# REPORTS

OF THE

CASES ARGUED AND DETERMINED

IN THE

# SUPREME JUDICIAL COURT,

OF THE

# STATE OF MAINE.

BY JOHN FAIRFIELD,
COUNSELLOR AT LAW.

VOLUME II.

*HALLOWELL:*
GLAZIER, MASTERS & SMITH.

1836.

# JUDGES

OF THE

# SUPREME JUDICIAL COURT

OF THE

# STATE OF MAINE

DURING THE PERIOD OF THESE REPORTS.

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HON. PRENTISS MELLEN, L. L. D. CHIEF JUSTICE.
HON. NATHAN WESTON, L. L. D. } JUSTICES.
HON. ALBION K. PARRIS, }
*Attorney General*, NATHAN CLIFFORD, ESQ.

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OF CASES REPORTED IN THIS VOLUME.

# CASES

IN THE

# SUPREME JUDICIAL COURT

IN THE

COUNTY OF WASHINGTON, JUNE TERM, 1833.

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## BUCK *vs.* PIKE.

*Brewer*, bargained with *Munroe* for a lot of land, and caused it to be conveyed to *Downes*, the latter signing a note with him as surety for the purchase money. *Brewer* then assigned his interest in the land to *Buck*, as trustee for the benefit of his, *(Brewer's)* creditors; and afterwards, *Downes* becoming dissatisfied with his situation, *Brewer* requested *Pike* to take a deed of it and hold for him, paying to *Downes* the amount of his lien upon it; to which *Pike* consented. *Buck*, then brought a suit at equity to compel *Pike* to convey to him, tendering the amount of *Pike's* payments to *Downes* with interest, and by the Court it was held: —

That, the conveyance from *Munroe* to *Downes*, created by implication of law, a resulting trust in favor of *Brewer*: —

That, this trust with which the land was chargeable, enured to the benefit of *Buck*, in the conveyance from *Downes* to *Pike*; and that the latter took the land subject to it: —

That, *parol proof* was admissible to show the payment of the purchase money by *Brewer*, though in *contradiction of the deed* from *Munroe* to *Downes*: —

That, to raise a resulting trust by implication of law in favor of one who pays the purchase money, the payment must be a part of the original transaction — the trust cannot arise from *subsequent payments*:

That, the acceptance of a *promissory note* by the grantor, instead of money, may be regarded as such payment.

THIS was a bill in equity; an abstract of which was as follows, viz. The complainant alleged, that on the 20th of *December*, 1823, one *Artemas Ward*, in consideration of $2000, con-

veyed to *Asa A. Pond* 87 acres of land in *Calais*, called the *Terrol* lot, and on the same day took back a mortgage to secure the purchase money.

That on the 16th of *February*, 1827, *Pond's* right in equity was attached by his creditors and afterwards on the 30th of *August*, 1828, was purchased at a sheriff's sale by *Edmund Munroe*.

That on the 3d of *April*, 1827, *Pond* conveyed one acre thereof to *Thomas A. Brewer*, who, on the same day, conveyed the same land in mortgage to *George Downes*, to secure the payment of $1443,03.

That on the 21st of *July*, 1829, *Brewer* conveyed the acre in question to *Buck*, the complainant, in trust to pay $2964,61 to certain creditors of said *Brewer*.

That on the 20th of *November*, 1829, *Ward* assigned *Pond's* mortgage of the 87 acres to said *Munroe*, who thereupon claimed to be owner in fee.

That on the 16th of *June*, 1830, *Munroe* demanded $300 of *Brewer* for the acre purchased of *Pond* as aforesaid, and conveyed the same to *George Downes* at the request of *Brewer*, who, finding himself liable to be evicted by an elder and better title, *paid the consideration therefor*, at the time, by his negotiable promissory notes, *himself as principal* and *Downes as surety*, whereby a *trust resulted to said Brewer for the benefit of the complainant.*

That on the 15th of *October*, 1830, *Downes* being unwilling longer to hold said estate as mortgagee and trustee, requested *Brewer* to appoint some other person to assume his liability ; and *Downes*, at the request of *Brewer*, conveyed the same to *William Pike*, the defendant, to discharge himself of said trust, to whom *Brewer*, at that time made known the nature and character of said *Brewer's* interest in the premises, and that said *Downes* held the same as a mortgagee and trustee of said *Brewer*, and that said *Pike* then and there consented and agreed to take the place of said *Downes*, and to hold the estate in trust and for the benefit of said *Brewer*, subject to the payment of whatever balance should be found due to said *Downes* on his mortgage of the 3d of *April*, 1827, and for his liability as surety to said *Munroe* on his note as aforesaid, which was ascertained to be $678,08.

That said *Pike* on the 15th of *October*, 1830, mortgaged the said acre to said *Downes* to secure the $678,08.

That on the 10th of *January*, 1831, and at divers other times said *Brewer* paid said *Downes*, in discharge of said *Pike's* liability to him, $103.

That on the 17th of *May*, 1832, *Brewer*, in consideration of $100, released his interest in the premises to the complainant, in trust as aforesaid.

That on said 17th of *May* the complainant tendered to *Pike*, in discharge of his liability as aforesaid and for his services and expenses as *Brewer's* trustee, $645 and requested his consent that said *Downes* who then held the same in mortgage, might convey the premises to the complainant, and that he refused his consent.

After certain interrogatories proposed to the defendant, the Bill closed with a prayer that *Downes* might be required to receive the balance due him on said mortgage of *Pike* and to discharge the same; and that said *Pike* might be required to accept the tender made as aforesaid, and to convey the premises to the plaintiff for the purposes of the trust aforesaid, and for further relief.

The defendant in his answer to the Bill and interrogatories, admitted the conveyance from *Ward* to *Pond* and mortgage back; that *Pond's* right in equity was attached and sold as set forth in the Bill; the conveyance from *Pond* to *Brewer* of the acre and mortgage to *Downes* by *Brewer;* that improvements thereon were worth $1200; the assignment of *Pond's* mortgage to *Munroe* as to part, but required proof that the acre in question was assigned and that the consideration was $2000. Denied any knowledge of mortgage by *Brewer* to the complainant, and required proof of debt of $2964,61 alleged to be due from *Brewer* to plaintiff and others.

He then set forth, that, on the 16th of *June*, 1830, the said *Brewer* considering himself liable to be evicted from said acre by said *Munroe*, to secure his improvements and the safety and indemnity of said *Downes*, gave *Munroe* his negotiable promissory notes for $325, signed by himself and by said *Downes* as his surety, and that, thereupon with the assent of *Brewer*, *Munroe* released his lien on said acre to *Downes*, at *Downes'* request, and

for his security and benefit, and in order to avoid a suit upon the covenants of his mortgage deed to said *Downes*.

That before the transactions aforesaid, *Pike* had been a member of the house of *N. D. Shaw & Co.* of which *Brewer*, his brother-in-law, was a member; that *Pike* withdrew, transferring his interest to the remaining members of the firm, who undertook to indemnify him against their debts. That *N. D. Shaw & Co.* became insolvent, and left *Pike* exposed in person and property to a large amount without indemnity. That while the defendant was thus situated, in order, as he was induced to believe, to enable him to make himself secure, as far as said acre would go, *Brewer* informed him that he could not pay the money due *Downes*, and advised the defendant to pay *Downes* and take a deed of the premises to himself for his own absolute benefit.

He denied knowledge of the complainant's mortgage or any other title than that of said *Downes*, either before, at the time, or until long after any transaction alluded to in the Bill. Averred that he made inquiry of *Brewer*, at the time, as to title, and *Brewer* declared he had made no conveyance to any person except *Downes*, and that no other person had any claim upon the same; and being informed by *Downes* that the title to the premises was absolute in him, he agreed to buy said acre for the amount then due from *Brewer* to *Downes*, provided *Brewer* would agree to make the first payment to said *Munroe*, being $100, part of $325; which *Brewer* promised to do. He thereupon, on the 15th of *October*, 1830, purchased of *Downes* the premises, taking his legal conveyance of the same, and gave his notes and mortgage therefor for $678, for his own use and benefit, and not in trust or for the benefit of said *Brewer*, not having at the time of the conveyance, any knowledge or information of the plaintiff's title. He therefore insisted, that the legal and equitable title was in himself against the complainant. He denied that *Brewer* requested him to take *Downes'* place as trustee of the property of *Brewer;* or that *Brewer* made known to him any interest of his in the premises, other than is herein set forth, and that he was advised of any equitable interest therein as the plaintiff has alleged.

He averred, that, at the time of his purchase, *Brewer* told him that it was out of his power to pay *Downes* the amount due to

him, or to pay the $325 to *Munroe*, and that he, the defendant, was induced to believe, and did believe, said estate must therefore continue to belong to *Downes*, unless the defendant should deem it for his interest to purchase the same, as aforesaid, for the sake of obtaining indemnity for losses he was about to sustain, out of any small excess of value, of said estates, over and above what he might pay said *Downes* for the same, which he accordingly did.

He denied knowledge of any payments made by *Brewer* towards the $678; but when the first payment to *Munroe* of $100, which *Brewer* had agreed to pay, fell due, *Downes* called on the defendant to pay it, and the defendant called on *Brewer*, who being unable to pay, the defendant loaned him $50 for that purpose and charged it to him. *Downes* also paid a part of it — after which the defendant took it up, refunded to *Downes* what he had paid, and charged the amount to *Brewer*.

He denied that he ever called on or expected *Brewer* to pay any part of the moneys for which said *Downes* was holden, or of that which was due to *Downes*, except the $100, but always expected to pay the same out of his own moneys and has accordingly so paid the same in full to the amount of $678.

He then alleged that since the conveyance to him from *Downes*, *Thomas Lord & Co.* sued *N. D. Shaw & Co.* and attached *Brewer's* goods to the amount of about $1200, which were delivered the plaintiff and others by the attaching officer, for safe keeping, to be redelivered on execution; which goods the plaintiff applied towards his own claim against *Brewer*, without the consent of the defendant, by means of which the defendant was afterwards obliged to satisfy said judgment of *Thomas Lord & Co.* to the amount of $1700, out of his own private estate.

That, the defendant has been compelled to pay and satisfy out of his own property, divers other debts due by said *N. D. Shaw & Co.* for which he has not been reimbursed, and is damnified to a greater amount than $1500.

He admitted the tender of $645, but denied the right of the plaintiff to redeem or obtain the premises by the payment of any sum whatever; but if he had such right, then the defendant denied the sufficiency of the tender as to amount.

He denied that the notes for the $1403,03 were ever paid and adjusted by *Brewer* as the plaintiff alleges, or that they ought to have been given up to *Brewer*, or that they were delivered to the defendant by mistake; but alleged that at the time of his purchase, *Downes* endorsed and delivered said notes, and assigned said mortgage, to the defendant, the more perfectly to assure to him the absolute and indefeasible title to the premises.

He did not know how far *Brewer* had discharged his liabilities to *Downes*, but averred that, as well said notes uncancelled, and the assignment of the mortgage given to secure the same, as the absolute deed of said *Downes* to him of the premises, formed the consideration for which he undertook to pay said *Downes*, and did pay, the sum of $678 aforesaid.

He admitted that, prior to his purchase, both *Brewer* and *Downes* did inform him, that *Downes* held the premises originally by mortgage from *Brewer*, and subsequently by absolute deed from *Munroe*. But said, that they represented the title in the premises to be absolute and indefeasible, and denied that he had any knowledge of any other title to the same either at law or equity.

He admitted that *Brewer* had ever since his purchase occupied the premises — that, there was no special agreement as to rent — that, none had been paid — that, he had demanded none because *Brewer* was poor, and was a near relative by marriage; but, he insisted upon his legal right to claim rent for the premises, against *Brewer* and all other persons.

Denied, that, he ever called on *Brewer* to pay any part of the consideration, except the $100, which he had agreed to pay and did not; — that, he considered *Brewer* his debtor for what he, the defendant, had paid of that first payment, and had accordingly charged him $103,30; — but, that he had charged him with no other money paid for the premises; — that, the whole amount paid, had been from his own moneys, and that no part of it had been furnished by *Brewer;* — that, he, the defendant, expected and intended, to account to said *Brewer*, on a final adjustment of this affair, for said first payment to said *Munroe*, of $100, if he, *Brewer*, had paid it.

There was much testimony introduced by both parties — but the following is all that is deemed material to a right understanding of the case.

Complainant's evidence.

1. Extracts from the books of the defendant.

" *Thomas A. Brewer*, Dr.

| | | | | |
|---|---|---|---|---|
| " 1831, *Jan.* 5. | To cash paid *George Downes* on note to | | | |
| " | | *E. Munroe*, - - - | | $40, |
| " | | " interest on do. - - - | | ,24 |
| " | *Jan.* 10. | " cash paid on same note, *Nov.* 10, | | 50, |
| " | " " | " cash paid, balance of yr. note and | | |
| " | | interest, - - - - | | 12,50 |
| | | | | $103,33 |

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" 1832, *Jan.* 15. By this sum charged to *Brewer* house, $103,33

" *Brewer* house to sundries Dr.

| | | | | |
|---|---|---|---|---|
| " 1832, *Jan.* 5. | To amount of note paid *Munroe*, charg- | | | |
| " | | ed *Brewer*, - - - | | $103,33 |
| " | | " paid *Samuel Wheeler* for amount of | | |
| " | | *Brewer's* note to *Jan.* 5, | | 341,48 |
| " | | " interest — amount for interest acct. | | 4,63 |
| " " | *July* 5. | " my draft to *Downes*, dated *June* 5, | | 262,77 |
| " " | *Aug.* 2. | " paid *George Downes* balance of my | | |
| " | | note, - - - - - | | 28,25 |

2. Deposition of *Edmund Munroe*.

The deponent confirmed the statements of the Bill, in regard to the bargain to sell the acre to *Brewer*, the consideration paid, by whom, and the conveyance to *Downes*. He stated further, that *Brewer* was in possession of the land at the time, and had made the improvements that were upon it.

3. Deposition of *George Downes*, in which he stated, that, on the 3d of *April*, 1827, *Brewer* conveyed to him the lot in question, in mortgage, to secure the payment of $1443,03, for which sum *Brewer* gave him his notes at that time. — That, he never gave any value for said notes, but that the transaction was a friendly one, between *Brewer* and himself, to preserve his pro-

perty from sacrifice, for the debts of *Neal D. Shaw & Co.* which firm had failed, and of which said *Brewer* was a member.

He then related the transaction of the purchase by *Brewer* of *Munroe*, the consideration paid, by whom, and the conveyance to himself, conformably to the statements in the Bill. Previously, however, to the conveyance from *Munroe* to him, *Brewer's* note to *Samuel D. Wheeler*, assignee of *N. D. Shaw & Co.*, and a note in favor of *Perry & Lincoln* came into his, the deponent's, hands, which, it was understood, he should hold secured by the mortgage.

The deponent then related the circumstances of his being dissatisfied with his situation — requesting *Brewer* to procure some one to take his place — *Brewer's* request to convey to *Pike* — the conveyance accordingly — the payment by note of $678,08 by *Pike*, — and the mortgage to secure the payment — in substance as set forth in the Bill.

He also stated, that *Pike* at various times had paid him the $678,08 and interest — That on the 7th of *May*, 1832, *Buck* tendered him $645, and demanded a discharge of *Pike's* mortgage, which he refused to do, by direction of *Pike*. — That he estimated the property at the time he took it, at the sum of $1500, though now worth $2300. — Did not recollect that he told *Pike*, at or before the time of the conveyance to him, that he, deponent, held the property exclusively for the benefit or interest of *Brewer*. — That, he knew nothing of the plaintiff's claim, at or before the time of his conveyance to *Pike*. — That, he told *Pike* at the time of the conveyance, that his title was good, and that he would hold through or under the deed from *Munroe*. — That, he passed over to *Pike*, at the time, *Brewer's* notes for $1443,03 — did not state to him that they were given without any value received for them — *Pike*, however, paid no consideration for them, when endorsed to him, but that he, deponent, handed them to *Pike*, as a part of the transaction between him and *Brewer*.

*Thomas A. Brewer*, in his deposition, stated, that on the 21st of *July*, he was indebted to *Buck & Tinkham* and others, in the sum of $2964,61, to secure which, he conveyed the premises to the plaintiff, in trust for the payment of his several creditors nam-

ed in the instrument of conveyance. — That he, deponent, was in possession at the time, and had been ever since, under a lease from the plaintiff. (The deed and lease were annexed). — That, the improvements on the lot were worth from $1500 to $2000.

The deponent then related the circumstances, substantially as set forth in the bill, relative to his purchase of *Munroe* — the conveyance to *Downes* — the amount and mode of payment of consideration — the dissatisfaction of *Downes* — his procurement of *Pike* to take his place — the conveyance to *Pike*, &c. — He deposed further, that, at the time of the conveyance, he informed *Pike* of the situation of the property, and asked him to take it and hold it for him — that he stated to him, he would pay the amount due to *Downes* if he could, but if he could not, wished the defendant, *Pike*, to assist him, which he promised to do. — He stated further, that *Pike* frequently called on him, at first, to pay for the land, but he did not pay more than $50, because it was inconvenient for him.

On cross examination, he stated that at the time of his conveyance to the plaintiff, for the benefit of himself and others, the sum of $2964,61 was actually due to them, but that since that time, he had paid to *Buck & Tinkham*, in part of their claim, $700; to *Joseph C. Noyes*, his whole demand, about $400; and to *George & J. Hobbs*, about $250.

That his goods that were attached by *Thomas Lord & Co.* were receipted for by the creditors named in the conveyance to *Buck*, and were left in his, deponent's possession — the execution when obtained, was satisfied, as he believes, from the property of *Neal D. Shaw & Co.*

That, all the agreement that was made by *Downes* to hold the land for his, deponent's, benefit, was made prior to the conveyance from *Munroe*.

*Neal D. Shaw*, stated in his deposition, that as agent of *Samuel Wheeler*, assignee of *Neal D. Shaw & Co.* he paid to *Isaac Clapp*, of Boston, between the years 1827 and 1830, the sum of $2323,27. This sum was afterwards claimed by *William Pike*, the defendant, on the ground of his preference in the assignment to *Clapp*. That a short time since, the matter was settled with

*Pike*, he relinquishing $1000 of the amount, and the balance being paid him by the agent of *Clapp*. That, *Pike* stated at the time, that he claimed the balance because he was secured in the assignment of *N. D. Shaw & Co.* for his liabilities as a member of the firm. That, *Pike* left the firm before its failure, but not giving legal notice, he was held liable for certain debts of the firm.

Evidence introduced by the defendant:

Second deposition of *Neal D. Shaw*, in which he stated that the execution for about $1700 recovered by *Thomas Lord & Co.* against the firm of *N. D. Shaw & Co.* since its failure, was paid by *William Pike*; and that there are still outstanding debts against the firm for which *Pike* is liable.

Second deposition of *George Downes*, in which he stated that, from his knowledge of the amount of debts of *N. D. Shaw & Co.* he should not think the property conveyed by *Brewer* to him on the 3d of *April*, 1827, would be any more than his proportion of said debts, provided *Pike* paid no part thereof. — That, he did not recollect of telling *Pike* at the time of his conveyance to him, or at any time prior thereto, that he held the property in trust for *Brewer* — and thought he never did tell *Pike* so. — That he did not tell him that the notes for $1443,03 were of no value. — That he did not tell *Pike* the conveyance to him was for the benefit of *Pike* or any one but himself.

The case was argued in writing by *Hobbs* for the plaintiff and *Greenleaf* for the defendant.

The following points were made by the counsel for the plaintiff: —

1. That by the conveyance from *Munroe* to *Downes* on the 16th of *June*, 1830, in the manner and under the circumstances of the case, a trust estate resulted to *Brewer*, by operation of law.

2. That, therefore, *Pike* was not entitled to hold against the complainant — he having had notice, actual or constructive, at the time of the conveyance to him — or at all events having had the means of notice, while the purchase money remained in his hands unpaid.

3. That, inasmuch as the mortgage to *Downes*, of 3d of *April*, 1827, was fraudulent as to creditors, the trust estate of *Brewer* enured to the benefit of the complainant as first mortgagee. *Brewer* having before the conveyance from *Munroe* to *Downes*, for a valuable consideration, mortgaged the same to the complainant.

4. That no tender was necessary, but if otherwise, that more than sufficient was tendered.

5. That the liabilities of *Pike* on account of *Brewer*, if any exist, or have existed, raise no equity in his favor against the complainant's title.

The following authorities were also cited on the same side, viz: *Powell & ux.* v. *B. & M. Manufacturing Co.* 3 *Mason*, 361; *Sugden on Vendors*, 414; *Fonbl. Eq. Book* 2, *ch.* 5, *sec.* 1; *Boyd* v. *McLean*, 1 *Johns. Chan. Rep.* 582; *Botsford* v. *Burr*, 2 *Johns. Chan. Rep.* 405; *Peebles* v. *Reading*, 8 *Serg. and Rawle*, 492; *Wallace* v. *Daffield*, 2 *Serg. and Rawle*, 592; 2 *Mad. Chan.* 112 *et seq.* and cases there cited. *Maneely* v. *McGee*, 6 *Mass.* 145; *Thacher & al.* v. *Dinsmore*, 5 *Mass.* 299; 2 *Mad. Chan.* 129; *Bond* v. *Kent*, 2 *Vern.* 280; *Fonbl. Eq.* 442; *Murray* v. *Ballou*, 1 *Johns. Chan. R.* 567; *Wilson* v. *Mason*, 1 *Cranch*, 100; *Frost* v. *Beekman*, 1 *Johns. Chan. R.* 300, and cases there cited. *Smith* v. *Low*, 1 *Atk.* 490, *Fonbl. Eq.* 447; *Jewett* v. *Palmer*, 7 *Johns. Chan. R.* 68; 8 *Wheaton*, 449; *Townville* v. *Nash*, *Bridgman's Eq. Dig.* 690; 3 *Serg. & Rawle*, 434; 2 *Atk.* 60; 2 *Mad. Chan.* 158.

Argument for the defendant:

The counsel for the defendant first dwelt at considerable length on those parts of the case showing strong equitable considerations in favor of the defendant.

2. *Nothing passed to Buck by the deed from Brewer to him of July* 21, 1829. No *title passed*, for *Brewer* had none. The only title he *ever* had was a right in equity of redemption from *Pond*, subject to a *prior attachment*; and this attachment was followed by judgment and execution, and the right sold to *Munroe*, who afterwards and prior to *July* 21, 1829, took an assign-

ment of the original mortgage held by *Ward;* thus uniting in himself both titles, and wholly displacing that of *Brewer.*

*Nor had Brewer any adverse possession.* He always had holden in submission to the title acquired by *Munroe.* And he ever afterwards has continued to hold in the like manner, as a mere tenant at will under that title; and as such he attorned to *Downes* in *June,* 1830, and again to *Pike* in *October* of the same year.

It was the case of a tenant at will or by sufferance, executing a deed to a stranger in fee, but remaining in possession as before; and afterwards yielding up the possession peaceably to the true owner. If the stranger could have acquired any rights in such a case, they were defeated by the entry of the owner of the fee, viz: *Munroe.*

3. It results also from this view of the case that *nothing* passed to *Downes* by the mortgage of *April* 3, 1827, which therefore must be laid out of the case. Or if any right was created by that deed, it was displaced by the subsequently perfected and paramount title in *Munroe,* to the whole property.

4. The main position however in the case is this, that, *the conveyance from Munroe to Downes, June* 16, 1830, *did not create a resulting trust to Brewer.*

It is true, *Downes* says he took the deed from *Munroe* to himself for *Brewer's* benefit; but his intentions, or those of the other party, to do a *kindness to Brewer,* form no foundation whereon the law will raise a trust. 2 *Johns. Ch.* 409. *Brewer* had erected buildings on the land, but they were forfeited to *Munroe;* who, however, was willing to convey a title on receiving the value of the *land,* exclusive of the improvements. And *Downes* was willing to do the same. The utmost that can be inferred from this part of the case, is the *purpose* of the parties to give *Brewer* the right of pre-emption. But the trust which the law raises by implication, results only to him who pays the consideration money. And the question is, has *Brewer* paid it?

His *agreeing* to pay it, is no payment. For though *Munroe* accepted the note of *Brewer* and *Downes* as satisfactory *security* for the money; yet it was *Downes' name alone* which gave the security its value; and if the giving of a *security* is such a pay-

ment as raises a trust, the trust clearly resulted to *Downes*, and not to *Brewer*. But it must be such a payment, at least, as, if made for a third person, would furnish ground for an action of money laid out and expended. But it is well settled that the *giving of a note* will not sustain such an action, unless the money has been paid. *Douglass* v. *Moody*, 9 *Mass.* 548; *Taylor* v. *Higgins*, 3 *East*, 169; *Cumming* v. *Hackley*, 8 *Johns.* 202. It is true that it has been said that the giving of a *negotiable* note *may*, in some cases, be equivalent to the payment of money, so as to entitle the party to his action; especially where the note has already been negotiated. But such exceptions are questioned; and this is not that case; for here *Brewer* is not liable to be called upon for a dollar. *Downes* cannot call on him; for he has paid nothing; nor can *Pike*, for he has received the value of all he has paid.

This position is confirmed by analogy to the case of a mortgage; which is never discharged by any renewal or change of *security*, so long as the *money* has not been paid. See *Davis* v. *Maynard*, 9 *Mass.* 242; *Cary* v. *Prentiss*, 7 *Mass.* 63; *Elliot* v. *Sleeper*, 2 *N. H. Rep.* 525. *Watkins* v. *Hill*, 8 *Pick.* 522.

The whole foundation for a resulting trust is the actual "*payment of the money*. And this must *be clearly proved*." *Willis* v. *Willis*, 2 *Atk.* 71; 2 *Johns. Chan.* 415. "If therefore the party who sets up a resulting trust made no *payment*, he cannot be permitted to show, by parol proof, that the purchase was made for his benefit or on his account." *Bottsford* v. *Burr*, 2 *Johns. Chan.* 409; 1 *Cruise's Dig. tit. Trust, ch.* 1, *sec.* 43, 44; *Goodwin* v. *Hubbard & al.* 15 *Mass.* 218. "The trust arises out of the circumstance that the moneys of the real, and not of the nominal purchaser, formed, *at the time*, the consideration of that purchase, and *became converted into the land*. *Bottsford* v. *Burr*, before cited. So said *Ld. Hardwicke*, "where one person *pays* the purchase money." *Young* v. *Peachy*, 2 *Atk.* 257; 2 *Mad. Chan.* 113, 114. To adopt any principle short of this would work monstrous injustice. In the present case it might have led to this consequence, that *Mr. Downes* might have been compelled to pay the money, and any other creditor of *Brewer* have obtained the land. The question is, not who *promised to pay*, but,

*whose money was actually converted into land?* For equity treats the land and the *money* (not the *note*) as the same thing.

