestate and others. A verdict was returned therein, *October* term, 1830, in favour of said *Green*, for the sum of $2816,40 — on which judgment was rendered *May* term, 1831.

Immediately thereupon, the defendant represented the estate of the said *David Young* insolvent, a commission of insolvency issued, due proceedings were had, and a list of claims returned to the Probate office — among which was the claim of the said *Green* allowed in part, to wit, for the sum of $3467, 46.

The defendant was licensed to sell the real estate of his intestate, for the payment of debts, *Feb.* 28, 1832. An account was rendered by the defendant in Probate Court, *April* 25, 1832, by which it appeared that the timber lot aforesaid, sold for the sum of $299, 45 only, and that the gross amount of sales of all said real estate was $1255, 22. On the decree of distribution, *Green* received of his claim twenty-seven cents on a dollar.

The jury also found the following facts, *viz.:* That prior to the rendering of the verdict in the suit before mentioned between these parties, *Jonathan Young* had taken from said timber lot a quantity of wood and timber to the amount of $450. That between the time of the returning of the verdict and the rendition of judgment thereon, he cut another quantity to the amount of $200 — and that after the rendition of judgment and before the sale by the administrator, he cut a further quantity to the amount of $350; which last quantity was taken with the knowledge of the defendant. They also found that the defendant himself, prior to the representation of insolven-

cy and before the insolvency was known to him, cut wood on the lot set off to him to the amount of $50.

By agreement of the parties the verdict was to be put into form and amended if necessary, for such sum as the Court should be of opinion the plaintiff was entitled to recover; but if the Court should be of opinion, that the facts proved did not constitute a breach of the bond, then the verdict was to be amended and returned for the defendant.

Allen, for the plaintiff.

The defendant is guilty of a breach of the bond in this case in not administering according to law, the goods and chattels which came to his hands or the hands of others for him, after the return of the inventory. The words of the condition are, "and the same goods and chattels, *rights* and credits of the "said deceased at the time of his death, which at any time af- "ter shall come to his hands, &c. or into the hands of any "other person for the administrator, do *well and truly adminis-* "*ter*," &c.

The defendant has been guilty of *waste* in suffering timber to the amount of $1000, to be taken from the land of his intestate and disposed of. It was a *right* of the intestate at the time of his decease — after it was cut, it was goods and chattels. The defendant might have seised and sold it, and it was his duty so to have done. The timber when severed was personal property, and should either have been seised, or sued for in trespass or trover.

The administrator had even the legal custody of the lands of the intestate, so far as to preserve them for the payment of debts. The *real* and personal both, are made assets. 1 *Maine Laws*, 227, *sec.* 1 & 2. This statute is tantamount to a devise to an executor to sell for the payment of debts. It is a legislative appropriation, but requiring *a license* to render it certain that the necessity for a sale exists, and that the preliminary steps have been taken.

At all events the timber *as soon as it was severed* from the land, was the property of the administrator in trust, to be administered according to law. Suppose an execution to have

issued against the goods and estate of the intestate in the hands of the administrator, might not this timber have been seised as the goods of the intestate? 1 *Maine Laws*, 235, *sec.* 19. And if insufficient, might not the land have been levied on? (supposing no insolvency.) And would not the administrator be notified to choose an appraiser? *Hambleton v. Cutts*, 4 *Mass.* 349. The law presumes the land and goods in his hands. The estate being insolvent, the administrator is not the less responsible, and when he himself represents it so, he is bound to take the utmost care of what there is.

The suit of the plaintiff which caused the insolvency of the estate was commenced in *Jan.* 1830, when most of the timber was standing. The administrator might then have forbidden any further cutting, having good reason to suppose that the estate would prove insolvent. But he not only neglected to do this, and to reclaim the timber after it was cut, or the avails of it, but he licensed the cutting. His deed with the other heirs to *Jonathan Young*, though it ultimately proved to be void, operated as a license to cut. He gave it at his peril. *Prescott Judge v. Pitts*, 9 *Mass.* 376; *Mansfield v. Patterson*, 15 *Mass.* 491; *Royce v. Burrell*, 12 *Mass.* 395; 1 *Dane's Abr.* 590; *Toller's Exr.* 424; 1 *Dane's Abr.* 583; *Walker v. Hill*, 17 *Mass.* 380; *Fox v. Paine*, 16 *Mass.* 129.

Sprague, for the defendant.

An administrator has nothing to do with the real estate of his intestate, except when wanted to pay debts. By the license from the Probate Court he acquires a mere naked right to sell. Immediately upon the death of the intestate, the heirs have a right to the possession, control and income of the real estate. And though the estate be insolvent, they have a right to the rents and profits until after a sale. These never were a part of the estate *of the intestate*. *Heald v. Heald*, 5 *Greenl.* 387; *Butler v. Ricker*, 6 *Greenl.* 268; *Henshaw v. Blood*, 1 *Mass.* 35; *Deane v. Deane*, 3 *Mass.* 258; *Drinkwater v. Drinkwater*, 4 *Mass.* 354; *Willard v. Nason*, 2 *Mass.* 438; *Gibson v. Farley*, 16 *Mass.* 280; *Stearns v. Stearns*, 1 *Pick.* 157.

But if the power resides in the administrator, as contended

by the plaintiff's counsel, still the exercise of it is *not covered by the bond*. *Nelson v. Jaques*, 1 *Greenl.* 139; *Nelson v. Woodbury*, 1 *Greenl.* 254; *Freeman v. Anderson*, 11 *Mass.* 192.

But if any action can be maintained, it can only be after the administrator has been *cited* to account. *Potter Judge v. Titcomb*, 7 *Greenl.* 302. The property with which the defendant is sought to be made chargeable, was either real or personal. If it was real, then by the authority of the cases cited, it is most manifest, that the defendant has nothing to do with it. If personal, then he should have been cited before action brought, on the authority of *Potter v. Titcomb*.

Again, it is contended that this action cannot be maintained for the benefit of one creditor alone. It should have been for the benefit of *all* the creditors. *Newcomb v. Wing*, 3 *Pick.* 70. If this action be sustained, the whole fruits of it go to *Green*, the plaintiff, who is not entitled to it, — the fund is a common one, belonging to *all* the creditors. *Coffin v. Jones*, 5 *Pick.* 61.

Allen, in reply. The cases cited by the counsel for the defendant seem to have followed the *dicta* in the English books, whose principles are the offspring of their feudal tenures, without sufficiently regarding the change wrought by our statutes, and which is referred to by the Court in the case of *Royce v. Burrell*. In England, the *personal* estate only is to be administered by the executor or administrator — the *real* descends to the heir. *There*, a creditor cannot levy on real estate an execution against the administrator. The real estate is not liable except to creditors by specialty, and then only in a suit against the *heir*. Here it is otherwise. "The administrator has the "whole control of the real and personal estate both, under the "regulation of the Probate office, so far as may be necessary "to raise a sufficient fund for the payment of debts," according to the authority of *Royce v. Burrell*.

Besides, in *Henshaw v. Blood*, the only question necessary for the Court to decide was, whether an administrator is bound to *inventory* real estate. The case of *Dean v. Dean*, decides only that an administrator could not sell the real estate for any other purpose than to *pay debts*. The case of *Drinkwater v.*

Drinkwater, does not decide the points raised in this case. The case of *Gibson v. Farley* has no application to this, because the plaintiff is not seeking the ordinary rents and profits, but to charge the administrator for *waste*. *Heald v. Heald*, has no application for the same reasons.

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

This seems to be an action of a new impression, and an attempt to extend the construction of the condition of the bond, on which the action is founded, beyond the limits established by any decided cases to which our attention has been called in the argument of the cause, or which have fallen under our observation before or since. By the report it appears that the defendant duly caused an inventory to be made and returned to the Probate office, of all the estate of the intestate, including the lots of land on which the several parcels of timber and cordwood, mentioned in the verdict, were cut, after the intestate's decease. The present action is one of the consequences of the unexpected insolvency of the estate, occasioned by the recovery of a judgment to a large amount, by the said *Green*, against the defendant as administrator. Prior to the commencement of that action, the heirs had made an arrangement among themselves as to the division of the real estate, and entered into possession. It further appears, that as soon as this Court had rendered judgment in the above-named action, a commission of insolvency was issued by the Judge of Probate on the representation made by the defendant, on which due proceedings were had and a final decree of distribution passed. It seems that timber of the value of $350 was cut on the timber lot *after* the above judgment was rendered, *with the knowledge* of the defendant: and about $50 were cut *by the defendant himself*, before the insolvency was known. On these facts is the defendant liable on his bond? At the time the intestate died, the trees in question were all standing on the land and *then* were a part of the *freehold*, and thus were inventoried as a part of the land. They never *could*, and certainly never *did* become *personal* property until they were severed from the freehold. This principle is undisputed. The condition of the

bond is, after describing the property required to be inventoried, " and the same goods and chattels, rights and credits of " the said deceased, *at the time of his death*, which at any time " after shall come to the hands and possession, or into the hands " and possession of any other person or persons for the said (ad- " ministrator) do well and truly administer according to law." The counsel for the plaintiff contends that as the trees, *when standing*, were the property of the deceased — and *real* estate, that they were his *personal* property, as soon as they were felled and severed from the freehold: still they were not *personal* property of the intestate *at the time of his decease;* — is the defendant then accountable on his bond for its amount?

It is urged that he should have seised the timber and cord-wood as soon as they became personal property, by a severance from the freehold; and that his neglect so to do, was unfaithful administration and a breach of the condition of his bond. By ascertaining the *rights* of the defendant, in his character of administrator, in the circumstances above stated, we can most readily decide what were his *duties* and *liabilities*.

It is a familiar and established principle of law, that when a man dies seised of real estate and intestate, it descends to *his heirs*, subject to the payment of his debts, if there be a deficiency of personal assets. His administrator has no right to enter into the lands or take the profits. He has *no interest* in them, but a *naked authority* to sell them on license to pay the debts. An administrator has no interest in the real estate, unless mortgaged to the intestate, he has no right of entry into it, and cannot bring any real action to recover seisin and possession. The foregoing principles are distinctly laid down by *Parsons C. J.* in *Drinkwater v. Drinkwater, Admr.* 4 *Mass.* 354. And in *Nason v. Willard*, 5 *Mass.* 240, the same Chief Justice says, " The " executor or administrator has in *no case, virtute officii*, a right " to the possession of the deceased's lands." — If they are wanted for payment of debts, the administrator may sell them, when in possession of a devisee or of an *heir*, his heirs or assigns; — see also *Gibson & al. v. Farley & al.* 16 *Mass.* 280. These principles are firmly settled. Nor can an administrator maintain an action, in his official capacity, of trespass *quare*

clausum fregit. Such actions must always be brought by the heirs and by them only. On the death of the intestate, in the case before us, all his lands and real estate immediately descended to his heirs. They had a right *immediately* to enter into possession; such possession was lawful, and such a division as they made among themselves, subject to the right of the administrator to sell them to pay the debts, when duly licensed for the purpose: and they had a right peaceably to hold such possession, until their conditional estate was defeated and taken away by such sale. What more then could the defendant have done than he has done?

As to the timber and wood cut on the timber lot, it was not cut by the *defendant* or his *consent:* though a part of it was with his *knowledge;* but how could he have prevented it? He had no power to do any thing more than take immediate measures to obtain authority to sell the land; and all this was regularly done, and the land sold. The trees descended with the land, and as a part of it, to the heirs; and a portion of them was appropriated by them before a sale was made, or even suspected to be necessary. Such was the fact also with respect to the trees and wood cut by the defendant himself, before the estate was supposed to be insolvent. It has been settled in the above cited case of *Gibson & al. v. Farley & al.* and in *Heald v. Heald,* 5 *Greenl.* 387, that in case of an insolvent estate, the creditors are entitled only to the estate of which the intestate *died seised;* and not to the *rents* and *profits* after his death; for these belong to the *heirs.* In the above cases, however, the Court were deciding in respect to the *annual rents and profits,* which had no *existence, as property,* in *any form,* during the life of the intestate, as the trees had in the case under consideration; though not as *personal* property. Whether any distinction can be made between the two cases, has been a subject of interesting inquiry, in view of those consequences which might, in certain circumstances, be productive of manifest and extensive injustice. If, for instance, the heirs at law of a person who dies seised of a tract of woodland, but insolvent, can strip the land of all its wood and timber, before an administrator can so far proceed in the settlement of the estate

as to procure a license to sell it for payment of debts; or if the administrator himself, after the decease of the intestate and the return of an inventory, including the land supposed, should cut down the timber and wood and appropriate the same to his own use; and, if in neither case the creditors can avail themselves of the value or proceeds of such timber and wood, because, in the former case, the administrator has nothing to do with *real* estate of an intestate, except to sell it under license, and because the intestate did not die possessed of it as *personal* estate; and because, in the latter case, it was not personal estate, until he made it such, after the intestate's death; if, we say, these principles are legally founded, the consequences may prove serious to thousands: for though, in the latter case, the *heirs* might sue the administrator for the trespass and recover damages, still, such recovery *might*, and generally *would* be of no use to the creditors. We suggest these ideas and present these views, as worthy of some consideration, and also as calculated to create some perplexing doubts and difficulties. But in this cause we do not feel it necessary to give any opinion on either of the supposed cases: for if the administrator in the present case, *is not* liable on his bond to account for the value of the timber and wood, because the *land* was duly inventoried and sold, and the proceeds of the sale accounted for; and because such timber and wood were never the *personal* estate of the intestate, then it clearly follows that the action cannot be maintained. On the contrary, if he *is* liable to account for the value of such timber and wood, according to the true construction of his bond, as property that has since the return of the inventory come to his hands and use, in the shape of *personal* property, and of which the creditors have received no advantage from the inventory, still, the defendant cannot be held to account, until he shall have been cited by the Judge of Probate for the purpose: as this Court has decided in the case of *Potter, Judge v. Titcomb*, 7 *Greenl.* 302. In that case the Court adjudged the replication insufficient, because the plaintiff in assigning a breach of the condition of the bond, did not allege that, before the commencement of the action, *Titcomb* had been cited by the Judge of Probate to render an account of

the property which was stated to have come to his hands and for which he had not accounted. In such cases our statute expressly requires a citation as a necessary preliminary to the maintenance of an action on the bond. Thus it appears that, *quacunque via data*, the action cannot be sustained; and according to the terms of the report, the verdict is to be so amended as to stand a verdict for the defendant.

COWAN *vs.* ADAMS *& als.*

A. authorized B. his agent, to sell certain logs belonging to the principal, and expressly instructed him, that in every event, the logs were to *remain the property of the principal until paid for, or amply secured.* B. sold, permitting the property to go into the possession of the purchaser, without being paid for, and for security, the purchaser agreeing that the principal should have a *lien* upon the logs until paid for. *Held*, that the sale was not obligatory upon the principal, it not having been made in conformity to the authority given; the supposed *lien* without *possession*, yielding but an imperfect security, and differing from that contemplated by the principal.

The statute of frauds relating to contracts for the sale of goods, &c. of the price of $30 or more, cannot be set up in defence, except by him who is sought to be charged by such contract, or his legal representatives.

THIS was an action of trespass for taking and carrying away a quantity of pine mill logs. It was proved that they were cut by the plaintiff in the winter of 1828–9, on a township of land then owned by *John P. Boyd*, which he purchased in *July*, 1828, of the State, in pursuance of information derived from the plaintiff, who had spent considerable time, and incurred some expense in exploring it.

Immediately after *General Boyd* bought the township, he requested *Edmund T. Bridge, Esq.* to take the general superintendance of it, and instructed him to give the plaintiff the preference as a purchaser of the timber, if he would give as much as any other person. He further directed him, to receive proposals for the sale of the timber, and to report them to him. The plaintiff offered one dollar per thousand, which *Boyd* de-

clined, saying it was worth $1,50. *Bridge*, however, testified that, the best offer he received from any other person was 75 cents per thousand.

Aug. 22, 1828, *Boyd*, in a letter to *Bridge*, said, " After re- " ferring to your several advices, am fully decided that the " sooner arrangements are concerted for the sale of stumpage " the better; the mode, security, &c. has been submitted for " your judgment. I should hope to obtain more than one dol- " lar, *but you will do the best for my interest.*" " *Contracts* " *should be so made that the logs are to be my property until* " *paid for.*"

Late in the fall of 1828, *Bridge* informed *Boyd*, that the plaintiff was cutting timber on his township, and *Boyd* thereupon wrote to him, to seize the logs — but *Bridge* replied, that he did not think it for *Boyd's* interest to seize the logs then, but to avoid giving the plaintiff any license or permission and thereby hold him and his logs in his power, and that he might settle with him in the spring, having the logs scaled, and taking pay for the standing timber. To this *Boyd* assented, or referred the matter to the discretion of *Bridge*.

In another letter from *Boyd* to *Bridge*, dated *Dec.* 23, 1828, he said, " Refer to my advice of *Aug.* 22, — the logs *always to* " *remain my property until ample security or payment is made.*"

In *April*, 1829, *Bridge* and the plaintiff, agreed upon one *Joseph Norris* to scale the logs, who did so, and made his report to *Bridge*, and he to *Boyd*. For the timber thus cut and scaled, *Bridge* settled with the plaintiff at one dollar a thousand, deducting 15 per cent. from the aggregate scale. It was agreed that *Boyd was to have a lien upon the timber until paid for, according to the plaintiff's contract. Boyd*, after some objection, finally paid *Norris* for one half his services, as had been agreed between *Bridge* and the plaintiff. The latter was to take charge of the logs and run them to market, subject to *Boyd's* lien. The sum to be paid by the plaintiff was $850, 67, which was predicated on *Norris's* survey. None of the logs were run down in 1829. In 1830 the plaintiff run down a raft, out of the proceeds of which, he paid to *Bridge* $600 on account of his contract, that sum being in the opinion of *Bridge*, the

amount of the stumpage on the timber thus got down that season. Of this amount, $500 was remitted to *Boyd*, and for the balance *Bridge* gave him credit in account.

It appeared that no other adjustment was made, or payment received from the plaintiff, until the death of *Boyd*, which happened in *November*, 1830.

Bridge stated, that it was his intention and expectation that *Boyd's* lien should be preserved until he was fully paid.

On the part of the defendants, was introduced the deed of *Boyd* to *Tarbell*, one of the defendants, dated *Aug.* 23, 1830, of the township on which said logs were cut, and *Tarbell's* deeds of one third to each of the other defendants. — Also the deposition of *Samuel Adams*, who testified that he, as the agent of *Gen. Boyd*, effected the sale of the township to *Tarbell*. In one conversation he had with *Boyd* upon the subject, he asked him what he intended to convey. *Boyd* replied, that he meant to convey with the township, all the logs and timber standing or cut, and after the deed was given, he offered to give a separate instrument to that effect, but it was not done.

It was proved that the logs in controversy, at, and after the giving of this deed, were lying within the limits of the township where they had been cut, and where they were taken by the defendants' agent and run down to a market by the express direction of the defendants after they had taken possession of said township, which is the trespass complained of.

It was contended by the defendants' counsel, that the plaintiff never had any property in the logs sued for — that *Bridge* had no authority to transfer them to him — and if he had, it was only upon and after actual payment of the stumpage, which had not been entirely paid — and that *Bridge* never did undertake or agree to transfer the logs to the plaintiff.

But the presiding Judge instructed the jury that the authority given by *Boyd* to *Bridge* was sufficient to enable him to transfer the interest of *Boyd* in the logs, and that the letters that passed between him and *Bridge*, the contract of the plaintiff, and the testimony of *Bridge*, were sufficient evidence that the authority was fairly exercised, and the property in the logs transferred to the plaintiff subject to the lien of *Boyd*. — The

defendant's counsel further contended, that by the deed to *Tarbell*, and the agreement proved by the deposition of *Samuel Adams*, these logs were conveyed to the defendants. But the jury were instructed, that neither that deed, nor the agreement, could operate to convey logs to the defendants, which *Boyd* had either by himself or agent, previously sold to the plaintiff. — It was further contended for the defendants, that the logs being upon their land, and thus in their possession, they could not, under the circumstances, be trespassers for taking and removing them. But the Court instructed the jury, that although the logs were on the land, they were not the property of the defendants, that what they did by their agent, *Gibson*, was a violation of the rights of the plaintiff that made them trespassers, and that they might be charged in this form of action.

If the ruling and instructions above, were not correct in the opinion of the whole Court, the verdict, which was returned for the plaintiff, was to be set aside and a new trial granted, otherwise, judgment was to be rendered thereon.

Allen and *Sprague*, for the defendants.

1. The logs in question lying upon the land at the time of the conveyance, passed by *Boyd's* deed to *Tarbell*. *Farrar v. Stackpole*, 6 *Greenl.* 154; *Lassell v. Reed*, 6 *Greenl.* 222; 4 *Dane's Abr. art.* 9. If not, the circumstances testified to by *Samuel Adams*, are tantamount to a bargain and sale.

2. *Bridge* never *sold* to the plaintiff, — at most, it was a mere contract *to sell*.

3. But if he did sell, *Boyd* retained a *lien* upon them, or else the sale was void, *Bridge* in that event, having exceeded his authority. He had no authority to sell without receiving *payment* or *security*. He had no authority to sell without retaining a *lien* on the logs until payment.

4. But the defendants are not liable in *trespass*, however they may be in *trover*, or *assumpsit*. The land was theirs — the logs were on it — and they might lawfully take and remove them from the land.

Boutelle and *Potter*, for the plaintiff, argued against the admissibility of *Adams'* deposition on the ground, that a grantor

cannot by his declarations, made subsequent to the grant, impair or affect it. *Bartlett v. Delplat*, 4 *Mass.* 702; *Clark v. Wait*, 12 *Mass.* 439.

But if admissible, and it prove a sale, then contend that the sale would be within the statute of frauds, and so nothing passed to the defendants.

Bridge was fully authorized to sell, and did sell to the plaintiff. *Boyd*, in his letter of *Aug.* 22d, 1828, directs *Bridge* to do the best he could, thereby investing him with a general authority.

But if *Bridge* had no precedent authority to make the sale in the manner he did, yet if *Boyd* knew it, as it seems he did, and made no objection, as it seems he did not, it may be construed as a confirmation of the sale. *Frothingham & al. v. Haley*, 3 *Mass.* 70.

In this case, however, there was not merely a silent acquiescence in the doings of *Bridge*, but an express ratification, by the appointment of *Norris* to scale the timber, and afterward receiving the pay for it in part.

That the plaintiff has a good cause of action, and that trespass is the proper remedy, they cited further, 5 *Dane's Abr.* 559; 9 *Pick.* 552; *Cowing v. Snow*, 11 *Mass.* 415; *Petersdorff's Abr.* 15, 123; 3 *Stark. Ev.* 1490; 2 *Saund. R.* 47, *note c.*; 1 *Chitty on Plead.* 48.