Now how stands the *proof* of the payment of the money? In the first place, the defendant objects that parol proof, though generally admissible to raise a resulting trust, yet is not admissible where it goes to *contradict a deed*, except upon the allegation of fraud. This is clearly laid down in *Northampton Bank* v. *Whiting*, 12 *Mass.* 109; and two years afterwards by *Chancellor Kent* in 2 *Johns. Chan.* 415. The doctrine of implied trusts was said by him, in the same place, to be "a very questionable doctrine," even when limited strictly to the case of an "*actual payment of money*" — and in *Boyd* v. *McLean*, 1 *Johns. Chan.* 582, he says that parol evidence in these cases is "to be received with great caution." In the present case the *deed* declares that the consideration was paid by *Downes*. On what principle can the plaintiff be allowed to contradict this by *parol?*

In the next place the testimony of *Brewer* to this point is inadmissible; because he is *directly interested* to set up a trust estate in himself. If the plaintiff prevails, the estate goes to the benefit of *Brewer*, by extinguishing so much of his debts. And if the plaintiff loses, there is no ulterior liability of *Brewer*, to balance his interest.

But if the testimony be admissible, still the evidence does not show that *Brewer* paid any part of the consideration money. [The defendant's counsel here went into a particular examination of the testimony touching this point.]

But if *Brewer had paid any thing*, the question would arise whether parol proof is admissible not only to raise an implied trust, but *also to establish the nature of the estate* to be holden, and the *portions to be allotted among the several tenants in common* who may have advanced the money. *Ld. Hardwicke*, in *Cross* v. *Norton*, 2 *Atk.* 74, limited this doctrine of implied trusts to cases where all the money was paid by *one person;* but though this is doubted by *Chancellor Kent* in 2 *Johns. Chan.* 410, yet the latter holds that where one has paid *part only*, he can only claim to charge the land *pro tanto*. Now the price was $678, and if *Brewer* had paid any part of this sum, he could, at

best, only charge such portion of the land as the sum he paid bore to the whole purchase money.

5. But there is still another ground on which *Pike* is entitled to hold this land, even if there had been originally a trust raised to *Brewer* by implication of law, by reason of the deed from *Munroe* to *Downes*. For the defendant bought not only *without knowledge of any such trust*, but *under assurances of the most positive character, both from Brewer and Downes, that the latter held the absolute and indefeasible title.* The registry of *Buck's* deed shows nothing to the contrary. It was made before this pretended trust was created.

The position of the plaintiff is denied, "that if the defendant *had notice* of the trust before he paid all the purchase money, it is sufficient to charge him" — and to this point cite 4 *Kent's Com.* 307, 2*d ed.* and cases there cited.

WESTON J. at a subsequent term, delivered the opinion of the Court.

Waiving for the present the effect of the mortgage made by *Brewer* to *Downes*, in *April*, 1827, and its assignment to the defendant, it becomes necessary to consider, whether, while *Downes* held the land in controversy, he held it in trust for *Brewer*. There was no declaration of trust in writing, and if any existed, it must have been what is termed in law a resulting trust. As jurisdiction of trusts generally, without qualification or exception, is given to this Court, wherever they arise, according to the settled practice of a court of equity, they must be recognized and enforced. *Sugden*, in his law of vendors, 443, *Philadelphia* edition, states the law to be, without a single exception, bearing upon this point, that if one man purchase an estate in the name of another, a trust results to him, who advances the purchase money. He cites a large number of authorities to sustain his position, to which cases in this country are added by the American editor. It is treated by *Chancellor Kent*, in *Boyd* v. *McLean*, 1 *John. Chan.* 582, as a well known and a universally admitted rule in equity. As it is not controverted by the counsel for the defendant, it cannot be necessary to advert further to the authorities. But it is a well settled part of the doctrine, that it should appear

that the payment, from which the trust results, was a part of the original transaction, at the time of the conveyance; and that it cannot arise from subsequent payments. It is further holden that the facts creating the trust must be clearly and fully established; to prove or to repel which, parol testimony is admissible.

It is contended that, as in the deed from *Munroe* to *Downes*, it is recited that the consideration was paid by the latter, parol evidence is not to be received in contradiction to the deed, unless in case of fraud, to prove that it was paid by *Brewer*. Upon this point, the case of *Botsford* v. *Burr*, 2 *John. Chan.* 405, is cited. The plaintiff there relied upon the assignment of a note to the defendant, in addition to other testimony, to establish a resulting trust. It was holden that it could not have that effect, it being subsequent to the original transaction. The Chancellor further states that the formal assignment of that note to the defendant by an instrument under seal, could not be contradicted by parol. But in the case of *Boyd* v. *McLean*, Chancellor *Kent* went into an elaborate consideration of the point raised, whether such a resulting trust be within the statute of frauds, and whether the fact, on which the trust arises, may be shown by parol proof in opposition to the language of the deed, and even in opposition to the defendant's answer. And although he admits that such evidence may be dangerous in its consequences, he felt himself constrained to come to the conclusion that such proof was admissible in courts of equity. The Chancellor examines the cases with his usual ability, and without going over the same ground, which we cannot regard as necessary, we find ourselves compelled by the weight of authority to adopt the same opinion, however distrustful of its policy. In this case however, in the transactions between *Brewer* and *Downes*, there was an attempt to put the property out of the reach of the creditors of the former, in a manner which is deemed fraudulent in law. And of this, the defendant, taking an assignment of the fictitious mortgage, without consideration, could not be ignorant.

In regard to the circumstances attending the conveyance from *Munroe*, there is no conflict of testimony. *Brewer* made the bargain with him, gave his notes for the purchase money, with *Downes* as his surety, and by his request the deed was made to

*Downes*, who held the land only as security for what he might have to pay, and for what he might advance. Had *Downes* lent the money to *Brewer* to pay *Munroe*, and taken the deed in his own name for security, it would have been a payment of the purchase money by *Brewer*, to whom a trust would have resulted. So it was decided in *Boyd* v. *McLean*, upon such a state of facts. In this case *Downes* did not in the first instance lend the money, but lent his name to *Brewer* as surety. Shall he be held a trustee if he lends money, and shall he hold the land free of the trust, if he only lends his credit? There is no ground in reason or justice for such a distinction. He always regarded *Brewer* as the purchaser, and the real debtor of *Munroe;* and that the land was conveyed to him to secure any sum he might have to pay as *Brewer's* surety. The defendant, at the request of *Brewer*, paid to *Downes* the money he paid to *Munroe*. At the time of the original transaction with *Munroe*, *Brewer* was the purchaser, his note was accepted with such surety, as he had it in his power to offer. This was virtually payment at the time. If upon this security the deed had been made to *Brewer*, and he failing to pay, *Downes* had been called upon and paid, could it be said that a trust resulted to *Downes*, from the payment of the consideration? If so, every man, who signs as surety for another, for the consideration, in the purchase of real estate, will be secured by a resulting trust, if he has to pay the money. And yet this cannot be pretended. The question who is the purchaser, does not depend upon who is ultimately compelled to make actual payment. If the surety pays, he will be entitled to be reimbursed, upon the implied assumpsit of the principal; but he has no lien, trust or interest in the land, unless it has been conveyed to him, and then he will hold it only, as in *Boyd* v. *McLean*, by way of pledge.

If the consideration was paid or secured to *Munroe* by *Brewer*, a trust resulted to *Brewer*, while the land was in the hands of *Downes*, charged with his claim for indemnity. Had the defendant notice of the trust? He denies that he himself was to hold the property in trust for *Brewer*, or that there was any agreement or understanding between them to this effect, but he was apprized and does not deny, that *Downes* was ready, upon being indemni-

fied, to convey at the request of *Brewer*. He did so. The defendant received the conveyance by *Brewer's* procurement and direction. He denies any knowledge of the plaintiff's title; but does not deny that *Brewer* had an interest in the property, after paying the amount of *Downes'* claim. He knew that was less than seven hundred dollars, and that the property was worth more than fifteen hundred dollars. Indeed he admits that he was induced to take the conveyance, to avail himself of the excess of value, over what he would have to pay to *Downes*, to indemnify himself from loss incurred, or apprehended, from *Brewer's* firm. With regard to the legal title, he was truly informed that it was absolutely in *Downes;* but from the bill and answer, aside from the proof, it is not going too far to hold that he had notice that *Brewer* had a valuable trust interest in the land, which had been conveyed to *Downes*.

If we look at the proof, the existence and notice of the trust is very clearly established. An objection is made to the testimony of *Brewer* as an interested witness. If the plaintiff prevails, the excess in value, beyond the amount paid by the defendant, will go in discharge of *Brewer's* debts. And if the defendant prevails, the same consequence will follow; as it is then to be applied, as the defendant admits, to the payment of his claims against *Brewer*. The witness has other inducements to sustain the title of the defendant. He is his relative. He has been permitted to enjoy the property without payment of rent; and he may expect further accommodation. The objection to the witness is overruled. *Downes*, in his deposition, declares that he held in trust. That he was dissatisfied with his situation, and requested *Brewer* to get some one to take his place, who thereupon brought in the defendant, to whom he conveyed at *Brewer's* request, but that he did not tell the defendant that he held the land exclusively for *Brewer's* benefit. How far *Downes* had an interest, the defendant was apprized by the amount of his claim, and the residue he could not but see, he held subject to the direction of *Brewer*. The mortgage, *Brewer* to *Downes*, was assigned to the defendant also at the request of *Brewer*, without consideration, and this was a circumstance strongly indicating that *Downes* held in trust for him.

*Brewer* deposes, that *Downes* held the land for his benefit, that he told the defendant the situation of the property, and desired him to take it to assist him, informing him that *Downes* did not wish to have any thing to do with the land, and desiring him to take his place. He adds on cross-examination, that the defendant never agreed or promised to convey the land to him on payment of any sum whatever, and that he did not request him to take the property in trust for him, or any other person. The point we are now examining is, whether *Downes* held in trust for *Brewer*, and whether the defendant had notice of it. Taking the bill, answer and proof together, both these facts are made out beyond a reasonable doubt.

The defendant calls for proof of the consideration, for which the estate in controversy was conveyed to the plaintiff; and it is furnished by the deposition of *Brewer*, and the papers thereto annexed. It is objected that when the indenture was made, under which the plaintiff holds, *Brewer* had nothing to convey, the seizin being then in *Artemas Ward;* to this it is a sufficient answer, that *Brewer* was the assignee of the mortgagor, and was in possession, and that the right to redeem, either the equity sold on execution, or the legal estate, had not expired. In respect to the prior mortgage to *Downes*, it was so clearly fraudulent as to creditors, of which the defendant, who paid no consideration for it, must be holden to have had notice, that it does not stand in the way of the plaintiff's title.

The defendant being chargeable with notice of the trust to *Brewer*, it was his duty to inquire, whether *Brewer* had conveyed it to a third person. He says, in his answer, that he did inquire of *Brewer*, who denied that he had made any such conveyance. To this he thought proper to confide. If he had examined the records, he would have found the deed to the plaintiff recorded more than a year before. If he did not take proper precaution and was deceived, he must abide the consequences.

But independent of this direct and obvious means of notice of the plaintiff's title, and regarding him as unaffected with it at the time, he has suffered nothing from the want of it. He took the land, charged with the same trust under which *Downes* held it, of which he had notice. As to any interest of his own, beyond the

amount secured to *Downes*, although set up in the answer, it is disproved by the entire silence of *Brewer* upon that point, by his continued possession, without payment of rent, and by the manner in which the defendant kept his accounts with him. The trust then with which the land was chargeable in favor of *Brewer*, would enure to the plaintiff in virtue of the indenture, whether the defendant had notice of it or not.

Upon these facts equity requires, that there should be refunded to the defendant all he has paid, with interest upon it, including the amount charged to the *Brewer* house, which being paid, it is ordered and decreed, that the defendant release to the plaintiff his interest in the land, subject to the trusts in the indenture of *July* twenty-first, 1829. But under all the circumstances, we do not award costs.

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## Galvin vs. Bacon.

The plaintiff, being the owner of a horse, bailed him to A for use for a limited period, under the expectation of a purchase by the latter. During the time, A for a valuable consideration and without notice, sold the horse to B, and he, in like manner, to the defendant. *Held*, that no previous *demand* was necessary, to enable the owner to maintain replevin against the last purchaser.

This was an action of replevin for a horse. On trial before *Weston Justice*, it appeared that the horse was originally the property of the plaintiff. That the defendant bought him of one *McAllister*, he of one *Scott*, and *Scott* of one *Staples*, to whom the horse had been delivered by the plaintiff for use for a limited period and under the expectation of a purchase by *Staples*. The horse in question was delivered at each of these sales, and it was agreed that *Scott*, *McAllister*, and the defendant respectively purchased *bona fide* for a valuable consideration, and without notice of any claim or interest in the plaintiff. There was no evidence that the plaintiff had made any demand on the defendant for the horse prior to the bringing of this action. Whereupon it was insisted that the plaintiff had failed to support the action. But with a view to have the jury pass upon the question of general property which was in controversy, the presiding Judge ruled otherwise. The jury returned their verdict for the plaintiff. If

upon the foregoing ground, he had failed to make out a case, entitling him in the opinion of the Court to retain it, the verdict was to be set aside and a new trial granted; otherwise, judgment was to be rendered thereon.

*A. G. Chandler* for the defendant, contended that, as the horse came lawfully to the possession of the defendant, he could not be liable in replevin for an *unlawful* taking — that this suit could be sustained only on the ground of an *unlawful detention*, and of that there was no proof. The original taking having been lawful, a demand before suit was indispensably necessary. Without this there could be no wrongful detention. *Gates* v. *Gates*, 15 *Mass.* 311. Nor do the cases of *Hussey & al.* v. *Thornton & al.* 4 *Mass.* 405, and *Marston* v. *Baldwin*, 17 *Mass.* 606, make against this position. It is true it is there decided, that where goods are delivered in pursuance of a conditional sale, which condition has not been performed by the vendee, the vendor may reclaim them by *replevin*. That, as replevin is founded on property and not on possession, there is, notwithstanding such sale and delivery, sufficient interest or property in the goods remaining in the vendor, to sustain the action of replevin; and that replevin did lay, notwithstanding the defendant's original possession was lawful. But it is not decided, that in such cases the plaintiff need not prove a demand, or show the existence of facts which go to constitute *a wrong* in the defendant, to be redressed by the suit.

In *Seaver* v. *Dingley*, 4 *Greenl.* 316, this subject is fully examined, and the Court expressly say, that "no action of replevin will lie for goods of which the defendant lawfully obtained the possession until after demand."

In this case, *Staples* came lawfully into possession of the horse, and by consequence, *Bacon* also, who holds by title derived from the former, and no demand has been made on either. 6 *Bac. Abr.* 563, *Trespass* (C) 1. 2. *Ib.* 577. *Trespass* (E) 2. 6.

The other point decided in *Seaver* v. *Dingley*, that if the defendant in replevin plead property in himself, it is not necessary for the plaintiff to prove a demand previous to the suing out of the writ, turned entirely on a question of *pleading*, and not on the general principles having relation to the foundation of the action.

*Downes* for the plaintiff cited *Baker & al.* v. *Fales*, 16 *Mass.* 151; *Oliver* v. *Smith*, 5 *Mass.* 184; *Buffington & al.* v. *Gerrish & al.* 15 *Mass.* 158; *Seaver* v. *Dingley*, 4 *Greenl.* 316.

The opinion of the Court was delivered by WESTON J.

Where a party is rightfully in possession of property belonging to another, he does not unlawfully detain it, until after a demand by the true owner and a refusal. But if the taking is tortious, no such demand is necessary. This is a principle uniformly applied in actions of trover. In *Gates* v. *Gates*, 15 *Mass.* 311, and in *Seaver* v. *Dingley*, 4 *Greenl.* 306, the same rule is understood to apply in cases of replevin. In some other cases cited, as in *Hussey & al.* v. *Thornton & al.* 4 *Mass.* 405, and in *Marston* v. *Baldwin*, 17 *Mass.* 606, this point does not appear to have been taken.

It is assumed in argument, on the part of the counsel for the defendant, that his possession was lawful, and that a demand was necessary by the plaintiff, to enable him to maintain replevin. And if his premises are correct, he is sustained in this position, by some of the cases cited. The possession of the defendant did not subject him to the imputation of any thing morally wrong. He acted in good faith, having purchased of one whom he supposed to have been the rightful owner; as did two others, who successively purchased and sold the horse in question. But their supposition did not accord with the fact. The horse was from the beginning the property of the plaintiff; and he had never authorized either of these sales.

Whoever takes the property of another, without his assent express or implied, or without the assent of some one authorized to act in his behalf, takes it, in the eye of the law, tortiously. His possession is not lawful against the true owner. That is unlawful, which is not justified or warranted by law; and of this character may be some acts, which are not attended with any moral turpitude. A party honestly and fairly, and for a valuable consideration, buys goods of one who had stolen them. He acquires no rights under his purchase. The guilty party had no rightful possession against the true owner; and he could convey none to another. The purchaser is not liable to be charged crim-

inally; because innocent of any intentional wrong; but the owner may avail himself against him of all civil remedies, provided by law for the protection of property. If the bailee of property for a special purpose, sells it without right, the purchaser does not thereby acquire a lawful title or possession.

In the case before us, *Staples* was rightfully in possession of the horse, but he had no right to sell him; if he had, the plaintiff would, upon the sale, have ceased to be the owner, which has been negatived by the verdict. It does not follow, because his possession was rightful, that those who hold under him are also lawfully in possession. Indeed the very reverse is true. *Staples* had the horse by the assent of the owner; but he sold him in his own wrong, and in violation of the rights of the plaintiff. The defendant came honestly by the horse, but he did not receive possession of him from any one authorized to give it, and is therefore liable *civiliter* to the true owner for the taking, as well as for the detention.

*Judgment on the verdict.*

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## Potter vs. Smith.

The tenure of the office of Clerk of a militia company, is not limited by the continuance in office of the Captain or commanding officer of the company by whom such Clerk was appointed.

Error, brought to reverse the judgment in an action of debt originally brought before a Justice of the Peace to recover a military fine.

It appeared by the facts as certified by the Justice, that *Potter*, the Clerk, had not received his appointment from the person who was Captain or commanding officer of the company at the time the fine was incurred and action brought, but from his predecessor in said office. It also appeared that the evidence of the defendant's enrolment was the record of the company roll, of the form furnished by the Adjutant General agreeable to statute requirements, on which was borne the defendant's name in the column headed "time of additional enrolments made after the Thursday following the second Monday of September;" — but it did not appear by the roll at what time the name was placed there. The

caption of the roll was thus: "The record of the Roll of —— Company, &c. —— *as corrected* on the Thursday following the second Monday of *September, A. D.* 1832."

On this evidence the Justice of the Peace decided, that the Clerk was not legally qualified to bring this action, his term of office having expired with that of the Captain from whom he received his appointment; — and that the defendant was not duly enrolled. The decision of these two points was assigned for error.

PARRIS, J. — The 12th section of the militia law of this State, *Chap.* 164, provides, that to every company there shall be a Clerk, who shall be one of the Sergeants, and shall be appointed by the Captain or commanding officer of the company. The tenure of the office, thus created, is not made, in any manner, dependant on the continuance in office of the Captain or commanding officer by whom the appointment was made. He is not Clerk of the Captain but of the company; and his duties are prescribed by statute, and continue to devolve upon him after the resignation or promotion of the officer appointing him, in the same manner as before.

The law provides how he may be reduced to the ranks, for disobedience of orders, neglect of duty, or unmilitary conduct; but it does not require a new appointment of clerk at every change of commanding officer of the company, any more than it does a new appointment of Adjutant or Quarter-master on the resignation of the Colonel of the regiment to which they belong. 2 *Greenl.* 431.

To prove the enrolment, the plaintiff produced the *record* of the company roll, on which the name of the defendant was borne. But as it did not appear, by that record, when the name was entered, the Justice declined to receive it as evidence. The form of a *record* of a company roll, as prescribed by the Adjutant General, does not contain a column for the time when *all* the members of the company were enrolled, but only a column in which is to be entered the "time of *additional* enrolments made after the Thursday following the second Monday of *September.*" If, as was alleged in the argument and not denied, *Smith's* name was borne on the company roll of the preceding year, it would

clearly appear by record evidence that he had been so long enrolled as to be liable to do military duty in the company in which the plaintiff is clerk, at the time when it is alleged he incurred the penalty.

It is said in *Sawtel* v. *Davis*, 5 *Greenl.* 440, that in the form furnished by the Adjutant General as the form of a *return* of an enrolment, there is a column designated as the one in which the time when any citizen shall be enrolled, shall be entered. — Whether such forms are still in use does not appear; but if they are, the *return* was not the document offered as evidence in this case. — If there be now in use any such paper as a "return of an enrolment," nothing appears but that such return of this company indicated the time when *Smith* was enrolled. No such paper was offered as evidence. The *record* was the proper evidence, and it does not appear but that contained every fact, in relation to *Smith*, either required by law, or indicated by the Adjutant General's form, to be recorded. If *Smith* was enrolled *after* the *Thursday* following the second *Monday* of *September*, then the time of his enrolment ought to have been entered in the column for noting the time of *additional* enrolments. But if he had been a member of the company and his name was on the roll of the preceding year, there was ample record proof of his seasonable enrolment; — and, in that respect, the case did not, like *Sawtel* v. *Davis*, depend upon parol evidence.

We do not, however, give any definite opinion upon this point in the case, as we are clear that the first error is well assigned, and for that the judgment must be reversed.

*Hobbs*, for the plaintiff.

## TODD, *plaintiff in review, vs.* DARLING.

A judgment against a trustee in the process of foreign attachment, is a collateral judgment incident to a suit at common law, and can be vacated or avoided only by the same process which would reverse the principal judgment.

The 14th *sec.* of the statute concerning foreign attachment, *ch.* 61, in which provision is made for enforcing the attachment against the estate of the trustee, if he die either before or after his examination, is not limited to cases where, at the death of the trustee, judgment had not been rendered against the principal defendant.

In *scire facias* against the administratrix of one, against whom judgment had been rendered as trustee, to enforce such judgment, the insolvency of the estate of the trustee is not pleadable in abatement; it not being an *original* action, but an incident to, and continuation of, the former suit.

In cases of insolvency and appointment of commissioners, the Judge of Probate is by law to allow "six months, and such further time, not exceeding eighteen months in the whole," to the creditors to bring in and prove their claims: — in this period of eighteen months, the time between the termination of one commission and the issuing of another, is not to be reckoned: — but the commission cannot be opened after the statute limitation of four years has attached.

THIS was a *writ of review* brought to reverse a judgment rendered in the Court of Common Pleas, *March* term, 1826, for $532 debt, and $32,65 costs, in favor of *Isaac Darling*, the present defendant, against *John C. Todd*, the plaintiff's intestate.

The original writ contained counts on four promissory notes for $200 each, dated *May* 13, 1820, and payable by said *Todd* to said *Darling*, and *not negotiable*. One payable on demand, the others, in one, two and three years from date, with interest. Judgment was rendered on the last two notes only, the other two not having been filed in the case. Execution had issued on said judgment and had been satisfied by a levy on the real estate of said *Todd* in his lifetime.

Said *Todd* died in the year 1827, having previously presented his petition for review, which was afterwards granted to his administratrix the present plaintiff, on the ground that her intestate had a defence to said action and had neglected to make it.

On the trial of the action upon the review, it appeared that prior to the commencement of the original suit by *Darling* against *Todd* the latter had been summoned as the trustee of *Darling*

in three suits, one in favor of *Ezekiel Foster*, another in favor of *Zebedee Cook*, and the third of *Samuel Darling*, in all of which, judgment had been rendered against said *Isaac Darling* as principal, and *Todd* as trustee.

In *Foster's* suit *Todd* had made a disclosure *before a justice of the peace*, there being no assent or dissent to such a course, on the part of *Darling*, the debtor; upon which disclosure the said *Todd* was adjudged trustee at the *September* term of the Court of Common Pleas, 1821, judgment being rendered at the same term against the principal for $505,77 debt and costs. Execution issued on said judgment and was paid in full by said *Todd*, *March* 15, 1822, with interest. This sum, therefore, the plaintiff in review claimed to have deducted from the amount of said notes sued. But *Darling* resisted it, on the ground that the act of *Todd* in making a disclosure before a Justice of the Peace was wholly unauthorised by law, or the agreement of the parties; — and also on the ground that only two of said notes were due when said disclosure was made, or the judgment rendered — or at the time when the execution was paid, or was returnable — and that said *Todd* was not legally bound to pay over anything more on said execution than the amount which was then due and payable to said *Isaac Darling*.

But *Weston J.* intending to reserve this and other questions in the case, ruled that the plaintiff in review was entitled to have the whole sum set off.

The administratrix further offered in evidence two judgments, one in favor of *Zebedee Cook*, and the other in favor of *Samuel Darling*, both against *Isaac Darling* as principal, and *Todd* as trustee, rendered at the *September* term of the Court of Common Pleas, 1821; in both of which *Todd* was defaulted. The first was for $39,20, the other for $99,09. — Also judgments in favor of the said *Cook* and *Samuel Darling*, rendered in the Court of Common Pleas, *September* term, 1832, on *scire facias*, against the administratrix founded on the two judgments aforesaid; in which *scire facias* suits the administratrix was defaulted. These also she claimed to have deducted from the amount of said *Isaac Darling's* claim against her intestate.

In regard to these claims, it appeared further, that, administra-

tion on *J. C. Todd's* estate was granted to the plaintiff in review, and she accepted the trust *July* 15, 1828, but did not give notice thereof until more than seven months afterward. On the 9th of *January*, 1829, the Judge of Probate appointed commissioners of insolvency, by his warrant returnable in six months, who at the expiration of that time returned the same, certifying that there were but two claims presented, and none allowed.

The inventory of *Todd's* estate was as follows, viz.: Real estate, $500 — personal estate, $213,39 — debts due, $229,75.

It did not appear that any account had ever been settled in the Probate Office.

On the 11th of *July*, 1832, the Judge of Probate, on the petition of *Zebedee Cook*, opened the commission again, and allowed two months further for said *Cook* to present and prove his claim. On the 3d *Tuesday* of *October*, 1832, the commissioners again made return of claims presented, and their doings thereon, allowing to *Zebedee Cook*, $64,67; and to *Samuel Darling* $163,49, being the amount of the judgments aforesaid, and interest thereon. To the allowance of these claims the administratrix made no objection before the commissioners.

The deduction of these judgments from the amount of his claims, *Darling* the defendant objected to, but the Court permitted it, and the jury returned their verdict accordingly; which was to stand or be set aside, as the opinion of the whole Court should be, upon the correctness of the ruling of the Judge who presided at the trial.

*Allen*, for the plaintiff.

The judgment obtained against *Todd* as trustee at the suit of *Foster;* is not binding upon the defendant *Darling*. It was rendered upon a disclosure not made according to law. The statute authorizing disclosures to be made before Justices of the Peace was not enacted until nearly nine years afterward. Nor was there any agreement of *Darling* to such a course — and if there had been the oath would have been extra-judicial.

Again, that adjudication that *Todd* was trustee is not binding upon *Darling*, because the notes given by *Todd* to *Darling* upon which *Todd* was holden as trustee were not due at the time. If in a trustee suit part of the debt of the trustee be then *due* and a

part not, perhaps the suit may be continued until all is due. But if the plaintiff take judgment before, he can only have judgment for what is due at that time. *Frothingham* v. *Haley*, 3 *Mass.* 68; *Clark* v. *Brown*, 14 *Mass.* 271.

The judgments in favor of *Cook* and *Samuel Darling* cught not to have been allowed to the administratrix as a set-off. She should have opposed the allowance of these claims before the commissioners, which might have been done successfully. There was no *debt* due from the intestate to *Cook* and *S. Darling*. The statute of foreign attachment creates a lien only. This lien is dissolved by the death of the trustee after judgment against him on disclosure, and before judgment against him and *his own goods*. Hence the rule that an executor or administrator are not chargeable as trustees. *Barnes* v. *Treat*, 7 *Mass.* 271; *Brooks* v. *Cook*, 8 *Mass.* 246; *Piquet* v. *Swan*, 4 *Mason*, 454.

The claim being but a lien is dissolved by the representation of *insolvency*. This is true with regard to the attachments of those who are real creditors, and the lien created by the trustee process is certainly not of a higher nature than that created by the attachment law.

To allow this assumed creditor, to share the estate with the real creditors would interfere with, and indeed be directly repugnant to *stat.* of 1821, *ch.* 51, regulating the distribution of insolvent estates "to and among all the creditors, *in proportion to the sums to them respectively due and owing.*" There was no "debt due and owing" from the intestate to the summoning creditor.

The *scire facias* suits should also have been defended. No action lies against an administrator after the intestate is represented insolvent and commissioners appointed, although it may ultimately prove to be solvent. *Paine Judge* v. *Nichols*, 15 *Mass.* 264; *Ellsworth* v. *Thayer*, 4 *Pick.* 122; *Johnson* v. *Ames*, 6 *Pick.* 330.

The administratrix might have pleaded in abatement and defeated the suits. *Moore* v. *Eames*, 15 *Mass.* 312; *Maine stat. ch.* 51, *sec.* 25.

The administratrix is not embraced within the provisions of *stat.* of 1821, *ch.* 61, *sec.* 14. Executors and administrators are only made liable where the death of the trustee takes place *before* final judgment against the principal.

*Greenleaf*, for the defendant in review, in support of the disclosure of the trustee and judgment thereon cited *Davis* v. *Ham*, 3 *Mass.* 63; *Staples* v. *Staples and Tr.* 4 *Greenl.* 532. And as to the proceedings in the Court of Probate, and on the suits of *scire facias*, *Maine stat. ch.* 61, *sec.* 14; *Parkman* v. *Osgood*, 3 *Greenl.* 17.

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

An objection is taken to the original disclosure of the trustee; it being made not in court, but before a justice of the peace, which it is insisted was not then authorized by law. Whatever might have been the force of this objection, if made seasonably before the trustee judgment, and even admitting the judgment to have been erroneous, it remains in force, until reversed upon writ of error. It is a collateral judgment, incidental to a suit at common law, and can be vacated or avoided only by the same process, which would reverse the principal judgment. *Crockett et al.* v. *Ross et ux.* 5 *Greenl.* 443. The debt attached at the suit of *Foster* was absolute, although payable at a day then future. A lien was created upon that debt by that attachment, to the amount of the judgment rendered in favor of *Foster*, which the trustee has discharged. This sum therefore was rightfully allowed to the plaintiff in review at the trial.

It is contended that the trustee judgments, in favor of *Zebedee Cook* and of *Samuel Darling* ought not to be allowed to the plaintiff in review, upon the ground, first, that they could never have been enforced against the estate of the trustee, or secondly, that they have been barred by lapse of time. By the fourteenth section of the act concerning foreign attachment, revised laws, *ch.* 61, provision is made to enforce the attachment against the estate of the trustee, if he die either before or after his examination. This, it is urged, is limited to cases where, at the decease of the trustee, judgment had not been rendered against the principal defendant. But no such limitation is to be found in the section, if the trustee die before his examination, which happened in the judgments in question. His executor or administrator may in that case be cited, pending the original suit. Or if the trustee die

after judgment, they may be called in upon scire facias; and this we are satisfied is the true construction of the statute.

No original action can be maintained against the administrator, after the estate of his intestate is represented insolvent, and commissioners of insolvency are appointed. It is insisted that the administratrix might and ought to have pleaded these facts in abatement. If it was competent by law for her to have taken this course, the lien created by the original trustee judgment would have been entirely dissolved. The fourteenth section of the law concerning foreign attachment, before cited, contains no exception in regard to insolvent estates. And in all the cases there contemplated, a scire facias is necessary to make the attachment effectual. The policy of the law for the settlement and distribution of insolvent estates, does not require such an exception. If goods or chattels are specifically entrusted to the deceased, there is no reason why they should be administered as a part of his estate. The duty of the executor or administrator will be discharged by surrendering them upon the execution. If a debt be due from the deceased, the attaching creditor is substituted for his own. His estate is not impaired, nor his other creditors injured. On a suggestion upon the record of the insolvency of his estate, no execution will issue upon the judgment rendered on the scire facias, but that judgment will be added to the list of claims against the estate, in order to participate in the dividend. To all interested, it is a matter of indifference whether it is allowed to the original, or to the substituted, creditor. The same course is pursued, where an action is commenced prior to the decease of the insolvent debtor, and prosecuted to judgment afterwards. In that case a special attachment is dissolved by law, because it could not be sustained without prejudice to the other creditors. But they are not prejudiced by allowing to a creditor the same dividend, to which his debtor would otherwise have been entitled.

The administratrix could not have pleaded the insolvency in abatement of the scire facias. It was not an original action, but an incident to, and a continuation of, the former suit. This has been decided in the case of *Adams* v. *Rowe*, *infra*.

The Court of Probate, in cases of insolvency, is to allow six months, and further time not exceeding eighteen months in the

whole, to creditors to bring in and prove their claims. In this period, the time between the termination of one commission and the issuing of another, is not to be reckoned. It is no part of the time in which creditors may prove their claims, which can be done only while the commission is open. But in order to give effect to the limitation of four years for the protection of the estate, the commission ought not to be opened after that limitation has attached. *Parkman* v. *Osgood et als.* 3 *Greenl.* 17.

The administratrix, in the case before us, gave notice of her acceptance of the trust in *February*, 1829. Before the termination of four years from that time, the commissioners to receive and examine the claims of creditors against the estate of her intestate, had allowed the amount of the judgments in favor of *Zebedee Cook* and *Samuel Darling*, and they had also obtained judgments against her as administratrix, upon scire facias. These judgments therefore we are of opinion were properly allowed to the plaintiff in review; it being agreed that what has taken place since the last term, upon the suits on scire facias, and in the probate office, are to be considered as evidence in the case, as if it had existed and been offered at the trial.*

*Judgment on the verdict.*

* The facts occuring between *June* term, 1832, and *June* term, 1833, above alluded to by the Court, the Reporter has incorporated into the statement of the case without distinguishing them from those proved at the trial, in accordance with the spirit of the agreement between the parties.

## TODD *vs.* BUCKNAM.

A provision, in a general assignment for the benefit of creditors, requiring an absolute release of all claims and demands against the assignor in consideration of such assignment, does not affect its validity.

Nor will a provision requiring the surplus, should there be one in the trust property, to be paid over to the assignor, vitiate the assignment.

The assent of creditors cannot be *presumed* to an assignment which stipulates for a credit of six months for the balance that may remain unpaid after the assignee shall have executed the trusts therein imposed.

The trust property under a general assignment may be *attached* by a dissenting creditor, if not wanted to satisfy the claims of those creditors who had become parties to the assignment prior to such attachment; — the trustee process, though the usual, not being the only remedy in such case.

Though by the assignment the *nominal value* of the property be greater than the amount of the debts of the assenting creditors, yet, in an action between the assignee and an attaching creditor, the former may show that the *real value* is less than the amount of such debts.

TRESPASS, *de bonis asportatis.* Plea, the general issue, with a brief statement. The plaintiff claimed title to the goods in question under a certain deed of assignment made and executed on the 18th of *May*, 1832, by one *Cornelius W. Austin.* Beside said *Austin*, and *Todd* the assignee, it was also executed by *Gardner*, *Waite*, and *Heywood*, three of the creditors of said *Austin.* *Todd*, *Waite*, and *Heywood* resided in *St. Stephens* in the Province of *New Brunswick.* *Gardner* resided in *Calais.* *Austin* resided in *St. Stephens* but had his store and traded in *Calais.* By the assignment all other creditors of the said *Austin*, might become parties thereto at any time within three months from its date. The provision respecting the release of claims by the creditors was in these words: "and they hereby release the said *Austin* and his legal representatives from the said claims and demands, &c. so far as said claims and demands shall be paid, and so far as they shall be saved harmless from their said liabilities by the application of the said trust moneys thereto, in manner aforesaid, and no further."

After directing the distribution of the trust moneys among the parties creditors, the assignment proceeded; "and then in trust to pay over *the surplus* if any, to the said *Austin* or to his agent, representative, or to his, or their order in writing."

By the schedules annexed to the assignment it appeared that the amount of property and debts assigned was, $2307,71

That the amount of debts due to the creditors who had formally assented to the asssignment, was, $1490,43

Leaving an overplus of property in the hands of the assignee, of - - - - - $817,28

The defendant, late sheriff of the County, justified the taking by virtue of a writ of attachment issued *May* 31, 1832, in favor of one *Joseph Prescott*, against the said *Austin*, on a note of hand for $426,19, dated *January* 2, 1832, payable to *Richardson & Whitney* of *Boston*, and by them endorsed to *Prescott*; by virtue of which writ the defendant *attached the goods* to the amount of $490,48.

There was some evidence tending to show that the note sued was still the property of *Richardson & Whitney* though endorsed to *Prescott*. The cause was committed to the jury by *Weston J.* to find for the plaintiff the amount of damages; — and they were also instructed to find whether the property in the note in question was in *Prescott* or in *Richardson & Whitney*; — the jury found for the plaintiff, assessing damages at $490,48; — and that the property in the note sued was in *Richardson & Whitney* and not in said *Prescott*.

If upon the foregoing evidence the plaintiff was not entitled to maintain this action, the verdict was to be set aside and a new trial granted; otherwise judgment was to be entered thereon.

*Greenleaf* and *Bridges*, for the defendant, contended that the assignment was fraudulent and void, because; 1. it gave to the assignor the exclusive control of the surplus funds, subjecting them to his *order:* and 2. because it required a release from the creditors for the amount received, and *a credit* of six months for the balance.

They also contended that the attachment should be sustained, the creditors in the assignment being *foreigners*, while the real attaching creditor (according to the finding of the jury) was a citizen of *Massachusetts*. The latter is to be preferred. But if it were not so, and the citizen of *Massachusetts* stood on no better ground than a foreigner, still, the attachment should have preference, because *Prescott*, a citizen of this State, has an interest in

it. He has a lien upon the note for his expenses, commissions, &c. — and for any claim which he may have against *Richardson & Whitney.*

The attachment might well be made on another ground. The amount of property is far beyond what is necessary to pay the demands of the assenting creditors. The surplus therefore is attachable. And more especially so in this case, the assignee being a foreigner and not liable to our trustee process. To the several points made they cited, *Boyden and al.* v. *Sumner*, 4 *Pick.* 266; *Fox* v. *Adams and al.* 5 *Greenl.* 245; *Ingraham* v. *Geyer*, 13 *Mass.* 146; *Boston* v. *Boylston*, 4 *Mass.* 324; *Borden and al.* v. *Sumner*, 4 *Pick.* 266; *Ward and al.* v. *Lamson and trustee*, 6 *Pick.* 358.

*Allen* and *Downes*, for the plaintiff.

There is no surplus of property in the hands of the assignee beyond enough to satisfy the claims of the creditors who have assented to the assignment. Nine hundred dollars of the amount is in balances of accounts which are really worth little or nothing, and the remainder is in personal property on which there will be much loss. But if it were otherwise, a creditor to avail himself of a surplus in the hands of the assignee must resort to the *trustee process;* — unless the surplus be so large as to be evidence of *fraud* in the assignment, which is not pretended in this case. It is not competent for a creditor to step in by his attachment and make a selection from the property to satisfy his own debt, leaving a large amount of doubtful claims to satisfy the demands of the creditors in the assignment.

There can be no preference in this case on account of a portion of the creditors and parties to the assignment being foreigners, for the jury have found that citizens of another State were the real attaching creditors. They therefore in this respect stand on equal ground.

But if the nominal amount of the property assigned was the real value, and there should appear to be a surplus in the hands of the assignee, he should hold that surplus for the benefit of other creditors who became parties to the assignment after the attachment. Their assent might well be *presumed*, on the authority of *Halsey* v. *Whitney*, 4 *Mason*, 206.

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

This is an action of trespass *de bonis asportatis*. The plaintiff claims title to the goods in question under a certain deed of assignment made and executed on the 18th of *May, A. D.* 1832, by *Cornelius W. Austin*, the assignor, to *Robert M. Todd*, the plaintiff and assignee, and three of the creditors of *Austin*. It was executed in *Calais*, in this county. The defendant, late sheriff of the county, justifies the taking by virtue of a writ of attachment in favor of one *Joseph Prescott*, against the said *Austin*. The attachment was made on the 31st of *May*, 1832. Several objections have been urged by the counsel for the defendant against the validity of the assignment, and against the plaintiff's right, on any ground, to maintain this action: and on the part of the plaintiff it has also been urged that the conduct of the defendant, in violating the plaintiff's possession of the goods in question and taking and carrying them away, cannot be justified by the process which he executed. There is no intimation of *actual* fraud in respect to the assignment; but it is contended that it contains certain provisions which, in legal contemplation, render the assignment void and inoperative.

One objection to the assignment, as it respects the creditor whom the defendant represents, is, that it is made to an assignee living out of this State, to secure his debt and the debts of two other foreign creditors, and to the prejudice of *Joseph Prescott* of *Calais* — one of our own citizens; contrary to the well known principle, recognized and sanctioned in *Fox* v. *Adams and trustees*, 5 *Greenl.* 245. The answer to this objection is, that though the action, in which the attachment was made, was brought in the name of *Prescott* of *Calais*, still the jury have found that the property of the note sued was not in *Prescott* but in *Richardson & Whitney* of *Boston*, who also live out of this State. As to this point the *real* creditors claiming under the attachment, and *Todd*, claiming under the assignment, both stand on equal ground; and therefore the principle of policy on which the distinction, which has been invoked, reposes, does not apply in the case before us.

Another objection is that all creditors who should execute the assignment should cause their claims to be written on the

schedule B. Surely a compliance with this provision could be neither an injury or inconvenience to any creditor; and could not produce any but useful results. Indeed, it was merely suggested by the counsel.

Another objection urged, is, that the assignment requires that every creditor shall execute a release to *Austin* of all claims and demands against him, *so far* as such claims and demands *shall be paid*, or they shall be *saved harmless* from their *liabilities* by the application of the trust funds thereto, in the manner prescribed in the assignment, *and no further*. This amounts to a release of no subsisting claim; it is a mere provision that a partial payment shall amount to a discharge *pro tanto*. But, as the objection has been made, we will go further and state explicitly, that if the assignment had provided for an *absolute release* of *all claims* and *demands*, in consideration of the assignment, it would not have impaired the validity of it. In *Hatch* v. *Smith*, 5 *Mass.* 42; *Marston* v. *Coburn*, 17 *Mass.* 454; *Andrews* v. *Ludlow*, 5 *Pick.* 28, and *Lupton* v. *Cutter*, 8 *Pick.* 298, there was a provision for a release of debts by the creditors: yet it was not considered by the counsel or the court as affecting the validity of the assignments. In *Halsey* v. *Whitney*, 4 *Mason*, 206, a review of all the cases, bearing on the point, and a careful examination of them, led the learned Judge to the conclusion that the assignment was valid, though containing a general release of the debtor, by the creditors. This Court, in *Fox* v. *Adams and trustees*, before cited, evidently concurred in that opinion, though the cause was decided on another ground. And in the *Canal Bank* v. *Cox and trustees*, 6 *Greenl.* 395, it was expressly decided, though the opinion seems to have been misunderstood, that a provision for the release of the assignor and his indorsers and sureties, did not, in any manner, invalidate the assignment. We have here alluded to the foregoing decisions for the purpose of clearly expressing our opinion on the point, and the principles and grounds on which it rests.

Another objection to the assignment in the present case, is, that it contains a provision for the payment over to the assignor of the *surplus*, if any, after paying certain *preferred* creditors, and the *other* creditors who should become *parties* to the assignment, by *signing* and *sealing* the same. This *surplus*, would, of course,

include the sums due to creditors who *declined* or *neglected* to become parties to the assignment, in the manner before mentioned. In the case of *Andrews* v. *Ludlow*, above cited, there was a similar provision, which, however, was not considered as impairing the effect of the assignment. In *Halsey* v. *Whitney*, 4 *Mason*, 222, a provision of the same nature was critically examined by *Mr. Justice Story* with his usual *acumen*. He observes, "What is the nature of this surplus as it stands on the face of the assignment? It is not of any specific sum to be paid to the debtor, whether his debts are wholly paid or not, but of such surplus only as shall remain after indemnifying and paying fully all the creditors who shall come in under the assignment. There is no ground for saying, that if all his debts were paid, the debtor may not honestly reserve the surplus to himself; if there was no such reservation, it would constitute a resulting trust by mere operation of law; if all the creditors should not choose to come in, and accept the terms of the assignment, there must necessarily arise a resulting trust, as to the surplus, in favor of the debtor, and the charge is therefore merely an expression of that which the law would imply. The creditors are at liberty to come in if they please; if they do not, the debtor stipulates that the assignment shall not carry the *whole* interest, but *so much only*, as is necessary, to discharge the debts of the assenting creditors: and the residue remains as a fund for the payment of other creditors, if they choose to attach." Here is a lucid statement of the law upon this subject, and of the reasons on which it is founded. We forbear citing any other cases to this point.

Another objection urged against the plaintiff's right to maintain the action, is, that it appears by the schedule of property assigned, compared with the amount of the debts due to the creditors who have signed and sealed the assignment, there is property enough in the hands of the assignee to pay those debts and satisfy the claims of the attaching creditor also. This objection is *now* mentioned for the sake of order; it will be noticed again in the close of this opinion, after we have considered some of the points relied on by the plaintiff, against the right of the defendant to take the goods in question out of his possession.

In the first place, by way of answer to the defendant's last objection, it is contended that the consent of *all* the creditors, named

in the schedule of creditors, is to be presumed; because, by the terms of the assignment, such assent must have been for their interest; as no release was required, or discharged for anything beyond the sum paid. The reasoning of the court in *Halsey* v. *Whitney*, has been appealed to in support of this argument. In the case before us the assignment *excludes* all *implied* or *presumed* assent, and requires it to be manifested under the creditor's hand and seal, as before stated. It also requires that every creditor who shall come in under the assignment, shall give *six months* credit for the balance of his demand, after deducting the amount received by him out of the trust fund, calculating the six months from the time when the trustee shall have executed the trust, on the penalty of forfeiting such balance, by instituting process for recovery of it within that time. Can the court *presume* an assent to these terms? They are so manifestly in derogation of a creditor's rights as, in our opinion, not to justify the presumption of assent. In addition to this we would refer to the case of *Russell and al.* v. *Woodward*, 10 *Pick.* 408, in which the assignment required *no release;* but the trustee was directed, after deducting necessary expenses, &c. &c. to pay the amount of the trust fund among all the creditors in rateable proportions: hence it was contended that the assent of creditors must be presumed. But *Shaw C. J.* in delivering the opinion of the Court, says, "It must be considered that by assenting to and affirming such an assignment, the creditors do in effect consent that the whole of such insolvent's available property — shall go into the hands of a stranger, appointed by the debtor and under his direction. We think it would be difficult to presume, without proof, that the creditors have assented to an arrangement which thus defeats their legal remedies, especially against a creditor, who by bringing his suit and *attaching the property*, has expressed his dissent from, and disaffirmance of the assignment."

It has also been made a question whether the process to which *Prescott* resorted is a legal one, and compatible with the rights of the assignee, when the object of the attaching creditor is to avail himself of that portion of the property assigned, which may not be wanted for the purpose of satisfying the demands of those creditors who have come in under the assignment prior to such

attachment. It has been said, that it produces an unnecessary derangement and delay, prejudicial to the interests of all concerned. On the contrary, *by our law*, a creditor *generally* has a right to attach the property of his debtor and take it out of his possession and retain it until judgment, notwithstanding the inconvenience and delay and expense which it may occasion. In the above cited case of *Russell and al.* v. *Woodward*, it appears the defendant *attached the goods*, then in question, as a deputy sheriff, in behalf of a creditor of the assignor, though the usual course has been to use the trustee process as the remedy in such cases; yet the learned counsel who argued the cause, did not notice the *attachment* of the goods as an illegal or objectionable proceeding. In the present instance a trustee process would not have availed; as the assignee is an inhabitant of the province of *New Brunswick*, where, we are informed, no such process could be sustained in such a case as this. We apprehend the action of the attaching creditor and the attachment made by the defendant, were not, in a legal point of view, objectionable.

The only remaining question is, whether the verdict, which was returned for the plaintiff, ought to stand, according as the facts appear on the report of the Judge, or be set aside and a new trial granted. By the report it appears, that the amount of property and debts assigned, was - - - $2307,71
and that the amount of debts due to the creditors who have formally assented to the assignment, are only 1490,43

Leaving an overplus of property in assignee's hands of $817,28

If the facts are *in reality* such as they thus *appear* to be, there can be no reason why this action should be maintained, and the attaching creditor defeated in the pursuit of his legal rights. The counsel for the plaintiff, however, alleges that the debts assigned are of very little value in fact: and, with the property assigned will not prove sufficient to satisfy the claims of the creditors who have assented to the assignment. If the fact be so, on a second trial, the plaintiff will have an opportunity to prove it. As we were satisfied from the examination of the report, that there must be a new trial, we have deemed it proper and useful to give our opinion upon all the points of law that were raised, so that another trial may be final in all respects.

Accordingly the verdict is set aside and a new trial granted.

## JOHNSON *vs.* RICHARDS.

In an action of replevin brought into this Court by appeal from a judgment rendered on a plea to the merits in the Court below, a motion to quash the process on the ground of the insufficiency of the replevin bond was not sustained. If the defendant would avail himself of such defect of service, he should do it by plea in abatement or on motion at the return Term; — by pleading in chief, he may be considered as waiving all exceptions to the irregularity of the process and service.

IN this action, which was replevin, the defendant pleaded to the merits in the Court below, and from the judgment thereon rendered, an appeal was taken to this Court. The only question in the case was, whether a motion to quash the process because of the insufficiency of the replevin bond, would now be sustained, which was submitted on the statement of the parties, by

*G. M. Chase*, for the plaintiff, and

*Downes* and *Cooper*, for the defendant.

PARRIS J. — An officer cannot lawfully execute a writ of replevin without taking a bond according to the statute, and the Court do say in *Cady* v. *Eggleston*, 11 *Mass.* 285, that the "defendant may by plea in abatement or motion avoid the process." But pleas in abatement, unless for matter arising since the last continuance, are generally to be pleaded at the return term of the process, and uniformly so when the matter alleged is irregularity of service. By pleading in chief the defendant waives all objections to the irregularity of the process and service, and so the court decided in *Chandler* v. *Smith*, 14 *Mass.* 315, which was an action of replevin carried up by appeal. — In the appellate court, a motion was made, by the defendant, to dismiss the suit, on the ground that the bond given by the plaintiff was not sufficient, within the provisions of the statute. The Court say, "the defendant, having answered fully to the suit, thereby admitting a proper service of the writ, which comprises the taking a legal and valid bond with sufficient sureties, cannot now avail himself of his objection, but must be considered as having waived his exception."

The officer is required to return the bond with the writ. It becomes a part of the record, and the defendant has the opportunity of inspecting it at the return term, and if it be defective there has been no sufficient service of which the defendant may take advantage by plea in abatement or motion.

But if he answer in chief he thereby waives all defects to writ and service, which includes the bond.

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

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## DICKINSON *Judge vs.* BEAN *& al.*

Where the administrator of an insolvent estate, neglects to exhibit and settle an account of his administration in the Probate office for the term of six months after the report of the commissioners of insolvency has been returned and accepted, a creditor may maintain his action against the administrator in the same manner as if said estate had not been represented insolvent; by virtue of the provisions of *stat.* of 1821, *ch.* 51, *sec.* 28.

But this provision is not exclusive of any other remedy — the creditor may, if he prefer it, maintain an action on the administration bond in the name of the Judge of Probate for the official negligence of the administrator; — in which, judgment will be rendered for the penalty of the bond, — and execution will issue for the amount of debt and costs.

Such neglect of the administrator was further held, to dispense with the necessity of *a demand* upon him before suit.

THIS was an action of debt, commenced on a bond given by *Mary Bean* as administratrix of the estate of *Thomas Bean*, deceased, and the others as her sureties.

The facts in the case were agreed, and a verdict was returned for the plaintiff, subject to the opinion of the whole Court upon the case as reserved in the report of the Judge who sat in the trial. The facts and arguments of counsel are sufficiently stated in the opinion of the Court.

*A. G. Chandler*, for the defendant, cited the following authorities: 5 *Dane's Abr. ch.* 149, *sec.* 12; *Prescott Judge* v. *Parker*, 14 *Mass.* 128; *Robbins Judge* v. *Haywood*, 16 *Mass.* 526; *Paine Judge* v. *Gill and al.* 13 *Mass.* 369; *Newcomb* v. *Wing and al.* 3 *Pick.* 169; *Coffin* v. *Jones*, 5 *Pick.* 62; *Nelson* v. *Jaques*, 1 *Greenl.* 141.

*Downes*, for the plaintiff, cited *Cony Judge* v. *Williams and al.* 9 *Mass.* 117.