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

Mellen C. J. — The plaintiff claims a right to maintain this action against the defendants, and recover damages for the alleged trespass by them committed, in virtue of a contract made with *Bridge* as the agent of *Boyd*, in *April*, 1829. It appears that the logs, respecting which the contract was formed, had been *before* that time cut by the plaintiff, *without permission*, on *Boyd's* land, and were *then* lying there. It is important to ascertain the *nature* and *extent* of the *instructions* and *authority given* by *Boyd* to *Bridge*, *in relation to the logs* in *question*; and in the next place, the *nature* and *consequences* of the *contract* as made, *if made* in *conformity* to the *instructions*

and *power* given by *Boyd* to his agent. The evidence as to the nature and extent of *Bridge's* authority is principally derived from *Boyd's* letters to him; for *Bridge*, in his testimony, speaks of no other or verbal instructions, though he describes them in the manner in which he seems to have understood them in making the contract with *Cowan*. In *Boyd's* letter of *August* 22d, 1828, which has almost exclusive reference to the logs in question, he says, as to the disposition of them, "contracts "should be so made that the logs are to be *my property until* "*paid for*." In another letter of *December* 23d, 1828, he says, "*Refer to my advice* of *August* 22d, the logs always to remain "*my property* until *ample security* or *payment is made*." Again, in his letter of *April* 27th, 1829, about the time the contract was made, he says, "I have your favour of the 24th. The care "of my property in *Tom Hegan*, was committed to your legal "knowledge, *with my several advices*. 1. To request your fath- "er's advice respecting the trespass of *Cowan*.—Next, that "payment for all logs cut should be made in *June*; and, *to* "*hold the logs until absolutely paid for*." In no one of his letters is any authority given, to make any disposition of the logs, by which the *property* of them should pass to *Cowan*, until they should be *fully paid* for. It is contended by the counsel for the defendants, that the contract made by *Bridge* was not justified by his instructions; and that, as they claim under *Boyd*, they are interested in this question, and, of course, are entitled to contest the validity of the contract, as made by *Bridge* and *Cowan*. And they further contend that the contract, as made, amounts to a *transfer of the property* of the logs to *Cowan*, and that a *lien* only is reserved to *Boyd*, upon the logs, as security for payment; and that *such a lien*, unaccompanied with a *possession* of the logs, was of no use to *Boyd* or of any legal effect, whatever the parties might then have supposed. It here becomes necessary for us carefully to examine the alleged distinction, and the rights which *Cowan* would have had, in respect to the logs in question, had the contract been made in the spirit and terms of the instruction; and also what are his rights, according to the terms of the contract as stated by *Bridge*, in his testimony. His own words are, "It was agreed that *Boyd* was

"to have a *lien* upon the timber, until paid according to the "plaintiff's contract." — He adds, that *Cowan* "was to take "charge of the logs and run them to market, *subject to Boyd's* "*lien.*" If there is a material distinction between the contract *as made*, and as it was the *duty of Bridge to make it*, in pursuance of his instructions, in regard of the legal rights of *Cowan* under the contract, then *Boyd* was not bound by it, and *Cowan* acquired no rights under it, unless *Boyd* afterwards ratified and sanctioned the contract, as made; of which fact there is no evidence before us. This is a principle of law perfectly familiar. *Paley on agency*, 150, 151. The parties to a contract are always supposed to have some object *in*, or some expected advantage *from*, the insertion of the stipulations and provisions it contains. In giving his instructions to *Bridge*, *Boyd* must have considered the logs as unsafe, under the absolute control of *Cowan*, as his letters distinctly show, and as liable to be seised by *Cowan's* creditors; the object of both parties must have been to secure *his* interests against that peril, in a manner deemed legal and sufficient. In the action of *Waterston & al. v. Getchell*, 5 *Greenl.* 435, the nature of such a contract as was intended by *Boyd* has been the subject of examination and decision by this Court. The facts were these: The plaintiffs entered into a contract with *Robinson*, by which they granted him permission to enter upon their tract of land and cut and carry away therefrom, pine timber, which was to be floated down to certain specified places. The contract contained a clause, "that "the ownership of all the timber so cut, how or wherever sit-"uated, should be and continue in the hands of *Waterston & al.* "until all sums due them, &c. shall be paid and discharged, and "all the conditions of this agreement fulfilled." — *Robinson* sold the timber to the defendant, who knew of the reservation, and the plaintiffs recovered against him. Suppose the contract had been made as *Boyd* directed — the property to remain in *him* till payment, (which has never been made:) how could *Cowan* be viewed, in a legal sense, any thing more than the *agent* or *servant* of *Boyd* in running the logs to market. In such case the possession of *Cowan* would have been the possession of *Boyd*, for the purposes of protecting his own rights, reserved to

him by the contract. On what principle, then, can the plaintiff maintain the present action and recover damages, equal to the value of the timber? If he can so recover, of what use is the cautionary proviso in the contract, as to *Boyd's ownership* of the logs till paid for? The whole benefit of it is lost at once, and it is taken from him in direct violation of the property of the owner, *Boyd*, and *contrary* to the *express agreement* of the parties, made for the sole purpose of protecting it from violation. The design was to leave the *property* in *Boyd*, to prevent *Cowan* from disposing of it as *his own* property, or its being attached or seised on execution by his creditors, and in either case, that he might have it in his power, by asserting his rights, to reclaim the property for his own use. His object was to have the legal control of it and of its avails. The contract *authorized to be made*, was a legal one.

But in the manner the contract was made by *Bridge*, if *Boyd* was bound by it, then the *property* of the logs was *transferred* to *Cowan*, subject, it is said, to the *lien* of *Boyd* for the amount due. But on this principle there was no *lien;* for the logs were in the possession of *Cowan*. "No *lien* can be *acquired*, unless "the property on which it is claimed, come into the possession "of the party claiming it." *Kinlock v. Craig*, 3 *T. R.* 119; *Whitaker on Lien*, 65; *Portland Bank v. Stubbs & al.* 6 *Mass.* 462. Nor *continue* any longer than his possession of such property continues. *Jones v. Pearl*, 1 *Stra.* 556; *Doug.* 97; 1 *East*, 4; 7 *East*, 5. The consequence of which must be, that the absolute property vested in *Cowan*, contrary, not only to the repeated directions of *Boyd*, but the idea and intention of *Bridge*. However, upon a full view of the facts of the cause, touching this branch of it, and the principles of law applied to them, we are satisfied that the contract made by *Bridge* and *Cowan* was not authorized by *Boyd's* instructions and think the presiding Judge's opinion erroneous on this point; and that the contract, therefore, must be deemed a nullity, unless it has been since ratified by *Boyd*, as we have before observed, of which we have no evidence.

The only remaining question is, whether the plaintiff can maintain the action against the defendants on his *alleged pos-*

session of the logs, without other title. If they are to be considered as *strangers*, and without any privity with *Boyd*, we think the authorities cited and many others clearly show that the plaintiff is entitled to recover; but is there not a privity existing between *Boyd*, or his heirs, and the defendants? On the 23d of *August*, 1830, *Boyd* made a deed of the township to *Tarbell*, *one* of the defendants; and he conveyed one third part of it to *each* of the *others*; and *Samuel Adams* testifies that in a conversation with *Boyd*, which was before the deed was given, he told him, after some conversation respecting logs and timber, that he meant to convey all the logs and timber, *standing or cut*, and offered to give a separate instrument for it. He had a right to do this, inasmuch as the contract, made with *Cowan* was not binding upon *Boyd*. On this principle, as the defendants claim the logs under *Boyd*, they are not *strangers*; and, of course, may defend themselves, if the sale of the property by *Boyd* to them was complete and effectual. No writing was necessary to make the sale valid. At the time, the property was lying on *his* land, and, in *his* possession: he then had a legal right to dispose of it. But it has been contended that the sale of the timber was void by the statute of frauds, *sec.* 3d, the property being sold for a price exceeding thirty dollars. To say the least of it, it seems to be a singular objection for *Cowan* to make. He was no party to the contract, nor representative of a party. The 3d *sec.* of *ch.* 53, of the revised statutes declares, that no contract for the sale of goods, &c. for the price of thirty dollars or more shall be allowed to be good, except the purchaser shall accept part of the goods and actually receive them, or give something in earnest, or in part payment, or some note in writing, of the bargain made and signed by the parties *to be charged* by such contract. Here, it is evident, that a party attempted to be charged by the contract, is the person objecting to the charge made; and in all the cases where the question has arisen, a party to the contract or his legal representative made the objection, when called on to perform his contract. Surely no person can plead infancy or the statute of limitations but a party to the contract thus attempted to be avoided, or his legal

representative. Neither *Boyd* nor his representatives are dissatisfied with the sale he has made. But, independent of the above observations, by attending to the facts in the case, we perceive that the objection is not supported by facts. When the conveyance of the township was made by *Gen. Boyd* in *August*, 1830, the timber on the land, as well as the land, passed into the possession of *Tarbell*, who made the purchase for *all* the defendants. In this manner the sale was perfected and complete. 2 *Starkie*, 609; *Searl v. Keeves*, 2 *Esp. Ca.* 598. The next spring, the defendants, by their agent, took the property and removed it, and appropriated it to their use.

On the whole, we are of opinion, that the action is not maintainable upon the evidence before us, and accordingly the verdict is set aside and a new trial granted.

HAINS *vs.* GARDNER *& al.*

One holding under a conveyance in fee, from the husband of the demandant in dower, is *estopped* from controverting the *seizin* of the husband.

THIS action, which was brought to recover the demandant's dower in certain real estate in *Hallowell*, was submitted upon the following agreed statement of facts; or such of them as the Court should be of opinion were legally admissible.

The demandant was married to *Jonathan Hains*, *Sept.* 19, 1808, and remained his wife till he died, which was *May* 4, 1829. Her right to dower in all the lands described in her writ, except a lot of nine acres called the quarry lot, was not contested. In regard to this it was agreed, that, it was parcel of lot No. 1 — one undivided half part of which lot, including the nine acres was conveyed by *John Hains*, who was the owner of the whole lot, to *Jonathan Hains*, by deed dated *April* 30, 1806. The other undivided half of said lot was conveyed by *John Hains* to *Daniel Hains*, *May* 10, 1809; and by *Dan-*

iel to *Peter Hains*, *October* 4, 1809; and by *Peter* to *Jonathan Hains*, *January* 30, 1810. On the 30th of *October*, 1807, *John* conveyed the nine acres by quit-claim to *Jonathan*, and the same day, *Jonathan* conveyed it to *Walter Powers*, who on the 21st of *July*, 1818, conveyed the same to *Dudley Hains*. After the decease of *Dudley*, *viz: May* 15, 1827, his heirs joined *Jonathan* in a submission by bond to three arbitrators, of his claim to the nine acres together with other matters, who awarded that, the heirs of *Dudley* should convey the said quarry lot to such person as *Jonathan* should appoint, on his paying to the heirs the sum of seven hundred dollars. In pursuance of this award, the said heirs conveyed the premises to *John Hains*, one of said heirs, who by appointment of *Jonathan*, *Dec.* 7, 1827, conveyed by release and quit-claim, the same nine acres, to *Levi Thing* and *Winslow Hawkes*, in equal and undivided moieties; — and subsequently and before the commencement of this action, *Hawkes* conveyed his part of the nine acres to the other tenants. On the same day, *viz: Dec.* 7, 1827, *Jonathan Hains* also conveyed by deed of warranty the nine acres to *Thing* and *Hawkes*. The consideration paid by the latter was $2400 — seventeen hundred of which was paid to *Jonathan*, and seven hundred to *John Hains*, or the heirs of *Dudley*. The deeds were all duly registered.

The case was argued in writing, by *W. W. Fuller*, for the plaintiff, and by *J. Otis*, for the defendants.

For the plaintiff, it was insisted, that the defendants were *estopped* to deny the seizin of the plaintiff's husband, by their acceptance of his deed, and claiming and holding under him. And to this point was cited, *Nason v. Allen*, 6 *Greenl.* 243; *Kimball v. Kimball*, 2 *Greenl.* 226; *Bancroft v. White*, 1 *Caines' R.* 185; *Hitchcock v. Harrington*, 6 *Johns.* 290; *Collins v. Torrey*, 7 *Johns.* 278; *Hitchcock v. Carpenter*, 9 *Johns.* 344; *Bacon v. Hinman*, 10 *Johns.* 292; *Dolf v. Basset*, 15 *Johns.* ; *Fitch v. Baldwin*, 17 *Johns.* 161; *King v. Stacy*, 1 *T. R.* 1; *Trevivan v. Lawrence & al.* 1 *Salkeld*, 276; *Co. Litt.* 352, *a*; 4 *Bac. Abr.* 107; *Com. Dig. Estop. E.*; 5 *Dane's Abr.* 383; *Milliken v. Coombs*, 1 *Greenl.* 343.

As to the favour with which the doctrine of estoppel is now regarded and the manner of applying it, he cited *Williams v. Gray*, 3 *Greenl.* 213; *Allen v. Sayward*, 5 *Greenl.* 227; *Somes v. Brewer*, 2 *Pick.* 197.

2. That, the plaintiff's husband was *in fact seised* during coverture. This is established by the submission to arbitration of all *Jonathan's claim* and *interest* in that lot, and the *award* thereon. This award establishes his interest to be seventeen parts out of twenty-four. It does not appear what evidence of his right was exhibited before the arbitrators, nor is it material to be known. Their award itself vested in him *an interest in the land*, subject to an incumbrance of $700, to the heirs of *Dudley Hains*; — it raised an *equity of redemption* in favour of *Jonathan*, on payment of that sum. This is the legal operation of the *bond of arbitration*, and the *award*, without any other act or conveyance from the parties. *Kyd on Award*, 62, *note*; *Morris v. Rosser*, 3 *East*, 15; 4 *Dallas*, 120; *Jones v. Boston Mill Corporation*, 6 *Pick.* 154; *Sellick v. Adams*, 15 *Johns.* 197; *Shepherd v. Ryers*, 15 *Johns.* 497; *White v. Dickinson*, 4 *Greenl.* 280.

It was also contended that, the bond of arbitration might be construed to be a covenant to *stand seised*, on the part of the heirs, to the *use* of *Jonathan*, in case the arbitrators should find him entitled to the land in question. And the *stat. of uses* (27 *Hen.* 8) transfers the *legal* estate to *cestui qui use*. It makes him "*complete owner* of the lands, as well at law as in equity." 2 *Black. Com.* 333. It is no objection that this bond was not founded on the consideration of blood or marriage. *Emery v. Chase*, 5 *Greenl.* 235; *Welsh v. Foster*, 12 *Mass.* 296; *Marshall v. Fiske*, 6 *Mass.* 24; *Pray v. Peirce*, 7 *Mass.* 381.

For the defendants, it was contended that, they held under *Walter Powers*, and not under *Jonathan Hains*. The latter had title in 1807 by conveyance from *John Hains*, but on the *same day* of the conveyance to him, he conveyed to *Walter Powers*. This was a year before the marriage of the demandant. And her husband has never had title to the premises since, consequently she has no legal claim to dower.

The bond of reference entered into between the heirs and *Jonathan* in 1827, was a mere *personal* obligation, and could create no title to, or lien upon the land. The arbitrators awarded that the heirs should convey to such person as *Jonathan* might appoint upon certain conditions being fulfilled — but in no event was it to be conveyed to him. — This created a mere personal obligation which might be enforced by a suit on the bond, on their refusal to convey, after a performance of the conditions — but could not operate by its own force to divest the title of the heirs. These personal obligations however, created by the bond and award, were terminated by the conveyance to *Hawkes* and *Thing*. The heirs held the estate after the award as they did before, in their own right, and not as trustees or mortgagees. There was no interest in the land which in any event could result to *Jonathan Hains*. The paying a part of the purchase money to him was in accordance with the award under the submission, and was a discharge of the award and nothing more.

Nor could the entering into this arbitration by bond, be construed into a covenant to *stand seised to uses*, any more than could the giving of a note of hand. Nor could the award, whether it followed or did not follow the bond, create an equity of redemption. If A. pay to B. the price of a farm, to be conveyed to C. and it is conveyed to C. without any further reference to A. could this create an equity of redemption, or amount to a covenant to stand seised to uses? No more could *Jonathan Hains* acquire an interest or title in the land in question by the bond and award.

But it is a sufficient answer to this action to say, that there was *no seizin* in the husband during coverture, nor any *right* to such seizin. This is an indispensable requisite of dower. In *Co. Litt.* 153, *a*, it is said, " seizin imports the having possession " of an estate of freehold, or inheritance, in lands or tene- " ments." The case here finds no possession, no estate of freehold or inheritance. In *Stearns on Real Actions*, 51, *2d ed.* we have a general rule by which to determine the wife's right to dower, so far as relates to the thing. " It must be such an " inheritance, that the issue which may be born during the mar- " riage, shall inherit as heirs." Would not the award of the

arbitrators in this case have gone to the administrators as a chattel, had it not been fulfilled? Again, the right to seizin must be a *present right*, depending on no contingency. *Stearns on Real Actions*, 2*d ed.* 182, 258, 285. The question being upon the seizin or want of it, in the husband, the burthen of proof is on the demandant; and if the case does not establish the former, it is not to be presumed.

But it is said, that, the defendants are *estopped* to deny the seizin of the husband. The doctrine contended for, is not that the husband's deed is some *evidence* of his having an interest in the land, but goes the length of excluding a *perfect title*, and establishing an entirely spurious one in its stead, and that too against the acts and protestations of those holding the estate.

This case differs from that of *Nason v. Allen*, inasmuch as there has been no claiming or holding by the present defendants under the husband's deed. Whereas in that case the tenant had *claimed* in a suit upon the mortgage, under the mortgagee, and still *held* his title under the mortgage. There is this same radical and essential difference betwixt this case, and all the other cases cited for the plaintiff. In the case at bar there was no title or interest conveyed by the husband, he having none to convey. The deed has answered the grantees no purpose whatever. It has had no operation or effect in their favour, and it should not be permitted to have any against them.

But further, it may be said that the present defendants are strangers to that deed, and it is said in *Co. Litt.* 352, *a.* that, "a stranger shall neither be bound by, nor take advantage of, "estoppel." A man is a stranger to a deed when he does not claim under it, though he may claim under the same grantor, for he may have a better title. *Co. Litt.* 265, *b*; 4 *Com. Dig.* 8; *Fairbanks v. Williamson*, 7 *Greenl.* 100; *Goodtitle v. Moore*, 3 *T. R.* 365.

Again, estoppel operates only by way of *admission*, and there is no case in which an admission operates to bind a stranger to the admission unless it affects the title. If the admission does not divest the title to the land, it does not operate in the hands of the grantor to him that made it. A judgment, a levy under execution, an admission by deed, under the hand and seal of

the person owning the estate prior to the conveyance, operate as an estoppel against him, and all who claim under him, having notice; because these operate on the *estate*, and divest the title. But whatever is matter of admission, matter of evidence, however strong, unless it operate to divest the title does not operate as an estoppel against a stranger to the admissions. Admissions are evidence, and evidence must depend upon its application and operation for its effect; but whatever depends on inference, argument or deduction, does not afford matter of *estoppel*. *Adams v. Moore*, 7 *Greenl.* 89. "It must be cer- "tain to every intent." *Co. Litt.* 353, *f.* In this case, the only effect of taking the deed, that could be legitimately deduced is, that *Hawkes* and *Thing* supposed the husband might have some interest in the land. If it be said that *Hawkes* and *Thing* cannot deny the taking of the deed, they may reply that nothing passed by the deed. *Wolcott & al. v. Knight & als.* 6 *Mass*, 418; *Williams v. Jackson*, 5 *Johns.* 489. So, though it be said, that a person shall not aver against a record, or deny his own deed, yet he may aver against the *operation* of the record, and against the *effect* of his own deed. 1 *Roll. Abr.* 862; *Hayne v. Maltby*, 3 *T. R.* 438. The true principle is, to judge of the *effect* and *operation* of the act; and if it be inconsistent with any other inference, it may operate as an estoppel — but where a *paramount* title can be shown, there is no estoppel.

The reason of estoppels is said to be to avoid circuity of actions, and where there can be no circuity of actions there can be no estoppel. *Co. Litt.* 446, 4; *Dane's Abr. ch.* 124, *art.* 6; 14 *Johns.* 193. Here no circuity can be prevented. And if one cannot take a deed to secure himself against a pretended claim for fear of weakening by its defects his own title, it would operate to multiply law suits, rather than to prevent them. This subject is very properly commented on in the case of *Fox & al. v. Widgery*, 4 *Greenl.* 214. The mere taking a deed of precaution shall not prejudice the title. *Porter v. Hill.* 9 *Mass.* 34; *Blight's Lessee v. Rochester*, 7 *Wheat.* 547.

At the subsequent *June* term in this County, the opinion of the Court was delivered by

PARRIS J. — The plaintiff demands dower in certain real estate which formerly belonged to her husband, and her right is not contested except so far as relates to a lot of nine acres, called the quarry lot. Her claim to dower in this tract is resisted on the ground that the husband was not seised thereof, during coverture. But the plaintiff contends that the tenants are estopped to deny her husband's seizin, inasmuch as they hold under a conveyance from him, containing all the usual covenants of seizin and warranty.

This Court has repeatedly recognized the principle, that a person holding under a conveyance in fee from the husband of the demandant in dower, is estopped from controverting the seizin of the husband. If, therefore, the tenant in this case holds under a deed from the plaintiff's husband, executed subsequent to the marriage, all the facts in the agreed statement, tending to shew that the husband was not seised during coverture, are inadmissible as evidence, and can have no effect upon our decision.

The defendant's title is either from *John Hains*, by deed of release and quit-claim of the 7th of *December*, 1827, or from *Jonathan Hains*, the plaintiff's husband, by deed of warranty of the same date, or from both. The whole consideration paid for both deeds was twenty-four hundred dollars, seventeen hundred of which was paid to *Jonathan* as the consideration for his deed of warranty. This deed the tenants accepted and caused to be recorded. They have treated it as a valid conveyance, and it is not consistent with legal principles, or the whole tenor of their conduct in relation to this estate, for them now to repudiate it as inoperative.

The agreed statement does not shew who had the possession of the granted premises at the time of the conveyance, but it does shew who was understood to have the fee, the foundation and basis of the title. *Jonathan* must have understood it to have been in him, for he so covenanted. *Thing* and *Hawkes* must have so understood it, for they not only relied upon his covenants of seizin and warranty, but paid him largely therefor,

while they took from *John Hains*, under whom they would now pretend solely to claim, a mere release. Why they thus did it is not for us to inquire. What facts existed to render it expedient for them to take a release only from *John*, and a deed of warranty from *Jonathan*, the case does not disclose. They elected so to do, and it is not sufficient for them now, in order to avoid an incident which the law attaches to the land, to disclaim all title under the conveyance. They are the tenants in possession. The widow finds them holding under a deed from her husband executed during coverture, in which deed the husband claimed to be seised by covenanting that he was so, and there is nothing in the case tending to shew that he was not, at the time of the conveyance, in actual possession.

We cannot consider this case as bearing any resemblance to *Fox v. Widgery*. In that case the instrument relied upon as an estoppel was a naked release, given without consideration, treated as of little or no value, and under which no relations of subordination could arise between the parties. In the case at bar, we find no evidence of any omission or refusal on the part of the tenants or their grantors to hold under their deed from *Jonathan*, until the present claim of the demandant, and we think they cannot now be permitted to avoid the plaintiff's demand by repudiating an estate or a title which they have accepted, and through the public records have held forth to the world as valid. *Co. Litt.* 352, *a.*

The cases of *Kimball v. Kimball*, 2 *Greenl.* 226; *Nason v. Allen*, 6 *Greenl.* 243, and *Bancroft v. White*, 1 *Caines'*, 185, fully sustain this opinion. 4 *Bent's Comm.* 38. Those who take an estate under a defective conveyance are estopped from denying its validity. *Ripple v. Ripple*, 1 *Rawle*, 386.

From such of the facts in the agreed statement as are admissible evidence in the case, we think the plaintiff is legally entitled to dower in the nine acres. But we have no *evidence* that there is any mine or quarry on the premises, although it is assumed as a fact in the argument, and the case is wholly destitute of proof that the mine or quarry, if any there be, was opened or wrought during the coverture. If such was the fact, it is incumbent on the plaintiff to shew it.

BROWN *vs.* MEADY.

In the deed conveying a lot of land, the grantor made the following reservation: "*And the said A. hereby reserves to himself the right of passing and repassing* "*with teams in the most convenient place, across the land conveyed.*" *Held* that, the term "*across*" did not *necessarily* confine the right of a way to a *transverse* one, over the lot.

But, where the grantor's lot was nearly in the form of a parallelogram, and the grant was of one half, dividing it longitudinally; and it appeared that the rear end of the grantor's land not conveyed, occupied as a mowing field, was separated from the front where the grantor's buildings were, by an impassable barrier; the reservation was construed as retaining to the grantor the right of passing in the most convenient route, from said field to his buildings, though in so doing it was necessary to pass over the lot both *transversely* and *lengthwise.*

THIS was an action of trespass *quare clausum.* The general issue was pleaded, with a brief statement claiming a right of way. It was proved or admitted, that the lot in which the trespass was alleged to have been committed, was formerly owned by the defendant, who conveyed it to *James Brown,* under whom the plaintiff held. In the deed from the defendant to *Brown,* which was dated *23d of March,* 1831, after a description of the lot conveyed, was a reservation in these words. "*And the said Alexander*" (the defendant) "*hereby reserves to himself* "*the right of passing and repassing with teams in the most con-* "*venient place, across the land here conveyed.*"

The land of the plaintiff and defendant, — the location of the defendant's buildings, — his field, — and other objects referred to in the report, are delineated in the sketch below.

It appeared that toward the rear of the lots, there was a high and steep hill extending nearly across both, which was impassable by teams, separating the defendant's mowing field from his buildings; — and that the most convenient way in which the defendant could go to his said field, was by the route which he took, described below by the dotted line, and which is the trespass complained of, without going upon the lot adjoining, which belonged to one *Blanchard.*

It was proved that the defendant had requested *Brown* to

mark him out a way, the spring before, when *Brown* told him he must go in the *Blanchard* road. The defendant objected to this, alleging that he could not do it rightfully, the road being the property of *Blanchard;* and thereupon gave notice to *Brown* of the way he claimed to go, — in which he afterwards did go, for the purpose of carting his hay from the said back field to his barn, doing no more damage than was unavoidable in going that route, and omitting to pass through the plaintiff's wheat field, the wheat having been sown before he gave him notice as aforesaid.