The opinion of the Court was delivered by

MELLEN C. J. — The present action was commenced pursuant to the directions of the act of *March* 16, 1830, *ch.* 470, *sec.* 1, on the administration bond given by *Mary Bean*, one of the defendants, as administratrix on the estate of *Thomas Bean*, for the recovery of a certain sum due to *Whipple*, the real plaintiff, for his services as a physician in attending on the deceased in his last sickness. His estate was represented insolvent in *June*, 1826, and the commissioners made their final report in *January*, 1828, which was then accepted, but no decree of distribution has ever been made. *Whipple's* claim was presented to, and allowed by the commissioners; but he has never made any demand of the sum allowed him, upon the administratrix. She never returned any inventory on oath as by law required, and has never settled any account of her administration or been cited so to do. On these facts the inquiry is whether the action can be maintained. The counsel for the defendant has contended that, inasmuch as it is specially alleged in the declaration that the action is prosecuted and was commenced for the benefit of *Whipple*, he cannot maintain it in consequence of any neglect and violation of official duty in not returning an inventory or settling her account of administration: — that for *such* neglects and violations the Judge of Probate, as the general trustee of all interested in the estate, may commence and prosecute actions without any specification of the person or persons interested, or any application whatever; — that as the action is professedly brought for the sole use and benefit of himself, as a creditor of the deceased, in the prosecution of it, he must rely upon *his* interest and rights as such creditor, and cannot resort to facts, to sustain the action, which relate merely to general violations of duty, which it is more peculiarly the province of the Judge of Probate to guard against and for which to call an administrator to account: — and, proceeding on this ground, the counsel contends that this action cannot be maintained, according to the requisitions of the 72*d section* of *ch.* 51, of the revised statutes; because *Whipple's* claim has never been ascertained by judgment of court, and, of course, no demand of it was ever made

on the administratrix; and though the claim was ascertained and allowed by the commissioners, yet no order of distribution was ever made, nor demand on the administratrix; hence, it is contended that there is a fatal defect of proof. Whether the foregoing reasoning and the conclusion to which the counsel has thus arrived, are wholly correct, we do not deem it necessary to decide on this occasion, because there is another fact in the cause, having no necessary connection with the conclusion above stated. We allude to the provision in the 28*th section* of *ch.* 51, and the neglect of the administratrix to *exhibit* and *settle her account of administration* with the Judge of Probate *within six months* after the commissioners made their report to the Judge of Probate, as the above section expressly required, unless a further time had been allowed for the purpose. The case before us does not show that any such further time was ever allowed. If instead of the present action, *Whipple* had commenced an action in his own name against the administratrix, after the end of six months from the time the report of the commissioners was made, by one of the provisions of the before mentioned section, he might have maintained the action and obtained judgment thereon in the same manner as if the estate had not been represented insolvent. But there is another remedy different from those provided in the 72*d* and 28*th sections* of *ch.* 51, which we have been considering, and to this we will now direct our attention. On this point the case of *Cony Judge* v. *Williams and al.* 9 *Mass.* 114, and decided in the year 1812, is one of importance. In that case it was distinctly decided that where the administrator of an insolvent estate, unduly neglected to exhibit and settle his account of administration within six months next after the commissioners made their return, an action might be maintained upon the administration bond for the benefit of a creditor, besides the remedy against the proper estate of the administrator. The above action was founded on an administration bond; plea — general performance. The replication stated a judgment recovered against the administrators by *Blackstone*, for whose benefit the action was brought — that they had sufficient funds in their hands — and that they had been requested to pay it. In avoidance of the replication,

the defendants rejoined that the estate had been represented insolvent — that commissioners had been appointed — that the said *Blackstone's* judgment had been filed with the commissioners and recorded, but that no order of distribution had been made; and they *deny* that any demand of payment of said judgment or his dividend had been made upon them. The plaintiff surrejoined that the administrators neglected for more than six months after the final return of the commissioners to exhibit and settle their account of administration; no further time having been allowed to them for that purpose. Upon demurrer the court held the action maintainable. *Sewall J.* in delivering the opinion of the Court, and speaking of the statute of 1794, *ch.* 5, of which the 28*th section* of *ch.* 51, of our revised statutes is a copy, says, "This is a case, therefore, where a creditor may proceed, and is entitled to maintain any action, commenced before or after the representation of insolvency, to the same effect as if no proceedings, as upon an insolvent estate, had ever been had. The creditor by the additional statute above referred to, is specially *entitled* to *that* remedy, but he is not *restricted* to it. The provision is not *exclusive* of any other legal remedy." By the proceedings under the commission of insolvency the debts of the deceased were ascertained and the voluntary neglect of the administratrix for more than six months after the return of the commissioners, to settle and adjust her accounts, as the court observed in the above case "is an unfaithful administration and a breach of the condition of the bond." In the case just cited, there was no proof of any demand on the administrators before the commencement of the action: for though a demand was *alleged* in the replication, it was *denied* in the rejoinder. The official negligence of the administrators to comply with the provisions of the act of 1794, *ch.* 5, by settling their administration account within the six months prescribed, was considered as dispensing with the necessity of a demand. This construction of an act of *Massachusetts*, eight years before it was re-enacted in this State, in the same language, is not only entitled to our highest respect, but the re-enactment of it is justly considered as a legislative adoption of the construction. We have, in numerous instances, been govern-

ed, in our decisions, by this principle, and accordingly feel disposed to be governed by it in the present instance. We are all of opinion that there must be

*Judgment for the penalty of the bond: — Execution to issue for the amount of the verdict.*

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## MARSHALL *vs.* JONES.

In *assumpsit* it is competent for the defendant under the *general issue* to show that there are other persons jointly interested with the plaintiff who should have been joined; — and it is not necessary to plead such matter in *abatement.*

Where there is a *special contract,* the plaintiff cannot recover in *indebitatus assumpsit,* the stipulated price, unless there has been a complete performance on his part; nor then, if by such recovery the terms of the contract would be infringed.

Where general *indebitatus assumpsit* is brought notwithstanding the existence of a *special contract,* on the ground of performance by the plaintiff, such special contract is not necessarily excluded as evidence; but it may be introduced by the defendant to show that the plaintiff has not performed it, — or that the defendant is liable to others as well as the plaintiff for the damages sought to be recovered, — or that the rule of damages has been agreed on by the parties.

In this action the plaintiff declared in general *indebitatus assumpsit* for money had and received, work and labor performed, and money paid, laid out and expended. The several counts were for the same cause of action, *viz.* the building of a vessel for the defendant.

In support of the action the plaintiff called a witness who testified, that he worked in the plaintiff's ship-yard on the vessel built for the defendant — that he was employed by the plaintiff, of whom he received his wages except $12 paid by one *Winslow* — that the plaintiff appeared to have the sole control of the yard, though he added, that *Winslow* was often in the yard, and that he had frequently heard both *Winslow* and the plaintiff say, that they built the vessel together. He further testified, that the vessel was about 250 tons, and that it was worth $12 per ton to build her — that there was a number of items of extra work and labor not belonging to the contracts (hereafter stated) but relating to the completion of the vessel, which he knew to be performed by the plaintiff, amounting to $——— which he considered the plaintiff entitled to beyond the $12 per ton.

The plaintiff also called one *Sibley* as a witness who testified, that he was present when the plaintiff and defendant were together at *Robbinston*, at the time of the service of the plaintiff's writ, while the defendant was under arrest — that they talked of settling the claim sued — that the defendant made no objection to it, and offered to pay it by giving his own notes payable annually for the whole amount — but the plaintiff objected to taking the defendant's notes without an endorser. In this conversation the witness further said, that *Winslow's* name was not mentioned, nor any thing said about a suit that had been brought in the Province of *New Brunswick* against the defendant, nor any thing about the form of the action.

In defence, the defendant produced a written contract, dated *Aug.* 23, 1828, signed by the plaintiff and one *Abner Winslow* on the one part, and by *Francis Jones & Co.* of the other part, for building a vessel, similar in its description to the one which was built. Also another contract, dated *Nov.* 27, 1828, containing some modification of the former contract.

The counsel for plaintiff contended that it was not competent for the defendant to set up the contract introduced by him, in bar of this action, or to defeat it, inasmuch as he had never performed his part of it by paying the money for the vessel; and that the work having been proved to have been done by the plaintiff, and the defendant having received the vessel, he was bound to pay the plaintiff in the same manner as though there had been no such written contract.

It was stated by defendant's counsel in the opening of his defence, that the plaintiff and *Winslow* had formerly commenced an action against *Jones & Co.* in the Province of *New Brunswick* which was carried to the superior Court and then settled by *Winslow* with *Jones.*

The plaintiff's counsel relied on the facts as testified to by *Sibley* after said supposed settlement in *New Brunswick*, as evidence of a severance.

*Weston J.* before whom the cause was tried, instructed the jury, that if *Winslow* was jointly concerned with the plaintiff in building the vessel, he should have been joined, and that the action could not be maintained in the name of the plaintiff alone,

unless there had been a *severance* of the plaintiff's claim from their joint claim by a settlement between the defendant and *Winslow* of *Winslow's* part. That how the suit brought by *Marshall* and *Winslow* was arranged or settled did not appear, or whether *Winslow* had received payment or not, or whether if he had, it was of all due to them jointly or for his own part alone; — and that the offer on the part of the defendant, as testified to by *Sibley*, to give his notes to the plaintiff, could not be regarded as sufficient evidence of a severance of the cause of action, if it was an offer of compromise made without reference to the form of action, or to procure his liberation from arrest. The jury, under these instructions, returned a verdict for the defendant, which was taken subject to the opinion of the Court upon their correctness.

*Allen*, for the plaintiff.

*Hobbs*, for the defendant.

The opinion of the Court was delivered by

PARRIS J. — It is competent for a defendant, in an action founded upon contract, to shew in defence that there are other persons than the plaintiff interested in the subject matter in litigation, and who ought to be joined as plaintiffs in the suit. — It is not necessary to plead such matter in abatement, but it will defeat the action if proved, as it may be, under the general issue, in any stage of the proceedings. The plaintiff has declared in general *indebitatus assumpsit* for money had and received, work and labor performed and money paid, laid out and expended.

No proof was offered in support of the first and third counts, and the only proof introduced by the plaintiff in support of the second count, for work and labor, was the testimony of a witness who labored in a ship-yard on a vessel built by the plaintiff, and who testified that the plaintiff appeared to have the sole control of the yard. This vessel the defendant received, and, as he contends, under a written contract made with the plaintiff and one *Abner Winslow*, and that if he is answerable at all, it is under the contract, and not on a general count for work and labor; — it is to *Marshall* and *Winslow* jointly, and not to the plaintiff.

To prove that *Winslow* ought to have been joined as plaintiff,

the defendant offered the written contract which purported to be executed by the plaintiff and *Winslow* on the one part, and by the defendant on the other, for building a vessel similar to the one which was built; and also another contract signed subsequently by the same parties, containing some modifications of the former contract. It also appeared from the testimony of the plaintiff's witness that he received some pay for his labor from *Winslow*, who was often in the yard; — and that both *Winslow* and the plaintiff said, frequently, that they built the vessel together. The plaintiff contends that, inasmuch as the defendant has not fulfilled the written contract on his part by paying for the vessel, he cannot make use of it in defence.

But we are not aware of any principle or authority by which such a position can be sustained. The parties, having entered into a special contract are to be governed by it, and the law will enforce its execution, and look to it for the rule of damages, in case either party fail to fulfil it. Where the terms of the special contract are performed, general *indebitatus assumpsit* will perhaps lie, but the special contract is not thereby necessarily excluded. If by that the damages are stipulated, the law will hold the parties to their own estimate. The special contract is not to be infringed by a resort to the general counts. The defendant may use it to show that the plaintiff has not performed the contract on his part, and thereby defeat the action on the general count. He may use it to shew that he is liable to others, as well as the plaintiff, for the damages sought to be recovered, and thereby defeat the action for want of proper parties; or he may introduce it as evidence that the parties have agreed upon the rule of damages, and thereby prevent the recovery of any greater sum than that specified in the contract. Where there is a special contract, the plaintiff cannot recover in *indebitatus assumpsit*, the stipulated price, unless there has been a complete performance on his part; — nor then, if by such recovery the terms of the contract would be infringed.

The ruling of the Judge in receiving the written contract as evidence was undoubtedly correct; and by that contract, as well as by the testimony of the plaintiff's witness, it is manifest that *Winslow* was jointly interested with the plaintiff, and ought to

have been joined, unless there had been a severance of the plaintiff's claim from the joint claim by a settlement between the defendant and *Winslow* of *Winslow's* part. Of that there was no evidence. The plaintiff's statement on the trial, that he and *Winslow* had formerly commenced an action against the defendant in the Province of *New Brunswick*, shews that the claim was then considered joint, and that it was necessary to prosecute in the name of both; and the additional statement that the action was settled by *Winslow* with the defendant, if proved, would not amount to a severance, unless it appeared further that the defendant paid *Winslow* his share of the demand only, and that the balance, to which the plaintiff was entitled, remained unpaid. The case does not shew that to have been the fact. The offer to settle, while the defendant was under arrest on mesne process in this action, is no evidence of severance. It does not appear that he knew that the suit was in the name of the plaintiff alone;— and if he did, the offer on his part is to be regarded as a proposition to buy his peace, and not to be used as evidence in determining his legal rights. There must be

*Judgment on the verdict.*

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## MARSHALL *vs.* WINSLOW.

Where, in the building of a vessel one part owner had contributed more than his share of the expense, it was held that he might maintain *assumpsit* against the other part owner to recover such excess; though there had been no liquidation of their accounts, nor balance ascertained, nor any express promise to pay such balance as might be found to exist.

ASSUMPSIT, by one part owner of a vessel against the other to recover a sum expended by the former in the building, beyond his proportion. The joint business of the parties relating to said vessel had been closed prior to the bringing of the action; but there had been no liquidation of their accounts, nor balance ascertained, nor any express promise by the defendant to pay such balance as might be found against him. And for failure of proof in these particulars, the counsel for the defendant insisted the action was not maintained. But *Weston J.* who tried the cause

ruled otherwise, and the jury returned their verdict for the plaintiff — which was to be set aside or judgment rendered thereon, as the opinion of the whole Court should be upon the questions reserved.

*Downes* and *Hobbs*, for the defendant, insisted that no action would lie by one *partner* against another, before any liquidation of their accounts, or demand made, or express promise to pay, and cited the following authorities. 2 *Starkie's Ev.* 124; *Casey and al.* v. *Bush*, 2 *Caine's R.* 293; *Beach* v. *Hotchkiss*, 2 *Conn. R.* 425; *ibid*, 697; *Com. Dig. tit. Merchant D.* 169; *Gow on Partnership*, 99; *Chandler* v. *Chandler*, 4 *Pick.* 78; *Haskell* v. *Adams*, 7 *Pick.* 60.

*Allen*, for the plaintiff, cited *Brigham* v. *Eveleth*, 9 *Mass.* 538; *Jones* v. *Harridan*, 9 *Mass.* 540, *in note*; *Bond* v. *Hayes*, 12 *Mass.* 30; *Willey* v. *Phinney*, 15 *Mass.* 116; *Fanning* v. *Chadwick*, 3 *Pick.* 420; *Gardiner Factory Co.* v. *Heald*, 5 *Greenl.* 381.

The opinion of the Court was delivered by

Parris J. — The parties in this case were jointly interested in building a brig, and the plaintiff, having advanced beyond his proportion, brings his action of assumpsit for contribution.

The defendant resists on the ground that in the transaction out of which the demand arose they were partners, and that, inasmuch as prior to the bringing of the action there had been no liquidation of their accounts, nor any balance ascertained, nor any express promise to pay such balance as might be found due, assumpsit cannot be maintained.

Such no doubt is the law where the claim arises out of partnership transactions, and in relation to partnership concerns; — as where two persons engage in business under a contract to share in the profit and loss arising from such connexion, assumpsit will not lie in favor of one partner against the other on an implied promise, except for a liquidated balance either struck by the parties, or the result of a final adjustment of the partnership concerns. But notwithstanding their association as partners, they may, in their private and individual character, contract with each other in relation to concerns not the subject matter of the partnership,

in the same manner as if such partnership had never existed. In the case at bar, if there were any partnership, it was confined exclusively to the brig. She was to form the common stock or capital, to constitute which, both parties were to contribute a certain proportion. What that proportion was, it is immaterial to inquire, as the case finds that the plaintiff did in fact advance more than *his* proportion. If then we view it as a partnership it is a case of two persons agreeing to furnish a common stock, and on the failure of one to advance his share, the deficiency is on his account supplied by the other. It is not a question concerning the division of the stock, or the profits arising from the operations of the company, and consequently the principles of law relating to the division of partnership effects, and the rights of partners *inter se*, do not apply. No liquidation could be necessary. Whether the concern in which they were engaged should be a profitable or a losing business would be a fact in no way affecting the plaintiff's rights. The profit or the loss could not be ascertained until the capital had been supplied. That, by mutual agreement, was to be furnished in proportion to the parties' interest when the vessel should be completed, and whenever one party failed to supply his proportion of the capital necessary to the carrying forward of the work, the other must necessarily furnish it or the whole would be suspended. The amount, thus supplied, would be certain, depending on no contingency arising in the prosecution of the business, or the employment or sale of the vessel, and, of course, the plaintiff's right to remuneration would be immediate, not liable to be postponed to the completion of the vessel, or to be defeated by any casualty. Suppose she had been accidentally destroyed by fire, so that the whole expenditure was a total loss. Could the defendant avoid refunding his proportion of the amount expended? If a copartnership be by deed and the partners covenant each to advance a stipulated sum, as capital, for the purpose of launching the partnership, an action to enforce payment will lie by one partner against the other who fails to make the advance, and the sum agreed upon will be the measure of damages. *Venning* v. *Leckie*, 13 *East*, 7; *Gow on Part.* 106, *Am. ed.* But when the contract of partnership is verbal, as it may be, or by writing not under seal, it cannot be enforced by action of cove-

nant. In such cases, the remedy can be only in assumpsit, and it is advanced as an indisputable proposition by *Gow* in his treatise on the law of partnership, that in whatever instances an action of covenant is maintainable for the breach of a covenant comprised in a deed of copartnership, in the same instances an action of assumpsit can be sustained if the partnership, instead of being constituted by deed, were contracted verbally or by writing only; and he gives an illustration of the principle by stating a case somewhat similar to the one before us. If two persons agree in writing to share the profit or loss upon goods bought by one of them on their joint account, an action of assumpsit may be maintained, founded on the agreement, by the one against the other for the payment of his proportion of the original purchase, — because until that is paid there cannot be any account of profit and loss between them. It is further said by *Gow*, that in an action of assumpsit for money paid to the use of his copartner, one partner may enforce contribution from him in a case in which he has solely discharged a demand to which himself and his copartners were jointly liable. Now, whether the plaintiff and defendant were interested in the brig as copartners or tenants in common, is immaterial to the decision of this case. In either view, the advances by the plaintiff beyond his proportion, as determined by the agreement of the parties, were made for the use and benefit of the defendant, and the law raises the promise of payment.

*There must be judgment on the verdict.*

## BIXBY *vs.* WHITNEY.

In an arbitration bond it was stipulated that the award should be made before a certain day — "provided nevertheless, that in case either of the said parties shall, by affected delay or otherwise, prevent the arbitrators from making their award by the time limited, then the arbitrators shall be at liberty to proceed and make up their award, taking such time as they shall think reasonable." Before the day fixed the arbitrators met the parties, but at the request of the defendant adjourned to a time beyond it, when they again met the parties, gave them a hearing and made up their award. It was *held* that they had authority so to do, having been prevented by the defendant from making it before the day limited, within the meaning of the phrase, "by affected delay or otherwise."

*Held* further, that upon a just construction of the bond, the enlarged time extended to all the purposes for which the arbitrators were appointed, and not merely to the *making up and signing* of the award on a hearing had prior to the day first named.

DEBT on an arbitration bond, the condition of which was in the following words, *viz:*

"The condition of this obligation is such that if the above bounden *Joseph Whitney* shall well and truly stand to, abide, perform, &c. the award and determination of J. A.—J. M.—and D. L. or any two of them, arbitrators indifferently chosen as well on the part and behalf of the above bounden *Joseph Whitney* as of the above named *Mary Bixby*, to arbitrate, award, &c. of and concerning all manner of actions, causes of action and actions, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages and demands whatsoever both in law or equity, or otherwise howsoever, which at any time or times heretofore have had, been, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done or suffered by or between the said parties, or the said *Joseph Whitney* and the said *John Bixby*," (the plaintiff's intestate) "or either of them, so as the said award be made in writing, under the hands and seals of the said arbitrators, or any two of them, and ready to be delivered to the said parties, *on or before the first day of January*, 1824. Provided nevertheless, and it is hereby agreed by and between the said parties, that in case either of the parties, shall, by affected delay or otherwise, prevent the said arbitrators or any two of

them, from making their award by the time abovementioned for making the same, than the said arbitrators or any two of them, they notifying the third shall be at liberty to proceed *ex parte* and make up their award in manner as above directed, taking such time for making up the same as they shall think reasonable; which said award shall be as conclusive and effectual, both in law and equity, to bind the said parties or either of them, as if the same had been made on or before the said first day of *January.*" Signed and sealed by *Joseph Whitney.*

The defendant after oyer, pleaded the general issue, and filed a brief statement containing, among other matters of defence, the points hereafter stated.

The plaintiff proved an award made and published in her favor; that is to say, that the said *Whitney* should pay to her the sum of two hundred and eighty-two pounds fifteen shillings, *New Brunswick* currency, as a balance due from the said *Whitney* to the said *Mary Bixby* in her capacity of executrix; — and also eight pounds ten shillings and eight pence, *costs of arbitration.* The award was dated *November* 19, 1824. The plaintiff also proved that the arbitrators met the parties *prior to Jan.* 1, 1824, and adjourned from time to time beyond that day, *at the request of the defendant;* and that they heard the parties and their evidence, and made up their award on the day of its date, the defendant not objecting to the lateness of the time, but tacitly assenting thereto. She also proved a demand on the defendant of payment of the sum awarded. And further, that the defendant made use of the award as stated in the case of *Bixby* v. *Whitney,* 5 *Greenl.* 192. The defendant hereupon objected that the plaintiff ought not to prevail, because the award did not conform to the submission; and was made after the day assigned in the bond; — that if the time was enlarged by agreement of parties, the action should have been on the agreement; — that the award should have set forth the fact of such agreement, or the causes why it was made later than the day appointed in the bond; — that it was not mutual, nor final; — and that as to the costs, it was void. But *Weston J.* before whom the cause was tried, intending to reserve these questions for the consideration of the whole Court, directed the jury to return a verdict for the plaintiff for the sum

awarded and interest, exclusive of the sum awarded as costs of arbitration, which they accordingly did. If the award was valid and binding, judgment was to be rendered on the verdict. If not, the verdict was to be set aside and the plaintiff nonsuited.

*Bridges*, for the defendant.

1. The award is not binding because the parties were not heard prior to 1*st Jan.* 1824. No *hearing* was provided for *after that time* — the meetings after that, were to be for the purpose merely of making up the award. If a hearing was had afterward by consent, it was a submission by *parol*, and not under the bond; the action therefore, if any can be maintained, should have been on the parol agreement. *Freeman* v. *Adams*, 9 *Johns. Rep.* 115; *Brown* v. *Goodman*, 3 *T. Rep.* 592.

2. The award is not *mutual*. It does not require anything to be done by the plaintiff for the defendant's protection against her claims. *Kyd on Awards*, 198.

3. It is not *final*. It could not be pleaded by *Mary Bixby* in defence of a suit commenced against her by *Joseph Whitney*. The bond is to her in her private capacity — the award says nothing about her private claims though they were submitted.

*Allen*, for the plaintiff.

The bond expressly provides for the contingency of inability in the arbitrators to make a report before the 1*st Jan.* 1824. The exception is broad enough to embrace all cases of delay — the words of the bond being, "by affected delay or *otherwise*."

But whatever objections may have existed to this award have been waived by the defendant. He waived all objection by appearing before the arbitrators and having a trial after the 1*st Jan.* Also by taking the award and using it in the case of *Bixby* v. *Whitney*, reported in 5 *Greenl.* 192.

The reason why an action could not be sustained on the bond in the case cited from 9 *Johns. Rep.* was because there was no provision in it for an enlargement of the time by the arbitrators. And the same may be said of the case cited from 3 *T. Rep.*

There was in this case all the *mutuality* that the law requires. It was not necessary for the arbitrators to distinguish particularly the claims upon which the amount was finally made up. They

had only to ascertain which of the parties was indebted and how much, which they have done.

As to the waiver, he cited *Bellows* v. *Brown*, 4 *Pick.* 179; *Kyd on Awards*, 171, 173, 221.

That the award was final, *Buckland* v. *Conway*, 16 *Mass.* 397; *Peters* v. *Peirce*, 8 *Mass.* 398.

*Greenleaf*, in reply, said that the appearance of the defendant before the arbitrators being an act *en pais* could not aid the suit on the bond.

Then as to the use made of the award by the defendant in the case of *Bixby* v. *Whitney*, in 5 *Greenl.* it will be seen that the *award* was relied on, not the *bond*. The defendant does not now object to a suit on the *award*—he had rights there, which he cannot avail himself of in a suit on the bond.

The opinion of the Court was delivered by

WESTON J.—It appears that the arbitrators met the parties in season to have made their award by the day limited; and that they adjourned from time to time, beyond that day, at the request and for the accommodation of the defendant. It may be well said therefore, that he prevented the making of the award by the time appointed, by affected delay or otherwise, in which case it was expressly provided in the condition of the bond, that the arbitrators might take such further time, as they might think reasonable. It is insisted that this further time was for the purpose of making up the award, and not of hearing the parties. But we are satisfied that upon a just construction, the enlarged time extended to all the purposes, for which the arbitrators were appointed. There can be no good reason for giving the proviso a more restricted meaning. In the cases cited upon this point, by the counsel for the defendant, the arbitration bonds contained no such condition.

The arbitrators say that they have taken upon themselves the burthen of the award and that they have fully examined and duly considered the proofs and allegations of both the parties. We cannot intend that any thing was omitted, falling within the terms of the submission. The avowed object of the arbitration was, to put an end to the differences and disputes between the parties.

This is recited in the award, in which a balance is adjudged to the plaintiff. The benefit resulting to the defendant is, that upon payment of the sum awarded, he is discharged and protected from all further claims on the part of the plaintiff against him, in regard to the matters submitted. This is clearly to be implied and understood from the award.

In a case between these parties, 5 *Greenl.* 192, the defendant relied and insisted upon this same award, the validity of which he would now impeach. But in our opinion it follows the condition of the bond, and is binding and operative upon him, except in regard to the costs, which were not allowed at the trial.

*Judgment on the verdict.*

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## PETTYGROVE *vs.* HOYT *& al.*

A sued out a writ of replevin against B and gave bond in the form prescribed by law, but neglected to enter his writ at the term of the Court to which it was returnable; whereupon B filed a complaint *for his costs*, omitting therein to pray for *a return of the goods*. Execution issued for the *costs* only, and was satisfied; and then B brought his suit upon the replevin bond. — *Held* that the action could not be maintained.

IN this action, which was debt on a replevin bond, the parties agreed on the following statement of facts. *Hoyt*, the present defendant, sued out his writ of replevin against *Pettygrove*, for a schooner boat, the value of which, as stated in the writ and bond, was $175. The writ was duly served on the execution of the bond now put in suit, which was in the form prescribed by statute; and the boat was thereupon delivered to *Hoyt*. The writ of replevin was not entered at the term of the Court to which it was made returnable, and *Pettygrove* filed a complaint *for costs*, but made no claim in it, for *a return of the boat*. No return was ordered by the Court; — no writ of return issued; — and no return was ever in fact made. Execution issued in favor of *Pettygrove* for his costs, which were paid by *Hoyt*.

If upon these facts, the Court should be of opinion, that there had been a breach of the bond, it was agreed, that the defendants should be defaulted, and the damages assessed by the Court.

*A. G. Chandler*, for the plaintiff.

The case presents two questions. 1. Whether there has been a breach of the condition of the bond, and if so, then 2. what should be the measure of damages.

It is contended, that as the original plaintiff in replevin did not enter his action in Court, he did not *prosecute it to final judgment*, which, it is a condition of the bond he should do; and that thereby the condition of the bond has been broken. Here then the question arises, what is *prosecuting said replevin suit to final judgment* within the meaning of the condition of the bond?

The mode of proceeding in replevin suits, is in several respects different from all others. One of no slight importance is, that before judgment and determination in whom the right in the property in question is, it invades or disregards the *apparent* right, and title, that which pertains to the possession; takes it from the possessor and transfers it to one merely claiming it as his without any *evidence* of title. To prevent the gross abuses and injustice which would otherwise result from this course, the law makes it a condition precedent to the disturbance of the possession and to the delivery of the property to the plaintiff in replevin, that he shall undertake to procure a decision, a judgment of Court in his action, upon the question, to whom does the property rightfully belong. The law goes far in changing the possession of the property, before it is known to whom it belongs, and is careful to make provision that the wrong, if any thereby has been done, shall be corrected by him who caused it. He must therefore give bond, to proceed in said action and to procure a final judgment therein.

Such being the *object* of the law, it would seem to follow that the *final judgment* contemplated should be such an one as would make an end of the question in the suit.

True, it is said in *Badlam* v. *Tucker*, 1 *Pick.* 286, that any judgment, is a final judgment, which terminates the suit, whether on the merits or not. This may be true in one sense, but not without some qualification or limitation in the sense in which that expression is used in the bond; for it is said on the same page that neither a judgment on nonsuit, or discontinuance, is a final judg-

ment within the meaning of the bond, though they both terminate the suit.

What that qualification or limitation is, is implied, in part at least, in the language used in the condition of the bond. It is to "*prosecute* the said replevin to final judgment." The plaintiff in replevin is to *prosecute*, by his *proceeding to procure*, and obtain the rendition of a judgment, final in the suit. Not that there shall be a judgment in consequence or resulting from his not prosecuting or proceeding. Hence the judgment on nonsuit and discontinuance are not such judgments as are intended, in the condition of the bond. The object in requiring the plaintiff in replevin to prosecute to final judgment, shows that judgments on nonsuit and discontinuance are not such as the bond contemplates. On the rendition of such judgments the bond is forfeited. Much more then is the bond *forfeited*, when the plaintiff in replevin omits to enter his action in Court, so that there is no judgment whatever "*in said replevin suit:*" for the judgment of Court for defendant's cost in a complaint filed therefor, is not a judgment "*in said replevin suit*;" for that suit is not then in existence, and this judgment for cost, is rendered because it is not in existence.

In England, the requisition in replevin suits is "to prosecute with effect," and this has been construed to be synonymous with ours "to prosecute to final judgment." *Dane's Abr. ch.* 171 *a.* 6, *sec.* 1; *Badlam* v. *Tucker*, 1 *Pick.* 286; *Carthew*, 519; 2 *Selwyn's N. P.* 1117, *note* 8.

*Mr. C.* then discussed at some length the question of damages.

*Bridges*, for the defendant, cited *Maine Stat. ch.* 80, *sec.* 4; *Bruce* v. *Learned*, 4 *Mass.* 618; *Ladd* v. *North*, 2 *Mass.* 516; *Arnold* v. *Allen and al.* 8 *Mass.* 150; *Turner* v. *Turner*, 2 *Brod. and Bing.* 37; *Badlam* v. *Tucker*, 1 *Pick.* 286.

The opinion of the Court was delivered by

MELLEN C. J. — The condition of the bond declared on is in the legal form; namely, that *Hoyt*, the plaintiff in the action of replevin, should prosecute the said replevin to final judgment, and pay such *damages* and *costs* as the said *Pettygrove* should *recover* against him; and also *return* and *restore* the boat replevied, in like good order and condition, as when taken, in case such should

be the final judgment. In the *4th section* of *ch.* 80 of the revised statutes it is enacted, among other things, that "in case the plaintiff in replevin shall neglect to enter and prosecute the suit, the defendant may, upon complaint, have *judgment* for a *return* and *restoration* of the goods and chattels replevied, and the *damages* for the taking, to the amount of six per cent. on the bond, with reasonable costs." The bond is given with sureties to secure to the defendant in replevin the complete execution of the *judgment* which he may recover against the plaintiff. The judgment and execution thereon are sufficient to compel the plaintiff to do justice, if he has property to pay damages and costs, and to obtain a return and restoration of the property replevied, if not eloigned; but in failure of a satisfaction of the judgment by statute process, the bond must be resorted to, in order to reach the sureties, and compel *them* to pay damages, equal to the injury sustained, by the neglect of the principal to satisfy the judgment in all respects. The *sureties* are bound to perform what the *principal* was *adjudged* to perform, or must pay damages as an equivalent for performance. It is a familiar principle that the Court cannot enlarge or vary the condition of the bond. The view we have thus taken will simplify the cause and lead us in a direct course to the legal conclusion. We have seen by the part of the *4th sec.* above quoted, that *Pettygrove* was entitled, upon his complaint to a judgment for a *return* of the boat, for *damages* and *costs*, because the original plaintiff neglected to enter and prosecute the replevin: but for some reason, he prayed and had a judgment *for costs only*. The Court observe, in the case of *Badlam* v. *Tucker*, 1 *Pick.* 284, "whenever the defendant in replevin is entitled to a return, he should move for it on the rendition of such judgment." It is very clear that a *nonsuit* or a *discontinuance* is a breach of the condition of the bond: and so also is a failure to *enter* and *prosecute* the action: for the original plaintiff was not prevented by the act of God, as by death. But though the condition of the bond was thus violated, the question is, whether the present action is maintainable, in the peculiar circumstances of the case; the judgment *for costs* having been satisfied, and no judgment for a *return* or for *damages* having ever been rendered. As we have stated before, by the condition, the

obligors were bound to pay the obligee such *damages* as he should *recover*, and he recovered *none;* and *return the boat*, if such should be the *final judgment;* and there never was any such judgment. All these facts are placed before us in the simple form of a statement of facts; and all are to be considered upon their merits, without any reference to *form*, or technical learning; and notwithstanding the labored argument of the plaintiff's counsel, we are unable to find any solid ground on which the action can be sustained. — Accordingly a nonsuit must be entered.

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## RICHARDS *et ux. vs.* FOLSOM.

An authority as *general agent* is sufficient to enable one to make an entry into lands for his principal.

But if it were not, the bringing of a suit by the principal to avail himself of rights acquired under such entry, is a sufficient ratification of the agent's act.

THIS was trespass *quare clausum fregit.* Plea the general issue. The plaintiffs to show title in the close described in the writ, read a deed of mortgage of the same, from the defendant to *Stephen Jones*, the plaintiff's wife's father, whose sole heir she is, dated *Sept.* 8, 1812. Also a deed of the defendant's equity of redemption in the *locus in quo*, by an officer, to *A. L. Raymond*, dated *Oct.* 15, 1823; and a deed of said equity of redemption from *Raymond* to *Jones*, dated *July* 15, 1825. The proceedings by the officer were admitted to be regular. Also another deed from the defendant of the same land to *Jones*, dated *July* 12, 1825.

The defendant proved that for the last twenty years he had exclusively mowed and improved the land in question; and that even since his last deed to *Jones* he had mowed the grass and *claimed that part of the land* on which the trespass was alleged to have been committed.

*R. K. Porter, Esq.* called by the plaintiff, testified, that he had the general care of the plaintiff's property in this vicinity, but had no written authority — that in *July*, 1829, he entered upon the lot in question, and upon that part of it on which the trespass was committed with two other persons as witnesses; but he did

not know that the defendant had any notice of such entry — the defendant lived between one and two miles from the premises. He testified further, that he had no special directions from the plaintiffs to enter upon this lot — but that after said entry made by him, and previous to the commencement of this action, he informed *Francis Richards*, the principal agent of the plaintiffs of what he had done, who thereupon advised this suit, and endorsed the writ himself, that *Mr. Porter* might be a witness — *Porter* had seen neither of the plaintiffs since that time.

The defendant upon this evidence contended, that he having been long in the undisturbed possession of the land, the plaintiffs could not maintain trespass against him without an entry by himself, or by some person by his direction.

The *C. Justice* who tried the cause, instructed the jury, that if any entry was necessary, the entry proved to have been made by *Mr. Porter* removed this objection ; and that the action might be maintained for such damages as the plaintiffs had suffered since the said entry up to the time charged in the plaintiffs' declaration.

If the jury were properly instructed, judgment was to be rendered upon the verdict, which was for the plaintiffs ; but if the Court should be of opinion, that an entry was necessary, and no sufficient entry had been proved, the verdict was to be set aside, and a new trial granted.

*Allen* and *Lowell* for the defendant, contended that actual possession was necessary to entitle one to maintain trespass. *Taylor* v. *Townsend*, 8 *Mass.* 411 ; *Starr* v. *Jackson*, 11 *Mass.* 519 ; *Little* v. *Palister*, 3 *Greenl.* 6.

The defendant was tenant at will. His character of *mortgagor* had ceased — the right in equity having been sold, and the year expired. He could only become a trespasser by being properly ordered out by the true owner. He could not be considered a trespasser merely by remaining, the original entry having been by right.

The entry of *Porter* was insufficient being without authority. We do not contend that it must be in writing, but do contend that there must be some express authority given previous to the entry, or a subsequent ratification. *Robinson* v. *Swett*, 3 *Greenl.* 316.

If the defendant was tenant at will there must be notice to quit. *Ellis* v. *Page*, 1 *Pick.* 43; *Rising* v. *Stannard*, 17 *Mass.* 282; *Co. Litt.* 57, *a*, 2 *Blk. Com.* 546.

*Greenleaf*, for the plaintiffs.

The relation of mortgagor and mortgagee had ceased between the parties at the time the trespass complained of was committed, though it had once subsisted — neither was the defendant tenant at will nor by the sufferance — but he was a mere trespasser.

The defendant is estopped by his deed to the plaintiffs' ancestor — for after foreclosure of the mortgage, the conveyance becomes absolute.

He adverted to *Maine Stat. ch.* 60, as to the effect of the sheriff's sale of the equity. It is to be considered as if the defendant had himself conveyed the right in equity to the mortgagee, because the statute gives this effect to the sheriff's sale.

There was no holding over here either by right or by wrong, because there was no previous tenancy.

The moment he set up a claim to dominion over the soil he became a trespasser.

Where one has given a deed with general warranty, he cannot upon any legal principles, assume the character of a disseisor, and insist upon the duty of making an entry by the owner.

But if an entry be necessary, here is one proved by *Porter* — his general agency was sufficient authority. 4 *Dane's Abr.* 722. Every act that he could do by virtue of verbal authority he was bound to do. *Clark* v. *Moody & al.* 17 *Mass.* 145; *Stimpson* v. *Sprague*, 6 *Greenl.* 470. The entry was effectual. *Stearns on Real Actions*, 25, 42, 43. The bringing of the suit was a sufficient ratification of the agent's act. 1 *Dane's Abr.* 296, *sec.* 18; 2 *Kent's Com.* 478.

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

In this case it is admitted that the title to the *locus in quo* is in the plaintiff: his title was *conditional*, in virtue of the mortgage deed from the defendant to *Stephen Jones*, the father of *Mrs. Richards*, whose sole heir she is: and in *July*, 1825, it became *absolute* by his purchase of *Folsom's* equity of redemption of *Raymond*, who purchased the same at auction on execution. In

1829, the trespass was committed. The counsel for the defendant has contended, that, inasmuch as he has openly and exclusively possessed and improved the *locus in quo* and cut the grass ever since the mortgage deed was given, the plaintiff cannot maintain the present action. From the time the mortgage deed was given in 1812, to *October*, 1823, the mortgage existed, and the defendant possessed and improved the land as mortgager; during all which time his possession, instead of being *adverse* to the plaintiff's title, was in submission to it; and, indeed, was in legal contemplation, the possession of the plaintiff. It is true that a person must have possession of land, in order to maintain an action of trespass *quare clausum fregit*. This is the general principle; but in the present case, as between the plaintiff and defendant, we are inclined to think that the latter may be considered as in possession, under his title deeds, so far as to enable him to maintain the action against the *defendant*, if he could not against any *other* person. We do not, however, place our decision on this ground, because, if we admit that the defendant's possession has been adverse to the plaintiff's title, ever since the estate became absolute in him, and that an entry was necessary to regain the possession and enable him to maintain the present action, we are satisfied that the entry made by *Mr. Porter*, before the commencement of the action, was sufficient for the purpose. He was the agent of the plaintiff, having the care of his lands, for the very purpose of protecting his rights and superintending his property. His authority was of a general character. He was not *specially* authorized to make this entry, but, if it was a necessary step to enable the plaintiff to maintain actions against trespassers, then it was an act within the scope of his general power and authority. If an attorney is authorized to commence an action, he is thereby authorized to indorse the writ for the plaintiff. In addition to all this, we find the plaintiff, for whose benefit the entry was made, ratifying the act, by prosecuting this action to recover those damages, which the counsel for the defendant contends, could not be recovered without a legal entry previously made for the purpose of regaining the possession. Viewing the cause in this light, we are satisfied the action is well maintained.

*Judgment on the verdict.*

## THURSTON *vs.* FOSTER.

A being engaged in transporting timber in his schooner from *Georgetown* to *New York*, in which business it was contemplated by both A and B that said vessel should continue, the former contracted with the latter, to carry freight for him in the cabin from *Georgetown* to *New York*, during the season ensuing, in payment for a quantity of rice sold him. Within the time, A offered upon two or three occasions to take freight, but B did not furnish it. Afterward, but within the time, B requested A to go with his vessel about two and a half miles up *Georgetown* river to *Kinlock's* mills, the place where rice was usually received, there to take a cabin freight; but the vessel being then deeply laden with timber, and it not being safe and proper, (as the jury found) to attempt going to the place designated with so large a vessel, laden, A declined going. *Held*, that these facts did not show a breach of the contract by A, construing the contract by the circumstances under which it was made.

*Held* also, that it was incumbent on A to do the first act; that is, to have the vessel at *Georgetown*, ready to receive the stipulated freight, *occasionally*, as the well known course of his business would allow; — and that the deposit of rice by B at *Kinlock's* mills was not a condition precedent.

Whether the *option* as to the *time when* the contract should be performed was with A or B — *quære*.

THIS was an action of *assumpsit* founded on a special contract to carry freight in the defendant's schooner *Constellation* from *Georgetown, South Carolina*, to *New York*, during the season of 1825, in payment for a quantity of rice which the plaintiff had sold the defendant. It was admitted to be understood by both parties, that the said vessel was to be employed during the said season in carrying *timber* from *Georgetown* to *New York*.

The plaintiff alleged in his writ, and proved, that in the spring of 1826, he requested the defendant to take a quantity of freight for him to *New York*, consisting of rice at *Kinlock's* mills, about two and a half miles from the village of *Georgetown*, where it was proved that vessels in the *Georgetown* coasting rice trade were generally accustomed to take in their freight, and averred a breach of the contract by a refusal of the defendant to take said freight; but offered no evidence that vessels in the timber trade, or that vessels of so large a size as said schooner ever went there; nor any evidence that he had rice at said mills.

The defendant proved that during the season ensuing the purchase of said rice, he made several trips from *Georgetown* to *New*

*York* — that he loaded said vessel each time with timber excepting the cabin — and that prior to the plaintiff's request aforesaid, he the defendant, upon two or three occasions, offered the plaintiff to take freight for him, but the plaintiff did not furnish him any. He also proved that at the time of the plaintiff's request for the defendant to take rice at *Kinlock's* mills, the schooner was deeply laden with timber — that rice *in casks* could not without difficulty, if at all, be got into the cabin of that vessel, and could not be carried in the hold with timber — that the usual cabin freight from *Georgetown* to *New York* consisted of bags and skins — that at the usual rate of freight, the cabin, if it would admit casks, would pay about $40 a trip — and that, in the opinion of the witness, vessels of the size of the *Constellation,* loaded, could not go to *Kinlock's* mills. It was in evidence also, that rice at *Georgetown* is put up in *casks only*, except for the *West India* market.

Upon this evidence the jury were instructed that the option as to *the time* of performance of said contract, was with the defendant, and not with the plaintiff; and that if they believed from the testimony that the defendant did in fact offer to the plaintiff, to take freight for him, to the extent the contract required, from *Georgetown* to *New York*, there was in that case no breach of the contract declared on, notwithstanding he might afterwards have declined to take the freight when requested by the plaintiff. The jury were also instructed to inquire, and be able to answer on returning their verdict, whether the contract was for the transportation of such freight as could be carried *in the cabin*, and whether it would have been safe or reasonable when the plaintiff made his said request, for the vessel to go to said mill; and also whether the plaintiff had rice at said mills at the time of said request.

Upon their return the jury answered, that with regard to the contract, they found that the freight was to be carried in the cabin, as the plaintiff knew that the vessel was to be employed in carrying timber, and in such cases a deck load is carried as well as hold full. The jury were also of opinion, that the refusal of the defendant to comply with the demand of the plaintiff, was not a violation of the contract, as the vessel appeared to have

been deeply laden, and from the proof, they were satisfied it would have been improper to have attempted to move her, under the circumstances, to *Kinlock's* mills. They also answered, that they were unable to determine from the evidence, whether the plaintiff had, or had not rice at *Kinlock's* mills.

If the ruling of the Judge was right as to the option of the defendant, then the verdict which was returned for the defendant was to stand, otherwise the same was to be set aside and a new trial granted, unless from the other facts found by the jury, the Court should be of opinion that the defence was otherwise maintained, in which case judgment was to be rendered on the verdict.

*Allen* and *Lowell*, for the plaintiff, insisted that the option in regard to *the time* during the season when the contract should be performed was with the plaintiff and not with the defendant; and that consequently the defendant had violated his contract by refusing to take freight when requested.

If the option be with the plaintiff, then the other facts appearing in the case do not constitute a good defence. If the plaintiff did not make a demand in sufficient season to enable the defendant to carry freight to the whole amount contracted for, he certainly did it in time to enable the defendant to carry *a part;* and surely it ought not to lie in the defendant's mouth to say that he would not perform *a part,* because he could not perform *the whole.*

In the most favorable view that can be taken for the defendant, if the plaintiff should neglect to furnish freight when the defendant was ready to receive it and he thereby suffered, perhaps a deduction should be made from the plaintiff's claim corresponding with the injury. But it should not annul the contract, and release the defendant entirely from all obligation.

But if the plaintiff is not entitled to recover *on the contract,* he is entitled, to recover under the general counts for the price of the rice sold. *Hayden* v. *Madison,* 7 *Greenl.* 76; *Abbot* v. *Hermon,* 7 *Greenl.* 118; *Keyes* v. *Stone,* 5 *Mass.* 391; *Proprietors of Lowell Meeting-house* v. *Smith,* 8 *Pick.* 178.

*R. K. Porter,* for the defendant, contended, that by the rules for construing maratime contracts, the plaintiff should have been ready to deliver freight whenever demanded by the defendant.

*Wilkie* v. *Ogden*, 13 *Johns.* 56; 5 *Dane's Abr.* 514; *Boyden* v. *Boyden*, 5 *Mass.* 67; *Robbins* v. *Luce*, 4 *Mass.* 474.

The option should be with the one who has the first act to do. Here it was necessary that the defendant should first procure a vessel, the option therefore was with him. *Bacon's Abr. tit. Elec. B.* 5 *Dane's Abr.* 359.

But if we are wrong, and the option is with the plaintiff, it is then insisted that there has been no such demand by the plaintiff as will enable him to maintain this action.

When freight is tendered, it must be at a suitable time and place. 4 *Stark. Ev.* 1398.

The opinion of the Court was delivered by

MELLEN C. J.—The *general* question reserved in this case is, whether upon the facts reported, the defendant is entitled to retain the verdict which the jury have returned in his favor; though, if the instruction of the presiding Judge was correct, there must be judgment on the verdict, without regard to the general question. Who then had the *option* as to the *time* of performance of the contract made between the parties? The Judge instructed the jury that it was with the defendant.

In payment for a quantity of rice purchased by the defendant of the plaintiff, the defendant agreed to transport freight from *Georgetown* in *South Carolina* to *New York*, in his schooner *Constellation*, in the course of the *season* following the time when the contract was made in 1825, during all which season it was understood that the vessel was to be employed in carrying timber from *Georgetown* to *New York*. The jury, upon the evidence, found and certified to the court that the freight, to which the contract had respect, was to be carried in the cabin, and that the refusal of the defendant to comply with the plaintiff's demand in the spring of 1826, was not, in then existing circumstances, a violation of the contract; as the vessel was then deeply laden with timber, and it would have been improper for her to move up the river to *Kinlock's mills*, where vessels of her size were not proved to have gone. Besides, the usual *cabin* freight from *Georgetown* consists of bags and skins; but rice at *Georgetown* is put up in casks only. It appears also that the defendant on

two or three occasions during the freighting season, and prior to the plaintiff's demand in the spring of 1826, he then being at *Georgetown*, offered to the plaintiff to take freight, but the plaintiff did not furnish him with any. According to the case of *Barruss* v. *Madan*, 2 *Johns.* 145, the defendant was to do the *first act* in order of time; that is, to be ready at *Georgetown* with his vessel, as the well known course of his business would allow, ready to take the stipulated freight; and that the deposit of rice at *Kinlock's mills*, was not a condition precedent. There appears to be considerable difficulty in deciding in this particular case, who had the *option* as to time, the plaintiff or the defendant; and as it is unnecessary for us to decide it, we place our judgment upon the *general ground* beforementioned.

The contract of the parties is based on the fact that the defendant, during the season in question, was to be regularly employed in the transportation of lumber from *Georgetown* to *New York;* that, of course, the *Constellation* could be at *Georgetown* only *occasionally*, during the contemplated season, regularly returning to that port, after delivering her cargo at *New York*, in order to take in another load at *Georgetown*. The defendant, therefore, at *each return* of the *Constellation* to that port, complied with his duty in performing the preliminary act on his part, by being at the proper place, ready to receive the stipulated freight. On two or three of these occasions, as we have before mentioned, he offered to the plaintiff, who was at *Georgetown*, to take freight, but none was ready; at least none was furnished. It does not appear that the plaintiff ever offered, or, indeed, had any in readiness, except once in the spring of 1826, and then under circumstances, which in the opinion of the jury, furnished sufficient grounds for declining to receive it. The plaintiff seems to have been on the spot, and the defendant was there also with his vessel as often as the parties expected and understood she would be, when they entered into the contract. We consider this as a circumstance of importance, leading to a satisfactory construction of the contract, as to the nature and extent of the duties devolving on each of them. On the whole we think the defence is maintained by the evidence reported, and therefore there must be

*Judgment on the verdict.*

## FREEMAN *vs.* SWETT.

The plaintiff had entrusted a note to the defendant to collect, taking his receipt promising to collect or to return it. The defendant, without authority, entrusted it to another for the same purpose, taking a similar receipt, by whom the note was lost. After demand, the plaintiff brought trover for the note, and the question being upon the ratification by the plaintiff of the defendant's acts, it was proved; that when the plaintiff was first informed of the circumstances by the defendant and the person who lost the note, they offered to furnish him with their depositions proving the loss, so as to enable him to look to the maker of the note; to which he replied, that "*he calculated to take further advice*," *and refused to accept the proposition.* It also appeared that the plaintiff carried the last mentioned receipt to an attorney, and after asking advice, left the receipt with him; which receipt the *defendant* afterward demanded of the attorney claiming it *as his own*, and alleging that he had only *lent* it to the plaintiff to enable him to obtain advice. *Held*, that a verdict in favor of the defendant, could not be said to be found *entirely without evidence.*

TROVER for a note of hand signed by one *Charles S. Page*, and payable to the plaintiff, for $33,35, dated *Nov.* 11, 1826.

The plaintiff gave in evidence a receipt of the following tenor: "Received of *Randall Freeman* a note of $33,35 to collect or to be returned against *Charles S. Page*, of *Campobello*. The above note given *Nov.* 14, 1826. *Nathaniel Swett.*

*Nov.* 13, 1828."

The plaintiff then proved by the deposition of *Ebenezer Emerson*, that he, (the deponent,) by the request of the plaintiff, carried the above receipt to the defendant and demanded the note or the money for it; and that the defendant told him he had carried it in his pocket, and worn it out, and lost it.

*John Page* testified, that *Charles S. Page* commenced trading in *Frankfort*, 18*th May*, 1829, and was then, and for some time afterward, in possession of property and in good credit. It appeared also that the defendant resided at *St. Stephens*, in *New Brunswick*, 35 miles from *Campobello*, and was a cabinet maker.