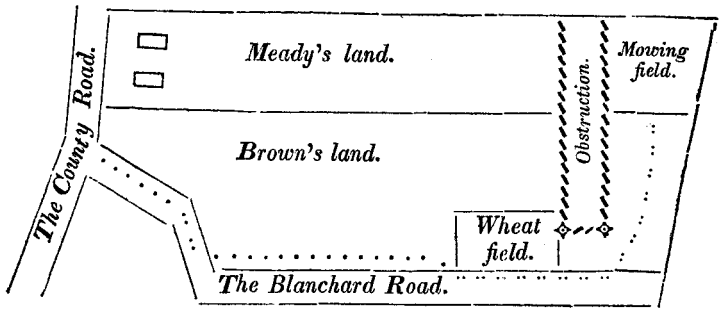
It appeared that for about ten years next before the suit, the plaintiff, and defendant, and *Blanchard*, had used a private road by mutual consent, it being a useful and convenient one, for passing to and from the rear of their lots. Said road is marked " the *Blanchard* road," on the sketch below.

Said *Blanchard* was called by the plaintiff, and testified that he told the defendant he might go upon his land in the old road, as had been before understood and agreed between *Brown* and himself, — that the defendant asked him to give a writing to that effect, which he refused to do. He further testified, that the land over which the said road passed, was his, until it connected itself with the old road running across the plaintiff's land; — that no one had any right to pass there; — that he would not give the defendant any right to pass it for any term of time, — but had no objection to his passing for the present, as a mere matter of favour and indulgence.

It was contended by the defendant, that taking the reservation in his deed to *Brown* in connexion with the extrinsic facts proved, *viz.* that his mowing field in the rear of his lot retained, was separated from the front, where his house and barn were, by a barrier impassable by teams, — and the only route by which he could transport his hay from that field to his barn was by passing upon the land conveyed to *Brown*, without going upon the land of *Blanchard;* that he had a right to pass and repass with teams *where he did*, it being the most *convenient* place across the land conveyed, from the front to the rear of his said lot. But *Weston J.* who tried the cause, ruled that the defendant was not authorized so to pass over the land conveyed,

and that the reservation and facts proved, did not justify the entering and breaking complained of.

The defendant thereupon consented to a default, it being agreed by the parties, that if in the opinion of the whole Court this ruling was erroneous, and that the reservation and facts proved, constituted a good defence, then the default was to be taken off, and the plaintiff to become nonsuit, otherwise, the default was to stand.



Sprague, for the defendant, took the same positions that were taken in the opening of the cause to the jury, adverting to the circumstances of the location of the defendant's buildings, — his mowing field — the obstruction, &c. as conclusive to show what way across the lot was intended to be reserved. That these facts were to be taken into consideration in giving a construction to the deed, he cited *Storer v. Freeman*, 6 *Mass.* 435.

The defendant reserved *a right of way* to pass from his house to his field, — he reserved, and the law will appropriate, the most *convenient* route for that purpose, — and the case *finds* that the most convenient route, was in fact taken.

Otis, for the plaintiff.

1. A grant of a way from A. to B. "in, through and along," a particular way, will not justify the grantee in making a trans-

verse road. *Senhouse v. Christian*, 1 *T. R.* 560; *Russell v. Jackson*, 2 *Pick.* 574.

The grant in this case is of a road within certain limits,— that is, *across* the land, and in no other way. Under this grant the defendant has no right to a way *lengthwise* of the plaintiff's lot. He has no right to enter at one place, go partly across, and then come out on the same side of the lot. *Comstock v. Van Deusen*, 5 *Pick.* 163. That case is strikingly similar to the case at bar. 1 *Roll. Abr.* 391; 1 *Ld. Raym.* 75. Passing and repassing is restrained by the word "*across.*"

2. The most obvious construction of the deed would seem to be, that the parties intended the right of travelling in the old road, as it had been and was then travelled, which the plaintiff was to cause to be secured to the defendant. This view is strengthened by the parties having acquiesced in it for so long a time. The defendant's using this way after the giving of the deed, was a laying out of the way reserved, after which no alteration will be permitted. *Wincook v. Bergen*, 12 *Johns. R.* 222; *Jones v. Percival & al.* 5 *Pick.* 485.

3. But if he had a right to locate a different way, and neglected to do so, he cannot change the one laid out by the grantor. *Russell v. Jackson*, 2 *Pick.* 578.

The opinion of the Court was delivered by

MELLEN C. J. — *Meady*, being the owner of a piece of land nearly in the form of a paralellogram, extending in a south-east direction from a county road at the north-west end of the tract, and bounded on the south-west side by land of one *Blanchard*, sold the south-west half of the tract to the plaintiff, *Brown*; and the deed contains this clause, "and the said *Alexander* "(the defendant) hereby reserves to himself the right of pass- "ing and repassing with teams in the most convenient place, "across the land conveyed." The object which the parties had in view, in reserving this right of way, is apparent upon the report of the case, namely, because *Meady* had no convenient way in which he could pass, on *his own land*, from his buildings near the *north-west end* of the lot, to his mowing field at the *south-east end* of it. The case further finds, that the

same hill or precipice, forming the before-mentioned obstruction, extends so far upon the land conveyed to *Brown*, that the most convenient way in which the defendant could reach his mowing field (without going on *Blanchard's* land) was by the route which he took. The private way which had been used by the consent of the *plaintiff*, *defendant*, and *Blanchard*, for several years before the deed was given, ran from the public road before named, over a part of the north-west end of *Brown's* lot in an easterly direction, *to* and *on* the land of *Blanchard*, and so that, in order to reach his mowing field he must again cross over *Brown's* lot, after leaving the private way. And the defendant could pass only by *sufferance* on *Blanchard's* land. These are the principal geographical facts in the case; and they are presented without objection from either of the parties; and, as mentioned in the case of *Comstock v. Van Deusen*, they were properly presented and received as facts surrounding the question, and necessary to its correct decision.

What then is the true construction of the language employed in the reservation? In the first place the object was to secure to *Meady* "*a right*," not an *indulgence*. It was *a right* to pass over the land of *Brown;* for the reservation goes to diminish the value of *his* land, and in its operation must have been intended to give the same rights to *Meady*, as though *Brown* had by his deed *granted* the easement to *Meady*. If we consider the contracting parties as acting with understanding, and *Meady* with common prudence, we must presume that the design was to reserve to himself a right to pass to his mowing ground without being a trespasser on any one, or resisted by any one, and a right which would answer his purpose. The presiding Judge, we think, gave too restricted a construction to the word, "across." We cannot think that, in then existing circumstances, the design in using that word was, merely to reserve a right to *cross Meady's* land, and trust to an indulgent owner of the adjoining land for permission to go a step further. The word, "across," may mean, "over": it does not necessarily exclude the idea of passing over a parrallelogram in a longitudinal direction. To pass *across* a bridge, is a common expression; but does not mean, to pass from one side of it to

the other. In the cited case of *Comstock v. Van Deusen*, the reservation was, "to cross lot, No. 16, above-mentioned." *Wilde J.* says, in delivering the opinion of the Court, "the "words of the grant are to be understood according to their "common meaning, *unless it appears that the parties intended* "*to use them in a different sense.* The way claimed by the de- "fendant is not *across* the plaintiff's lot, according to the usual "acceptation of the word: and it cannot be presumed from "the facts and circumstances reported, that it was otherwise "understood by the parties." In *Senhouse v. Christian*, it was decided that a right to make *transverse roads across* the slip of land in question, was not conveyed, by a grant of a way from A. to B. *in, through* and *along* a particular way. *Buller* says, "here the *limits* of the grant are mentioned." — This is very different from the case before us. The counsel for the plaintiff has also contended that the defendant had once made his election, by travelling in the private way above-mentioned. This argument is not sustained by the *facts* of the case. The passage across the end of the lot, to the private way on *Blanchard's* land, was the result of a temporary *arrangement* made by the parties in this action and *Blanchard*, for mutual accommodation. It depended for its continuance on the uncertain indulgence of *Blanchard*. All this has no resemblance to the designation, *claimed of right*, under the reservation in the deed. He was obliged to resort to this course, as the plaintiff would not, though requested, mark out a way, many months before. The way designated is in the most convenient and proper place; of course, the act of which the plaintiff complains as a trespass on his land, was only the due exercise of a legal right.

We are all of opinion that the action cannot be maintained. According to the agreement of the parties, a *nonsuit* must be entered.

MELVIN *vs.* WINSLOW *& als.*

A. B. attached certain property including a horse. C. D. replevied it, but ultimately failed in his action, and judgment was rendered for a return, damages and costs. All the property was accordingly returned, except the horse, which, during the pendency of the two suits, *died*, without the fault or negligence of any one. *Held*, in a suit on the replevin bond, that C. D. was not liable for the value of the horse.

THIS action, which was debt on a replevin bond was, submitted for the decision of the Court, upon the following agreed statement of facts.

The plaintiff as a deputy-sheriff, having in his hands a writ against *Moses B. Gilman*, in favour of one *Clancey*, attached certain personal property including a horse, estimated to be worth $60. In *July*, 1828, the defendant replevied the property attached, and gave the bond declared on. The replevin writ was entered and prosecuted to final judgment, which was rendered in this Court, *October*, 1829, in favour of the present plaintiff for a return of the property, and damages assessed for the detention, at $31, 87, and costs of suit.

In *December*, 1828, *Clancey*, at whose suit the goods replevied had been attached, recovered judgment in his suit against *Gilman*, for $350, 65. The execution which issued thereon was put into the hands of an officer, who received from the defendants all the property originally attached except the horse aforesaid; and on the *24th* of *November*, 1829, sold the same; but the proceeds were insufficient to satisfy the execution by the sum of $250.

Some months *prior* to the rendition of judgment in the suit, *Clancey v. Gilman*, and while the replevin suit was also pending, the horse *died* without the fault or negligence of any one.

The right of the plaintiff to recover the $31, 87, and costs, was not resisted, but the question was, whether the defendants were liable on the bond for the value of the horse.

Otis, for the plaintiff, contended that the loss of the horse should fall on the defendants. They were wrongdoers in in-

termeddling with property to which they had no right. *Pike v. Huckins*, 1 *Mass.* 420; *Seavey v. Blacklin & al.* 2 *Mass.* 541; *Flagg v. Tyler*, 3 *Mass.* 303.

The horse was at their risk. Their bond is to return him *at all events*. The loss therefore, is their loss. *Gordon v. Jenney*, 16 *Mass.* 465; *Ladd v. North*, 2 *Mass.* 214.

Sprague, for the defendants.

The opinion of the Court was delivered by

MELLEN C. J. — It appears that the horse in question died a natural death, without the fault or negligence of any one, *after* he was *attached* at the suit of *Clancey*, and *before* the action was decided; but not till *after* the action of replevin was commenced. The question is, whether, according to the true construction of the condition of the replevin bond, the obligors are answerable for the value of the horse. By law, *Melvin*, the officer who served the writ in *Clancey's* action, had an unquestioned right to attach the horse and hold him in his custody, until he was taken from his custody by virtue of the writ of replevin. Suppose he had died in the possession and custody of *Melvin*, before the action of replevin was commenced, would *he* have been answerable? We are not aware of any principle of law which would render him so. He was answerable for him, to be *seised on execution;* but if he had died before execution issued, the plaintiff would not have been liable, unless he had been in fault. Now, had not the defendant, *Winslow*, as good and legal right to take the horse by the writ of replevin, out of the custody of *Melvin*, in order to try his right to the property, as *Melvin* had to take him out of the possession of *Gilman* towards satisfaction of *Clancey's* debt? We perceive no distinction. In *both* cases, the act of taking was lawful. And though, when the action was decided against *Winslow*, the law considers him so far a wrongdoer as to compel him to pay damages, yet *till* that time he was not a wrongdoer, but lawfully engaged in vindicating his asserted rights; and, as we have before stated, the horse died before the replevin suit was determined. In the case of *Congdon v. Cooper*, 15 *Mass.* 10, it was stated expressly by the *Chief Justice*, delivering the opinion of

the Court, that "the capture of *Eastport*, where the deputy-"sheriff lived, and where, according to his duty, the property "attached would be presumed to remain, would excuse him and "the sheriff from producing the property, to levy the execution "upon. But this is because the common consequences of "capture, according to the laws of war, are supposed to fol-"low: such as a restraint upon the *persons* of the inhabitants "captured, which would prevent their removal; and upon their "*effects*, so that they could not be *withdrawn from the control* "*of the captors*." He then goes on and states, that such was not, at the time, the situation of *Eastport* and the property there; and the sheriff was in that case held answerable. He had taken good security for them. Surely the *natural death* of the horse, which withdrew him from the control of *Winslow*, is as valid an excuse for *him*, as the absolute control of a *captor* would have been for *Cooper* and his deputy. Our opinion is, that the obligors are not held for the value of the horse.

BROWN *vs.* HOUDLETTE *& al.*

The *stat.* of 1821, *ch.* 62, *sec.* 11, which provides that certain actions shall be saved from the operation of the statute of limitations, where the action shall have been actually declared in before the expiration of the limit, but there was a failure of service of the writ through unavoidable accident, &c. was *held* not to apply to actions on *bond* or other *specialty*.

In an action on a bond given for the liberty of the jail-yard, in which there was proof of two breaches at different periods, it was *held* that, the statute, *ch.* 209, by which such actions are limited to one year, commenced running at the time of the *first* breach; the amount recoverable therefor, being the same as for *both* breaches.

DEBT on a bond given by the defendants to procure the liberties of the prison limits. The facts in the case were agreed, and in substance were as follows:

Houdlette, one of the defendants, was legally committed to the jail in *Wiscasset*, *May* 25, 1830, on an execution in favour of the

plaintiff, and on the same day, gave bond in the usual form, to procure his release from close imprisonment, which bond, forms the basis of the present action.

Houdlette being desirous of availing himself of the benefits of the act entitled "an act for the relief of poor debtors," on the *9th* of *Nov.* 1830, made the usual application through the jailer, to a magistrate, for a citation to issue to the creditor, to attend the taking of the poor debtor's oath by said *Houdlette*; — and on the same day, a citation issued which was as follows:

"LINCOLN ss. — To *Benj. Brown, Esq.* Greeting.

"Whereas the foregoing application hath this day been made "to me the subscriber, one of the justices of the peace within "and for said county of *Lincoln* — you are therefore hereby "notified of the same, and that *Monday* the 29th day of *No-* "*vember*, at eleven o'clock in the forenoon, is intended for the "caption of the oath (or affirmation) allowed by the act therein "referred to, when and where you will be present if you see "fit.

"*Dresden upper bridge.*

"Given under my hand and seal the ninth day of *November*, "1830. *Wm. M. Boyd.*"

This citation was duly served upon the plaintiff, on the 13th of the same *November*, by the officer's leaving a copy at his last and usual place of abode. At the time mentioned in the citation, the agent of the creditor went to the Jailer's office in *Wiscasset*, to resist said *Houdlette's* attempt to take the oath, but he did not appear. At the time appointed, two justices of the peace *quorum unus*, administered to said *Houdlette*, on "*Dres-* "*den upper bridge*," the oath required by law, and gave him a discharge; and as early as the middle of *December* following, he went without the exterior limits of the jail-yard, and was seen at *Hallowell* in the county of *Kennebec*.

It was agreed that said *Houdlette* had not, within nine months and three days after the date of his bond, surrendered himself to the keeper of said jail and gone into close confinement, pursuant to the provisions of the statute aforesaid in certain cases; nor in any way had complied with the provision of said bond, except as aforesaid.

On the 24th of *Nov.* 1831, the plaintiff commenced an action for the breach of the condition of said bond, making his writ returnable at the *December* term of the Court of Common Pleas for *Kennebec.* The plaintiff immediately sent his writ by mail to the sheriff of *Lincoln* for service, but failed to obtain it; — and on the 2d day of *January*, 1832, the writ having been returned by the officer without service, its date was altered to said 2d day of *Jan.* and made returnable at the *April* term then next.

Judgment was to be rendered for the plaintiff or defendants as the opinion of the Court should be upon these facts.

Sprague, for the defendants, contended, 1. that *Houdlette* was legally discharged on the 9th of *November*, and, 2. that if he was not legally discharged, the present action could not be maintained, not having been brought within a year from the time of the breach, agreeably to the requirements of *stat.* of *Feb.* 9, 1832.

The designation of the place in the notice was sufficiently particular. If the creditor could understand what place was intended it was sufficient. *Tuckerman v. Hartwell*, 3 *Greenl.* 147. But, however that may be, the decision of the justices in regard to the notice, is conclusive.

It was not necessary, that the oath should have been administered *at the prison. Commonwealth v. Alden*, 14 *Mass.* 388.

Emmons, for the plaintiff.

The conditions of this bond are, that the defendant should remain a true prisoner, and surrender himself within nine months — neither of which has he done. The plaintiff is therefore entitled to recover unless the defendant can protect himself under the transaction at *Dresden bridge.*

The mode of procuring release from imprisonment, is a subject of statute regulation, and should be strictly pursued. The statute requires the *place* of caption to be inserted in the notice to the creditor. There was no such designation of place in this notice. The words, "*Dresden* upper bridge," were altogether too uncertain, even if the oath could be administered away from the jail. It was at an inclement season of the year

and the creditor could not reasonably suppose that the oath was to be administered on a bridge. *Haskell v. Haven & al.* 3 *Pick.* 404.

The action was commenced early enough, it being at the *next term* of the Court after the accidental failure of service for a prior term. This was in strict compliance with the provisions of *stat.* of 1821, *ch.* 62.

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

This case presents two questions for our consideration: 1st. Has the condition of the bond declared on, been violated. 2d. If so, is the action barred by the limitation contained in the 11th section of the act of 1822, *ch.* 209. — As to the first question, we would merely remark that the notice to the plaintiff of *Houdlette's* intention to take the poor debtor's oath, was incautiously made out by the justice as to the place appointed for administering the oath. Had the copy which was left with the plaintiff, been a *fac simile* of the original, partly *printed* and partly *written,* it might have been perfectly intelligible, at least much more so than it now appears to be; still we are unwilling to pronounce it so defective as not to have been understood. It is a nice point; and as it is not necessary, in the view we have taken of the cause, we avoid expressing ourselves more distinctly on the subject. We also avoid any indication of opinion, whether the question, as to the sufficiency of the notice, is an open one, or whether the certificate of the officiating justices is conclusive as to the legality of the notice; because, after a careful examination, our opinion is, that the action is barred by the statute before mentioned. The section of the act is in these words. "That no action shall hereafter be maintained for the "breach of any bond given or to be given for liberty of the "jail-yard, unless such action be brought within one year from "and after such breach." — It is not pretended that *Houdlette* went without the limits of the jail-yard until after the oath was administered to him: namely about the middle of *December,* 1830, and the present action was commenced on the second day of *January,* 1832. But though a year had elapsed, next

after the breach and before the suit was commenced, still it is contended that the action is not barred: and in support of his position, the plaintiff's council relies on the eleventh section of the act of 1821, *ch.* 62, which provides, "that any action which "shall be actually declared in *as aforesaid*, and in which the "writ purchased therefor shall fail of sufficient service or re- "turn by any unavoidable accident, or by the default, negli- "gence or defect of any officer to whom such writ shall be "duly directed," then the plaintiff may commence another action upon the same demand and shall thereby save the limitation thereof, provided such *second* action shall be commenced by declaring in the same and pursued at the next term, or within three months after the term of the court to which the former writ was returnable. The above provision was complied with, in respect to *the time of commencing* the present action. This Court had occasion to give particular attention to the above-mentioned section, and a construction of the proviso, in the case of *Jewett v. Green*, 8 *Greenl.* 447, to which we particularly refer. The 11th section refers to actions "declared in *as* "*aforesaid.*" These words carry our examination back to the 7th and 8th sections. In the 7th section the following actions are enumerated, namely, actions of trespass *quare clausum fregit*, actions, of trespass, detinue, trover or replevin for goods or cattle, actions of account and upon the case; all actions of debt grounded upon any lending or contract without specialty, actions of debt for arrearages of rent, actions of assault, menace, battery, wounding and imprisonment. The 8th section, though for another purpose, mentions the same actions of the case or debt grounded upon any lending or contract, or for arrearages of rent. The 1st, 2d, 3d, 4th, 5th and 6th sections, relate exclusively to *real actions*, or to *real property*, and, of course, have no application to the present case, though the proviso is applicable to them. No part of the act of 1821, in any of its enactments, imposes a limitation upon actions on *bond* or other *specialty*; and therefore it would be a singular construction of the foregoing saving or proviso to apply it to *such* actions. As to such it would be superfluous and useless. Such an application, we are satisfied, could never have been intended

by the Legislature. Besides, if such had been their intention, and that the benefits of the proviso or saving clause in the act of 1821, should be applied to actions on prison bonds or any other specialties, why was not a similar clause added to the 11th section of the act of 1822? and why was it not added to the last section of the act of 1821, limiting actions against sheriffs, for the misconduct or negligence of their deputies, to the term of four years after the cause of action? We do not feel at liberty to introduce, by way of construction, so important a proviso in a subsequent statute, imposing a limitation in a *special case*, merely because such a proviso is found in the general statute of limitations, which never was *intended* to include, and *never did* include such special case. In the case at bar, it seems that the first action was commenced *Nov.* 24th, 1831, which was within one year next after the breach; but, for the reasons above assigned, we do not think that the commencement of that action and the failure of the service or return of the writ, have operated to save the plaintiff's rights. But there is also another objection to the maintenance of the present action under the above provision. If the saving clause in the act of 1821 were applicable to a suit on *a bond*, the facts in relation to the subject, as agreed by the parties, have not brought the case within the terms of it. It does not appear that the writ in the former action failed of a sufficient service or return by unavoidable accident, or by the default, negligence, or defect of any officer to whom the same was directed for service. This should distinctly appear. The statement is, that the writ was sent by mail to the sheriff of *Lincoln*, whose residence we cannot but know is nearly forty miles from that of the defendants. The writ was dated *Nov.* 24, 1831. The court to which it was returnable, was held on the 13th of *December* next following. The writ, therefore, could not have been served legally for that term after the 29th of *November*. It is stated that the writ was immediately sent by mail. When the mail regularly left the post-office to which it was delivered, does not appear; nor what office it was, or what was meant by *immediately*; whether on the day the writ was made, or the next day. No fault in any officer appears; nor any unavoidable accident. It

seems that the writ reached the sheriff, but the time *when* does not appear. If it reached him in due season for service, why have we not evidence of his negligence and default? The total absence of all proof on this subject, leave us to draw the conclusion, that owing to the plaintiff's delay in sending the writ to the officer it did *not* reach him in season for service; and is not the conclusion a fair one?

But since the argument of the cause, it has been suggested to the Court, by one of the counsel for the plaintiff, that, for the maintenance of the action, he relies not only upon the breach of the condition of the bond committed by *Houdlette*, in leaving the county of *Lincoln*, and going to *Hallowell*, in the county of *Kennebec*, as early as the middle of *December*, 1830, but also by his not surrendering himself to the jail-keeper, according to law; that is, at the expiration of nine months, from the date of the bond, which was *February* 25, 1831; and that although the action may be barred by the limitation in the act of 1822, as to the *first* breach; yet, as the present action was duly commenced on the 2d of *January*, 1832, which was within one year next after the 25*th* of *February*, 1831, the action is not barred. The above suggestion has led the Court to a careful examination of the distinction relied on (*now*, but not at the argument,) with a view of ascertaining whether, in a personal action, like the present, it reposes on any legal foundation. It is well known that our general statute of limitations, does not embrace *bonds*, or any instruments under seal: hence, no cases have been found, though we have made diligent search, which have a *direct* bearing upon the present question. We must therefore, in our investigation of the subject, in some measure, reason analogically and derive what light we can from cases supposed to resemble this. It may be affirmed with safety that, as the act of 1822, has subjected the bond in question to its operation, that operation should be in accordance with those principles which would govern the contract, provided it had not been under seal. Those principles seem to be well settled as to most points. "It is a general maxim," says *Pothier*, 431, (by *Evans*,) "*contra non valentem agere nulla currit prescriptio:* "and prescription only begins to run from the time *when the*

"*creditor has a right to institute his demand.*" As is observed by *Mr. Angel*, in his valuable treatise on the limitation of actions by the cases which have arisen under these statutes, it is well settled, that the statute does not begin to run or operate, from the time when a contract is actually made, unless a *full* and *complete cause of action*, instantly accrue thereon. In other words, the time limited is to be computed from the day upon which the plaintiff *might have commenced an action for the recovery of his demand.* These are undisputed principles of law, and are based on sound common sense. According to these principles, when *Houdlette* passed beyond the limits of the county of *Lincoln* and went into *Hallowell*, he violated the condition of the bond, and *then* the plaintiff had "a full and com- "plete cause of action:" and *then* he "might have commenced "an action for the recovery of his demand;" and *then* also, according to the same principles, the statute began to run. And here it is important to observe, that nothing more can be recovered where *both* the conditions of such a bond are violated, than where only *one* of them is broken. In *both* cases there must be an entry of *judgment* for the whole penalty of the bond; and execution can never be issued for more than the original debt, costs and interest against the *sureties*; nor in such a case as this, could the court issue execution for more than the *penalty* and costs against the *principal;* so that immediately after the *first* breach, the plaintiff had a *full, complete* and *perfect* remedy on the bond, and a *second* breach could add nothing to his rights, or vary them in the least, unless he thereby acquired an *option* to rely on the *second* and waive all claims on account of the *first;* and this is the only question in this view of the cause. In almost every other case of an action of debt on bond, where, from the terms of the condition, there may be *several* breaches, and at *successive* times, though for any *one* breach there must be judgment for the whole penalty, yet the amount of damages to be assessed, must depend upon the *number* of breaches, and also upon the nature of them. For one breach the damages might be but trifling, while for another they might be large and important: as if a lessee covenants to pay rent quarterly, and also surrender the premises at the expiration

of the lease, in as good order as they were at the commencement of it, and also pay all taxes assessed thereon, in one year from the time of the assessment; or, as in case of a conveyance of real estate and a covenant of seizin, and also a covenant of warranty, the first of which, if ever broken, is broken the moment it is made, but the latter not till eviction, or what is equivalent thereto. Other instances might be named by way of illustration. In such cases it will not be denied that *each* breach furnishes a new cause of action; and where for one breach a judgment has been rendered for the penalty, the damages for *subsequent* breaches are to be obtained upon *scire facias*.