The defendant proved by the deposition of *John Austin*, that in 1829, he, the defendant, gave said note to the deponent to carry with him to *Hallowell*, to collect, having understood that said Page was somewhere in that vicinity, and took a receipt promising to collect or return it to him — that said *Austin* made

inquiry for said *Page* at *Hallowell* and *Augusta*, but could hear nothing of him — and that on his return he lost his pocket book, containing the note in question, in the vicinity of *Machias*. That in the summer of 1829, the plaintiff was at *St. Stephens*, where the defendant informed him that he had made inquiry at *Eastport* and *Campobello* for *Page*, and was informed that he had absconded — that the deponent informed him of the circumstances of his taking the note and of its loss — that he thought, he and *Swett* the defendant, could place him on as good ground as he would be if he had the note — and *Swett*, *Freeman*, and the witness went to consult *A. G. Chandler, Esq.* who advised *Freeman* to have deponent and *Swett* make oath before a Public Notary as to the loss of the note, which they offered to do. But the plaintiff said he calculated to have further advice, and *refused to accept the proposition.*

*George Downes, Esq.* testified that *Freeman* came to his office in the summer of 1829, and brought the receipt that *Austin* had given *Swett*, for advice; and left the receipt with him — and that in *February*, 1833, the defendant applied to him for the receipt, saying that it was his, and that he had let *Freeman* take it to obtain advice — and the witness gave said receipt to the defendant, taking indemnity against the plaintiff's claim upon him for the same.

Upon this evidence the counsel for the defendant contended, that *Swett* had no right to let the note go out of his hands to *Austin* for the purpose mentioned, that it was a conversion of the note, and that the defendant was liable in trover for such conversion.

*Ruggles Justice*, in the Court below, where the cause was tried, instructed the jury, that if they were satisfied from the evidence adduced, that the plaintiff when informed of what the defendant had done with the note, did not disapprove, but assented to, and approved of his, the defendant's doings in sending the note by *Austin*, he thereby ratified his doings in that particular, and that the plaintiff had no right afterwards to complain of the delivery of the note to *Austin* as a conversion for which trover would lie. And the jury found a verdict for the defendant.

To this instruction the counsel for the plaintiff excepted.

*Fairfield* and *J. Granger*, for the plaintiff,

Contended that the act of the defendant was unauthorised and amounted to a conversion — that there was no evidence in the case showing or tending to show a ratification by the plaintiff — and that consequently the instructions to the jury were erroneous.

The authority of the defendant is to be found in his receipt. The terms are express. He is to *collect the note or return it.* The trust is a *personal* one and could not be delegated to another. By letting the note go out of his hands without receiving the amount due on it, a loss has ensued, and he must bear it. The case is a plain one. The defendant was the plaintiff's agent for a special purpose, to wit, to collect a note which the plaintiff placed in his possession. He admits he has not collected it — and the proof is, that he refuses to redeliver it to the owner.

Whether the note was valuable or otherwise — whether it could ever have been, or can now be collected of the maker, or not, are questions that cannot be raised here. The *amount* of loss is a question for the jury.

In support of this reasoning, they cited *Paley on Agency*, 4, 148, 149; *Banorgee* v. *Hovey*, 5 *Mass.* 37; *Catlin* v. *Bell*, 4 *Camp.* 184; *Durell* v. *Mosher*, 8 *Johns.* 381; *La Place* v. *Aupoix*, 1 *Johns. Cas.* 406; 2 *Kent's Com.* 495.

There is no evidence in the case tending to show a ratification of this unauthorised act of the defendant. When the circumstances were first communicated to the plaintiff, the communication was accompanied by an offer of evidence which would enable the plaintiff still to look to the maker of the note, and by the acceptance of which he probably might have been considered as indirectly sanctioning the act of the defendant; but the proof is, that "he *refused to accept the proposition.*"

The acceptance of *Austin's* receipt is no evidence of ratification. The same evidence which proves this fact, proves also that the purpose and design of the plaintiff in taking it, was merely to procure advice upon the subject, and not for the purpose of availing himself of any claim he might have under it upon *Austin.* This testimony comes from the defendant himself. And that the plaintiff did not ratify the defendant's act, and agree to pursue his

remedy on *Austin's* receipt, is most abundantly confirmed by the act of the defendant in afterward applying to *Mr. Downes*, the depositary of *Austin's* receipt, *claiming it as his own*, and alleging that he had merely *lent it to Freeman* to enable him to take advice upon the subject.

If then there was no evidence showing a ratification by the plaintiff, it would seem that the instructions to the jury were erroneous. It is true they are expressed in general terms and in the abstract are unquestionably sound. But though the opinion of the Judge be expressed in general terms it must be understood "as having reference to the particular facts on which it is founded." So say this court in *Howes & al.* v. *Shed*, 3 *Greenl.* 202. But the facts in this case all go to show a refusal on the part of the plaintiff to ratify the act of the defendant. There is no evidence even tending to show the contrary. The instructions therefore, are complained of because they *authorised the jury to believe*, that, of which there was *no evidence*.

*A. G. Chandler*, for the defendant.

The only question in this case is, whether the plaintiff ratified the acts of the defendant in regard to the note in question. This is purely a question of *fact*, and has been settled by the jury in favor of the defendant. And he insisted that there was sufficient evidence to justify the jury in thus finding. The parties were seen together, and it is known they had conversations about the note. The plaintiff had *Austin's* receipt and left it with an attorney. Under all the circumstances it is believed the jury might well infer an assent on the part of the plaintiff.

WESTON J. delivered the opinion of the Court.

The law laid down by the Judge at the trial is unexceptionable. If the plaintiff ratified and adopted the act of the defendant, he had nothing afterwards to complain of. But it is said the evidence does not warrant the facts assumed, by way of hypothesis. It may not; and perhaps would rather have justified and required a different result. But the facts are not submitted in this mode to our revision. If, however, there was no pretence or color for the view of them suggested by the Judge, and sustained by the jury, the instruction, although correct in the abstract, might be

objectionable, as tending to defeat the justice of the case. The plaintiff did not complain of the defendant for having omitted any thing in his power to fulfil the trust confided to him; nor does it appear that he acted otherwise than fairly and honestly. The plaintiff was apprized of what had been done. He expressed no dissent, except that he could not accede to the proposition of *Mr. Chandler*, without further advice. It appears that he was in possession of *Austin's* receipt to the defendant, and that he left it with an attorney. The ratification of a principal may often be implied from his silence, or from his acts. We cannot say there was no evidence to this effect; and it is not our province to determine its weight or preponderance.

*Exceptions overruled.*

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## Clapp *vs.* Ingersol.

In *assumpsit* on a promissory note of more than six years standing, the defendant pleaded the statute of limitations. The plaintiff to prove a new promise, offered to read to the jury an indorsement on the back of the note in his own hand writing, purporting to have been made prior to the time when the statute attached, which was objected to by the defendant. *Held*, that as to the mere question of *order of time*, he might read such indorsement, without *first* showing that it was actually made at the time it purported to have been, or prior to the lapse of six years from the maturity of the note.

But *it seems* that such indorsement would be of no avail unless accompanied by some *other proof* of the payment.

Assumpsit upon an account annexed to the writ, and two notes of hand payable in lumber. The writ was dated *Dec.* 26, 1831. The first note was dated *Oct.* 28, 1819, and was payable in *June*, 1820; upon which were two indorsements, one purporting to have been made *March* 18, 1825, and another *June* 20, 1827. The other note was dated *Oct.* 14, 1823, payable in six months, on which was also an indorsement, *Oct.* 28, 1826.

The defendant pleaded the statute of limitations.

There was no controversy as to the account and the last note, except that the defendant contended that certain payments of lumber hereafter mentioned should go toward that note.

The plaintiff produced the first note, and to take the case out of the statute of limitations offered to read the indorsements

thereon, to which the defendant objected, unless the plaintiff first proved that the first indorsement was actually made within six years from the maturity of the note. This objection was overruled by the Court.

The plaintiff also proved a payment of lumber by the defendant to him in *Sept.* 1826, the price of which it was admitted was indorsed on the last note. He also proved a payment to him of lumber by the defendant, *May* 18, 1825, and another, *June* 20, 1827, the price of which two lots made the two indorsements on the first note; but he offered no evidence to show that the said indorsements, which were both in the handwriting of the plaintiff, were made at the time they purport to have been made. He further proved, that the defendant in *September* or *August*, 1831, admitted that he owed the plaintiff lumber, and promised to haul him a load.

The defendant contended, that no presumption should be raised from the circumstance of the indorsements appearing on the first note, that they were made at the time they purport to have been made, and that the payments, and admissions, and promises proved by the plaintiff, should be applied to the last note and to the account then open between the parties, and not to the first note.

The jury were instructed, that upon the evidence before them, they might presume that the several indorsements on the notes were made at the time they bear date, as the lumber was delivered at those times, the price of which was indorsed; and as no directions were given by the defendant, how the payments made, should be applied, the election was with *Clapp* how to apply them, whether by way of credit on the account, or on either note. The jury were also instructed that in aid of the presumption abovementioned they might consider the confession and promise of the defendant made in 1831.

A verdict was returned for the plaintiff for the amount of the account and both notes.

If this ruling and instruction was not correct, the verdict was to be set aside, and a new trial granted. If correct, judgment was to be rendered on the verdict.

Arguments were submitted in writing by *R. K. Porter*, for the defendant, and *E. L. Hamlin*, for the plaintiff.

For the defendant it was contended, that the indorsements upon the note of *Oct.* 28, 1819, especially the first indorsement, were improperly admitted as evidence for the consideration of the jury. The admission of indorsements on notes and bonds, in the handwriting of the obligee, as evidence to rebut the statute of limitations, or the presumption of payment arising from lapse of time, is founded upon the supposition that no person will make a false statement against his own interest. But until it is first shewn that the statement is *against his interest*, the foundation of the rule is wanting. Without such evidence of its being against his interest, or in other words, without evidence that the indorsement was actually made before the statute of limitations attached, it amounts to nothing more than a party's own testimony in his own cause, and that without the solemnity of an oath. It is not more satisfactory than a *debit* in an account not sworn to, by a charge in which within six years it should be attempted to draw after it preceding charges so as to take them out of the statute; and not so satisfactory for that purpose, as a credit given within six years. Yet it is believed that even a credit within six years has never been held to have that effect, unless it appeared as a charge by the other party, or was proved by other evidence, as in *Davis* v. *Smith*, 4 *Greenl.* 337; *Catling* v. *Spaulding*, 6 *T. R.* 189; *Cogswell* v. *Dolliver*, 2 *Mass.* 217; in all which it was decided that the plaintiff's account and the defendant's offset, mutually took each other out of the statute. The *dictum* of *Judge Sedgwick* in the last cited case, must be understood as limited by the facts of that case, otherwise it is unsupported by authority, and is contradicted by *Cotes* v. *Harris*, cited with approbation in *Catling* v. *Spaulding;* also by *Buller's N. P.* 149.

That the admission of indorsements as evidence of a new promise is not to be permitted without proof that they were made at a time when it was against the party's interest to make them, may be cited 1 *Stark. Ev.* 310; *Phillip's Ev.* 114, *et seq.* *Rooseboom* v. *Billington*, 17 *Johns.* 182; *Rose* v. *Bryant*, 2 *Camp.* 323.

The establishment of a contrary doctrine would render insecure the rights of individuals against the machinations of dishonesty. *Richards* v. *Maryland Ins. Co.* 8 *Cranch*, 84

2. Whether the other evidence in this case was sufficient to take the case out of the statute is not material for it was not submitted to the jury upon such ground, and it does not appear upon what principle they rendered their verdict. The jury should have been instructed to inquire whether the indorsement was made with the privity of the defendant, or whether the lumber, for the price of which the indorsement is admitted to have been made, was intended at the time by the defendant as a payment towards this note. There is no pretence, other than by the indorsement itself, that the appropriation was made by the plaintiff until after this note was barred by the statute of limitations. And the decisions are numerous, that where there are several demands, and a payment or new promise is made *generally*, it shall be applied to the demands which are not disputed. The question to the jury in such cases has been, whether there were *other demands* to which the payment or new promise could be applied. *Frost* v. *Bengough*, 1 *Bing.* 261; *Bailey* v. *Ld. Inchiquin*, 1 *Esp. Cas.* 435; 3 *Wend.* 532; *Whitney* v. *Bigelow*, 4 *Pick.* 110.

3. According to recent decisions there was not in any view of this case sufficient evidence of a new promise. *Crofton* v. *McLellan*, 6 *Greenl.* 348; *Porter* v. *Hill*, 4 *Greenl.* 41; *Bell* v. *Morrison*, 1 *Peters*, 351; *Frost* v. *Bengough*, before cited; *Lloyd* v. *Maund*, 2 *T. R.* 760.

The plaintiff's counsel controverted the foregoing positions, and cited *Whitney* v. *Bigelow*, 4 *Pick.* 110; *Brewer* v. *Knapp & al.* 1 *Pick.* 337; *Copeland* v. *Wadleigh*, 7 *Greenl.* 141; *Springer* v. *Bowdoinham*, 7 *Greenl.* 442.

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

The question is, whether upon the facts stated in the report and the ruling and instructions of the presiding Judge, the plaintiff is entitled to judgment. The first objection is, that the Judge permitted certain indorsements on the *first* note declared on, to be read to the jury, before the plaintiff had offered any proof *when* the indorsements were actually made, or whether the *first* indorsement was made within six years from the maturity of the note. If the time *when* it was made were essential, and it could in no manner avail the plaintiff without such proof, then it could

be of no importance which was *first* proved; the *indorsement itself*, or the *time when* it was made. If an action should be founded on a promissory note for the delivery of certain specific articles, on demand, would it be necessary to prove the demand before the note could be properly admissible in evidence? The order of proceeding should be reversed. First, the *promise* should be proved, and then a *breach* of it by a refusal or neglect to deliver the specified articles on *demand* made. We perceive nothing exceptionable in the ruling of the judge in the above particular.

It is not necessary in this case to give any opinion upon the question, whether the appearance of an indorsement of a partial payment on the back of a promissory note within six years from and after its maturity, *unaccompanied by* any *other facts*, is legal evidence for the consideration of a jury, to prove payment of the sum indorsed, so as thereby to avoid the statute of limitations. On this point there is some disagreement between decided cases. The better opinion seems to be that such indorsement would not be legal evidence for such a purpose. In the case before us we are presented with several *additional* facts. One is the confession of the defendant in 1831, that he was indebted to the plaintiff, and owed him *lumber* and promised him a load; both the notes declared on are payable *in lumber*. But there are other facts in the case which are clear and decisive. The present action was commenced on the 26*th* of *December*, 1831, and, as it is stated in the report, the plaintiff proved a *payment of lumber* in *September*, 1826, the price of which, it was admitted, was indorsed on the last note, and that he proved another *payment of lumber* by the defendant to him in *May*, 1825, and another in *June*, 1827, the *price* of which *two lots of lumber* made the *two indorsements* on the first note. It is true, no direct evidence was offered as to the time when either of the indorsements was made; but that can be of no importance. Suppose no indorsements had been made, still the facts proved would have avoided the statute of limitations. If there had been proof that the indorsements had been made at the times they *appear* to have been made, they would only have been *strong presumptive* evidence of the payment of the sums specified; and, yet *such* proof would have been

sufficient. *Rooseboom* v. *Billington*, 17 *Johns. R.* 183. 1 *Phil. Evi.* 122, *note a.* But in this case the sums indorsed, at least *one* sum on each note, was actually *paid* by the defendant, in lumber, to the plaintiff within six years next before the commencement of the action: that is, *one* was paid about four years and a half, and the *other* about five years before. Such payments amount to a new promise, and completely avoid the statute. It appears from the case that the plaintiff had the right of applying the payments (as the defendant gave no directions on the subject) and he applied them in the manner in which they are indorsed. We think the instructions of the Judge were correct; and accordingly there must be

*Judgment on the verdict.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK, JUNE TERM, 1833.

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## ADAMS *vs.* ROWE.

*Scire facias* against one who had been charged as trustee in a process of foreign attachment, is not a *new suit*, but is an incident to, or *a part and continuation of*, the original process.

A service of such writ of *scire facias*, in a suit commenced in *Massachusetts*, by the officer's leaving a copy thereof at the *last and usual place of abode* of such trustee in that State, according to the laws of the State, is sufficient, though prior to such service he had removed to a neighboring State.

And a judgment rendered in such suit, in the Courts of *Massachusetts*, is conclusive on the defendant, and not open to examination in the Courts of this State, where it is sought to be enforced.

IN this action, which was debt on judgment, the following facts, in substance, were agreed in a case stated for the opinion of the Court.

At the Court of Common Pleas held at *Boston*, *July*, 1829, *Adams*, the present plaintiff, recovered judgment against one *Henry J. Benson*, as principal, and against his goods, effects and credits, in the hands of *Rowe*, the present defendant, as his trustee, *Rowe* at that time residing in *Boston*, and the service of the writ on him being *personal*. Judgment was rendered on default. Execution issued, and a return of *nulla bona*, and *non est inventus*, was made to the Court, *October* term, 1829. Within a year thereafterwards, *Adams* sued out his writ of *scire facias* against *Rowe* — and the officer returned thereon, that he had summoned the defendant, "by leaving an attested copy of the writ at the

*last and usual place of abode of said Rowe in Boston.*" Some time *prior to such service* however, *Rowe had removed to this State where he had ever since resided.* After two continuances, judgment was rendered against the defendant, on default; and that judgment forms the basis of the present action. The defendant had no *actual notice* of the *scire facias* suit against him, until after judgment had been rendered therein.

A nonsuit or default was to be entered, according to the opinion of the Court.

*Rogers*, for the defendant, submitted an argument in writing, of which the following is an abstract.

The process of *scire facias* against a trustee is a statute process, and the plaintiff to avail himself of it, must bring himself clearly within the terms of the statute. The statute of *Massachusetts* of 1795, *ch.* 64, *sec.* 6, provides for the suing out of a *scire facias* against a trustee. The 7*th sec.* provides, "that if any trustee upon whom the writ of *scire facias shall be served,* shall not appear," &c. he shall be adjudged trustee, and judgment shall be rendered against him accordingly. The Court are empowered to render judgment against the trustee only where there has been a *legal service* of the *scire facias.* And it is contended that there was no such service on the defendant.

The *statute* of *Mass.* of 1798, *ch.* 50, *sec.* 1, directs the manner in which service shall be made when the *goods* or *estate* of any person shall be *attached.* *Sec.* 2*d* provides the mode of service in *all suits* where the process is by original summons, as in *scire facias*, &c. By this section, "leaving a true copy thereof at his or her house *or place of last and usual abode,*" &c. is declared to be a good service — that is, in all suits therein specified. By the 3*d section*, where the defendant "was at no time an inhabitant, or resident within the Commonwealth," in *all actions* specified in the 2*d section*, another mode of service is provided. The 2*d sec.* of the *stat.* of *Maine*, *ch.* 59, (which is a transcript of the *Mass.* statute) is succeeded by a transcript of the 3*d section*, but having an additional exception in favor of those who *having had* a residence in the State, have *removed* therefrom prior to the suing out of the *scire facias.*

From the cited provisions of these several statutes, it appears,

that the 2d section of the statute of *Mass.* passed 1798, is not *universal* in its application, and intended to embrace *all actions.* What then are its limitations? It is contended they are to such suits as may be instituted in the Courts of the State against those having *a residence* there, in suits wherein the Court have *jurisdiction* of the *cause* and the *parties. Bissell* v. *Briggs*, 9 *Mass.* 462. *Hall & al.* v. *Williams & al.* 6 *Pick.* 232.

The object of the additional provision in the 3d section of the statute of *Maine*, was not merely to protect the defendant, but to supply a legal deficiency, and to provide a mode by which a plaintiff could recover in a case not before authorised.

The Court in the case of *Hall* v. *Williams, page* 240, say, that "it is manifestly against *first principles* that a man should be condemned without an opportunity of being heard in his defence." How is this opportunity provided if a citizen, having been once an inhabitant of a State, but removed therefrom, one, ten, or more years, may be defaulted, having no other notice than a copy of the writ left at the house he last occupied? The laws of a State do not operate except upon its own citizens, *extra territorium,*" say the Court in the case before cited. "Nor does a judgment of its judicial tribunals, except so far as is allowed by comity, or required by the *Constitution* of the *United States;* and neither of them can be held to sanction so *unjust* a principle." The reasoning of the Court throughout forcibly illustrates the injustice of applying the principle contended for in a case like the present. *Rowe*, is *in fact*, not trustee, and the presumption of law is with him. The law presumes no indebtedness. After the service of the original writ upon him, he removes from *Massachusetts* into *Maine;* and the first intelligence of any proceedings against him comes in the shape of an execution. The intimation of the Court, that a new trial could be obtained and the judgment corrected, is answered by the Court in the case before cited from 6 *Pick.* 240.

It is said, admitting the principles decided in the cases of *Bissell* v. *Briggs* and *Hall* v. *Williams*, they are not applicable to this case, which is but the continuation of a process regularly instituted and upon which notice was regularly given and a legal judgment recovered. It is true that he was regularly served with no-

tice in the trustee process, and that this *scire facias* was predicated upon that judgment. So is *scire facias* against bail, founded upon certain proceedings upon mesne process. *Scire facias* to renew a former judgment, is predicated upon that judgment. The necessity of notice is based upon the idea, that as the rights of the parties may be affected by the suit, the law no less than justice require that an opportunity should be afforded to protect those rights. If the party in consequence of the first suit was obligated to be ever afterwards in Court, why the necessity of any notice? If notice means any thing, it means that the party against whom the process issues shall be apprised of the proceedings. Can the copy of a writ of scire facias, left at the dwelling-house of an individual which was once tenanted by the defendant, but which he has vacated for years, and exchanged for a residence in a neighboring State, be available notice in law? Well might the Court say in 6 *Pick.* that neither comity nor the Constitution of the *United States* can be held to sanction so unjust a principle.

But it is apprehended that all doubts upon the subject are dispelled by a subsequent statute of *Massachusetts*, passed *March* 2, 1829. By that statute, which is prior to the recovery of the judgment declared upon, it is enacted that in *any action*, &c. against any person who is not an inhabitant or resident in this *Commonwealth*, &c. the Court before whom, &c. on suggestion thereof made, and the facts appearing by the officer's return upon the writ, shall order the said action continued, and the Court may order notice, &c. This statute is in effect similar to our own statute, *ch.* 59, *sec.* 7, and goes to confirm the position that the subsequent sections of the "Act Regulating Judicial Process and Proceedings" are not in restraint and qualification of the 2*d section* but an enlargement of the general provisions of the act; and viewed in connection with the 2*d section* serve to explain what is therein intended by the term "*all suits*," and exhibit the necessity of adopting such a construction as will promote substantial justice and preserve to the parties the justice administered by the application of "first principles."

It may be said that the principles for which we contend, if adopted, would enable a trustee to defeat the claim of the plain-

tiff by removing from the State, after a service of the writ upon him and before the suing out of the *scire facias*. To this it may be answered, that the *rights* of the parties are not affected, the mode of enforcing them only is changed. It is for the legislature to provide a suitable mode, and when that is done, the objections cease.

In conclusion it may be said, that the statute of 1798, has provided no mode of service in a case like the present; the term "all suits" being applicable to all such suits as where the defendant is within the jurisdiction of the Court. That this is not only enforced by a consideration of the necessity of giving such a construction to the statute as will comport with first principles and promote the ends of substantial justice, but also by the subsequent provisions of the 3*d section* of the additional provision in the statute of *Maine*, above referred to. If there has been no legal service then by the statute, the Court were not authorised to render judgment, and their proceedings are merely void.

But if there had been a compliance with the provisions of the statute, and the defendant had had legal notice by the law of *Massachusetts*, the case finds that there was no notice *in fact*, and "as the record does not show any service of process," by which the Court must intend *personal* service, "or any appearance in the suit, we think he may be allowed to *avoid* the effect of the judgment *here*, by showing he was not within the *jurisdiction* of the Court which rendered it."

The circumstance that this is *scire facias*, is immaterial as to the question raised, the statute and the reason of things require the service to be alike in both cases. 1 *Stark. Ev.* 215, *in notis.*

*Pond*, for the plaintiff, cited the several statutes of *Massachusetts* and *Maine*, touching the question, and the following adjudged cases. *Peck* v. *Warren*, 8 *Pick.* 163; *Mitchell* v. *Osgood & al.* 4 *Greenl.* 132.

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

As *Rowe* was an inhabitant of *Boston* when the original action was commenced against *Benson* and the defendant as his trustee, and as he was served personally with an attested copy of

the process, the Court of *Massachusetts* had jurisdiction of the cause, and over both the defendants; at least, so far as that the default of each was properly entered, and both the judgments thereon were correctly rendered, and, *to all legal purposes*, binding on both, in *this State* as well as in *Massachusetts*. But as to the present defendant, the default entered and the consequent judgment against the goods and chattels, rights and credits of *Benson* in his hands and possession, did not expose him to any liability to pay any sum whatever to the plaintiff; for if he had been *actually* notified and accordingly appeared and answered to the *scire facias*, and disclosed on oath as by law prescribed, and on his disclosure the Court had adjudged him not the trustee of *Benson* when the original process was served upon him, he would have been at once discharged by the Court; and the only consequence of his neglect to appear and disclose on the original process, instead of being defaulted, would have been that he could not have recovered any costs. On examination of the several acts of *Massachusetts*, relating to the service of writs of *scire facias* which have been introduced and commented upon in the argument, we are not disposed to doubt, (were it our province to inquire) that the service of the *scire facias* in the present case was regular, as it appeared on the officer's return; and authorised the Court there, to render the judgment on which the plaintiff has declared. The important and interesting question is, "What is the character of that judgment *in this State*, as to its conclusiveness on the defendant and upon the Court in this State, where the plaintiff is seeking its enforcement?" It appears that the defendant removed from *Massachusetts* and became a permanent inhabitant of *Maine* some time before the writ of *scire facias* was sued out, and has continued such to this time; and never had any notice of the existence of such suit on the *scire facias*, or of the judgment therein rendered against him, till some time subsequent to its rendition.

If the judgment declared on had been rendered against the defendant in a common action, in which he had been sued as the *debtor* of the *plaintiff*, instead of the debtor of *Benson*, it is perfectly clear that, according to the decisions in *Bissell* v. *Briggs* and *Hall & al.* v. *Williams & al.* cited at the argument, the

judgment would be open to examination in our courts, as much as the demand, on which the judgment was founded, would be. It would not have the sanctity of a judgment, and thus conclude the defendant as to his rights. The case of *Bissell* v. *Briggs*, was decided many years since, and prior to our separation from *Massachusetts;* and has ever been considered in this State as reposing on the soundest principles, and sustained by unanswerable arguments. And the case of *Hall & al.* v. *Williams & al.* was decided on the same principles, after a full and learned investigation of the subject, and a review of the principal authorities, having a bearing upon it. The only question of any importance in the cause is, whether the action on *scire facias* is to be considered as an *exception*, and not subject to the operation of the doctrine established by the foregoing decisions; or, in other words, was the *scire facias* to be considered as a *new action*, or a *continuation* of the *original suit*, and as constituting a necessary part of it? If it was, it would seem that this action is maintainable, because the Court of *Massachusetts* had unquestionable jurisdiction of that suit. In 6 of *Dane's Abr.* 463, the learned author says, that a *scire facias* is not properly *an action*, but a mere *continuation of an action*, whenever it is used to *carry into effect* a former judgment against a party to it; and it differs from *scire facias* against *bail;* that, he observes, is a *new action*. He states no *other scire facias* as an exception. Bail are *sureties* for the defendant, in the same manner as the *indorser* of a writ is a *surety* for the plaintiff. In both cases, however, their suretyship is of a conditional character. In certain events *each* may be liable to pay a sum of money recovered by one party against the other, but, in other respects, they have no immediate connection with the original action. The *scire facias* against *bail* and against the *indorser* of a writ is properly considered as a *new action;* in each case it issues against a person who was no party to the record in the original action. In the case before us, *Rowe* was a party to the action when the same was commenced; the judgment entered on his *first default*, was indefinite, incomplete, and in no respect *conclusive* upon him, except as to costs. The statute has therefore made provision for furnishing the creditor with *further* process, for ascertaining the plaintiff's *rights* and the

defendant's *liabilities*, and thus preparing the way for his obtaining *final* process, to compel payment of whatever sum the Court shall adjudge to be in his hands and possession as the trustee of the principal debtor. When the defendant submitted to the first default, he knew that he was thereby subjected to no liabilities to the plaintiff; he knew that there must be further proceedings in court, in which he was to bear a part, in making his disclosure and discharging himself on oath, or else that the plaintiff would avail himself on *his default*, of all the expected advantages from the institution of proceedings against him; he knew that his own conduct had rendered a *scire facias* necessary to a final decision of the cause against him. He knew when he removed from *Massachusetts* into this State, that legal process from the Court in *Massachusetts*, could not run into *Maine;* of course, that there could be no service of the *scire facias* upon him *personally*, or in any other manner than by a copy of it left at his last and usual place of abode in *Boston*, according to the law of *Massachusetts*. He knew that if he had *no goods, effects, or credits* of *Benson* in his hands when the process was served on him personally in *Boston*, it was important for him to disclose that fact on the *scire facias*, and thus protect himself from all danger consequent upon his *first* default. He must be presumed to have known that the *scire facias* would necessarily issue from the Court in *Massachusetts*, and that no service of the writ could be made upon him in this State, but only by leaving a copy at his last and usual place of abode in *Boston*, as we have before mentioned. Considering the peculiar nature of our trustee process, must not the *scire facias*, which the statute has provided, be considered as a part, and a very essential part, of the original action, and a continuation of it for the purposes we have been considering. It is true that the statute provides for a service of the *scire facias* on the defendant in the same manner as for that of the *original process*, so that he may know when and where he must appear and disclose; but it is very evident that its provisions are predicated on the idea that the party summoned continues within the jurisdiction of the Court, where legal service may be made upon him. No provision is made for a service upon him, if he should remove from the State in the manner the defendant did. Our construction of the

act must be such, if possible, as to give operation and effect to all parts of it, and preserve and protect the rights of all concerned; for such must have been the intention of the legislature which framed and passed the act. Now, as the defendant was in the first instance *personally* notified to answer and disclose before the Court the facts as to his being the trustee of *Benson*, as alleged in the writ; as he did not appear at the first term, but was defaulted, thereby declaring that he intended to make his disclosure on the *scire facias;* and as he removed without the jurisdiction of the Court, before the *scire facias* was issued, so that it could not be legally served upon him in this State; must he not be considered as having agreed to take notice of such a service as could be made, and was made, in *Massachusetts*, by leaving a copy of the writ in *Boston*, where he had his last place of abode: and, that whatever inconvenience he has suffered, must it not be imputed to his inattention to his own interest in not leaving an agent in *Boston*, with whom a copy of the writ could have been left, and notifying the plaintiff of the same. No one will deny the right of the defendant to remove, as he did, from *Massachusetts;* but if by so doing, he *could* and *did* at once relieve himself from accountability, and dissolve the *lien* on the property in his hands, created by the service of the original process, the effect was certainly a singular one; and to sanction such a principle, would often produce direct injustice and destruction of a creditor's rights, and lead to the practice of innumerable frauds with perfect impunity. For we are not aware how such a consequence can be prevented, but by considering the jurisdiction of *Massachusetts*, which had once fully attached, as still continuing, on the principle that the *scire facias* is an incident to, or a part and continuation of the original process. It has been said, however, that though it is not such, still the Court of *Massachusetts*, might have had jurisdiction, in respect to the *scire facias*, and rendered the judgment which they did render, so as to be conclusive upon the defendant in this action, provided *actual* notice had been given to him in the manner provided by the act of 1829. True, it might have been binding on him, had the present action been brought in *Massachusetts*, and personal service been made there. So it would be, as the *scire facias* was served. If the Court in that

State had jurisdiction of the *whole* cause, the service made was sufficient, in our opinion, for the reasons we have given. If the Court had *no* jurisdiction over the defendant, of what use could personal notice, served upon him in *this State*, have been? He had no *property* in *Massachusetts*; now, if *Massachusetts* had no jurisdiction over any of the defendant's *property*, nor over *his person*, how could personal notice, served on him in *this State*, give any jurisdiction to *that* State, or enable its courts to render a judgment binding on him here. The answer is plain. Surely our Courts cannot render a legal judgment against a citizen of *Louisiana*, who has no property in this State, merely serving a summons upon him in *Louisiana*. Whether the defendant could have discharged himself on oath, had he appeared on the *scire facias*, we have no means of knowing. If he cannot avail himself of the defence to the present action, which has been urged, it does not follow that he might not have found relief by application to the proper tribunal in *Massachusetts*. This he has declined doing, for reasons which were satisfactory to himself.

We place the decision of this cause upon those provisions and principles of our trustee act, which are of so peculiar a character, as when applied to such a case as the one under consideration, must place it out of the reach and influence of the doctrine established in the cases above cited; and for the reasons we have assigned, that decision is in favor of the plaintiff. Accordingly, a default must be entered.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WALDO, JULY TERM, 1833.

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## JOHNSON *Judge vs.* AVERY *& al.*

One who had been appointed by the S. J. Court to sell real estate here, of a minor, resident in another State, on the petition of the guardian residing in the same State, and receiving his appointment there, is bound to pay over to such guardian the proceeds of said sale.

And where such person had placed the proceeds at interest, taking a note running to himself, which he refused to deliver over to the guardian or to pay the amount of it, though he had been cited into Probate Court for the purpose, it was held, that his bond was thereby forfeited, and that the guardian might institute a suit thereon, in the name of the Judge of Probate.

And this, notwithstanding there was no formal decree made by the Judge of Probate under the citation.

THIS action, which was debt on a Probate bond, instituted for the benefit of *Andrew P. Wiggin*, was submitted to the Court on the following agreed statement of facts.

*Andrew P. Wiggin*, of *Stratham*, in the County of *Rockingham*, and State of *New-Hampshire*, being the duly appointed guardian of *John H. Gilbert*, a minor under the age of fourteen years, also resident of *Stratham*, filed in the Probate Office, in the County of *Somerset*, a duly authenticated copy of the letter of guardianship issued from the Court of Probate in the State of *New-Hampshire*, and petitioned this Court for license to sell the real estate belonging to said minor, lying in this County, pursuant to *stat. of* 1821, *ch.* 52. On this petition, *July* term, 1828, the principal defendant, *Avery*, was appointed by the Court to make sale of said estate lying in this County; who thereupon by

virtue of said license, or authority, made sale of the same, the net proceeds amounting to $322, after having given bond in conformity to the provisions of the statute aforesaid, which is the bond now sued.

Immediately after the sale, the defendant put out and secured on interest for said minor, the amount aforesaid, taking a note in his own name, which note remained unpaid at the time of the trial.

It was further agreed, that *Avery*, prior to the commencement of this action, was cited to appear before the Probate Court in this County on the application of *Wiggin*, the guardian, to account for, and pay over, the proceeds of said real estate in his hands. That *Avery* accordingly appeared at said Court, and exhibited said note, but refused to deliver up the same, or to pay the amount thereof to *Wiggin*.

If on this statement, the Court should be of opinion, that the said *Avery* was bound by law to pay the money, or deliver up the note to *Wiggin*, or that the action could be sustained, the defendants were to be defaulted, otherwise, the plaintiff was to become nonsuit.

*J. Williamson*, for the defendant.

1. The guardian deriving his authority, as he does, from a foreign State, has no right to claim the note in question, running to the trustee, under any circumstances. A guardian in another State, has no more power to institute suits in this State, than an administrator has. Both derive their authority from the same source, and give bonds to the Judge of Probate. That a foreign administrator can neither *sue*, nor *be sued*, in that capacity, in the Courts of this State, cite *Goodwin* v. *Jones*, 3 *Mass.* 514; *Holyoke* v. *Haskins*, 5 *Pick.* 25. Nor can he assign a mortgage, or do any other legal act, in such capacity. *Cutter* v. *Davenport*, 1 *Pick.* 81.

If a guardian, from *New-Hampshire*, were authorised to bring suits here, then there might be two or more guardians in this State, deriving their authority from different sources. *Haven* v. *Foster*, 9 *Pick.* 134.

The certificate of the guardian's appointment in *New-Hampshire*, confers no authority beyond that of making application for

license to some one to sell. Such a certificate could confer no power to maintain suits here, either by an administrator or guardian, in such capacities. They must first give bonds in this State. *Fay Judge* v. *Richardson*, 7 *Pick.* 91.

2. But if *Wiggin* had derived his appointment from the authority of this State, he has not taken those preliminary steps, which the law requires, to enable him to maintain this suit. *Avery* was cited before the Judge, but there was no decree, nor any adjustment of his claim for services. The citation before the Judge was a nullity without a decree. *Dawes Judge* v. *Bell*, 4 *Mass.* 106.

By the laws of *Maine*, *ch.* 470, *sec.* 2, the Judge of Probate is authorised to allow administrators, guardians, and *trustees*, their travel and attendance to Probate Court, and a commission of five per cent. on the personal assets that may come into their hands. *Avery*, the trustee then, had a lien upon the note, at least, till the Judge of Probate had settled his account, or until the guardian had paid his fees.

The object of selling the minor's estate, was to secure the money at interest, and for no other purpose, see *Maine Stat. ch.* 52, *sec.* 7. There is no pretence that the guardian wants the money to clothe, feed, and educate the minor. The object of the law is complied with; the proceeds of the sale are on interest, for the benefit of the minor, and any other disposition of them would defeat this very salutary provision of the law.

*H. O. Alden*, for the plaintiff.

The opinion of the Court was delivered by

Mellen C. J. — The license to sell was regularly granted, on the application of *Wiggin*, the guardian. *Avery* was appointed, as a suitable person to sell and convey the estate, probably on account of his residence near it; and though he placed the proceeds of the sale on interest, for the benefit of the minor, and took security for the same in his own name, still he did not, by so doing, acquire a right to control the security, or the amount of sales, according to his pleasure. He contends, that as an administrator, appointed in *New-Hampshire*, cannot institute and pursue actions in this State, in virtue of such appointment, for as

good reasons a guardian cannot: *such* guardian, however, may obtain license to sell the minor's real estate, situated here, as was done in the present case; and the very design of the law in requiring a bond to be given to the Judge of Probate, of the county in which the real estate to be sold is situated, will in this manner be accomplished. This action is not brought by the guardian, but by the Judge who received the bond for the benefit of the minor and his guardian. Of what use is the bond, if the obligee cannot maintain an action upon it?

Again, the defendant contends that this action was prematurely brought, no decree of the Judge having been made in respect to the proceeds of the sale, and the security taken, and the claims of the defendant, for his services under the appointment of the Court. Whose fault is this? Why did he not appear on the citation, and have his claims adjusted and allowed? If no action can be sustained on the bond till this shall have been done, the defendant may never present his claims, or account for the proceeds of the sale. By the condition of his bond, the defendant is bound to "account for, and make payment of, the proceeds of said sale, agreeably to the rules of law." By law he is to account to the guardian, on whose application the sale was made, under the direction of the Judge of Probate to whom the bond was given. He has been cited so to do, and he has refused; and his refusal is a breach of the condition, for which he stands chargeable. Still the defendant objects that the guardian has no occasion for the money, to clothe, feed, or educate the minor, and that there is no assignable cause why the money or the security should now be demanded. It is not for the defendant to ask why the money should be demanded so soon, nor for the Court to answer such a question. The condition of the bond is very plain, and the defendant must comply with the terms of it. There is no foundation for the defence. A default must be entered and judgment thereon for the penalty of the bond, *viz:* three hundred and thirty dollars.

## CAMPBELL *vs.* RANKINS.

To incur the penalty under the *statute of* 1821, *ch.* 22, *sec.* 2, for carrying or transporting "*out of this State*, any person under the age of 21 years," "*to parts beyond sea*, without the consent of his parent, master, or guardian," the carrying must be to some *foreign* port or place, and not merely from *one State to another.*

THIS was a *qui tam* action of debt, brought to recover the penalty given in the statute of 1821, *ch.* 22, *sec.* 2. The material parts of the declaration were as follows. "For that the said *Rankins*, at said *Frankfort*, on the first day of *November*, 1832, being the commander of a certain outward bound vessel, called the *William*, did take on board said vessel, and carry and transport out of this State, one *William Crockett*, of said *Frankfort*, a minor under the age of twenty-one years, to *parts beyond sea*, to wit, *to Baltimore, in the State of Maryland*, without the consent of his parents, master, or guardian, contrary to the form of the statute," &c.

*John Carleton*, a witness for the plaintiff, testified, that the defendant, immediately after his return from said voyage, stated to him that he did take *Crockett* on said voyage — that he carried him to the *West Indies*, and back to *Baltimore*, in *Maryland*, and there left him. That *Campbell*, the plaintiff, as next friend of the minor, had sued him for his wages, and had recovered them. That he thought he had a right to ship said minor without the consent of *Campbell*, as he was not guardian.

It was also in proof, that *Campbell* married the mother of the minor about thirteen years since — that all the parties lived in *Frankfort* — and that no guardian had ever been appointed by the Judge of Probate.

Upon the opening of the case, the plaintiff moved for leave to amend, by filing a new count, similar to the first, with this exception, viz: after the words "to *Baltimore*, in the State of *Maryland*," to add, "and to the *West Indies*," or the particular place or port to which the vessel went.

The *Chief Justice*, who tried the cause, refused to permit the amendment, on objection by the Counsel for the defendant. And

upon this evidence, intending to reserve the question as to the construction of the statute, he directed a nonsuit. If either of these decisions were incorrect, the nonsuit was to be taken off, and a new trial to be had, otherwise the nonsuit to stand.

*Kent*, for the plaintiff.

The question is upon the meaning of the words "*beyond seas*" in the statute upon which this action is founded. The declaration alleges that the minor was carried to *Baltimore*, in the State of *Maryland*, and it is insisted that this falls within the terms of the statute — that, "*beyond seas*" means out of the jurisdiction of the State, whether viewed on authority or on the principle of regarding the intent of the legislature.

The passion that many boys have for going to sea, and the great facilities for their escape from their parents, by reason of our extended seacoast, undoubtedly induced the legislature to interpose by this statute to prevent it. But the intention of the legislature will be frustrated, and the statute rendered nearly useless, if it be restricted to cases of a transportation *out of the country*. Is it reasonable to suppose that the legislature intended to impose a penalty for carrying a minor from *Eastport* to *St. Andrews*, and not for carrying him from *Eastport* to *New Orleans?*

But on authority these words "beyond seas" will be found not to have been restricted in the manner supposed to be insisted on by the counsel for the defendant. The same phrase is used in our statutes of limitations, and has in numerous instances received a judicial construction. In *Murray* v. *Baker*, 3 *Wheat.* 541, it was decided that *out of the State*, fell within the scope of the phrase, *beyond seas*. So also in 3 *Cranch*, 174; 1 *Harris & McHenry*, 89, and *Byrne* v. *Crowninshield*, 1 *Pick.* 263. And 1 *Shower's Rep.* 91, *Anonymous*, may also be cited to the same point, where *Dublin* was considered by *Ld. Holt*, as "*beyond seas.*"

The Counsel for the plaintiff also renewed his motion for leave to amend.

*Kelly*, for the defendant, contended, 1, that the evidence disclosed no *transporting* within the meaning and spirit of the statute. There was no fraud or force used to get possession of him; but

at his own special instance and request, he was *allowed* to go as a mariner with the defendant.

2. But if otherwise, then the penalty was not incurred, because *Baltimore* is not in "*parts beyond seas.*" It is true, that in a decision of the U. S. Courts, these words as used in the statute of limitations, have received a narrow construction; yet on the whole, even as it regards the statute of limitations, the meaning of these words is *questio vexata;* for in *England*, they are used as synonymous with *foreign parts*, *King* v. *Waldron*, 1 *Wm. Black.* 286. So in 2 *Dallas*, 217; *Thurston* v. *Fisher*, 9 *Serg. & Rawle*, 288; *Angel on Lim.* 221; *Amer. Jurist*, *No.* 14, *p.* 374.

But in commercial parlance, "parts beyond seas" is synonymous with *foreign countries. Abbot on Shipping*, 414, 416, 451. And in this sense is the phrase in the statute to be understood.

Again, that this construction is correct, is evident from the fact that the penalty attaches, by the very terms of the section on which this action is founded, only to the master of an *outward bound* vessel, which description only applies to foreign voyages, as understood at the Custom House. And in the 1*st vol.* of *U. S. Laws*, *ch.* 29, *sec.* 8, "*bound without the limits of these United States,*" and "*outward bound,*" are used as convertible terms.

3. It is a constituent and indispensable part of the offence, that the transporting be without the consent of the minor's *parents*, *master*, or *guardian.* In this case, the minor's father was dead, and his mother again married, and he had no master or guardian. He was therefore his own master, and under only his own control. No one had any right to his earnings, or was bound by law for his support. *Freto* v. *Brown*, 4 *Mass.* 675; *Commonwealth* v. *Hamilton*, 6 *Mass.* 273. And that the law contemplated only that person who was legally in *loco parentis*, appears from the latter clause of the section, which in addition to the penalty, gives to the parent a special action of the case, for the damages he has sustained.

4. Against the motion for leave to amend, he cited *Hamilton* v. *Boiden*, 1 *Mass.* 50; *Davis* v. *Saunders*, 7 *Mass.* 62; *Dawes* v. *Gooch*, 8 *Mass.* 488; *Haynes* v. *Morgan*, 3 *Mass.* 208.

The opinion of the Court was delivered by

MELLEN C. J. — This action is founded on the second section of the statute of 1821, *ch.* 22, which is in these words: That every master or commander of any *outward bound* ship or vessel, that shall hereafter carry or transport *out of this State*, any person under the age of twenty-one years, or any apprentice or any indented servant to *any parts beyond sea*, without the consent of his parents, master or guardian, shall forfeit and pay the sum of two hundred dollars." The *first* section makes it penal "to carry *any* subject of this State, or other person lawfully residing and inhabiting therein, to any port or place *without the limits of the same*, by land or water, without his consent or voluntary agreement." The main question in the cause is, what is the true construction to be given to the words "parts beyond sea," as used in the second section above quoted? In our statute of limitations, *ch.* 62, there is this provision in the 9th section, *viz:* "that this act shall not be understood to bar any infant, feme covert, person imprisoned or *beyond sea*, without any of the United States, *non compos*, &c. &c." So in *ch.* 10, *sect.* 2, there is this provision, "this act shall not extend to any person whose husband or wife shall be continually remaining *beyond sea*, by the space of seven years together, &c. &c. — In the case of *Farr* v. *Roberdeau's executors*, 3 *Cranch*, 174, *Marshall C. J.*, when commenting on the statute of limitations of *Georgia*, where the same expression is used in the saving clause, as in our statute, says, "*Beyond seas* and *out of the State* are analogous expressions, and must have the same construction." In *Murray* v. *Baker*, 3 *Wheat.* 541, the only question presented was, whether the plaintiff, who resided in *Virginia*, came within the exception in the act in favor of persons "beyond seas." The Court were unanimously of opinion that to give a sensible construction to the words, they must be held to be equivalent to "without the limits of the State." Should we be called upon to give a construction to the above words in our statute of limitations, we should pro-

bably adopt the same construction; not only on account of the high authority of the above decisions, but because the words were borrowed from an English statute, which was perfectly intelligible in *England*, and where it has a local and geographical aptitude, but from the necessity of the case, has been subjected, in its construction here to certain modifications to accommodate it to circumstances. But we must proceed further and inquire the meaning of the expression, *as used* in the act, on the second section of which this action is founded, and *in connection* with certain *other* expressions to be found in the same sentence, in the description of the offence. And here it is proper to advert to the familiar principle, that *some* parts of a statute may throw light upon *others*, and furnish aids in their construction. Another familiar principle also should not be disregarded, namely, that penal statutes are not to be extended by construction, so as to embrace cases which are not, by plain language, included within their provisions. We now proceed to consider the language of the first and second sections of the act in question. The *first* declares it to be an offence to carry *any inhabitant* of the State *out of the limits of it*, without *his* consent, either by land or water. The offence described in the *second* section, consists of *two acts*. The *one* is, the act of a master or commander of an *outward bound* ship or vessel, in carrying or transporting a minor, apprentice or indented servant, without the consent of the person entitled to his obedience and service, *out of the State;* and the *other* is, in carrying him to some parts *beyond sea:* unless *both* acts have been done by the defendant, he has not incurred the penalties of the act. Now, according to the decisions of the Supreme Court before mentioned, an *adjoining State* is to be considered as a *part beyond sea*, for the purposes of the saving clause in the statute of limitations; but if such a principle was in contemplation of the legislature in enacting the law in question, why was there such difference of phraseology between the *first* and *second* sections? Why was a transportation to *parts beyond sea* made a *constituent part* of the offence, if it was complete by a transportation of the minor, apprentice or servant, *merely out of the State?* Is it not evident that something more was intended? Why was the expression "*outward bound* ship or vessel," employed, unless a *foreign*

voyage was meant? Are not all vessels, when *going to sea*, in one sense to be considered as *outward bound?* But is this the *mercantile* sense of the expression? Is a vessel bound from *Frankfort* to *Boston*, to be considered as an *outward bound* vessel? The section on which the action is founded, is a transcript, *mutatis mutandis*, of the provincial act of 1718; in the preamble to which it is stated, that complaints were made that minors, apprentices and servants, were in the habit of going on board of *outward bound vessels*, and were "there entertained by the master and mariners, and actually transported to some parts *beyond the seas.*" Could this simple language of that early day have intended any thing less than a transportation to some *foreign port or place?* If it be said that on this construction of the section in question, masters of vessels may, with impunity, carry minors, apprentices, and servants to the most distant ports in the *United States;* the answer is, that is a subject of legislative consideration; and if a prohibition against transporting minors, apprentices, and servants, from *this* State to any *other* State in the Union, should be deemed necessary or advisable, it is the province of the Legislature to extend the prohibition so as to effect the object. The preamble above mentioned plainly shews, that the act then passed was not a re-enactment of any British statute, but was occasioned by the peculiar circumstances above stated. These facts shew that the expression, "to some parts beyond the seas," was really descriptive of those evils which the statute was enacted to prevent. We are thus lead to the conclusion, that the facts stated in the declaration do not constitute a legal ground of action, and that therefore the nonsuit was properly ordered.

The remaining question is whether the plaintiff ought to have leave to amend the declaration in the manner proposed. It is true, that the decision of the Judge upon the motion to amend, is not properly a subject of revision as *a matter of law*, but of *judicial discretion;* still, as it was specially reserved by him, for further consideration, we have considered it. It appears from the report, that the plaintiff married the mother of the minor, who sued the defendant for, and recovered his wages, by the present plaintiff as his *prochein amie*; by which proceeding, the plaintiff did all in his power to ratify the act of the defendant, and con-

sider it as the basis of a contract on his part. Upon a question of *discretion*, we cannot but consider this as furnishing some reason for denying the motion: and when it appears that by granting the motion, we should subject the defendant to liabilities to which he is not now liable, and cannot be rendered so in a *new* action; and this too being a *qui tam* action, we, on the whole, are not disposed to grant the motion. We approve the ruling and decision of the Judge, and confirm the nonsuit. We have not thought it necessary to examine the other grounds of defence, which have been very ably urged by the counsel for the defendant, much less to express any opinion in relation to them; preferring to place our decision on the peculiar language of the statute and what we consider must have been the intention of the Legislature, in its enactment.

*Nonsuit confirmed.*

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## THE TRUSTEES OF BELFAST ACADEMY *vs.* SALMOND.

A lot of land granted to a corporation for the purpose of erecting an Academy building thereon, and which was actually used for the purpose for which it was granted, is liable to be appropriated to the uses of the public, by the location of highways over it.

What is *reasonable* notice for the selectmen of a town to give the owner of the land over which they propose laying out a road, must depend on circumstances. Where the owners were trustees of an Academy, and a majority of them lived in the town where the road was contemplated to be laid out, it was *held* that a notice of *seven* days was sufficient.

Where after the location of such road by the selectmen, and their proceedings being laid before the inhabitants of the town, at a meeting duly called for that purpose, it was voted "to accept the road" — after which another vote was passed "to postpone the further consideration" of the road to the adjourned meeting; *held* that the road was duly *accepted*, and that the latter vote did not annul or in any wise affect the former.

THIS was an action of *trespass quare clausum fregit*, and was submitted to the Court on the following agreed statement of facts.

In *June*, 1809, one *Ephraim McFarland* conveyed in fee, by deed to the plaintiffs, four acres of land, *(the locus in quo,)* situate in *Belfast*, in this county, "for the purpose of erecting and maintaining thereon an Academy or some higher institution of

learning." In 1812, the plaintiffs proceeded to erect a building for an Academy on said lot, which is still standing. On the *25th of September*, 1825, the selectmen of *Belfast* having given seven days previous notice to the plaintiffs, laid out a town-way diagonally across said lot, and running within a few feet of the Academy building. At the time when the notice aforesaid was given to the trustees, a majority of them including the President and Secretary, were, and ever since have been, inhabitants of *Belfast*. On the *3d of October*, 1825, a legal meeting of the inhabitants was held, the 2d article in the warrant calling it, being, "to see if the town would *approve* and *allow* said way, called Church street," the same being sufficiently described. At this meeting the following proceedings were had, relative to this road, as exhibited on the town records.

"*Article 2d.* Voted, to accept Church street, as laid out by the selectmen and described in *Art. 2d.* Yeas 45, Nays 36."

"Voted, to postpone the further consideration of Church street to the adjournment of this meeting."

"Voted, that this meeting be adjourned to the annual meeting, in *March* or *April*."

"Voted, to reconsider the last vote."