It is admitted, that where, by the terms of a covenant or the condition of a bond, several acts are to be done, of a distinct character, whether at the same time or at different times, the covenantee or obligee, may waive or release all right of action for any *one* breach of the covenant or condition, without prejudice to his rights in regard to others; but the legal consequence of such waiver or release necessarily is, that he thereby releases his right to *all* damages which he might have recovered for *such* breach, had there been no such waiver or release. Whenever, then, an obligee can by law recover for the *first* breach the *same* and as *full* damages as he could if *every condition* in the bond had been broken, it follows, that a waiver or release of the right of action for *such* breach must operate as a complete discharge of the bond. It is of importance to remember the above principle, and to distinguish the bond declared on from other bonds, in respect to the fixed amount of damages to be recovered, as we have before stated. In *other* cases, each breach is followed by its own particular damages: in *this* case, the *first* breach at once settles the full amount of damages, and no subsequent breach can enlarge those damages by any addition to them. If the plaintiff has waived or lost his right of action for the *first* breach, by suffering the statute of 1822 to bar it, it is equivalent to an express release. And now, why has not the statute barred all claim? It would seem to be a correct position, that as soon as the plaintiff acquired a *perfect* and *complete* right of action, the defendants also at the same time, acquired an interest in the commencing protection

of the statute, and in its legal consequences at the end of one year from that time, unless avoided on the part of the plaintiff by the commencement of an action during the statute year. Can the plaintiff be permitted to defeat and destroy this right in any *other* manner? The language of the 11th section of the act of 1822 is peculiar. It is, "no action shall hereafter be "maintained for '*the breach*' of any bond, given," &c. But *one* breach is contemplated; because *one* is sufficient. If there are *two*, still the *first* gives a perfect right of action for *all* that can ever be recovered. We may further remark, that the construction we have given to the act, as applied to such a bond, seems to harmonize with the evident intention of the Legislature, which must have been to hasten a creditor to assert his claim on the bond without delay, for the benefit of the sureties. The section is strong proof of this, as before it was enacted, there was no statute limitation whatever, affecting bonds of this description, or, indeed, of any other. As has been already observed, we have endeavoured in vain to find any case of *contracts*, where it has been decided that a creditor has the option contended for, so that he can waive the benefit of a right of action for a *prior* breach of a contract and rely upon a *subsequent* breach of the *same* contract, when *all* damages could have been recovered for the *prior* breach, which could be recovered for *both* breaches.

For the reasons assigned, a majority of the Court are of opinion that the action cannot be sustained, being barred by the limitation of the statute of 1822. Accordingly, a nonsuit must be entered.

Note.—PARRIS J. dissented.

The Inhbts. of FAYETTE *vs. The Inhbts. of* LEEDS.

In a case of the contested settlement of a pauper, it was held by the Court: — That the settlement of an illegitimate child was in the town where the mother had her settlement, at the time of its birth.

That such child could not lose this settlement, and acquire a new one, in her own right, until emancipated from the control of the mother as a natural guardian.

And that, the adjudication of the Court of Common Pleas, by which the custody of the child was committed to the putative father, and his exclusive support, and actual control of her for a period of sixteen years, worked no such emancipation.

Nor was she emancipated by the marriage of the mother and removal to another town; — nor by the mother's becoming a pauper herself.

So that in neither of the cases aforesaid could the pauper child, gain a settlement in a town by virtue of *a dwelling and having her home there* on the 21st of *March*, 1821, pursuant to the provisions of statute, *ch.* 122, *sec.* 1.

THIS was an action of *assumpsit*, brought to recover for supplies furnished a pauper, and was submitted for the decision of the Court, upon the following agreed statement of facts.

Laura Ann Josselyn, the pauper, was the illegitimate daughter of *Temperance Swift*, and was born in the town of *Leeds* in the year 1811; said *Temperance Swift* at that time having her legal settlement in that town. The mother commenced a prosecution against one *Ezra Josselyn*, then an inhabitant of the town of *Fayette*, in which prosecution he was ultimately adjudged the putative father of the said *Laura Ann;* and *Josselyn* thereupon gave bond with surety to the said *Temperance Swift*, to pay her the sums awarded to be paid, by the Court; and also a like bond to the town of *Leeds*, to save it harmless from all costs and charges that said town might incur for the support of said child.

In the year 1813, *Josselyn* filed a petition in the Court of Common Pleas, for this county, praying that the custody of the said *Laura Ann* might be committed to him, which, after a hearing of the parties, was granted. In 1817, *Josselyn* bargained with one *Josiah Elkins*, then, and ever since, resident in the

town of *Fayette*, to take and support the said *Laura Ann* until she should arrive at the age of eighteen, which he accordingly did, *Josselyn* paying him therefor at the rate of thirty dollars by the year. During all this time, from 1817 to 1829, the mother furnished her daughter with no portion of her support, nor exercised any control over her.

In 1815, or 1816, the said *Temperance Swift* was married to one *Ebenezer Clough*, whose legal settlement was in the town of *North-Yarmouth*; — and about the year 1819, she removed to *North-Yarmouth*, and has ever since resided there, supported by that town.

Sprague, for the plaintiffs, relied in the opening, upon the following authorities to show that the pauper had her legal settlement in the town of *Leeds*. *Pittston v. Wiscasset*, 4 *Greenl.* 293; *Lubec v. Eastport*, 3 *Greenl.* 220; *Hale v. Gardiner*, 1 *Greenl.* 93; *Somerset v. Dighton*, 12 *Mass.* 383; *Winchendon v. Hatfield*, 4 *Mass.* 123; *Taunton v. Plymouth*, 15 *Mass.* 203.

To show the extent of an illegitimate mother's rights, he cited, *Wright v. Wright*, 2 *Mass.* 109; *Somerset v. Dighton*, 12 *Mass.* 383; *Petersham v. Dana*, 12 *Mass.* 429.

That a person supported in one town, at the expense of a person residing in another, does not gain a settlement in the former town, he cited, *Southbridge v. Charlton*, 15 *Mass.* 248.

Allen, for the defendants, contended that the settlement of the pauper was fixed in the town of *Fayette* by her residence there on the 21st of *March*, 1821, by virtue of the provisions of *stat.* of 1821, *ch.* 122, *sec.* 1. She was then ten years of age — the father had the legal control of her — and wherever he chose to place her and provide for her there was her home.

The pauper was emancipated from the control of her mother; —1. By the adjudication of the Court in 1811, whereby *Josselyn* was charged as the father. 2. By the additional adjudication in 1813, by which the pauper was placed under the control of *Josselyn*. 3. By the marriage of the mother to *Clough*, in 1816. 4. By the poverty of the mother, who in 1819, became a pauper herself.

In support of these positions he cited, *Boothbay v. Wiscas-*

set, 3 *Greenl.* 354; *St. George v. Deer-Isle*, 3 *Greenl.* 390; *Lubec v. Eastport*, 3 *Greenl.* 220; *Sidney v. Winthrop*, 5 *Greenl.* 123; *Commonwealth v. Hamilton*, 6 *Mass.* 273; *Spring v. Wilbraham*, 4 *Mass.* 493; *Nightingale v. Withington*, 15 *Mass.* 272; *State v. Smith*, 6 *Greenl.* 462.

And being emancipated, she was rendered capable of gaining a settlement in her own right.

The case cited by the defendants' counsel to show that a person supported in one town by a person residing in another, does not thereby gain a settlement in the former town, has no application to this case; for here, *Josselyn*, *Elkins*, and the pauper, all resided in the same town, *Fayette*.

The case of *Pittston v. Wiscasset* is unlike this — here the child was illegitimate — there it was not. There the father retained the right to reclaim his daughter — here the mother had no right, the father having the control of the daughter by order of Court.

In *Somerset v. Dighton*, it is true, the Court say that emancipation is not to be *presumed*. But here we have *proof* — or circumstances from which it may be fairly inferred.

Sprague, in reply, insisted that the cases cited for the defendants were all unlike this. In none of them was it decided that an emancipation took place while the parents or either of them were living.

As to the 2d cause of emancipation stated by defendants' counsel, he was not aware that the Court of Common Pleas under the then existing law, had power to change the settlement of the child — or indeed that it had the legal power to deprive the mother of the control of the child, and transfer it to the putative father. The act of the Court of Common Pleas was in this respect merely void.

If the Court do not recognize the rights of the putative father to the control of this child, then the mother had the legal control, and of course, there was no emancipation. If the Court do recognize his rights, then there was no emancipation, for he was supporting her by *Elkins*, his agent.

No decision can be found shewing that the marriage of the mother emancipates the child. The same reasons assigned by

the counsel for the defendants, would apply to the case of a widow with children by a former husband, in which case no one would contend, that on the second marriage they thereby become entirely emancipated.

WESTON J. at a subsequent term, delivered the opinion of the Court.

The settlement of the mother, at the time of the birth of the pauper, an illegitimate child, was in the town of *Leeds*. This fixed the settlement of the pauper there, where it would by law remain, until she gained one in some other town. It is insisted that, she subsequently gained a settlement in *Fayette*, in virtue of the act of *March* 21, 1821, where it is contended she then dwelt and had her home.

It appears that one *Elkins*, an inhabitant of *Fayette*, in *July*, 1817, gave a bond to the putative father to indemnify and save him harmless from any expense and trouble arising from her support, until she should become eighteen years of age. In pursuance of this undertaking, the pauper resided in the family of *Elkins*, from that time, until after the passage of the law before adverted to, when she was about ten years old. We are not apprized of the reasons, which induced the Circuit Court of Common Pleas, in 1813, to commit the child to the keeping of the putative father for support, until the further order of Court. It was an arrangement to which the mother was constrained to submit, or to forego all further assistance from the father; as it was doubtless competent for the Court to determine for what period, and to what extent, he should be chargeable. But it was not in the power of the Court to emancipate the child from its mother. Her parental rights remained in full force, and might be exerted by her, whenever she might think proper to reclaim the child; although she would thereby take upon herself the entire burden of its support.

This right was expressly recognized in *Wright v. Wright*, 2 *Mass.* 109. *Parsons C. J.* there says, that the custody and control of an illegitimate child belongs to its mother, as its natural guardian. And the doctrine of this case is sustained in *Somerset v. Dighton*, 12 *Mass.* 382; and it is there further sta-

ted, as resulting therefrom, that an illegitimate child ought not to be separated from its mother, while a minor, without her consent. It does not appear that the mother was assenting or even privy to the placing of the child in the family of *Elkins*. In the cases cited for the plaintiffs, it has been repeatedly holden that a minor cannot gain a settlement in his own right, until emancipated, and that emancipation is not to be presumed.

Nor has it been at any time decided, that parental authority or control ceases, when the parent becomes a pauper. While supported by the town, its exercise may be somewhat restrained or modified by the power, which acts upon the parent; but that restraint ceases, whenever the parent is in a condition to support himself and family. Even while receiving partial assistance from the town, he may lawfully avail himself of the labour and earnings of his minor children. Nor did the marriage of the mother emancipate the child. This point was also decided in the case of *Wright v. Wright*, before cited, it being there held, that the natural right of guardianship in the mother devolves on her husband on the marriage. It results that there being no emancipation, no change of settlement is proved, and that the plaintiffs are entitled to judgment.

BALDWIN *vs.* FARNSWORTH *& al.*

Where one by contract was to have delivered to another, an article of machinery at an agreed *time* and *place*, but delivered it at *another* time and place, the contractee receiving it without objection, the latter must be considered as thereby waiving the right to exact strict performance.

A note signed by two, jointly and severally, and made payable at their *dwelling-houses*, in the town of D. was presented to *both*, at the *barn-yard* of *one* of them, and no objection was made by either as to the *place* where payment was thus demanded. *Held*, that the demand was sufficient.

ASSUMPSIT on the following note or contract in writing.

"*Dennysville, Sept.* 11, 1830.

"For value received of *William Baldwin*, we, the subscribers, "jointly and severally promise to pay him or order forty-four "dollars in one year from date and interest, payment to be de- "manded at their dwellinghouses in *Dennysville*.

"The conditions of this note are these, that if the said "*Baldwin* shall within the space of four weeks from date, deliv- "er, or cause to be delivered at the store of *Samuel E. Crocker* "in *Portland*, one complete and warranted fancy spinner, "agreeable to the late patent granted to *John R.* and *Joseph* "*B. Wheeler* of the State of *New-York*, then this note to be "good, otherwise, void and of no effect.

"*Jonas Farnsworth*,
"*Theodore Wilder, Jr.*"

Plea, the general issue. The plaintiff, in maintenance of the action, proved by one *William Woodworth*, that at the request of the plaintiff, sometime in the fall of 1831, he went with said note to the defendants for the purpose of demanding payment — that he found them in *Farnsworth's* barn-yard, and there requested payment of the note — that they declined paying it, but made no objection to the *place* or manner of the demand.

The plaintiff also proved by one *Foss*, that in the fall or winter of 1830, *Farnsworth*, one of the defendants, told him that he had a spinning machine in his possession which *Baldwin* had sent to him, and that it worked well.

The defendants' counsel contended, that the evidence relied upon to prove a demand, was insufficient for that purpose. That, by the terms of the contract a demand upon each of them, at their several dwellinghouses in *Dennysville*, was indispensable. They also contended further, that it was incumbent on the plaintiff to prove, that the machine referred to in the contract, was delivered at *Crocker's* in *Portland, within the time* therein prescribed, accompanied with a *warranty* that the machine was a complete one, and in conformity with the patent to *John* and *Joseph Wheeler*.

But *Whitman C. J.* who tried the cause in the Court below, instructed the jury, that the demand proved, was a sufficient compliance with the terms of the contract in that particular. That, upon the second point made by the defendants, if the jury were satisfied, that a machine answering the description of that engaged to be delivered to the defendants, had been received by them of the plaintiff, before the making of said demand, without objection on their part, on account of its not having been delivered within the time stipulated in said contract, they might be considered as having waived their right to make such objection. Whereupon the jury returned a verdict for the plaintiff. The cause came up on exceptions, filed by the counsel for the defendants, to the foregoing instructions.

D. Williams, for the defendants. The contract between the parties is plain and intelligible — and the plaintiff is bound to perform in all respects what is incumbent on him, before he can set up any claim under it. In ordinary cases, it is admitted that a demand on one of two joint promissors is sufficient. But here, by the express stipulation of the parties, the demand was to be made on *both* defendants and at *their houses*. The stipulation was a reasonable one. There the defendants had their money, and there could most conveniently perform their part of the contract. The demand proved was at neither of the *houses* of the defendants, and was therefore insufficient.

The machine was not delivered within the time stipulated in the contract. It is true, the case finds that the defendants received a machine, but there is no proof *when* it was received. By the contract, it should have been delivered within four weeks.

Again, the machine was not accompanied with a *warranty*, which the contract required. The price of the machine was not equal to the amount of the note. The note must have been given, at least, in part for the warranty which is here withheld by the plaintiff.

It is therefore contended that this action cannot be maintained *on the contract*, though the plaintiff may perhaps in *indebitatus assumpsit* recover *the value* of the machine.

Otis, for the plaintiff, maintained that the demand was sufficient, no objection having been made by the defendants as to the *place*. *Ruggles v. Patten*, 8 *Mass.* 480; 1 *Saund. Rep.* 33; 17 *Johns. Rep.* 248; 4 *Johns. Rep.* 183; 3 *Johns. Cas.* 71.

The obligations of the parties in the contract are mutual. One agrees to have the money ready to pay — the other to have the contract there at the place named. The latter is not a condition precedent. 2 *H. Blk.* 509.

It is a general rule, that when one would rescind a contract he must do it in a *reasonable* time. Here the defendants received the machine and have never offered to return it. *Brinley v. Tibbetts*, 7 *Greenl.* 70.

As to the question of warranty, that was left to the jury, who have found that the plaintiff sent such a machine as the contract required him to send.

The opinion of the Court was delivered by

Weston J. — The jury have found, that the defendants had received before payment of the note was demanded, a spinner, answering the description therein set forth. It was not delivered at the place, or within the time, stipulated; but being accepted subsequently, the jury were properly instructed, that the defendants thereby waived their right to have exacted strict performance.

There is in the note something peculiar with regard to the place of payment, inasmuch as more than one place was appointed. It may be understood that the defendants reserved to themselves the right to pay, either at the one place or the other. But if the note was made payable at either place, it

would be incumbent on the defendants to show, that they had the money ready at one of them. *Ruggles v. Patten*, 8 *Mass.* 480; *Foster v. Sharp*, 4 *Johns.* 183; *Wolcott v. Van Santvoord*, 17 *Johns.* 248. This they have not done. But something further seems to have been contemplated, than the right to pay at the places appointed. The plaintiff was to demand payment there. Payment was demanded of *Farnsworth*, personally, in his own barn-yard, which, as to him, must be considered a sufficient demand, as he made no objection, and intimated no readiness to pay in the house. Whether any thing more was necessary, in a joint and several promise, to put the defendants upon proof that the money was ready at the other dwellinghouse, may be questionable; but it appearing that a demand was made upon the other defendant also, at the same time and place, that he made no objection to the place or manner of the demand, and that he gave to the plaintiff no notice that he was prepared to pay at his own dwellinghouse, we concur in opinion with the Judge below, that the plaintiff proved a sufficient demand.

The exceptions are overruled, and there must be *judgment on the verdict.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF SOMERSET, JUNE TERM, 1833.

LINCOLN *vs.* AVERY.

Parol evidence is inadmissible to show that in writing a deed, the scrivener, *by mistake*, inserted the words "*the north half of*," immediately preceding the No. of the lot.

THIS was an action of trespass *quare clausum fregit*. The *locus in quo* was alleged and described to be, lot No. 87, on the plan of the north half of the town of *Solon*. The cutting alleged by the plaintiff and admitted by the defendant, was on the *southerly* half of said lot. To show title, the plaintiff produced and read a deed from *Volicut O. Brown* to himself, conveying a lot of land described in the following terms — "a cer- "tain parcel of land situated in *Solon* aforesaid, being *the north* "*half of* lot No. 87, on the plan of the north half of said *So-* "*lon*, being the same *land* that I bought of *Isaac Davis*." The plaintiff contended that this deed conveyed *the whole* of said lot No. 87, and offered to prove by *Arthur Martin*, who was one of

the subscribing witnesses, and who wrote the deed, that he had before him at the time of writing it, the deed from *Davis* to *Brown*, and intended to describe the *whole* lot, but by *mistake*, he inserted the words, "*the north half of*," immediately preceding the No. of the lot. But *Mellen C. J.* before whom the cause was tried, rejected the evidence, and decided that, by the true construction of the deed it conveyed only the *north* half of lot No. 87.

The plaintiff thereupon became nonsuit, which was to be confirmed, or taken off and the cause stand for trial, as the opinion of the whole Court should be, upon the correctness of the ruling and decision of the *Chief Justice* at the trial.

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

PARRIS J. — It is an established principle, that parol evidence is inadmissible to explain, enlarge, vary or control a written instrument. The application of this principle has been found to be most salutary in guiding to a correct decision those whose business it is to adjudicate between man and man.

Every one who has been conversant with courts, must be sensible of the danger of controlling written evidence, which is immutable, by that which depends upon memory, and which may be materially varied by the addition, omission, or even transposition of a single word.

This principle is applicable to all written contracts, but especially to those by which real estate is conveyed. — The deed offered by the plaintiff purports to convey the *north* half of lot numbered 87 in *Solon*. The cutting by the defendant, which the plaintiff charges as a trespass upon his property, was not on that part of the lot, but on the *south* half not included in the deed.

Now, if the plaintiff could avail himself of the parol evidence offered, he would prove title to the *south* half, not by deed or any instrument in writing, but by parol; and if he could hold that tract by parol, he might any other, by evidence of the same grade, directly in the teeth of the statutes, "directing the mode of transferring real estate by deed," *chap.* 36, and "to prevent frauds and perjuries," *chap.* 53.

The admission of such evidence to explain and vary the deed, and establish title, would shake the security of all the real property in the State, and overturn one of the soundest principles of evidence.

The ruling of the Judge was correct, and the nonsuit is confirmed.

MATTHEWS *vs.* HOUGHTON.

In an action on a promissory note not negotiable, in the name of the payee, for the benefit of his assignee, the declarations and admissions of the assignor, made subsequent to the assignment, are inadmissible.

ASSUMPSIT on a note of hand made by the defendant to the plaintiff for $45, payable in grain. It had been duly assigned to *Warren Prescott*, and this action was brought for his benefit. In the defence, the defendant offered evidence of certain declarations and admissions relative to the note, made by the plaintiff of record, subsequent to the assignment to *Prescott*, which was objected to by the counsel for the plaintiff in interest; but *Ruggles J.* who tried the cause in the Common Pleas, overruled the objection and allowed the evidence to go to the jury, instructing them "to consider it with great caution, mak- "ing allowance for any supposed interest he *(Matthews)* might "have adverse to the claim set up by his assignee." To which ruling of the presiding Judge the plaintiff took exceptions and brought the case into this Court.

It was submitted without argument by

Wells, for the plaintiff, and

Boutelle, for the defendant.

The opinion of the Court was delivered by

PARRIS J. — We had supposed that after the decision in *Hacket v. Martin*, 8 *Greenl.* 77, in this county, there would be

no further attempt to make use of an assignor of a *chose in action* to defeat the collection of a demand, which he had assigned for a valuable consideration, and of which the debtor had been duly informed.

That case settles the law that the assignor cannot discharge the demand, or defeat the suit by his admissions or his testimony.

The decision is founded on principle, and is supported by high authorities, some of which are referred to in the case.

Fear v. Evertson, 20 *Johns.* 142, is decisive of the question now before us. — We will, however, add *Welch v. Mandeville*, 1 *Wheat.* 233; *same case*, 5 *Wheat.* 277; *Wardell v. Eden*, *Coleman's cases*, 137.

Upon these authorities the admissions of *Matthews*, which were made after this suit was commenced, ought not to have been received, and we presume would not have been, if the case of *Hacket v. Martin*, had been published, or made known to the Judge who sat in the trial.

The exceptions are accordingly sustained.

MORRISON *vs.* WITHAM.

By *stat.* of 1832, *ch.* 45, *sec.* 9, the Selectmen have power to *alter* the existing limits of companies of Infantry, within their respective towns.

A certificate of the appointment and qualification of the clerk of a company of Infantry, was held to be a substantial compliance with the requisition of the statute, which was in these words: "*Aug.* 24, 1826. This may certify, that I "*have* appointed *Asa Witham* to be clerk in the North Company in *Madison*, "and the above named *Witham* personally appeared before me, and took the "oath to qualify him to discharge the duties of said office in the company under "my command, as the law directs. J. S. Capt."

Where an offence is created and the penalty given in the same statute, it is sufficient in an action brought to recover the penalty, to allege the offence to have been committed against the form of the *statute;* although there may be other statutes qualifying the method of proceeding upon the former. *Aliter*, where the offence is created by one statute, and the penalty imposed by another.

ERROR, brought to reverse the judgment of a justice of the peace rendered in an action of debt brought to recover a penalty alleged to have been incurred for neglect of military duty.

The facts in the case touching the points raised, as certified up by the magistrate, were as follows: On the 13*th of May*, 1832, the Selectmen of the town of *Madison*, by virtue of the authority supposed to be vested in them by *stat.* of 1832, *ch.* 45, *sec.* 9, *altered* and newly assigned the limits of the several companies of Infantry in that town. By this alteration the plaintiff in error fell within the limits of a company other than that of which the defendant in error was clerk, and in which it appeared he did duty on the day when the penalty was alleged to have been incurred. The commanding officers of the companies were furnished *on the first day of June*, with copies of the doings of the Selectmen.

The clerk produced his warrant as sergeant, on the back of which was the following certificate: "*Aug.* 24, 1826. This "may certify that I have appointed *Asa Witham* to be clerk in "the North Company in *Madison*, and the above named *With-* "*am* personally appeared before me and took the oath to quali- "fy him to discharge the duties of said office in the company "under my command, as the law directs.

"*Jesse Savage*, Capt."

There was also endorsed, *Aug.* 5, 1831, the approval of the above appointment, by *Fletcher Thompson*, Capt.

On the foregoing the magistrate decided, 1. that the Selectmen had exceeded their authority in assigning *new* limits to the several companies, and that the plaintiff in error still continued to belong to *Thompson's* company, notwithstanding such proceedings of the Selectmen. And further, that said assignment was inoperative because copies thereof had not been furnished to the commanding officers of the companies *before* the first day of *June*.

2. That the evidence of the appointment and qualification of the clerk was sufficient.

3. That the declaration was good and sufficient though the offence was alleged to have been committed against the form of the "*statute*," only.

All which was assigned for error.

Kidder, for the plaintiff in error.

Haskell, for the defendant.

PARRIS J. delivered the opinion of the Court.

We have decided in *Gould v. Hutchins*, *ante*, *p.* 145, that under the 9th section of the additional act of 1832, for organizing and governing the militia, *chap.* 45, the Selectmen had power to alter the existing limits of companies of Infantry, within their respective towns. The case before us shews, that the Selectmen of *Madison* duly exercised this power, on the 13th of *May*, 1832, by assigning new limits to the several companies in that town; and that the commanding officers of said companies were furnished with copies of the doings of the Selectmen, on the first day of *June*. Although the law requires that the copies shall be furnished before the first day of *June*, yet we think this is merely directory to the Selectmen, and that the validity of their act, assigning the limits, did not depend upon the time when they furnished the copies. If the copies had never been delivered to the commanding officers of the companies, they would not have been bound by the doings of the Selectmen, inasmuch as they would have been ignorant of the alteration in the bounds of their respective companies. But as this information, in a correct form, was furnished in ample season to enable them to correct their rolls and conform to the alteration, there seems to be no cause of complaint.

It has been decided in the Supreme Court of *New-York*, that a statute, specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is *directory* merely, unless the nature of the act to be performed, or the phraseology of the statute is such, that the designation of time must be considered as a limitation of the power of the officer. It was accordingly *held*, that a Brigade order constituting a court-martial, issued in *July*, when by the militia law under which the proceeding was held, it was made the duty of the commandant of the Brigade to issue such order

on or before the first day of *June* in every year, was valid. *The People v. Allen*, 6 *Wend.* 486.

Neither is there any appearance of inclination in *Morrison* to avoid the performance of military duty; for the record of the justice shews, that on the day when he is charged with neglecting to attend the inspection in *Thompson's* company, from which the Selectmen had detached him, he did actually attend and perform duty in *Snow's* company, where he had been enrolled in consequence of the doings of the Selectmen. We think the first error is well assigned.

The second error assigned is, because said *Witham* produced no legal evidence of his appointment to be clerk. The certificate on the back of his sergeant's warrant is in these words; "*Aug.* 24, 1826. This may certify that I have appointed *Asa* "*Witham* to be clerk," &c. — Although this is not in the exact phraseology required by the statute, yet we think it is a substantial compliance with its requirements. The case is very distinguishable from *Tripp v. Garey*, 7 *Greenl.* 266. In that case, there was no certificate of the Captain that he had appointed *Garey* as clerk. The only evidence of appointment was in the body of his sergeant's warrant, signed by the commanding officer of the regiment; and as that officer had no power to appoint a clerk, or certify his appointment, and as there was no certificate of appointment from the Captain or commanding officer of the company, the Court held the evidence insufficient. The only doubt that could arise, in the case before us, is as to the time of appointment. If the appointment was made before the granting of the warrant as sergeant, it would be void, as no person can be appointed clerk, unless at the time of his appointment, he be one of the sergeants. *Stat. chap.* 164, *sec.* 12; *Tripp v. Garey*, before cited. But we think the fair construction of the Captain's certificate is, that I have *this day* appointed, &c. It is certainly not a strict compliance with the letter of the statute; but that it is not within the spirit, we are not prepared to decide.

The last error assigned is, that the offence is alleged to have been committed against the form of the *statute*, whereas it ought to have been alleged against the form of the *statutes*, &c.

Where one statute creates the offence, and another gives the penalty, it seems to be settled, that an indictment must conclude against the form of the *statutes*. But if there be more than one statute concerning the same offence, and the first of them was never discontinued, and the latter only qualify the method of proceeding upon the former, without altering the substance of its purview, it seems agreed, that it is safe in an indictment on such statute to conclude against the form of the statute. 2 *Hawk. P. C. b.* 2, *ch.* 25, *sec.* 117; 3 *Bac. Abr. Indictment, H.* Where an offence is prohibited by several statutes, if only one is the foundation of the action, and the others are explanatory, it is sufficient to say, against the form of the *statute*. *Com. Dig. Action* upon *statute, H.; Yelv.* 116. In an action on a statute for a penalty, the fact must be alleged to be done against the form of the statute, the same as in indictments. *Lee v. Clark*, 2 *East*, 333.

There are a number of statutes additional to the act to organize, govern and discipline the militia of this State, but there is no one in force, except that passed *Feb.* 28, 1825, *chap.* 319, which renders it penal for neglecting to attend any company inspection and drill, or which gives the penalty for such neglect. The offence is created and the penalty given by that statute. By the first section thereof every non-commissioned officer and private, who neglects to attend a company inspection and drill forfeits the sum of four dollars.

As this is the only statute, which imposed the duty on *Morrison*, and prescribed the penalty for the neglect of that duty, it is the only one that would have been violated, if he had belonged to *Capt. Thompson's* company; and the offence is correctly charged as having been committed against the form of the *statute*. But, inasmuch, as he did not belong to that company, but to another, in which he actually performed the duty by law required, he incurred no penalty, and the judgment must be reversed.

ADAMS, *plaintiff in review vs.* JEWETT.

A. being a deputy-sheriff and also a constable, received a writ for service, directed to the sheriff and his deputies alone. Notwithstanding which, he served and returned the writ as *constable*. The plaintiff's counsel, without noticing the return, entered the action, obtained judgment on default, and delivered the execution which issued thereon to the same officer, which was afterward returned by him in no part satisfied. *Held*, that the Sheriff was liable, in case, for the neglect of the deputy *in not serving the writ*. The entry of the action and pursuing it to judgment, under the circumstances, being no waiver of the plaintiff's claim against the Sheriff for the neglect of the deputy to serve the writ.

THIS was an action of the case originally brought by *Jewett* against *Adams*, late Sheriff of this county, for the default of *Joshua Gould*, his deputy, in not serving a writ sued out by said Jewett against one *Jonas Buss*, and for neglecting to attach a certain number of chairs the property of *Buss*. *Gould* was the deputy of *Adams*, and also a constable of the town of *Norridgewock*, where *Buss* lived. The writ was directed to the Sheriff of the county of *Somerset* or his deputy, and had been directed also to a constable of *Norridgewock*, but the latter direction was erased by the counsel for *Jewett* before the writ was delivered to the officer. *Gould* served and returned the writ as *constable*, and attached the chairs as directed, but subject to two prior attachments in suits brought by other persons against *Buss* returnable before a justice of the peace. The action, *Jewett v. Buss*, the writ being thus served and returned, was entered at the *March* term of the Court of Common Pleas, 1824; was then defaulted and judgment rendered in favour of *Jewett*. The execution which issued thereon, was within thirty days put into the hands of *Gould*, and by him was returned no part satisfied.

John S. Tenney, Esq. attorney to *Jewett* in that action, testified that the fact that *Gould* had served and returned the writ as constable, escaped his attention until after judgment, and until he had occasion to inspect it on bringing the action, *Jewett v. Adams*.

It was insisted by the counsel for *Adams* that the entry by *Jewett* of his writ against *Buss*, served and returned as it was, and taking judgment on the same, was to be regarded as an acceptance of the service by *Gould* as constable, and a waiver of any right to look to him as deputy, or to *Adams* as his principal. But with a view to settle other facts in the cause, and intending to reserve this question, *Weston Judge* ruled otherwise. The jury returned their verdict in favour of *Jewett*.

If the point taken by the counsel for *Adams*, was rightfully overruled, judgment was to be rendered on the verdict. But if it ought in the opinion of the Court to have been sustained, and to be fatal to the right of *Jewett* to recover, the verdict was to be set aside, and the defendant in review to be defaulted.

Allen, for the plaintiff in review, argued in support of the position taken at the trial, and cited the case of *Livermore v. Boswell*, 4 *Mass.* 437.

Sprague, for the defendant, cited *Miller v. Mariners' Church*, 7 *Greenl.* 51 ; and *N. England Bank v. Lewis*, 8 *Pick.* 113.

The opinion of the Court was delivered by

MELLEN C. J. — The allegation in the writ is, that *Gould*, a deputy of *Adams*, then Sheriff of this county, neglected to serve the writ against *Buss* and attach certain chairs, as he was directed. It is true, that he undertook to serve the writ and to attach them, in the capacity of *constable*, but the writ was directed, not to any *constable*, but to the *Sheriff* of the county and his *deputies*. *Gould*, therefore, undertook to do what he was neither *directed* nor *authorized* to do. And when the execution which issued on the judgment in the action, was delivered to *Gould*, he neglected to serve it, or secure any property of *Buss*, and returned the same in no part satisfied. These facts having been displayed on the trial, the jury found a verdict for the original plaintiff and have assessed his damages. The only question reserved is, whether the plaintiff, *Jewett*, by proceeding to judgment in the action against *Buss*, must be considered as having waived all objections against the irregularity of the service and the misconduct of *Gould*, and con-

sented to adopt, and sanction the service and attachment of the chairs, though made by him as *constable*, and not as *deputy-sheriff*. When a creditor brings an action against a Sheriff for not making a service of a writ committed to him and securing property by attachment, or by arresting the body of the debtor, when he might have done either; by means of which neglect the creditor has been damaged; he must *prove* that he had a good cause of action against the debtor, or person sued, in order to maintain his action against the Sheriff; and, from the nature and necessity of the case, he must prove it *by parol*. But in those cases where the writ has been served, but a loss has been sustained by *the mode* or an *irregularity* of proceeding, or by any subsequent neglect or malfeazance, the plaintiff should proceed in his cause and obtain judgment, and thus, *by record*, verify his cause of action and entitle himself to execution. In ordinary cases, therefore, where there has been a service of the writ, the conduct of the plaintiff in obtaining judgment furnishes no legal proof of a waiver or abandonment of claim against the Sheriff for his neglect or misconduct. It is, however, contended in the present case, that though the writ was not directed to a constable, and that, though he therefore had no right to serve it as such, yet if *Jewett* was willing to accept it as a good service, and proceed to judgment, with no objection made by *Buss*, he might do so, and in existing circumstances, must be considered as acting on this principle; — as waiving all objections to the service, and all claims against the Sheriff. To rebut this conclusion, the counsel for *Jewett*, as stated in the report, testified, that the fact of the service of the writ by *Gould* as *constable*, escaped his attention *till after judgment was entered*. There is no proof that the plaintiff, *Jewett*, knew it before that time; nor is there any probability of it; inasmuch as the care of the action against *Buss* was confided to *Mr. Tenney*. How, then, can it be presumed that *Jewett* or his counsel waived objections against irregularities and malfeazance on the part of *Gould*, of which neither had knowledge — and claims against the Sheriff, of which neither was conscious. Such a presumption would be a presumption of an *effect* with-

out a *cause*; it would be establishing a *conclusion*, without the existence of any *premises*. On the whole, we do not perceive any solid ground on which the motion for a new trial can be sustained.

Judgment on the verdict.

RUSSELL *vs.* RICHARDS *& al.*

A. being the owner of a mill privilege, bargained by parol to sell it to B. and C. who then went on by *permission* of A. and built a mill thereon. Soon afterwards, a creditor of B. and C. in a suit against them, attached the mill as their *personal* property, and caused the same to be sold on execution, D. being the purchaser, and A. being present at the sale, and stating that he did not claim it. About three years after this, the mill in the mean time having been in the possession of A. was sold by him, with the privilege, for a valuable consideration to E., conveying it by deed of warranty, E. having no notice of the claim of B. and C., or D. the purchaser under them. *Held*, that under these circumstances, the mill never was a part of the *freehold;* but was the *personal* property, first of B. and C. and then of D. and that the latter might maintain trover for the mill against E. on his conversion of it.

THIS was an action of *trover* for a *saw mill*, mill-chain and dogs. On trial it appeared, that the land and privilege upon which the mill was built, at the time of the erection, in 1824 or 1825, belonged to *William Vance*. That *Shubael B. Vance* and *Asa Church*, had bargained by parol with the said *William Vance*, for the purchase of the privilege, and had caused the mill to be built thereon, through the agency of one *Seth Emerson*, by the *permission* of the said *William Vance*. It further appeared, that when *Emerson* contracted to build the mill, he took the guaranty of *William Vance*, for the eventual payment of the sum he was to receive. That *Shubael Vance* and *Church* being delinquent in payment, *Emerson*, by the request of *William Vance*, instituted a suit against *Shubael Vance* and *Church*, and attached the mill as their personal property; and having obtained judgment against them for about $800,

he put the execution issuing thereon, into the hands of an officer, by whom the mill was duly sold to the plaintiff in this action, for about $300, on the 8th of *Sept.* 1827, *William Vance* himself, being present at the sale, and declaring that he had no claim upon the mill, but only upon the privilege. It appeared that soon afterwards, the mill went into the possession and occupancy of *William Vance*, and on the 1st day of *April*, 1830, was in the occupancy of his lessee, on which day, he conveyed the *mill and privilege*, by deed of warranty, to the defendants.

Upon this evidence, the jury were instructed, that although as against *William Vance*, the mill might be seised, and sold as personal property, and against the defendants also, if they purchased with a knowledge, or had notice of the plaintiff's interest and claim; yet if the jury were not satisfied from the evidence that the defendants had such notice, they had a right to hold the mill as real estate, under their deed; and that in that case they should find for the defendants, which they accordingly did. If the jury were properly instructed, judgment was to be rendered on the verdict, otherwise it was to be set aside and a new trial granted.

Sprague, for the plaintiff.

Allen and *Boutelle*, for the defendants.

The verdict finds, that the defendant had no notice of the plaintiff's claim. The deed shows, that they were *bona fide* purchasers. And it appears that *William Vance* had *possession* from the time of the purchase by the plaintiff to the time of the conveyance to the defendants. Now, under these circumstances, though the mill may be considered personal property as to all the rest of the world, yet not so as to the defendants. *Dane's Abr.* 3, 145, 149, 154.

The argument *ab inconvenienti* in this case, is entitled to much weight. *Vance* having continued in possession more than three years before the sale to the defendants, it might well have been considered that the plaintiff had abandoned all pretence of claim. 3 *Mass.* 576, *Reading of Judge Trowbridge.*

Where one of two innocent persons must suffer, it should fall on him who has been the cause of the injury. No fault can

be imputed to the defendants. But if the plaintiff had taken possession, or had not abandoned for so great a length of time, purchasers might have been put upon their guard.

Whether this mill was real or personal property, depended on the election of the owner of the land. If one build upon the land of another with his consent, the owner of the land may usurp the building and appropriate it to his own use, but he is answerable to the builder for the value of the building. *Wells v. Bannister & trustee*, 4 *Mass.* 514.

In this case, *Vance* elected to make the mill his own, and to account with the owner for its value, by undertaking to convey it.

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

MELLEN C. J. — The saw mill in question was built on a tract of land, at the time belonging to *William Vance*, at the expense and as the property of his son, *Shubael B. Vance* and *Asa Church*, and by the permission of *Vance*, the father. The case finds an open and express disavowal by the father, of any interest in, or claim upon the mill. On these facts, according to the case of *Wells v. Bannister & trustee*, 4 *Mass.* 514; *Osgood v Howard*, 6 *Greenl.* 452, and *Van Ness v. Packard*, *Peters' R.* the mill was *never* the property of *William Vance* and never became a part of the *freehold*; but was *personal* property belonging to *Shubael B. Vance* and *Church*, and as such in *September*, 1827, was legally seised and sold on *Emerson's* execution against them, to *Russell*, the plaintiff, for about $300. It does not appear that *Russell* ever had any actual possession of the mill: but soon after the sale it went into the possession and occupancy of *William Vance* and then into the possession of his lessee. On the 30th of *March*, 1830, *William Vance* conveyed several tracts of land and among them, the tract on which the mill in question was erected, and the mill and mill privilege thereon, to the defendants in this action, for a valuable consideration: and the jury have found that they had not any knowledge or notice of the plaintiff's title and interest, at the time of their purchase. The question is, whether on these facts,

the plaintiff is to be deemed in law, the owner of the *mill*, and entitled to recover damages; or whether it was legally conveyed to the defendants, and became their property, according to the instructions of the presiding Judge. The case before us is not tinctured with any fraud or intimation of it. Who, then, has the better right? What authority had *William Vance* to sell the *mill* to the defendants, when he did not own it, or pretend to own it? And what act has the plaintiff *done* or *omitted* to do, by means of which he has *lost* his property and the defendants *acquired* it? It is certainly a correct principle of law, that *one* man cannot transfer the title of *another* to real or personal property, without his consent, *express* or *implied*, unless in certain cases, under statutory provisions; as in case of sales by guardians, executors or administrators; or where it is transferred by the levy of an execution or a sale of chattels by an officer on execution; or cases similar in principle. We cannot perceive how the want of *actual possession* of the mill can be considered as having affected his title during the interval between the sale of it to the plaintiff, in 1827, and the conveyance to the defendants in 1830. If A. is the unquestioned owner of a carriage and horses, and places them under the care of B. his friend, while A. is on a voyage to *Europe*, B. cannot deprive A. of his ownership, and convey a title to C. — and enable him to hold them against A. If he could, a man could never be secure as to his title to personal property, unless he or some one in his behalf were to stand sentinel over it.

The case before us differs essentially from what it would have been, if *William Vance* had owned the mill and being *insolvent*, had conveyed it to *Russell*, but still *had remained in open possession*, and sold it to the defendants, bona fide purchasers and for a valuable consideration. *Russell's want of possession* would be strong evidence of the fraud. It differs also from a sale made honestly by A. to B. of a bale of goods in payment of a debt, but before B. obtains a *delivery* and *possession* of the bale, C. attaches it for a debt due from A. to him: for in this case C. obtains possession *first*, and thus has the better title to the goods, as was decided in *Lanfear v. Sumner*, 17 *Mass.* 110. *There*, both parties claimed under the *same* person; but *Russell* claims under the former undisputed owner, and the defend-

ants under a man who never had any property in the mill. The question as to *priority of possession*, therefore, is not presented in the case before us, as having any legal influence; but the decision of the cause depends on *priority of right:* and *William Vance* had no more right to sell the mill than if *Russell* had been in exclusive possession of it. But it is urged that the defendants had a right to presume the mill to be a part of the freehold; and that such is always the presumption. In the present case, however, *the fact* was otherwise. But, surely, the possession of *real* estate is not considered stronger evidence of *title* than the possession of *personal* property. In the *latter* case, a sale of a chattel, *in the possession of the vender*, amounts to a *warranty of title;* not so in case of *real* estate. That is, in case of chattels, the possession of them at the time of sale, is so far evidence of title, as to make the sale a *warranty* to the purchaser, but not sufficient to convey property which he did not own.

But independently of the reasoning by which we have arrived at the above conclusion, and of the principles on which we have relied, we would observe, that according to the principles of the common law in *England*, which have long been recognized and adopted, and even extended in this country, the mill in question must be considered *personal* estate, and that it never was a part of the *freehold* and subject to the control of the owner of the land. It was a building erected for the purposes of *trade* and the *manufacture* of boards and other lumber; the manufacture and sale of which articles constitute the principal business of that section of the country. In this view of the subject, the decision is placed on grounds which cannot now be shaken, without disturbing rights and unsettling principles.

In the instance before us, the remedy of the defendants is on the warranty of *William Vance*. The principles stated in *Judge Trowbridge's Reading*, and those also in *Dane's Abridgement*, which have been cited, have more immediate reference to real estate, and can have no peculiar application to the present case. Our opinion is, that the instructions of the Judge, on the point reserved, were not correct.

Verdict set aside and a new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR

THE COUNTY OF PENOBSCOT, JUNE TERM, 1833.

TRAFTON *vs.* DORE.

The defendant received of the plaintiff by assignment, certain notes of hand against a third person, as collateral security for the payment of a debt due; and by contract *under seal* agreed to reassign them, *if* the principal debt should be paid, or said collateral notes should be collected, *before a certain day*. The collateral notes, the amount being greater than the principal debt, were paid, but not until long *after* the day fixed. *Held*, that if the plaintiff had any remedy it should be sought in an action of *covenant* and not in *assumpsit* — but that, he could maintain no action to recover the excess.

THIS was *assumpsit* for money had and received, and came up to this Court on exceptions taken to the opinion of the presiding Judge in the Court of Common Pleas.

The plaintiff, to maintain the action, introduced an agreement under seal, which was in the following words, *viz:*

"*Athens, Jan.* 12, 1827.

"Whereas *Mark Trafton* of *Bangor*, in the county of *Pe-*
"*nobscot, Esq.* has this day given me his note of hand for the
"sum of four hundred and sixty dollars and interest — has also

" assigned to me a mortgage deed and five notes of hand sign-
" ed by *William Bacon, Jr.* and *Henry Bacon,* amounting to
" *five hundred and seven dollars and thirty-two cents,* all dated
" *April* 3, 1826, as *collateral security,* for the payment of the
" said sum of *four hundred and sixty dollars,* I hereby promise
" and agree, that if the said *Trafton* should pay or cause to be
" paid, the said sum of four hundred and sixty dollars, *in one*
" *year from June next,* with interest thereon annually, *or* if I
" shall collect the same from the said notes, signed by the said
" *Bacon* and others, by the time last aforesaid, to reassign the
" said *Bacon* notes and mortgage to the said *Trafton,* thereaf-
" ter on demand.

Isaiah Dore." [L.S.]

The plaintiff also proved by *William Bacon, Jr.* that he, the witness, paid the whole amount of the notes described in the foregoing instrument to the defendant, *Dore.* But no part of it was paid within a year from said 12th of *January* — nor was the sum of $460, paid previous to the *first day of July,* 1828; *all* the notes however were paid previous to *Oct.* 27, 1831.

It was thereupon contended by the plaintiff that, he was entitled to recover the balance in the hands of the defendant after the payment of the note of hand of $460, mentioned in the foregoing agreement. But *Perham, Justice,* ruled that on the evidence produced, the action could not be maintained, and directed a nonsuit, to which the counsel for the plaintiff excepted.

Abbott, for the plaintiff, relied upon the express declaration in the agreement, that the notes assigned were for "*collateral security*" merely. The defendant has received an amount sufficient to satisfy his own debt, and an excess of about $84. This in good conscience he is bound to refund, and for the recovery of which, this action may well be maintained. The action is not brought on the agreement under seal, because the $460 was not paid within the year, but was produced on trial, merely to show that the assignment of the notes and mortgage was not absolute, but conditional and *collateral.*

Kent, for the defendant, contended that *assumpsit* could not be maintained upon this agreement, it being *under seal.* Nor

could he go out of it and maintain an action for an alleged cause growing out of this agreement. The contract between the parties has been reduced to writing, and to that should they be confined.

He argued further, to show that, if no objection had existed to *the form of action,* it could not have been maintained on the merits, and cited, 5 *Dane's Abr. ch.* 154, *sec.* 7; *Appleton v. Crowninshield,* 3 *Mass.* 443; *Pothier on Obligation, part* 2, *ch.* 3, *art.* 2; *Bond v. Richardson,* 10 *Cro. Elix.* 141; *Makepeace v. Harvard College,* 10 *Pick.* 298; *Stanley v. Stanley,* 2 *N. H. Rep.* 364.

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

On the third of *April,* 1826, *William Bacon, Jr.* and *Henry Bacon* gave five promissory notes, for the sum of five hundred and seven dollars, payable to the plaintiff at different days; and also a mortgage of certain real estate as collateral security. On the 12th of *January,* 1827, the plaintiff gave his note to the defendant for the sum of four hundred and sixty dollars and interest, and assigned the said mortgage and notes to *Dore* as collateral security for the payment of his note. It appears, that the full amount due on *Bacon's* notes was paid to *Dore* by *Bacon,* as early as *Oct.* 27, 1831, and the plaintiff in this action demands the difference between the amount due on the note he gave to *Dore,* and the amount due on the five notes given by *Bacon* to the plaintiff, and by him assigned to *Dore.* In deciding this cause, the *mortgage* and the assignment of it to *Dore,* may be laid out of the case: it cannot be the subject of claim or consideration in the present action. The above balance is demanded on the principle, that the *five* notes were assigned to *Dore.* merely as collateral security for the payment of the note for *four hundred and sixty dollars,* given by the plaintiff to the defendant, and that of course the balance belongs to him, as *his* note is *overpaid.*

If such was the real character of the transaction, and such the agreement of the parties in relation to the assignment of *Bacon's* notes, the claim of the plaintiff in an equitable point of view, at least, would be well founded. To ascertain its cha-

racter and the plaintiff's rights more fully, we must look to the terms of the contract of *January* 12, 1827, under the hand and seal of the defendant, and which was introduced by the plaintiff to the action. By this contract, which is relied on by him, in support, and, of course, assented to by him, it is stated that the mortgage and the five *Bacon* notes were *assigned* to *Dore* as *collateral security* for the payment of the plaintiff's note to him: and *Dore* promised and agreed that, if *Trafton* should pay, or cause to be paid, the said sum of four hundred and sixty dollars in *one year from June then next following;* that is, *before the first of July*, 1828, with interest, or if he should collect the same from *Bacon's* notes *by the time last mentioned*, he would *reassign* the mortgage and the *Bacon* notes. If, upon the true construction of the agreement, the plaintiff is entitled to recover damages for any breach of it, the remedy must be sought in an action of *covenant*, and not *assumpsit*. But has the contract been violated as to the *Bacon* notes, (for we take no notice of the mortgage,) by the defendant's omitting to reassign them to the plaintiff, after *Bacon* had paid them and they were thus *Bacon's* property? It seems to us not to have been. If by a fair construction, then, of the contract, it does not furnish a ground of *claim* against the defendant *upon the contract itself*, does it, or does it not, furnish a *defence* against the present action, brought to recover the balance above-mentioned, now remaining in his hands? Though the *Bacon* notes were *assigned* as *collateral security*, yet by the terms of the contract, at least so far as respects the *notes*, the defendant was not bound to do anything, unless the $460 note was paid, or its amount realized out of the *Bacon* notes *before the first of July*, 1828; and neither of those events took place. *Until* that time, the notes were held by the defendant as *collateral* security; but *after* that time, by the terms of the contract, they immediately became the *absolute* property of the defendant; whereas by the *assignment* or *mortgage* of them, he acquired only a *conditional* property. *Chancellor Kent, vol.* 4, *page* 132, observes, "The distinction between a *pawn* and a *mortgage* of "chattels is equally well settled in the *English* and in the "*American* law; and a *mortgage* of goods differs from a *pledge*

" or *pawn* in this, that the *former* is a conveyance of the *title* " upon *condition*, and it becomes an *absolute* interest at law, if " not redeemed by a given time." *See Brown v. Bennett*, 8 *Johns. R.* 96. The Court in their opinion say, " Here was a " complete transfer of the title to the goods in question, with a " condition of defeazance on the payment of $120, 35 in four- " teen days. This was a *mortgage*, not a technical *pledge*." The money was not paid according to the condition, and the court decided that the title became absolute in the mortgagee. *Homes & al. v. Crane*, 2 *Pick.* 610. In *Barrow v. Paxton*, 5 *Johns.* 258, there was an *assignment* of certain household furniture as collateral security for the payment of rent, by certain specified days. The court say, " the bill of sale stated in the re- " cord, was a *mortgage* of goods and not a technical *pledge*." In the present case, it appears that the *Bacon* notes were *assigned* to the defendant, upon the conditions specified in the defendant's agreement, and in case the condition had been complied with, he would have been bound to *re-assign* them.

Exceptions overruled; nonsuit confirmed. — *Judgment for defendant.*

The State *vs.* Burr.

One duly licensed as a *common victualler* under the 2d. *section* of *ch.* 133 of the statutes, and selling spiritous liquors in small quantities to those whom he victualled and others, to be drank in his cellar, and not permitting them " to drink to drunkenness or excess," was *held*, not thereby to have violated the provisions of the 1st section, which impose a penalty for any person's presuming to be a " *common seller* of wine, brandy, rum and other strong liquors, " *without being duly licensed*."

The defendant was indicted for being a " *common seller* of " wine, brandy, rum and other strong liquors by retail, without " being duly licensed," in violation of the provisions of statute

ch. 133. The facts upon which the indictment was founded are sufficiently stated in the opinion of the Court, which was delivered by

MELLEN C. J. — The indictment charges the defendant with the violation of the first section of *ch.* 133 of the revised statutes, by having been for a certain period a common seller of wine, brandy, rum and other strong liquors by retail, without being duly licensed. The question is, whether the charge is maintained by the evidence as reported. It appears that the defendant, during the alleged period, was *a duly licensed common victualler*, though not innholder or retailer. The *first* section prohibits any person from being a *common victualler*, as well as a seller of spiritous liquors, without being licensed for the purpose. The *fifth* section declares that no innholder, victualler or retailer shall suffer any person to drink to *drunkenness* or *excess* in his or her house or shop, on pain of forfeiting five dollars for every offence of that kind. This section has reference to those persons of the above-mentioned descriptions who are *duly licensed:* and by its language does not prohibit either an innholder, retailer or common victualler from supplying customers with any of the spiritous liquors described, in moderate quantities and under proper circumstances. This may be lawfully done, by a common victualler, allowing no improper indulgence to those who are supplied. By the report it appears, that the defendant kept a bar in his victualling cellar, where he sold therefrom, to be there drunk, to such as he victualled, and to all other persons who might call (excepting they had already taken too much) spiritous liquors in small quantities, to be drunk by those who called for such. We cannot say that such supplies, thus furnished, amounted to a violation of the statute. As a *licensed common victualler*, he was authorized to furnish supplies of spiritous liquors, to a certain extent, to customers: what was allowed and done by him in his cellar, in this respect, was not a violation of the fifth section: and he did not presume to be a *common seller* of wine, brandy, rum and other spiritous liquors, within the true intent and meaning of the *first* section: but he was a *limited seller* of such liquors to those who frequented his victualling cellar, which was duly

licensed, to be there consumed. On this evidence, the charge in the indictment does not seem to be maintained. It is true, that the concluding paragraph in the first section declares, that "if any person shall at any time sell any spiritous liquors or "any mixed liquors, part of which is spiritous, *without license* "*therefor*, he shall forfeit and pay for each offence the sum of five "dollars." We think this provision cannot apply to the acts done by the defendant under his license as a *common victualler*. Besides, the indictment is not founded on this branch of the section: it charges *no act of selling* spiritous liquors to any one; and if it had, the penalty must, by the ninth section, have been recovered by action of debt before a justice of the peace. The present indictment charges the defendant with presuming to appear and act in a certain character, which he had no license or authority to assume and sustain; and though the penalty incurred by such an offence may be recovered on information or indictment, still, as we have before observed, we do not consider the evidence in the case as sustaining the indictment on the statute of 1821. — But our attention has been called to two other statutes which have been enacted since that time. The first is one passed in 1829, *ch.* 436, the first section of which required that every license granted under the second section of the act of 1821, should express whether it was granted to a *victualler*, innholder, or seller of wine, beer, ale, cider, brandy, rum or other strong liquor by retail, and that no such license should authorize the sale of spiritous liquors to be drunk in the store or shop of any victualler or retailer, and declaring that by a violation of such act the offender should forfeit five dollars. This section, however, was repealed by the act of 1830, *ch.* 482, the first section of which authorizes certain town officers to grant licenses to victuallers, innholders and retailers, and if authorized by their town, may authorize persons so licensed, to sell spiritous liquors to be drunk in their shops and stores, and that such permission shall be inserted in the license; and declares that every person who shall sell spiritous liquors, so to be drunk, or shall suffer any to be drunk in his store or shop, shall forfeit and pay for each offence *five dollars*; but the penalty is to be recovered by action of debt before a justice of the

peace. Besides, this is not the offence described in the indictment. On a careful examination of all the acts relating to the subject, we perceive no foundation on which the indictment can be sustained. The verdict is therefore to be so amended, as to stand a general verdict of *not guilty*.

Rogers, Attorney General.

Parks, for the defendant.

Trustees of Ministerial and School fund in LEVANT *vs.* PARKS *& al.*

Where by statute, "the Selectmen, Town Clerk and Treasurer of a town for "the time being" "are constituted and declared to be a body corporate and "*Trustees of the Ministerial and School fund*" in such town forever, with power "to prosecute and defend suits at law;" it was *held*, that a suit was rightly brought in the corporate name of "*Trustees of the Ministerial and School "fund in the town of L.*" — and that it was not necessary that the names and official characters of those individuals should be particularly set forth in the writ.

A note of hand made payable to G. W. *as treasurer of a corporation*, was *held* to be rightly sued in the name of such corporation.

Whether an action could have been maintained thereon in the name of G. W. — *quære.*

THIS was an action of *assumpsit* against the defendants, as guarantors of the payment of three notes of hand made payable to "*George Waugh*, Treasurer of the Ministerial and School "fund in *Levant*, or his successor in office." A verdict having been returned for the plaintiffs, the defendants' counsel moved in arrest of judgment "because the plaintiffs could main- "tain no action upon said notes in their names, said notes not "being payable to them, and not being indorsed to them; — "and because the evidence was variant from the declaration."

Allen and *Rogers*, for the defendants, insisted that the action

should have been in the names of the individuals holding the offices of Selectmen, Town Clerk and Treasurer, the statute having made them the Trustees of the fund.

2. Or it should have been in the name of *Waugh*, the payee. *Buffum v. Chadwick*, 8 *Mass.* 103; *Amherst Academy v. Cowles*, 6 *Pick.* 427; *Clap v. Day*, 2 *Greenl.* 305.

3. They also contended that, there was a variance between the evidence and declaration; — the note being payable to *Waugh*, and the writ setting out a promise to the plaintiffs.

Godfrey, for the plaintiffs, to show that if the objections *made* by the defendants' counsel, were sound, they could not be urged in this form, cited *Nantucket Bank v. Gilbert & al.* 5 *Mass.* 97.

To show that the action could be sustained in the name of the plaintiffs, he cited *Fisher v. Ellis*, 3 *Pick.* 323; *Irish v. Webster*, 5 *Greenl.* 171.

The opinion of the Court was delivered by

PARRIS J. — This is an action of *assumpsit* against the defendants, upon their guaranty of a note of hand given by *Bunker* and others, promising to pay to *George Waugh*, Treasurer of the Ministerial and School fund in *Levant*, or his successor in office, a certain sum therein specified. The action is brought in the name of the trustees of said fund, and a verdict having been returned in favour of the plaintiffs, the defendants move in arrest of judgment. That motion is now before us.

The first ground upon which it is attempted to be sustained is, that the action is not brought in the name of the proper party, having the care and management of said fund, or rather that the party is not properly described. Waiving the objection that might well be made to opening this question under a motion in arrest of judgment, we will proceed to consider it in the same manner as if taken in the proper form and presented in the proper stage of the proceedings. By the general statute, *ch.* 254, *sec.* 2, it is provided, that "*the Selectmen, Town Clerk* "*and Treasurer for the time being, of every town in the State,* "*wherein no other Trustees for the same purpose are already*

"by law appointed, shall be, and they hereby are constituted and "declared to be a body corporate, and Trustees of the Ministe- "rial and School funds in such towns forever, with power to "prosecute and defend suits at law, &c. and with all the other "powers heretofore granted, or incident by law, to such corpora- "tions."

It is contended, that this action should have been brought in the name of the Selectmen, Clerk and Treasurer for the time being, and that their names and official characters should have been particularly set forth in the writ. We are unable to perceive the necessity of such particularity. The law has pointed out who shall constitute the corporation, by describing their official character, as clearly and with as much certainty as if they had been designated by name. Who constitute the Trustees of the Ministerial and School fund in the town of *Levant?* The law answers; the individuals holding certain municipal offices in said town, to wit, the Selectmen, Town Clerk and Treasurer. Can there be any doubt who those individuals are? In law, that is considered certain which can be made so; and surely there can be no greater difficulty in proving by record evidence who are the Selectmen of *Levant* than in proving who are the members of any other corporation in the State; and we apprehend that the defendants, if they should prevail in this action, would meet with no difficulty in finding those who, under the name of Trustees, would be answerable for costs. How is it when suits are prosecuted by the Trustees of the various corporations created to superintend and hold property for the benefit of our literary institutions? The corporate name and style is the only designation of the corporation or the members composing it, whether they be plaintiff or defendant. It has never been deemed necessary to enumerate each individual composing the corporation; and why? Because they were sufficiently indicated by the corporate name; were known in law by that name, and any other designation or description would, at least, be superfluous.

A case is supposed, in the argument for the defendants, of a number of individuals associating together to accomplish a particular object, and take no name, and the question is asked,

how shall they be designated. If the law gives them such a name as will designate them, they must use it; if not, they must adopt some name by which they will be known and called. Suppose the Legislature should incorporate A., B. and C. and their successors as Trustees of an academy, to be established in *Levant*, without designating the name by which they should be known and called. Could they not take to themselves a name that would be equally as legal as if prescribed by the Legislature? It is said in *Angell on Corporations, p.* 56, and 1 *Salk.* 191, is referred to as authority, that the name of a corporation may be implied; as if the inhabitants of *Dale* should be incorporated with power to choose a Mayor annually, though no name be expressed, yet it is a good corporation, by the name of "Mayor and Commonalty."

It is objected, that one of the necessary properties of a corporation is wanting in this case, namely, perpetuity. That whenever there shall be no Selectmen, Clerk and Treasurer of the town, there will be no members of the corporation. All corporations must depend for continuance upon a succession of members. But that the succession may fail is no argument against the possession of corporate powers, so long as the succession continues. A corporation may refuse to fill vacancies and its very object and existence may wholly fail in consequence of such refusal; but so long as there remain a sufficient number of members to constitute a quorum they will retain full corporate powers up to the last moment of the existence of the corporation. So in this case, it is possible, though by no means a probable event, that a town may be destitute of such municipal officers as compose the Trustees of its Ministerial and School fund; still, that possibility in no wise impairs the powers with which such officers are clothed so long as they remain in office; neither do we perceive, that a succession in a corporation composed of municipal officers would be more likely to fail, than in one which possessed the power of filling its own vacancies by election.

The next objection is, that the plaintiffs can maintain no action upon the note in their own names, it not being payable to them and not indorsed to them; and that the evidence is vari-

ant from the declaration. As the evidence offered is no part of the record we have no means of ascertaining whether it did or did not support the declaration, other than it was admitted and went to the jury without objection on the part of the defendants. If it was variant, or inadmissible for any other cause, the proper course for the party objecting was to except to its admission; it cannot be the foundation of a motion in arrest of judgment.

Does the declaration set out a legal cause of action, for unless it appear from the declaration that the plaintiffs' title to their action is defective, the judgment cannot be arrested. It is alleged, that one *Clement Bunker*, by his note, &c. promised to pay *George Waugh*, Treasurer of the Ministerial and School fund in *Levant*, or his successor in office, &c. and the plaintiffs aver that the said promise was made to said *Waugh*, as their agent, and for their use and benefit, and that the defendants guaranteed the payment according to the tenor thereof, had notice, and promised to pay them the same sum on demand. The jury, having returned a verdict for the plaintiffs, have found all the material allegations and averments to be true. They have found that the promise was made to the Treasurer as the agent of the Trustees and for their use and benefit, and that the defendants guaranteed the payment and promised to pay the same to the Trustees on demand. But it is contended, that the action should have been brought in the name of *Waugh*. We do not say that it might not have been so brought, though the case of *Irish v. Webster*, 5 *Greenl.* 171, as well as some other cases, seem to render it doubtful; — as where certain members of a turnpike corporation agreed in writing to pay to the agent of the corporation, or order, all assessments made by the corporation on their shares, it was held by the Supreme Court of *Massachusetts*, that no action could be maintained upon this undertaking in the name of the agent, but that it must be brought in the name of the corporation. *Worcester Turnpike v. Willard*, 5 *Mass.* 80; *Gilmore v. Pope*, *ibid.* 491; *Taunton and South Boston Turnpike v. Whiting*, 10 *Mass.* 336. *Waugh* had no interest in the contract. The entire consideration that passed was between the Trustees and

the defendants or those for whom they undertook as guarantors. *Waugh* was the agent or mere instrument of the Trustees, acting in their behalf, and in a business in which they were exclusively interested. Wherever a promise is made *by* an agent it is considered in law as made by the principal, and he is holden for its performance; and it is difficult to perceive why the same doctrine does not apply and govern in cases where a promise is made *to* an agent. When the agency is fully known to the promiser and he well understands that the agent has no personal interest in the subject matter of the contract, and the promise is to him as agent only, we do not perceive any good reason why the principal may not declare specially as on a promise made to himself. A promise made to A. for the benefit of B. may be sued by either A. or B. *Com. Dig. action, &c. upon assumpsit, E.*

In general, a mere servant or agent, with whom a contract is made on behalf of another, cannot support an action thereon; and therefore where A. agreed in writing to pay the rent of certain tolls, which he had hired, to the treasurer of certain commissioners, it was decided that no action for the rent could be supported in the name of the treasurer. 3 *Bos. & Pul.* 147; 1 *H. Bl.* 84.

The plaintiffs allege that the promise in this case was made to *Waugh*, the Treasurer, as their agent, and for their use and benefit, and we see no objection to maintaining the action in the name of the Trustees.

The motion in arrest of judgment is therefore overruled.

COMINS *vs.* BRADBURY.

In trespass *quare clausum fregit* for locating a road through the plaintiff's grounds, the defendant justified as Agent of the State, and under the authority of a legislative Resolve; — but, it appearing that the resolve directing the location of the road, made no provision for a "just compensation" to the owner of the property, agreeably to the provisions of the constitution, the justification was held to be insufficient.

Compensation in such case, should be made *when* the property is taken.

THIS was an action of trespass *quare clausum fregit.* Plea, the general issue, which was joined.

The injury proved, was the location of a State road for about two hundred rods through the plaintiff's grounds, his title to which was admitted.

The defendant justified under two resolves of the Legislature of *Maine*, one passed *March* 12, 1830 — the other, *March* 28, 1831, which directed the location of the road in question, but made no provision for compensation to the owners of the land through which the road was to pass.

It was admitted, that the defendant was duly appointed Agent of the State under said resolves. And it appeared that the road was located and made under his authority.

Weston J. intending to reserve the question of justification arising from this authority, and with a view to have the jury determine the amount of damages, ruled that the justification was not made out.

The jury returned a verdict for the plaintiff, on which judgment was to be entered, or the verdict set aside and a new trial granted, as the opinion of the whole Court should be upon the ruling aforesaid.

Rogers, Attorney General, for the defendant, contended that, there was no necessity for directing a remuneration to the citizen in the act by which his property is directed to be taken for public uses, because it is already secured to him by the constitution. If, therefore, redress had been provided in the law authorizing the laying out of the road, it would have given the defendant no greater right than he then already enjoyed.

The mode of seeking redress is by petition; — this results from the nature of the case, and the parties. It is such a redress as all who have claims against the State are obliged to resort to, not having the power to sue.

Suppose the act had provided a remedy or compensation, what could it have been? Must the surveyor go with the money in his hands when he takes the land? Must the acts be simultaneous?

In the case of private corporations it may be and is provided, that the citizen whose property may be taken shall have a right of action against the corporation. It is not required that, the money or measure of redress should be advanced. Now shall the same rights be denied to the State which are granted to private corporations? Shall it be assumed that the State would be unwilling to do what was just and right? And assumed as a legal ground of action?

There are no decisions that say the indemnity should precede, or even accompany the act of taking — but simply that there shall be an indemnity.

The defendant being duly authorized by the State — and the act being lawful in itself — this action cannot be maintained.

McGaw and *Sprague*, for the plaintiff, maintained the unconstitutionality of the resolve.

1. Because no measures preceded the taking of the defendant's property, to show that "*the public exigencies required it.*" *Const. of Maine, art.* 1. *sec.* 21.

2. Because the laying out of this road was a *judicial* act — therefore not competent for the legislature to do it. *Const. of Maine, art.* 3; *Lewis v. Webb,* 3 *Greenl.* 326.

3. Because it directed the taking of private property without making "*just compensation.*" 21*st art. of Const.*

Weston J. delivered the opinion of the Court.

The Legislature, in providing for the location and for the making of the road, of which the plaintiff complains, doubtless believed that they were conferring a favour upon all, through whose lands it might pass; and this is understood to be true, with the single exception of the plaintiff's case. Had its ef-

fect upon him been foreseen or contemplated, we may well presume that the object would not have been prosecuted, without making provision for his relief.

The right of acquiring, possessing and protecting property, is declared by the constitution of this State, *art.* 1, *sec.* 1, to be one of those, which are natural, inherent and unalienable. And the history and experience of mankind prove that it is essential to individual and to public prosperity, that every man should be secure in the enjoyment of the fruits of his own industry. The force of this principle cannot in any degree be impaired, without relaxing the springs of exertion and enterprize. When the right of property is assailed by private injustice, fraud or oppression, the laws of all civilized governments furnish adequate remedies. But there have been periods when, and there are now portions of the world where, the insecurity of property has been occasioned, and does arise, principally from the injustice of the government. In modern times, however, there has very generally prevailed a more enlightened and liberal policy, even in governments possessing absolute or uncontrolled power. And where private property is taken for public purposes, which is sometimes necessary, compensation is almost uniformly made. This is a duty, flowing from the right of ancient domain, which would rarely be controverted at the present day.

But the people of this State have secured to every citizen a suitable equivalent in such cases, by a direct constitutional provision. This is to be found in the twenty-first section of the first article of the constitution, which declares that private property shall not be taken for public uses, without just compensation; nor unless the public exigencies require it. A scrupulous regard has always been paid to this provision, in granting turnpike, canal and other corporations, which might interfere with private rights.

It is insisted that the present action ought not to be sustained; inasmuch as the plaintiff might have full justice done him upon petition to the Legislature. But this could not have been the mode, by which to obtain the indemnity, contemplated by the constitution. It is of too precarious and uncertain a character. Compensation must be made or provided for, when the

property is taken. It is upon that condition alone, that such taking is authorized.

Upon the facts presented in this case, the justification relied upon has not been made out.

Judgment on the verdict.

MITCHELL *vs.* ALLEN *& al.*

T. J. F. indorsed and delivered a promissory note to W. G. F. and took from him a receipt therefor in which it was stated, that the proceeds were to be paid on certain notes held by F. F. — after which, and prior to payment to F. F., or notice to him of such indorsement, or assent on his part thereto, T. J. F. assigned the note to S. M. and in writing revoked the orders given to W. G. F. regarding its appropriation, and ordered it to be delivered to S. M. In an action of *trover*, brought by S. M. against the assignees of F. F. who had obtained possession of the note, it was *held*, that the property in the note by the first transaction did not pass to F. F. or to W. G. F. as his trustee, but remained in T. J. F. — that he had the legal power of appropriating it at any time before the power granted to W. G. F. had been executed: — and that though S. M. had never had possession of the note, still, he might maintain *trover* for it.

THIS was *trover*, for a note of hand given by one *Daniel Forbes* to *Thomas J. Forbes*, for $535, 98, and was submitted for the opinion of the Court upon the following agreed statement of facts.

The note in question was indorsed and delivered to *William G. Forbes*, *Sept.* 8, 1832, from whom said *Thomas*, at the time, took the following receipt, *viz.*: "Received of *Thomas* "*J. Forbes*, a note for $535, 98, signed by *Daniel Forbes*, "the proceeds of which, when collected, I am to apply to the "payment of certain notes given by said *Thomas J. Forbes* to "*Franklin Fling* in *May* last.

"*William G. Forbes.*"

Prior to this, *Thomas* had drawn an order on *Daniel*, in part payment of said note, for $100, in favour of one *William Bradbury*, and for $75 in favour of said *William G. Forbes*, which

had been sent to *Daniel*, but there was no proof that he had accepted them, or that *Bradbury* had any knowledge of the order drawn in his favour, or that *Fling* had any knowledge of the indorsement and delivery of the note to *William G. Forbes* for his, *Fling's*, benefit.

These facts had been disclosed by *Thomas* in an action, the present plaintiff against him, on his being arrested, and carried before two justices of the peace, under the provisions of the statute entitled "An act for the abolition of imprisonment of "honest debtors for debt." Upon the justices' stating their opinion to be, that, he had not divested himself of all interest in said note, he made and executed an assignment of it to the plaintiff, and also wrote upon the receipt aforesaid of *William G. Forbes*, as follows: "Mr. *William G. Forbes*, please to de- "liver the within note to *Sylvanus L. Mitchell*, or his agent, "*Isaac S. Whitman*, I having assigned the same to said *Mitch-* "*ell* this day; and I hereby revoke the within directions as to "appropriation of the note or proceeds. *September* 11, 1832.

"*Thomas J. Forbes.*"

At the time of said examination before the two justices of the peace, and prior to the assignment aforesaid to the plaintiff, *John Appleton, Esq.* being present, notified the justices, and the plaintiff's counsel in that suit, that the assignees of *Fling*, (the defendants in this action,) would accept of, and agree to, the assignment made to *William G. Forbes*, for the benefit of their assignor, and immediately on the same hour communicated what he had done to said assignees, who approved and confirmed his proceedings.

The plaintiff and defendants had both regularly exhibited to *William G. Forbes* the evidences of their respective claims and demanded the note. He delivered it, with the assent of *Thomas J. Forbes*, to the defendants, on their giving him indemnity against the claim of the plaintiff, and an agreement that its proceeds should be appropriated to the payment of *Fling's* notes.

Judgment was to be entered for the plaintiff or defendants, with costs, as the opinion of the Court should be upon the foregoing facts.

Kent, argued for the plaintiff, that as neither *Fling* nor his assignees, had assented to the assignment to *William G. Forbes* at the time of the examination before the justices, *Thomas* had full power to revoke the order previously given to *William*, and to assign the note, as he did, to the plaintiff. What was done by *Appleton* was entirely ineffectual; he having no authority whatever to act for *Fling* or his assignees. He cited the cases of *Foster v. Lowell*, 4 *Mass.* 308; and *Thayer v. Havener*, 6 *Greenl.* 212.

Starrett and *Appleton*, for the defendants.

The receipt of *William G. Forbes*, was a virtual assignment of the note to *Fling* and his assigns, and could not be revoked; —at all events, not until they had had a reasonable time to assent to, or to dissent from said assignment. And they having assented within a reasonable time, that assent operated retroactively and took effect from the day of the date of the receipt. *Fling's* assignees also having approved the act of *Appleton* subsequently, was equivalent to prior authority: and the plaintiff, therefore, not only took his assignment after *Fling's*, but after express notice thereof, and therefore acquired nothing under it.

But there was no necessity for express assent to the assignment by *Fling* or his assigns, it will be presumed, it being for their benefit. *Halsey v. Whitney*, 4 *Mason*, 214; 1 *Johns. Cas.* 209; *Ward v. Lewis*, 4 *Pick.* 251; *New-England Bank v. Lewis & al.* 8 *Pick.* 121; *Hall v. Marston*, 17 *Mass.* 579.

Again, this note was a chattel; supposing, therefore, the creditors to have equal rights after notice, then he who first obtained the possession acquired the legal title. *Lanfear v. Sumner*, 17 *Mass.* 110.

They contended further, that the plaintiff never having had *possession* of the note could not maintain *trover* for it.

At a subsequent term the opinion of the Court was delivered by

PARRIS J. — The note in question is claimed by both parties as creditors of *Thomas J. Forbes*. On the 8th of *September*, *Thomas* deposited it with *William Forbes* to collect, with direc-

tions to pay over the proceeds to *Fling*, the defendant's assignor. It remained in *William's* hands uncollected and without any notice having been given to *Fling*, or his assignees, only three days, until the 11th of *September*, when *Thomas* revoked his directions as to the appropriation of the proceeds of the note, and assigned the note itself to the plaintiff. If he had the power to do this the plaintiff acquired a title to the note and must prevail.

It is contended, that the transaction between *Thomas* and *William*, on the 8th of *September*, was such an assignment of the note as constituted *William* the trustee of *Fling*, and divested *Thomas* of all interest in the note, and power to control its collection or appropriation. If there was such an assignment as vested the property in *William*, in trust for *Fling*, then *Thomas* had no remaining interest, and of course could convey nothing to the plaintiff, and *William*, as the agent or trustee of *Fling*, would be accountable to him for due fidelity in collecting the note, and for the proceeds when collected.

But we think it is not to be viewed in that light. From the language of the receipt, it is manifest that the property in the note did not pass to *William*, either in his own right or as trustee; but remained in *Thomas*. *William* had no interest in the debt, and consequently could not sue as indorsee. The order which he held on *Daniel*, might or might not be accepted. If accepted, his remedy would be against *Daniel* as acceptor; if not accepted, his remedy would be against *Thomas* as drawer. The receipt makes no reservation of any claim upon the note by *William* or by *Bradbury*, arising out of the orders drawn in their favour by *Thomas*. No person can sue as indorsee, unless he be the owner of the note, or has some legal or equitable interest therein. *Thatcher v. Winslow*, 5 *Mason*, 58.

It is unnecessary in this case to enter upon an examination of the question, whether an assent to an assignment, by a creditor who is clearly to be benefited thereby, may be presumed so as to render the assignment valid against subsequent attaching creditors, as there was here no attempt to assign. No words of assignment or conveyance are used. The defendants' counsel contended, that an assent may be presumed, and cited a

number of cases in support of his position. From the case of *Russell v. Woodward.* 10 *Pick.* 408, it would seem, that in *Massachusetts* an assignment would not be valid to pass the property, unless there be an express assent by the creditor, who claims under it.

Suppose, instead of a note *Thomas* had deposited some article of merchandize with *William*, with directions to sell it, and pay the proceeds to the defendant in this action. In what capacity would *William* act in making the sale? Undoubtedly as the agent of *Thomas.* The latter would be considered as the vendor and accountable as such to the purchaser. Until the sale, the chattel would be liable to attachment by the creditors of *Thomas*, and he might revoke his direction to sell, or in the case of the note, to collect and appropriate at any time before the power granted had been executed;—as in *Bristow v. Taylor*, 2 *Stark. Rep.* 50, where partners, on the dissolution of their partnership, empowered an agent to receive and pay the joint debts due to and from the partnership, and a debtor to the firm acceded to the arrangement and promised payment of his debt to the agent, yet it was held that one of the partners, before payment of the debt, might countermand the authority to receive it.

Neither does the principle apply in this case which was recognized in *Lanfear v. Sumner*, 17 *Mass.* 110, cited in the argument, that where the same goods are sold to two different persons by conveyances equally valid, he who first lawfully acquires the possession, will hold them against the other. Here is a sale to one person only, and the purchaser is attempting to recover the article sold, from those who obtained possession from the vendor's agent after his authority, as such, had been revoked, and they knew it.

By the assignment of the 11*th September*, the general property in the note passed to the plaintiff; and as he has proved a conversion by the defendants, he is entitled to a remedy under this form of action, although the note did not actually come into his possession. 2 *Saund.* 47, *a, note* 1; *Bac. Abr. Trover, C.*; 1 *Chitty Pl.* 150.

NORTON *vs.* SAVAGE.

A demand was submitted to two arbitrators under the following terms, *viz:* "And should they not agree, they may choose one or more with them, the "Report of whom, or a major part of whom, being made as soon as may be, "shall be opened by the parties, or be returned to any Court of Common Pleas, "to be holden in, and for the County aforesaid, judgment thereon to be final "between the parties." The two not agreeing, appointed three others, the parties assenting thereto. The whole number, after hearing the parties, made and signed the Report which was against the party making the claim. The Report was not returned to the C. C. Pleas, but was opened by the consent of parties, each paying half the cost agreeably to the award. *Held*, that such award was binding on the parties, and constituted a valid defence to an action brought on the demand submitted.

THIS was *assumpsit* on a promissory note of hand, payment of which was resisted by the defendant, on the ground that it had been submitted to arbitration by the parties, and an award thereupon made in favour of the defendant. And he offered in evidence, 1. the writing of submission, which was as follows, *viz:*

"Know all men, we *James Norton* and *George Savage*, of "*Bangor*, have agreed to submit the demand made by the said "*Norton*, against the said *Savage*, which is hereto annexed, "and all other demands, to the determination of *James B.* "*Fiske*, and *E. T. Aldrich*;—and should they not agree, they "may choose one or more with them; the Report of whom, "or a majority of whom, being made as soon as may be, shall "be opened by the parties, or be returned to any Court of "Common Pleas, to be holden in and for said County, judg-"ment thereon to be final between the parties."

This was executed by the parties, and acknowledged before a justice of the peace. And on the face of it was also, the following certificate of *Fiske* and *Aldrich*, *viz:* "We, the above "named, *Fiske* and *Aldrich*, not having agreed, by consent of "the parties have mutually chosen *Amos Patten*, *John Hodg-*"*don* and *G. A. Thacher* to sit with us for the purpose of de-"termining the above."

The substantial part of the award, which was signed by the

whole number, was as follows, *viz:* The referees "met to de-"cide upon the within submitted question, at which meeting "the within *Savage* and *Norton* were present, and after a full "investigation of the case, and patient hearing of the parties, "adjudged as their final award and decision, that the annexed "note has been paid, and that nothing is due said *Norton* from "said *Savage*, either on note or account. Each party to pay "one moiety of the costs of reference."

The chairman of the referees also testified, that the parties assented to the addition of the three individuals not named in the writing of submission — that both parties attended the hearing — and that the Report was not returned to the C. C. Pleas, it having been opened at the request, or by the assent of the parties, each paying one half the cost.

The counsel for the plaintiff objected, that, said award thus made was not sufficient to bar this action; but *Whitman C. J.* before whom the cause was tried in the Court below, ruled otherwise, and the jury returned their verdict accordingly, whereupon the plaintiff took exceptions and brought the action to this Court.

W. Abbot, for the plaintiff.

J. Appleton, for the defendant.

The opinion of the Court was delivered by

PARRIS J. — In the original submission, the parties agreed that the subject matter in controversy between them, should be referred to *Fisk* and *Aldrich*, for their determination, and in case they should not agree, that they might choose one or more persons to act with them. The referees, not having agreed, did, by consent of parties, as they certify, select three other persons to act with them. The whole five met, and both parties were present and were heard; and we think, are as much bound by the award as they would have been if the whole five had been originally named in the instrument of submission. In *Matson v. Trower, Ry. & Moody*, 17, *Abbott C. J.* held an award good, though made by an umpire, the arbitrators having no authority to appoint one, but the parties having attended and

made no objection. They were considered as thereby recognizing the authority of the umpire. In *Rison v. Berry*, 4 *Rand.* 275, the parties agreed to submit their matters in difference to two arbitrators and an umpire to be chosen by them. The award was signed by the two arbitrators, and another person, as umpire, but it did not appear on the face of the award that the umpire was chosen by the referees. The court held the award to be good, notwithstanding. The award now under consideration, is certain and definite, and according to the terms of the submission, and there is no intimation of misbehaviour or corrupt conduct of the arbitrators. The parties might have entered into a verbal submission, and an award under it would have been good, and might have been made the foundation of an action. They have, however, taken a different course and reduced their agreement of submission to writing, nearly in the form prescribed by statute, but providing that the report may be opened by the parties *or* returned into court. The proof is, that the parties consented to opening and making known the award without having it returned to court. That they called on the chairman of the arbitrators, and each paid a moiety of the costs, and thereupon the award was published.

Nothing more could have been done if the report had been entered. No judgment could have been rendered in favour of either party, that could have required execution. The adjudication of the arbitrators had been fully complied with by the payment of the cost of reference.

They decided that the note, which is the subject of the present action, had been paid, and that nothing was due to the plaintiff from the defendant, either on note or account, and that each party should pay a moiety of the costs of reference. — Each party complied with the award by paying the cost, and waived the making the report to the court, as they had reserved to themselves the right to do in the submission ; and so long as the award is not impeached, we do not perceive how its binding effect is to be avoided.

These arbitrators were chosen by the parties themselves, as their judges to decide the matter in controversy. There has been a patient hearing of the parties, as the arbitrators certify,

and it is not denied. If the award had been in favour of the plaintiff, it would unquestionably have been a good ground of action. As it is, we think it competent evidence for the defendant, and as such was properly admitted. The exceptions are accordingly overruled.

SMITH *vs.* BARKER *& al.*

Partnership debts must be paid out of the *partnership funds*, before creditors of the *individual members* of the company can be permitted to appropriate any part of those funds in payment of their demands.

The fact of *issue being joined* in an action pending, will not *per se* prevent the defendant's being summoned as the trustee of the plaintiff in a process of foreign attachment. He should, however, have an opportunity in the first suit of availing himself of the commencement and pendency of the trustee suit.

THIS was an action of assumpsit founded on a receipt given to the plaintiff, as a deputy sheriff, for property attached. The receipt, dated *July* 24, 1826, was for 215 pine board logs of the value of $860, and which were stated in the receipt to have been attached by virtue of a writ against *James Babcock & Co.* in favour of *John* and *Amos M. Roberts.*

It appeared in evidence that, on the *8th of June*, the logs receipted for by the defendants, were attached by the plaintiff, at the suit of *John Roberts* against *Babcock & Co.*, in which judgment was rendered at the *June* term, 1827, of the Supreme Judicial Court for $356,60. This sum was paid by the defendants, and the execution was discharged.

On the same *8th of June*, the same property was attached by the plaintiff on a writ in favour of *Amos M. Roberts* against *the same defendants*, on which, judgment was rendered for $68,60. And this also was paid and satisfied by the defendants.

At the time of said attachment, the same property, it also appeared, was *returned* by the plaintiff as attached on three other writs, all in favour of *John Roberts.* The first against

Babcock & Johnson — the second against *Babcock* alone — and the third against *Johnson* alone.

It seemed, that the partnership originally formed, was between *James Babcock*, *Henry Johnson* and *James Hobson*; — but prior to the making of the attachments, *James Babcock* had agreed to permit *Moses Babcock* to be equally interested with himself in the profits of the partnership business, which was lumbering.

The three last mentioned suits were also pursued to final judgment, and within thirty days therefrom, the plaintiff demanded of the defendants on the executions, the property described in their receipt, but it was not delivered to him.

It appeared that, at the time when the above attachments were made, *Babcock & Co.* were, and had ever since continued to be *insolvent*.

On the 13*th of June*, 1826, an agreement was entered into relative to the logs attached, between *Barker & Crosby*, the defendants, of one part, *James Babcock*, *Moses Babcock*, *Henry Johnson*, and *James Hobson*, of the second part, and *Benjamin Smith*, the plaintiff, of the third part, the material part of which was as follows, *viz.* — "Whereas the said *Smith*, on the "12*th of June* instant, had in his hands a writ" "in which "the said *Barker & Crosby* were plaintiffs, and the said *Moses* "*Babcock & Co.* were defendants, and in which was demanded "a balance of book account — and whereas said *Smith* on said "12*th of June*, attached on said writ a large quantity of logs now "lying in the waters of the *Penobscot* and its branches — It is "hereby agreed by the parties of the first and second parts, "that the said *Barker & Crosby* may receive said logs of said "officer, and take all proper and necessary measures to get "them to a mill, and to convert them into boards, as soon as "practicable, or into lumber of some sort, and the same to get "to market and sell as soon, and on as good terms as practica-"ble; and the proceeds of the said lumber, when sold, the said "*Barker & Crosby* are to apply to the payment of any or all "demands they may have against and justly due from said par-"ties of the second part, or all, *any or either of them*, deduct-"ing expenses," &c. "And the said *Smith* is hereby author-

"ised to deliver said logs to said *Barker & Crosby* in confor-
"mity with said agreement."

It also appeared that after the commencement of this suit, and after *issue joined therein* in this Court, the defendants were summoned as the trustees of the firm of *Babcock & Co.* in a process of foreign attachment, sued out by one *Isaac Smith.* By the disclosure in that case, which was referred to so far as it was competent, and by other evidence, it appeared that, after the defendants had paid the two judgments aforesaid, recovered by the *Roberts's*, the residue of the property attached was more than sufficient to pay the demands which the defendants had against the firm of *Babcock & Co.* by the sum of $125 — but that they had demands against the *members of the firm, individually,* more than sufficient to absorb this residuum. — The trustee suit was still pending in this Court.

A verdict was returned for the plaintiff for $161,87, being the $125 aforesaid, and interest thereon, subject to the opinion of the Court upon the questions raised. If in the opinion of the Court, from the evidence, the defendants had no right to retain any part of the property in question, the verdict was to be amended so as to stand for $435, with interest from *Nov.* 26, 1827. If their opinion should be, that the defendants had a right to retain for their demands against *Babcock & Co.* and not for their demands against the individual members of that firm, and that they derived no protection or defence from the trustee process, so far as the same may be competent evidence, the verdict was to stand as returned. But if upon the whole case, the Court should be of opinion that the action was not maintained, the verdict was to be set aside, and the plaintiff to become nonsuit.

Starrett, for the defendants.

The defendants have paid all the judgments to which the receipt, in the terms of it, can be made to apply, and therefore should not be held in this action.

They had an unquestionable claim on the whole amount in their hands, except the $125 — and for this sum they are not liable in this action, because the property did not belong to the persons against whom the judgments were. The property was

partnership property — the claims were against the *individual members* of the firm. The creditors of the latter cannot touch the property until the creditors of the firm are paid. That the receiptors have a right to show that the property attached, and receipted for, did not belong to the debtor, he cited the following authorities, *viz: Larned v. Bryant,* 13 *Mass.* 224; *Fisher v. Bartlett,* 8 *Greenl.* 122; *Peirce v. Jackson,* 6 *Mass.* 242; *Rice v. Austin,* 17 *Mass.* 197; 16 *Johns. Rep.* 102; *The Commercial Bank v. Wilkins,* 9 *Greenl.*

If the logs were not liable to attachment as the property of *the debtors* on account of the partnership, then the defendants as receiptors ought not to be holden, their liabilities in this respect being commensurate.

The defendants have a right to retain the $125, to pay their claims against the individual members of the firm, because all the company so in writing agreed.

But if otherwise, then the defendants contend that the trustee suit has arrested the amount in their hands, the plaintiff in that suit being a creditor of the firm. *Locke v. Tippets,* 7 *Mass.* 149; *Foster v. Jones,* 15 *Mass.* 185; *Maine stat. ch. sec.* 11.

Sprague and *Rogers,* for the plaintiff.

The defendants have received certain property of the plaintiffs. Their obligation results from this fact, and is not therefore affected by any misrecital of the parties in the receipt.

But if otherwise, still, so long as the property remained in the hands of the receiptors, the plaintiff could attach it on other writs. And this the case finds. The naming of the action or parties in the receipt is not directory as to the mode in which it is to be appropriated, but is merely descriptive. The receiptor is the mere bailee of the officer, and has nothing to do with his duties in regard to the disposal of the property attached. *Whittier v. Smith,* 11 *Mass.* 201.

The defendants are liable on their receipt unless they can show that the creditor has had the property or its effects. *Webster v. Coffin,* 14 *Mass.* 196.

The principle invoked to the aid of the defendants, that re-

ceiptors may show that the property attached did not belong to the debtors, has no pertinency to this case. Here the property was the property of the debtors, and so both they and the defendants say in their agreement. At all events no one but a creditor of the firm has a right to say the contrary.

The courts have never decided that the company property cannot be attached for the debts of one of the members; but merely that it is *first* liable to the payment of the partnership debts.

The defendants set up a conveyance of the company property not only to pay partnership debts, but the debts of the individual members of the firm. Now if it cannot thus be attached, neither can it thus be conveyed.

The fact of the solvency or insolvency of the company cannot affect the defendants, nor can they avail themselves of it. It is entirely immaterial to them. But it is contended that *Moses Babcock* never was a member of the company. The contract between him and *James Babcock*, was a mere sub-contract. *James* had no power to admit *Moses* into the partnership, and the latter was not recognized by the others as a member of the firm — at all events not until after *Roberts'* attachment, and then for the purpose of defeating his claims. Under these circumstances he cannot be considered a partner. *Barstow v. Gray*, 3 *Greenl.* 409.

But is this defence open to the defendants? It is denied that they can set up a pre-existing claim of their own against the debtors. But even if they had a prior claim upon it, or preference in law, yet by taking it from the officer and giving their receipt for it, they thereby waived their pre-existing right.

They surely have no right to set up their claims against the individual members of the firm, for here we are prior in point of time, and priority in time, in this respect, gives priority in right.

The plaintiff's right to recover ought not to be affected by the trustee suit. The defendants are not debtors of *Babcock & Co.* and cannot therefore be held in that suit. There was no privity of contract between them. As bailees of the *plaintiff*, they cannot be held as the trustees of the original debtors —

they are mere servants *to him*, and cannot even maintain trespass for any injury done to the property. — Again, that process ought not to be effectually interposed because it comes after *issue joined*. *Howell v. Freeman*, 3 *Mass.* 121 ; *Kyd v. Sheppard*, 4 *Mass.* 238.

The agreement in writing cannot affect the contract upon which this action is founded. It is prior to the receipt. It merely grants the liberty for the plaintiff to deliver the property to the defendants — he was not obliged so to do — it was at his option, and upon such terms as he should think safe. Accordingly he took a *receipt*, by the terms of which the defendants are now bound to re-deliver it.

Allen, in reply.

The judgments rendered in the suits in which the logs were attached have been satisfied. We deny that there is any mistake in the receipt. The actions recited in the receipt were pending at the time. The attempt of the defendants is not merely to *amend* the receipt, but to *enlarge* it, which it is not competent for them to do.

But if the receipt is broad enough in its terms to embrace all the actions, still there is a good defence to this suit. The property was not liable to attachment by creditors of individual members of the firm, until the partnership debts were paid — and the case finds that they were *insolvent*.

The defendants are not mere receiptors, but they have claims on the property by virtue of the *agreement*, by which the property was all appropriated. But it is said, this cannot be done, for what cannot be *attached* cannot be *sold*. This is a *non sequitur*. For though furniture, cows, &c. be exempt from *attachment*, yet surely they may be sold by the debtor for the payment of his debts or for any other purpose.

But it is contended further, that the trustee suit furnishes a perfect defence to this action. The objection, that the trustee process cannot be maintained *after issue joined*, is of no force, because now there is no necessity for pleading any thing specially, every thing may be given in evidence under the general issue.

Moses Babcock was a member of the firm. He was to participate in the profit and loss, which the other members *assented* to, and he thereby became a member of the firm. In the case of *Barstow v. Gray*, it was decided merely that, a silent partner may not necessarily be joined as plaintiff.

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

It appears by the report of the Judge, that before any of the attachments of the logs therein mentioned were made, the firm of *James Babcock & Co.* was insolvent. That several of those attachments were made at the suit of creditors *to the firm;* and several at the suit of creditors of *individual members* of the firm. It further appears by the agreement of *June* 13th, 1826, made and signed by all the members of the firm, by the defendants and by the plaintiff, who was the attaching officer, that the logs above-mentioned were placed in the hands of the defendants for the purposes particularly specified in that agreement; and that after payment by them of the debts due to the attaching creditors of the firm, a balance of $125, remained in their hands, which they claimed a right to retain to satisfy certain demands which they had against some of the *individual members* of the firm, in virtue of the terms and special provisions of said agreement; but the verdict was returned in favour of the plaintiff for said sum of $125 and interest; the whole amounting to $161, 87. We are well satisfied that if the plaintiff can by law maintain this action, he is entitled to recover neither more nor less than the amount mentioned in the verdict.

The disclosure of the defendants, made in the action of *Isaac Smith* against them as trustees of *James Babcock & Co.*, and which is referred to in the report as a part of the report, if competent evidence, certainly is not competent to establish facts, except as against the plaintiff in *that action;* but they cannot derive facts from *that* case, and use them in the *present* action as evidence, merely because they constitute a part of their disclosure. But *the action* of *Isaac Smith* against them as trustees, and the *disclosure*, both of which are referred to, are legal evidence of the claim of *Isaac Smith* as a creditor of *the firm*

of *James Babcock & Co.* and of his pursuit of legal measures for the purpose of obtaining satisfaction of his demand out of the *company funds*, which he has caused to be attached and bound by the service of the process, provided there are any in the hands and possession of the defendants on which a legal *lien* can operate in his favour. — As the *firm* of *James Babcock & Co.* were insolvent before any of the attachments were made, it is perfectly clear, as a general principle of law, that the *company debts* must be paid out of the *company funds*. before creditors of the *individual members* of the company can be permitted to apply any part of those funds in payment of *their* demands: On this point, and in support of this principle, in its application in various circumstances, we refer to the case of the *Commercial Bank v. Wilkins*, lately decided in this county, but not yet reported, and to the numerous cases there cited and commented upon by the Court. The question principally requiring our consideration is, whether there are any peculiarities in the present case which relieve it, in respect to the plaintiff, from the influence and control of the *general principle* above stated; for, if not, we do not perceive on what grounds he can be entitled to retain the verdict.

Several objections have been urged on the part of the plaintiff against the prevalence of the motion for a nonsuit for the reasons stated in the report. In the *first* place it has been said, that *Moses Babcock*, at the time of the attachments, was not one of the firm of *James Babcock & Co.* It appears that *James* made a contract with him, before the attachments were made, by which *Moses* became equally interested with him; and, if one of a firm cannot introduce a new partner without the consent of the *other* partners, still they may afterwards assent to it; and in the present case this was done; for, in the agreement of *June* 13th, 1826, all four of the persons are named and described as composing the firm of *James Babcock & Co.* Besides, *all* the attachments made in suits against the firm, would be liable to the same objection. Again, it has been objected that as the trustee process was not commenced until after the present action had once been tried in this Court, and, of course, after issue had been joined, it can have no legal influ-

ence in the decision of this cause, or even be regarded by the Court; and the cases of *Howell v. Freeman and trustee*, and *Kidd v. Sheppard and trustee*, have been cited in support of the position. In the former case, the process was not served on the trustee until after a report of referees was made, in an action against him by *Freeman*, the principal, which was agreed to be final, and the report was against the alleged trustee. In these circumstances the trustee process was not sustained. In the latter case, the writ was served on the trustee while the action of the principal was pending against him and *before* verdict; but he did not attempt to guard against it until *after the verdict was returned*; and he then moved for a stay of execution, but the motion was denied. The language of *Parsons C. J.* that a trustee process came too late, if served after *issue joined*, in a direct action by the principal against the trustee, was not called for by the facts in either of the before mentioned cases, and could have had no influence in the decision; nor can we perceive why that circumstance should form a criterion. It is an event which settles no rights and imposes no *legal* liabilities. In the present case, the process was served long before the last trial, and, according to the course of practice, the defendants might have moved for leave to amend their plea and obtained it, and thus availed themselves of the commencement and pendency of the trustee process. Whether the pleadings were amended as above or not, does not appear by the report: but it does appear that the disclosure of the defendants was made at *Oct.* term, 1831, and that the present action was tried at the last *October* term, 1832; and in the report before us, the disclosure composes a part of the report, so far as the same is competent evidence; and in the argument, there was no intimation against its competency as being inadmissible on account of the state of the pleadings. Indeed, both actions are brought before us in such a manner that we may at once settle the rights of all concerned; and such seems evidently to have been the intention. — Again it has been urged that, the above-mentioned balance of $125, being a part of the proceeds of the logs attached, was under attachment in the hands of the defendants, as the agents of the plaintiff who attached them, and therefore

could not be the subject of a trustee process, any more than they would have been in the hands of the plaintiff himself. The answer to this objection is, that the company being deeply insolvent, the *individuals* of the firm had no property in the *company funds* till the *company debts* were paid; and consequently the attachment of the logs in the suits against *certain members* of the firm, was inoperative as against *Isaac Smith*, who was a creditor of the firm. For the law is settled, that property which cannot be *seised on execution*, cannot be *attached* on the *mesne process*. *Commercial Bank v. Wilkins*, and cases there cited. There was nothing, then, to prevent the effectual arrest of the above balance of the company funds, by means of *Isaac Smith's* trustee process. This answer is also an answer to the objection as to the *time* when the trustee process was served; because the balance could not be lawfully applied to satisfy executions against certain individual members of the firm. The action cannot be maintained, a nonsuit must be entered, but no costs can be allowed to the defendants.

STEWARD *vs.* RIGGS *& al.*

A jail bond was taken and a suit commenced thereon by an attorney for an alleged breach of it, without the knowledge of his client. The obligor afterward paid to the attorney the amount due on the bond, who wrote a discharge on the back of it, and delivered it to the obligor. Before, however, the latter had put up the bond, and retired from the attorney's office, where they then were, it occurred to the attorney, that he had accidentally omitted to take pay for the writ and service in the case, and he thereupon demanded the same of the obligor, who refused to pay it. The attorney then offered to return the money and demanded a return of the bond, but the obligor refused to receive the one, or deliver the other. The attorney then wrote to his client, stating the circumstances, omitting the fact of the payment and discharge aforesaid, and asking him if he would be responsible for all costs and advances; to which his client replied affirmatively, directing him to proceed with the suit. *Held*, that under these circumstances, the attorney had no such interest in the suit, as should have excluded him from being a witness.

Such payment, and writing on the bond, under the circumstances of the case, did not discharge the bond; but the action founded on it, might still be pursued.

There being no dispute as to the foregoing facts, the question, whether they amounted to payment, was a *question of law*, and not a question for the jury.

THIS was an action of debt on a jail bond. Plea, *non est factum*, with a brief statement. The bond declared on, was produced in evidence from the custody of *Fiske*, one of the defendants, with a discharge written upon the back of it, and with the names of the signers erased.

William D. Williamson, a witness for the plaintiff, testified, though objected to as incompetent, that when the bond went from his hands, there was no erasure of signatures, or mutilation of seals. That some time in *July*, 1831, he wrote to the plaintiff, in substance, that he had brought suits against *Riggs*, and *Fiske*, his surety, on a jail bond taken in the plaintiff's name, and as his, *Williamson's*, testimony in the case, might be material, he wished him to let him know, whether he, the plaintiff, would be responsible for costs and advances. To which the plaintiff replied in the affirmative, directing him to proceed with the suit. *Mr. Williamson* further stated, that prior to this, on the 11th *of March*, 1831, *Fiske* came into his office and proposed to settle the demand. That he, *Williamson*, calculated the amount, and found $22,50 due, and so told *Fiske*, which sum he, *Fiske*, thereupon paid him. That previous to this, he had written a discharge on the bond, and handed it to *Fiske*. That before putting up the money, and while counting it a second time, to see what kind of bills they were, he recollected that a writ had been made upon the bond and put into the hands of an officer. He then told *Fiske*, there was not money enough, as the writ was to be paid for, and that this was said to *Fiske* before he put up the bond. That, *Fiske* replied, that he would pay no cost — whereupon *Williamson* offered him the money he had paid, and demanded back the bond, but that *Fiske* would neither receive the money or return the bond. — The money paid by *Fiske* was brought into Court.

The counsel for the defendants insisted, that upon these facts *Williamson* was an incompetent witness, on the ground of in-

terest; but *Weston*, the presiding Judge, overruled the objection. He further contended, that it was to be left to the jury to decide from the testimony, whether the payment was complete, and the business done; whether the discharge on the back of the bond, was completed, and the bond delivered up to be cancelled, before the additional claim of *Mr. Williamson* was made, and that if the jury should so find the facts, their verdict should be for the defendants. But the Judge instructed the jury, that these facts had been before the whole Court upon exceptions from the Common Pleas, [*see same case* 9 *Greenl.* 51,] and that in their opinion the action was, upon the facts, maintained, — he therefore instructed them, that their verdict should be for the plaintiff, and that against the surety, *Fiske*, they should assess as damages the amount of the execution against *Riggs*, with the charges of commitment, and interest to the time of their verdict. The jury returned an informal verdict, that they found damage twenty-four dollars and sixty-eight cents. The presiding Judge directed it to be put into form, finding the amount of the penalty against the principal, and the amount of the execution and interest, and fees of commitment against the surety.

To this the counsel for the defendants objected, insisting that the jury had not understandingly found as damages the penal sum against the principal, and desiring that they might be inquired of whether such was the fact. But the Judge replied, that by law the penalty was recoverable against the principal and that the jury had no discretion to reduce it — and further that he did not deem their finding upon this point, material or essential. If in the opinion of the whole Court the testimony of *Williamson* ought to have been rejected on the ground of interest — or if the jury were not properly instructed — or if their first finding did not justify the verdict which was signed and affirmed, the verdict was to be set aside and a new trial granted, otherwise, judgment was to be rendered thereon.

Sprague, for the defendants, contended that *Williamson* had an interest in the suit, and ought therefore to have been rejected as a witness. The action was commenced and pursued

without authority, and was therefore pursued *at the risk* of the attorney. It is true, that after the attorney had received the amount due on the bond, and had discharged it, he received a letter from his client directing him to pursue the action — but then he had communicated none of these circumstances of the payment, discharge, &c. to his client. Now, suppose the plaintiff fail in this suit, will he not have a claim over against the attorney? His consent to the attorney to prosecute the action, was given without a knowledge of the facts, the attorney had not disclosed them to him, he therefore would not be bound by such consent. Hence the attorney had a direct interest in the event of the suit, and was inadmissible as a witness.

But suppose *Williamson* was properly admitted, then what is to be the effect of his testimony?

In an action on a bond, evidence of payment after the day, or forfeiture, is a sufficient defence. 2 *Stark.* 310; *Dix v. Park*, 1 *Esp. Cas.* 110; 1 *Chitty's Pl.* 480, 481; 2 *Chitty's Pl.* 505; *Bond v. Cutler*, 7 *Mass.* 205; 3 *Cranch*, 293. On a jail-bond *nil debit* is a good plea. 11 *Johns. Rep.* 474; 8 *Johns. Rep.* 82; 1 *Chit. Pl.* 478.

Suppose then this transaction had been completed — the money paid, and the bond discharged; there was an end of the plaintiff's claim, and of the defendant's liability. This was a question of *fact* which should have been submitted to the jury. By one construction of the testimony, the jury might have considered that the transaction was not consummated — by another, that it was — and they should have had the opportunity to decide. The defendant produced the bond with a discharge upon the back of it, as evidence in his defence. *Mr. Williamson* was called to contradict the discharge. Here, then, was conflicting evidence proper to be submitted to the jury.

The verdict was erroneously rendered as matter of form, for double the amount for which it was first returned. The first, was for the debt and costs in the execution, the amended one, was for *double* this amount, the penal sum of the bond.

W. D. Williamson, for the plaintiff, to the question of competency of the witness, cited *Fisher v. Willard*, 13 *Mass.* 381; *Phillips v. Bridge*, 11 *Mass.* 242.

The opinion of the Court was delivered by

MELLEN C. J.—The report of the Judge presents three questions for the decision of the Court.

1. Was *Mr. Williamson* properly admitted as a witness? He is not the indorser of the writ; and in reply to his letter to the plaintiff, stating, in substance, the facts in relation to the present action, he received the letter referred to in the report. In this letter, the plaintiff wishes him to prosecute the action and engages to reimburse to him all expenses he might incur in the prosecution. Under these circumstances we do not perceive how he can be considered interested any more than every agent is, acting under the authority and orders of his principal.

2. Were the instructions of the Judge to the jury correct? The facts are the same as they appeared on the trial in the Court of Common Pleas; and we have already given our opinion on them, that they did not amount to a payment and discharge of the bond; in consequence a second trial has been had. In this state of the case, the presiding Judge of this Court, instructed the jury that the action was maintained upon the facts before us; they not constituting a legal defence. It is contended, that this instruction was incorrect; that the questions, whether the payment was complete, and the business done and the bond delivered up, before the additional claim of *Mr. Williamson* was made, should have been left to the jury. It was not intimated at the argument that any other evidence existed on the part of the defence; nor did *Mr. Williamson* testify to any one fact contradicting the language of the receipt on the back of the bond; on the contrary, he testified that he wrote and signed it. His testimony was important merely as it respected certain *additional* facts. As to these there was no pretence that they could be controlled or varied or weakened by any opposing proof. But it is urged by the defendant's counsel that they had a right to the opinion of the jury as to the value of *Mr. Williamson's* testimony and his credibility as a witness. In reply to this argument, we remark, that the jury had an opportunity of weighing his testimony, they were not prohibited from so doing. A Judge, when giving instructions to a jury, is not obliged at every sentence to introduce the *cau-*

tionary condition, "if you believe the witness." This is to be understood as always implied, when not expressed; or else we must absurdly presume that they are to follow his instructions, whether they believe the evidence or not; and that such is his meaning in giving his instructions. Besides, a jury is to act and decide on evidence, not caprice: — they are to draw conclusions from legitimate premises. In the present case they must be considered as having done so, in believing a witness who stood before them unimpeached; and, for any thing appearing to the contrary, unsuspected. Had the defendant introduced or offered to introduce any impeaching evidence, it should unquestionably have been submitted to the special consideration and judgment of the jury. The facts of the case, therefore, being uncontested, it is a question of law, whether they amount to a *payment* and *discharge* of the bond, as much as it is a question of law, whether certain facts proved, amount to a *tender*. As to this principle no one can entertain a doubt. As a question of law, we have once given our opinion upon it, and we perceive no good reasons for changing it.

3. Was the verdict properly returned and affirmed?

The first section of the statute of 1830, *ch.* 463, furnishes a ready and conclusive answer to this question. It provides, that in all actions on bond, if the verdict be for the plaintiff, the *jury shall assess the damages by their verdict*, and the *Court* shall enter judgment for the penal sum of the bond. In the present case the jury assessed damages against *Fiske* to the amount of the plaintiff's execution against *Riggs*, the original debtor, with interest and *charges of commitment*, and damages against *Riggs*, equal to the amount of the penalty, according to the directions of the 10th *sect.* of the act of 1822, *ch.* 209. The informality of the verdict as *returned*, was properly corrected before it was *affirmed*, according to constant practice.

The State *vs.* Corson.

In *scire facias* on a recognizance, and demurrer to the writ, the Court refused to notice any variances between the writ and recognizance, the condition of the latter not being set out in *hæc verba* either in the writ or pleadings.

In a complaint against one, before a justice of the peace, for a larceny, not triable by such magistrate, but brought before him to have the offender committed or recognized to take his trial at the proper tribunal, the offence should be stated on oath in *substance* and *clearly;* but the same technical precision and accuracy is not required as in an indictment.

The justices of the *quorum* acting under the authority of the Act of 1821, *ch.* 68, have power only to *bail* a person charged with a *bailable offence*, and who has been committed for not finding sureties. — The particulars as to the *description* of the offence, and time and circumstances of its alleged commission, they have no authority to inquire into, much less to decide upon.

"This was a *scire facias* on a recognizance entered into by "the defendant as one of the sureties of *Henry G. Badger* "before two justices of the peace and the *quorum*, in virtue "of the act of 1821, *ch.* 68; the said *Badger* then being in "prison on a charge of larceny, for not finding sureties for his "appearance at the Court of Common Pleas for the county of "*Penobscot*, on the first *Tuesday* of *October*, 1831."

The mittimus on which *Badger* was committed, in reciting the previous proceedings, stated that he had been convicted on the *complaint* of *D. N.* without saying, "on oath;" — nor was there any statement or recital therein, of the *time when*, or *place where*, the offence was committed. There were the same recitals and the same omissions in the recognizance. In the latter, also, in describing the offence for which *B.* had been committed, it was stated that he had been charged with having feloniously *taken*, and *carried away*, a one horse wagon, and a buffalo skin, &c. The *scire facias* pursued the recognizance, except that it alleged the complaint to have been, "*under* "*oath*."

The defendant demurred specially, assigning substantially the following causes, *viz.:*

1. That, it did not appear by the recognizance, that the complaint was *on oath*.

2. That, it did not appear by the recognizance, that any offence had been committed by *Badger*, that would authorize the magistrate to commit him to jail.

3. That, it did not appear from the recognizance, *when*, or *where*, the offence, (if any,) had been committed.

4. That, the charge of having "feloniously *taken* and *car-* "*ried away* a one horse wagon, and one buffalo skin," was no sufficient or legal description of the crime of larceny, nor of any other crime authorizing the commitment of *Badger*.

5. That, the magistrate had no authority to issue his warrant on a complaint not made *under oath*.

6. That, the recognizance being founded on such warrant, was null and void.

7. That, the recognizance varied from the writ — in the latter it being alleged, that the complaint was on oath, when by the former, it appeared that the complaint was not on oath.

8. That, the recognizance varied from the form of the statute in such case made and provided, in having omitted to state that the complaint was *on oath*.

9. That, the defendant had recognized to appear at *Bangor*, &c. on the first *Tuesday* of *October* then next, but was not called on his recognizance, on said first *Tuesday* of *October*.

10. That, it did not appear by the recognizance that the justice gave any judgment whatever in the case.

11. That, it did not appear that the justice did adjudge *Badger* to be committed on failure of compliance with his requirements, but committed him without judgment, and without law.

The demurrer was joined, and judgment rendered by *Whitman C. J.* in the Court below, against the defendant, who thereupon brought the case to this Court by appeal.

J. Appleton, for the defendant.

The recognizance is void, it not appearing that the complaint was *on oath*. The recognizance should show a good cause of caption. *Bridge v. Ford*, 4 *Mass.* 642; *Commonwealth v. Lovering*, 11 *Mass.* 337; *Commonwealth v. Daggett*, 16 *Mass.* 447; *Commonwealth v. Downey*, 9 *Mass.* 520; *State v. Smith*, 2 *Greenl.* 63; *Ex parte Beaufort*, 3 *Cranch*, 448.

The recognizance is void also, for the want of a proper *venue*. *The People v. Miller, Johns. Rep.* 371.

The offence was not sufficiently described, the word *stole* was indispensable. *Chitty's Crim. Law*, 3, 711.

There was no sufficient adjudication. *State v. Smith*, 2 *Greenl.* 63. And the proceedings prior to the recognizance were all invalid. *Eng. Com. Law Rep.* 9, 493.

In answer to a suggestion of the Court, *Mr. Appleton* contended further, that, it was unnecessary to set out the condition of the recognizance in his demurrer. That he prayed oyer, which was granted by the Court, and that he thereupon demurred. If, therefore, it was necessary that the recognizance should be set out in *hæc verba*, and had not been, it was the fault of the clerk and not his.

Rogers, Attorney General, for the State.

The opinion of the Court was delivered by

MELLEN C. J. — This is a *scire facias* on a recognizance entered into by the defendant as one of the sureties of *Henry G. Badger*, before two justices of the peace and the quorum, in virtue of the act of 1821, *ch.* 68: the said *Badger* then being *in prison*, on a charge of larceny, for not finding sureties for his appearance at the Court of Common Pleas for the county of *Penobscot*, on the first *Tuesday* of *October*, 1831. To this writ of *scire facias* the defendant has demurred specially, but the condition of the recognizance is not set forth, *in hæc verba*, either in the *scire facias*, or as a part of the demurrer and introductory thereto, for the purpose of presenting to the view of the Court any variances which are said to exist between the writ and the recognizance. But by no pleading, has the same become a part of the declaration, and therefore, we can only examine the declaration and decide upon its sufficiency. The first, second, third, fifth, sixth, seventh, eighth, and tenth causes of demurrer may all be laid out of the case, as having reference merely to some alleged defect in the *recognizance*. The ninth is perfectly immaterial. No reliance has been placed on the eleventh by the counsel for the defendant. The only two objections which have been urged against the sufficiency

of the declaration are, — 1. That it is not alleged that the wagon and buffalo skin were feloniously *stolen*, taken and carried away, but only that the same were feloniously *taken* and *carried away*. This is the *fourth* cause of demurrer. 2. The other objection is, it does not appear by any direct averment in the declaration, that the larceny was committed in the *county of Penobscot*; but this is not assigned as one of the causes of demurrer.

It may be admitted that either of the two last named objections would be good, in case of an *indictment*, which ought to charge the alleged offence with legal and technical precision, but it appears by the declaration, that the offence charged was not triable by a justice of the peace. The complaint and warrant, in virtue of which the said *Badger* was arrested, were employed merely as the means for arresting and securing the alleged offender, that he might be held to answer to an *indictment*, if the grand jury should find one against him. The justice to whom the warrant was returned, had no power to try the offender, or decide on the sufficiency or insufficiency of the charge *in point of form*, but only whether there was evidence sufficient to require or justify him in securing the person accused, by commitment or recognizance, to answer before the proper tribunal, to the charge that might be made against him, by way of indictment. The offence, in such cases, should be stated on oath *in substance*, and *clearly*, but of what use is technical exactness, in a case where the magistrate has no authority to decide the cause. We cannot sustain this objection.

As the *other* objection is not *specially* set down as a cause of demurrer, it cannot prevail, unless the omission of a venue in *this* case is a matter of *substance*. On *indictment* it would be, as we have said before; but when the declaration states, that the committing magistrate, "upon examination of the facts re-"lating to the charge against *Badger*, decided that there was "good cause to suspect him to be guilty of it, and thereupon or-"dered him to recognize to appear and answer to the charge, "before the Court of Common Pleas in *Penobscot* county," and committed him for not so recognizing, the statement amounts to a declaration that the larceny was committed in that county;

and though by no means sufficient in an indictment, was sufficient for the purpose of examination and those proceedings *preliminary* to an indictment. We perceive no good reason for requiring, in such a case as the present, so much strictness, as to pronounce the *scire facias* bad and insufficient on that account. But even if we were not satisfied upon the points we have been considering, there is another ground on which we should think the *scire facias* sustainable; namely, that the two justices of the *quorum*, acting under the authority of the act before mentioned, have no power to do any thing but *bail* a person charged with a *bailable offence*, and who has been committed for not finding sureties. The particulars, as to the *description* of the offence and time and circumstances of its alleged commission, they have no authority to inquire into, much less to decide upon. They do the appointed duty and exercise the delegated authority properly, if they restore the prisoner to liberty, on his application, upon his entering into recognizance to appear and answer to the charge. Suppose this Court should order a person indicted, to recognize for his appearance at the next term, and he should not appear according to his recognizance, and a *scire facias* should be brought against him; could he avoid the obligation of that recognizance, by pleading in bar that *no venue* was laid in the indictment, nor a sufficient description given of the offence charged? This would be a novelty indeed. The two justices of the *quorum*, under the act before mentioned, had as much power as the Court of Common Pleas, or one or more Justices of the Supreme Court, and we are bound to take notice of this. Shall the defendant in this case, after having gained his liberty by means of the recognizance, avoid it by reason of alleged defects in the writ and proceedings therein stated, respecting which the justices of the *quorum* had not the least jurisdiction? We think, by his recognizance the defendant was bound to answer at all events for the appearance of *Badger* at Court to answer to any charge that might be made against him;—and that there was the place to avail himself of all legal defects. The law requires no particular form of recognizance to be taken by the two justices under the act.

Declaration adjudged sufficient.

Bangor Bridge Co. *vs.* McMahon.

Where one subscribed for shares in an incorporated company, agreeing "to take "and *fill* the number of shares set against his name," the Court *held*, that *assumpsit* might be maintained against such subscriber or proprietor, to recover an assessment on his shares; the word, "*fill*," in this connection amounting to a promise to pay assessments.

But where by the terms of the subscription, he agrees merely *to take* a certain number of shares, without promising to pay assessments, the only remedy against the delinquent proprietor is a sale of his shares.

This was *assumpsit*, brought to recover the amount of an assessment on a share in the *Bangor Bridge Company*, alleged to belong to the defendant. It appeared that the company had been duly organized, and that at a regular meeting, held in *Dec.* 1831, it was voted, "that the stock be divided into 300 shares, "and that a committee be appointed to solicit subscribers." The committee appointed under this vote, prepared a subscription paper in the following terms. "Three hundred shares "Bangor Bridge Corporation. — The subscribers agree to take "and fill the number of shares in the Bangor Bridge Corpora- "tion which are set against our names respectively." Which subscription paper was signed by the defendant, who also set "one share," against his name. The shares having been taken up, the company proceeded to make contracts for the building of a bridge, and, to meet the first payment under the contracts, an assessment of $25 was made on each share.

A certificate of the share according to the By-laws, together with a receipt for the amount of this assessment, were made and offered to the defendant, by the Treasurer, and payment demanded.

The case being submitted in the Court below on the foregoing statement of facts, *Perham*, *Justice*, ordered a nonsuit.

To which the plaintiffs took exceptions.

J. Appleton, for the plaintiffs, contended that the word, "fill," was equivalent to a promise to pay assessments, and cit-

ed, *Worcester Turnpike v. Willard*, 5 *Mass.* 82; and *Salem Mill Dam Corporation v. Ropes*, 6 *Pick.* 31.

G. Parks, for the defendant, opposed the plaintiffs' construction. The word, "fill," was not synonymous with, or equivalent to, a promise to pay. It is at best but equivocal. And corporations should be held to use explicit and unequivocal language in their subscription papers. They should not be permitted to take advantage of their own looseness, and hold subscribers to obligations, the latter never intended to lay themselves under. He also cited the following authorities. *Andover and Medford Turnpike v. Gould*, 6 *Mass.* 40; *Andover and Medford Turnpike v. Hay*, 7 *Mass.* 102; *Middlesex Turnpike v. Swan*, 10 *Mass.* 386; *Franklin Glass Co. v. White*, 14 *Mass.* 286; *Chester Glass Co. v. Dewey*, 16 *Mass.* 94.

The opinion of the Court was delivered by

Weston J. — The general remedy for the non-payment of assessments, in corporations of this character, is by the sale of the share of the delinquent proprietor. No other remedy exists, where the agreement is to take a certain number of shares. And in the case of the *Andover and Medford Turnpike v. Gould*, 6 *Mass.* 40, it was adjudged that no greater liability attached, where the agreement was to take a certain number of shares in that corporation, and to be a proprietor therein. Unless there is some further agreement or stipulation, as has been repeatedly decided, the corporation can look only to the statute remedy. This may often prove inadequate; and the enterprize contemplated fail for want of funds. Against such a contingency, the corporation may guard by requiring a promise not only to take the shares, but to pay the assessments, which may be lawfully made thereon. Assumpsit will lie upon such an agreement, as was decided in the case of the *Worcester Turnpike v. Willard*, 5 *Mass.* 86. This is conceded; but it is insisted that the promise must be made in terms, which were held binding in that case, or in language equally strong. The promise must be plain and unequivocal, and if so, in whatever terms expressed, it ought to have the same legal efficacy.

In the case before us, the agreement of the subscribers

was, not merely to take the number of shares, set against their names respectively ; but they were to fill up their shares. This stipulation had some meaning, was intended to have some effect, which indeed cannot be misunderstood. To fill up, is to pay the assessments, which ascertain what proportion of the general expenditure falls upon each share. The term used requires this construction, and no other sensible meaning can be given to it.

The exceptions are sustained, the nonsuit is set aside, and a default is to be entered.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.