"Voted, to adjourn this meeting to *Monday*, the *17th* day of *October*, instant, at 2 o'clock, P. M. to meet at this place."

At the adjournment of said meeting, held on said *17th* of *October*, the following vote was passed.

"*Article 2d.* Upon a motion to reconsider the vote accepting Church street, it was voted not to reconsider said vote."

No proceedings were had relative to said way, at the annual meeting of said inhabitants, held in *March* or *April*, 1826.

At the annual town meetings, held in *April*, 1831, and 1833, articles having been inserted in the warrants, calling them, at the request of the plaintiffs, "to see if said inhabitants would discontinue said way, called Church street," it was voted *not* to discontinue it.

In 1825, after the proceedings aforesaid in town meeting, the way was made passable by the inhabitants, and has been maintained, and much used as a public road, ever since.

In *June*, 1833, the trustees caused a fence to be erected on

the north line of the lot and across said way, entirely obstructing the same. The defendant being a surveyor of highways, and this street lying within the limits assigned him, removed so much of the fence as was necessary to abate the obstruction, for which act, this action was brought.

If, upon the foregoing statement, the Court should be of opinion that the plaintiffs were entitled to recover, the defendant was to be defaulted, and judgment rendered against him for nominal damages; otherwise, the plaintiffs were to become nonsuit.

*Allen* and *J. Williamson*, for the plaintiffs.

1. The original laying out of the road by the selectmen was illegal, inasmuch as no *sufficient* notice was given to the corporation. They were entitled to *reasonable* notice, and it was insisted that *seven days* was not such notice. It would be but reasonable that the corporation should have time enough to call a meeting and make preparations to oppose the location of the road if such should be their decision. By analogy to other cases *thirty days* would seem to be a reasonable notice. In suits against corporations, and in some other proceedings, that length of notice is required.

2. But if the road was legally located by the selectmen it was not legally accepted by the town. There was no article in the warrant calling the meeting to see if the town would *accept* the road laid out, but it was to see whether they would *allow*, &c. The article should have pursued the phraseology of the statute.

Again, the road was not accepted by vote. The vote to postpone the further consideration of the subject to a future meeting was virtually annulling the first vote. It was not necessary that there should be a formal vote of reconsideration. Surely no greater formality or technicality of proceedings should be required, than in the making or repealing laws of the State. And it is well known that laws may be repealed, by the passage of others inconsistent with the provisions of the first.

Again, by the passage of the vote of *adjournment*, the meeting was then, to all intents, *adjourned*, and the inhabitants could not reconsider it. Whatever therefore, was done in relation to this matter at the adjourned meeting, on the 17*th* of *October*, was invalid, and can in no way affect this case.

3. But the selectmen, or the inhabitants of the town had no legal power to locate a road over this lot, inasmuch as it had already been appropriated to public uses. *Commonwealth* v. *Coombs*, 2 *Mass.* 489; *Arundel* v. *McCulloch*, 10 *Mass.* 70; *Commonwealth* v. *Charlestown*, 1 *Pick.* 180; *Keene* v. *Stetson*, 5 *Pick.* 492. In this case, the corporation, though a private one, was established for public uses. And the selectmen of *Belfast* would have no greater right to locate a road over its land, than the selectmen of *Brunswick* would have, to lay out a road over the commons belonging to Bowdoin College.

The statute does not give the power. The language is, "if any *person* shall sustain damage," &c. The legislature never designed that selectmen should have the power to lay out a road over land already appropriated to public uses. Wherever the statutes use the word "persons," natural persons are intended, and not corporations. In the first statute granting the process of foreign attachment, it was to be used against "*persons*, having in their hands, &c. goods, effects, or credits belonging to another." Afterward, the legislature passed a law, giving the same right against *corporations*.

The constitution, *Art.* 21, gives the right to take *private* property only, which the *locus in quo* is not — but if it were, the facts do not show any such "public exigency" in this case, as would justify the invasion of rights complained of.

It is argued further, that the charter of this corporation is a *contract*, which the legislature could not impair, directly or indirectly, by a grant of power to the selectmen, or inhabitants of a town. *Constitution of U. States*, *Art.* 1, *sec.* 10; *Allen* v. *McKeen*, *Mason*.

If this road be sustained, it will also defeat the design of the donor; a reference to the language of the deed will show that it would be a misappropriation of the grant. The design of the institution could not be successfully carried into execution, if embarrassed by the noise and bustle of a highway.

The material points made in the argument on the other side, by *Allyn*, were fully sustained by the decision of the Court.

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

MELLEN C. J. — If the town-way in question was legally laid out and established, the act of the defendant in taking down the fence which had been erected across the road, is justified. The road complained of, is one running in a southeast direction, through the populous part of the town, called Church street, and dividing the lot of land belonging to the academy, in a manner which is considered by the Trustees as unreasonable as it is inconvenient; and highly prejudicial to the interests of the Institution. The authority to inquire into the expediency, propriety, or wisdom of the location, does not belong to this Court; it is by law vested elsewhere. We can only decide the contested point as to its legality.

The *first* objection is, that the town of *Belfast* had *no right by law*, to accept and approve of the laying out, by their selectmen, of a town-way over the four acres of land, conveyed by *McFarland* to the Trustees of the Academy. And *secondly*, if the town *had such right*, that the laying out of the way was illegal on the part of the selectmen, and that the same was never accepted by the town.

As to the *first* point, it is very clear that the land conveyed to the Trustees, must be considered as *private* property, notwithstanding the purposes for which it was conveyed and to which it has since been applied: that is, the public have no more control over it, than any other property belonging to other corporations, or to individual citizens. It was conveyed to Trustees, for the more convenient management of the property, when it should be appropriated to its contemplated uses; but it is subject, like all other property of the kind, to certain claims on the part of the public; that is, to the right to appropriate *private* property for *public* uses, making just compensation therefor, as stated in the 21st section, in our declaration of rights. In virtue of this principle, private property is appropriated to public use in the form of highways and town-ways; and the owners have a right to a just compensation for the property thus appropriated. In the case of County roads, the county commissioners, and in case of town-

ways, the selectmen and the town itself, are the agents employed by the public in making the requisite appropriations of private property for public use. We are not able therefore to discover any solidity in the first objection made by the counsel for the plaintiffs. As to the *second* point. The law requires the selectmen to give *reasonable* notice to the owners of land, over which they are about to lay out a town-way. What is reasonable notice, depends on circumstances. Seven days notice was given by the selectmen: and at that time a majority of the Trustees resided in the town. Under these circumstances we think the notice was reasonable and sufficient. The last inquiry is, whether the town legally accepted the way. The town meeting holden on the 3*d* of *October*, 1825, was regularly warned and held; and the warrant contained a sufficient article to authorise a vote of acceptance. In acting on this article, the town voted "to accept Church street, as laid out by the selectmen, and described in article 2d." The town then voted to "postpone the further consideration of Church street to the adjournment of this meeting." The town then voted to adjourn the meeting to the annual meeting, in March or April: then *reconsidered* that vote, and voted to adjourn the meeting to the seventeenth day of the same *October*; on which day, on motion to *reconsider* the vote of acceptance, the town voted not to reconsider it. At the annual meeting in 1826, no proceedings were had in relation to said way. What is the effect of all these votes? The vote to *postpone* the further consideration of Church street, did not, *of itself*, in any manner affect the *previous vote of acceptance;* and on the 17th, the town *adhered* to that vote, by voting *not to reconsider it.* But it is contended, that after the town had passed a vote, adjourning the meeting to the next annual meeting, it *was* adjourned accordingly, and therefore there was no authority to *reconsider* that vote: if such was the consequence, then the *vote of acceptance*, passed previously to the vote of adjournment, stands in full force, and has not been affected in one way or another since the same was passed. The result is, that the town-way was *legally laid out*, and legally *accepted* by the town. Accordingly a nonsuit must be entered.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF CUMBERLAND, APRIL TERM, 1834.

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## BRACKETT *Exr.* *vs.* MOUNTFORT.

The attestation of a note not before witnessed, by a person who was not present at the signing, is a *material alteration* of the contract, and destroys its validity.

ASSUMPSIT on the following note, or memorandum in writing: "1817, *May* 5th. This day settled all accounts with *Samuel Brackett* and find due to him sixty-five dollars and eighty-five cents, on interest till paid. *Richard Mountfort.*

Attest: *C. T. S. Brackett.*"

It was proved that the attestation of *C. T. S. Brackett*, as a witness to the signing of the defendant, was written by said *Brackett*, on the note about ten years after its date, when the defendant made certain acknowledgments as to his indebtedness thereon; but the witness was not present *when the note was signed.*

It was contended, by the counsel for the defendant, that the act of *C. T. S. Brackett*, (now plaintiff) in placing his name to the note, at the time, and under the circumstances related, destroyed entirely the validity of the contract. But the *Chief Justice*, who tried the cause, ruled that it had no such effect. That it neither prejudiced the plaintiff's right to recover upon the note, nor operated in any degree to relieve the contract from the statute of limitations.

A verdict was returned for the plaintiff. If the above ruling of the presiding Judge was correct, judgment was to be rendered thereon; otherwise, it was to be set aside and a new trial granted.

*Fessenden* and *Deblois*, contended that the alteration was a *material* one, and rendered the contract void, and cited *Pigot's case*, 11 *Co.* 27; *Master* v. *Miller*, 4 *T. R.* 320; same case, in 5 *T. R.* 367; 9 *East*, 190; 10 *East*, 431; *Homer* v. *Wallace*, 11 *Mass.* 309; *Smith* v. *Dunham*, 8 *Pick.* 246.

*Longfellow*, for the plaintiff.

The name of the witness was not affixed to the note to give it the character of a witnessed note, but merely by way of memorandum of the acknowledgment of the debt by the defendant. It never has been relied on as a witnessed note. The addition of the name of *Brackett*, therefore, does not affect the contract. It is not like the case of *Homer* v. *Wallace*. There the question was as to the genuineness of the signature of the defendant. Here, that fact is admitted. It is not contended, that if the terms of the contract were materially altered it would not affect its validity. But in this case, the terms of the contract remain unaltered. It was a mere memorandum to refresh the memory of a witness, as to the new promise.

Weston J. delivered the opinion of the Court.

It is well settled, that a material alteration avoids and defeats a note or other instrument. The cases cited for the defendant, are full to this point. The note in question, when made, was not attested by a witness. It now has such an attestation, and that by a witness, who was not present when the note was signed. Notes in writing, payable in money, attested by one or more witnesses, were excepted from the operation of the statute of limitations of *Massachusetts*, in force at the date of the note. The same exception is to be found in the statute of this State. Without an attestation, a note is barred by the statute in six years; with it, no bar whatever attaches by statute, any more than to a specialty, and it is subject only to a presumption of payment after twenty years, from the time when it becomes payable.

In *Smith* v. *Dunham*, 8 *Pick.* 246, *Parker C. J.* says, speaking of a note of this description, "that with the attestation, it is in fact a different legal contract, from what it would be without." It would seem to result from the authorities, that the note, being materially changed, was thereby defeated. But the Chief Jus-

tice proceeds to state, that the Court did not suppose that the note was so altered, as to defeat the payee's right to recover within six years, or after six years, upon a new promise, "because there was no fraudulent intent, and because the witness was actually present, and saw what his name purports to attest." But in this case, the witness was not present, and did not see the note signed. It was dated *May 5th*, 1817, and was evidence of a debt then due and payable. It was then without attestation. Ten years afterwards, when the note had ceased for four years to be a subsisting contract, which could be enforced at law, the attestation was affixed, by which it became on its face recoverable at law. It was an alteration of so material a character, that it at once infused life into an instrument, which had before lost all legal efficacy. In such cases, upon the decease of the witness, subsequently attesting, or if he could not be found, the maker might be entirely deprived of his statute bar. If experiments of this sort are tolerated, and regarded as harmless, the protection of the statute will be greatly impaired. It is of vital importance, that instruments, given as the evidence of debt, should not be tampered with. We hold the attestation to have been a material alteration of the contract; that it was unwarrantable, and that the validity of the note was thereby destroyed. The verdict is accordingly set aside.

*Plaintiff nonsuit.*

## *The Trustees of the* New Gloucester *School Fund vs.* William Bradbury.

The town of *New Gloucester*, holding lands by grant from the *Commonwealth of Massachusetts*, prior to the separation of *Maine* therefrom, for the *use of schools* in that town, deemed it advisable to have the lands sold; and on application of the town, an act was passed by the Legislature, incorporating certain persons, by the name of "The Trustees of New Gloucester Schools in the County of Cumberland" — authorising the sale, by them, of said lands — the putting of the proceeds at use — appropriating the interest annually to the support of said schools — empowering them to fill vacancies in their own board — and containing various other provisions. *Held*, that this constituted *a contract* within the meaning of the constitution of the United States and of this State; and that a subsequent act of the legislature of this State, authorising the town to choose a new set of Trustees, and directing the first Trustees to deliver over the trust property was *unconstitutional* and *void.*

This was an action of trover for sundry notes of hand, sundry deeds, and certain books, particularly described in the writ; and was tried upon the general issue, before *Parris J., November Term*, 1833.

It was proved or admitted, "that on the 16*th* of *June*, 1803, and for many years before, certain real estate, situate in *New Gloucester*, belonged to that town in fee, the title to which had been derived by grant from the *Commonwealth* of *Massachusetts*, *for the use of schools* in that town; and that from the year 1793, the same had been under the care, superintendance, and management of the town, until the year 1803; during which period, successive committees, appointed by the town, appropriated the rents and profits of the lands to the use of the schools, as originally intended.

In *May*, 1800, it was considered, by the town, advisable to have the school lands sold; and on application of the town, an act was passed by the Legislature of *Massachusetts*, on the said 16*th* of *June*, 1803, entitled "an act, authorising the sale of the school lands in the town of *New Gloucester*, to raise a fund for the support of schools in said town, and for appointing Trustees for those purposes." In the *first* section, Trustees were appointed, to sell the school lands, and to put out at interest the moneys arising from such sale, in the manner mentioned in the act. In

the *second* section, the Trustees were incorporated into a body politic, by the name of the "*Trustees of New Gloucester Schools in the County of Cumberland.*" The *third* section authorised said Trustees and their successors, annually to elect a President, Clerk, Treasurer, and other needful officers. The *fourth* section provided that the number of Trustees should not exceed seven, nor be less than five; and authorised the Trustees to fill vacancies in their number from the inhabitants of said town; and also to remove any of their members when unfit or incapable of discharging their duty, and to supply vacancies in the manner above mentioned. The *sixth* section authorised the Trustees to sell and convey the school lands in fee, and execute deeds of the same. The *seventh* section directed that the moneys, arising from the sale of the lands, with all donations or grants that should be made for the use of schools, should be put to use, and secured by mortgage or sufficient sureties. The *eighth* section directed that the interest arising from said fund, should be annually appropriated for the use of public schools, in said town, and that it should never be in the power of the town to alter or alienate the appropriation of the fund. The *ninth* section required the treasurer of the Trustees to give bond, faithfully to perform his duty. The *tenth* section declared that the Trustees should not be entitled to any compensation for their services, out of the moneys arising from said fund. The *eleventh* section directed the Trustees to exhibit to the town, at the annual meeting, a fair statement of their doings; and the *twelfth* section makes the Trustees, and each of them, answerable to the town, for their personal negligence or misconduct, and liable to a suit for any loss or damage thereby occasioned.

Under the authority of the above act, the Trustees therein named and their successors, had ever since discharged the duties of their appointment; and the defendant, who was their treasurer, had given bond as by the act was required; and was in possession of the notes, deeds, and books, for the alleged conversion of which, this action was commenced, claiming a legal right to retain them, in virtue of his office of treasurer of the Trustees.

The plaintiffs having shown the act authorising the sale of the school lands, and the creation of a school fund, and having shown

the same in the hands and under the care and management of said Trustees, claimed in this action a right to the fund and the documents exhibiting and securing the same. Their claim was founded on an act passed by the Legislature of this State on the second day of *March*, 1833, in accordance with the petition of the town and entitled as in addition to the act of *June* 16, 1803.

The act of 1833, in the first section provided as follows, *viz*: "that the inhabitants of the town of *New Gloucester*, qualified by law to vote in town affairs, be and they hereby are authorised and empowered, at their annual meetings in *March* or *April*, to choose by ballot seven persons, inhabitants of said town, Trustees of *New Gloucester* school fund, whose duty it shall be to take charge of, and manage all the property, both personal and real, belonging to said fund."

The second section declared that "said Trustees shall have all the powers and privileges which the Trustees now have in the act to which this is additional, except their right to fill vacancies which may happen in the board, and shall be under the same liabilities."

The *third* section directed the present board of Trustees to transfer and deliver over to the Trustees elected by the town, within one month from the election of said Trustees, all the books, papers, records, notes and all the property belonging to said school fund. The *fourth* section repealed those parts of the former act that were inconsistent with the latter.

These were the essential provisions of the two statutes, and the principal question in the case was, whether the act of 1833, "was constitutional, or a violation of the rights of the Trustees under the act of 1803, and an invasion of their chartered interests."

Other points than the foregoing were made in the argument, but as the decision of the cause was placed on the ground alluded to, the facts in relation to the former are not reported.

*Preble*, for the defendants, maintained that the act of *June*, 1803, by which the first Trustees were incorporated, was *a contract*, within the meaning of the Constitution of the United States, and of this State — and that the act of *March*, 1833, incorporating the second set of Trustees, was in violation of the first, and therefore, was *unconstitutional* and *void*. In support of this posi-

tion he made an elaborate argument and cited the following authorities. *Dartmouth College case*, 4 *Wheaton*, 518; 2 *Kent's Com.* 306; *Allen* v. *McKeen*, *Mason's Rep.*; *Angel and Ames on Corporations*, 81; *Richardson* v. *Brown*, 6 *Greenl.* 355; *Pawlett* v. *Clark*, 9 *Cranch*, 294; *County of Hampshire* v. *Franklin*, 16 *Mass.* 84; *Brunswick* v. *Litchfield*, 2 *Greenl.* 28.

*Fessenden*, for the plaintiffs, took the following positions. 1. The whole beneficial interest in the fund, is in the inhabitants of *New Gloucester*, in their municipal character, for the use of the public schools in that town — or, in other words, they are the *cestui que trust* of the entire fund.

The Corporation was created at the instance and request of the owners of the land, from which the fund is derived — the present *cestui que trust.*

2. The Corporation is the Trustee of the fund for the use of the *cestui que trust.*

3. The Trustees or Corporation have no beneficiary interest in the fund. It is not a trust coupled with an interest. Their duties are ministerial.

4. The Corporation is not, in the strict legal sense of the term, an *elemosynary* corporation. It is not such an one as the whole public have an interest in, as in a college or an academy.

5. It is not, in the sense of the law, a private corporation, such as a bank, manufacturing company, proprietors of a bridge, or turnpike, &c.

6. It is a corporation *sui generis* — created for the purpose of being the Trustee of this fund, for the use or benefit of the inhabitants of the town of *New Gloucester*, and at their instance and request.

7. Hence the act of incorporation is not, within the meaning of the Constitution of the United States, *a contract*, either between the State and the Trustees — or between the inhabitants of *New Gloucester* and the Trustees.

8. But if it be *a contract*, it is a contract between the State and the inhabitants of *New Gloucester.* In the same sense that a conveyance made by A to B, for the use of C, is a contract between A and C, and vests at once the whole estate in the latter.

9. Hence, the Legislature has the constitutional power, by the consent and on the application of the inhabitants of the town, who are the *cestui que trust*, to change the Trustees of that fund, and appoint others, or to authorise the *cestui que trust* to choose or appoint others, without the assent, and against the will of the present Trustees.

These positions, the counsel for the plaintiffs supported and illustrated by reasoning at length, citing the following cases: *Bridgton* v. *Harrison*, 11 *Mass.* 16; *Special laws*, dividing the towns of *North Yarmouth* and *Falmouth*; *Cumberland* v. *North Yarmouth*, 4 *Greenl.* 459.

MELLEN C. J. — This is an action of trover for sundry notes of hand, sundry deeds, and certain books, particularly described in the writ. The question is, whether, upon the facts reported, the action can by law be maintained. The *first* objection is, that there is no such corporation as that described in the writ, and to which the defendant is called to answer. The *second* objection is, that the case presents no evidence whatever of a conversion: and the *third* objection is, that the plaintiffs have no merits or legal ground of action. In our examination of the cause, we shall reverse the order pursued by the counsel for the defendant, in the argument, and commence with an examination of the facts and principles, on which the plaintiffs place their claim to retain the verdict which has been returned in their favor. The cause is important in principle and influence, and deserves particular and careful consideration. A brief summary of the principal facts will be useful in this place, in presenting our opinion, and the grounds of it, in a clear and distinct point of view. [See preceding statement.]

The great principles collected, discussed and established in the cases of the *Trustees of Dartmouth College* v. *Woodward*, and *Allen* v. *McKean*, treasurer of Bowdoin College, have been referred to, and relied on by the counsel for the defendant, as decisive of the merits of this cause in his favor. The counsel for the plaintiff, distinctly disclaims all objections against the decision of either of those cases, *on the points arising in this case*, and, *thus far*, admits the perfect correctness of the principles on

which *both* decisions repose. But he has contended, that the case before us differs from both those in some important particulars: that it is a case *sui generis*, in respect to the character of the *quasi* corporation, with which it was connected in its origin, and afterwards in its liabilities, *viz.* the town of *New Gloucester*. Hence, our inquiries are confined to the alleged reality and legal importance of these distinctions.

In the act establishing Bowdoin College, and making provision for its first and continued organization, there is also a grant of five townships, for the use of the College and for the purposes of instruction, &c., and the seventeenth section, by which they are granted, provides that the lands, so granted, shall be vested in the trustees, with power to settle, divide, and manage the same, or sell, convey, or dispose of the same. And the sixth section provides that the clear rents, issues, and profits of all the estate, real and personal, shall be appropriated to the endowment of the College: so that they have an interest in, and control over the *personal*, as well as the *real* estate, before it is sold and converted into *personal*. Here, by *one process*, the lands passed from the Commonwealth to the Trustees, for the use of the College, in either of the forms above stated. In the case under consideration, the school lands were first granted by the Commonwealth to the town of *New Gloucester, for the use of schools* in that town, and the fee vested in the town, in trust for the purposes mentioned: and by a *second* process, many years afterwards, the estate, so vested in the town, was sold and conveyed by the Trustees named in the act of 1803, which was passed, on the application of the town, for the purpose of converting the *real estate* into a *personal fund*; and this fund, by that act, was placed under the *exclusive* management and control of the Trustees. The *Commonwealth*, the *Town*, and the *Trustees* were all parties to this arrangement, made for the better security and productiveness of the property originally granted to the town. In both cases, the property was derived from public bounty, for promoting the cause of education, and the funds produced by the property, were in the same manner, placed under the exclusive management of Trustees. Why are not the Trustees, in both cases, equally protected from legislative control or interference, if no right is reserved to

interfere, to modify, limit, or destroy their powers and privileges. In the act of 1803, no such authority is reserved to the legislature. "A corporation is defined by *Mr. Justice Blackstone*, 2 *Com.* 37, to be a franchise. To this grant or franchise, the parties are the King and the persons for whose benefit it is created, or trustees for them. Certain obligations are created, binding on both parties, the grantor and grantees. It implies, therefore, *a contract not to reassert the right to grant the franchise to another*, or to *impair it.* The subjects of the grant are not only privileges and immunities, but property, or which is the same thing, a capacity to acquire and hold property in perpetuity." *Judge Washington's* opinion in *Dartmouth College* case. The legislature was bound by the act of 1803, so that they could not resume any powers by them granted to the Trustees: and for the same reason, or perhaps a stronger one, why was not the town bound by its own act, in requesting the legislature to pass the act of 1803, in which the only rights reserved to the town, are, to be furnished annually by the Trustees with a fair statement of their doings; and a right of action against the Trustees, for any losses occasioned by their negligence or misconduct.

The counsel for the plaintiff contends, that though the corporation in question, is of a peculiar character, and different from those described in our law books, it still is a *public* corporation, and subject to be regulated, controlled, and directed by the government. On this point, the doctrine laid down in the case of *Dartmouth College* v. *Woodward,* seems decisive. *Marshall C. J.* in delivering the opinion of the Court, in that case, says, "Strictly speaking, *public* corporations are such only, as are founded by the government, for *public* purposes, where the *whole* interests belong to the government." — "The charter of the crown cannot make a charity more or less public, but only more permanent." He further states, that no authority exists in the government, to regulate, control, or direct a corporation or its funds, "except where the corporation is, in the *strictest sense, public;* that is, where its *whole interests* and *franchises* are the *exclusive property and domain* of the *government itself.*" Surely the case under consideration is not of such a character. The school lands, the avails of which constitute the present school fund in *New*

*Gloucester*, were granted by *Massachusetts*, for the use of schools in that town; and for that purpose, they annually realize the amount of its interest, under the management and control of the Trustees, acting under the law of 1803, by a reduction of the sum to be raised and collected by taxation, for the support of schools in the town. In this manner, *New Gloucester* possesses and enjoys a beneficial interest in the funds of the corporation; which brings the present case within the very language of the court, in the case of *Dartmouth College* v. *Woodward*. By the original grant of the Commonwealth, of the lands to *New Gloucester*, the fee of the lands vested in the town, in trust for the purposes of the grant. The sovereign power then had no further control of the *lands*. By the act of 1803, passed by the consent, and on the application of the town, its right of managing the lands was at an end, and the right to the control of the fund, raised by the sale of the lands, was never in the *town*, but was expressly *vested* in the designated *Trustees*. This proceeding constituted a *contract*, and, in virtue of this contract, the Trustees acquired an interest — a legal interest: they accepted their appointment, and became entitled to a compensation for their services, which the *town* was bound to pay. But after a lapse of thirty years, during which period, the business relating to the school fund, seems to have been carefully and peaceably managed, according to the act of 1803 — the town and the Trustees enjoying their respective rights and privileges undisturbed, the legislature of this State passed the act of 1833, thereby undertaking to legislate the Trustees under the former act, at once out of office; and authorise the town to choose trustees, who were to have the same powers as the former trustees, except of filling vacancies, and ordering the former trustees to deliver all the books, papers, and property belonging to the school fund, to the Trustees named in the last act. The object of legitimate legislation is to define, establish, and secure to all the citizens, their legal rights: but there is another kind of legislation, expressly forbidden in the 11th section of the declaration of rights, which declares that the legislature shall pass no law impairing the obligation of contracts. The same thing is forbidden in the Constitution of the *United States*. The act of 1833 professes to *di-*

*vest* those rights which *vested* under the act of 1803, and to impair and dissolve those *contracts* which were created by that act. The prominent case of *Dartmouth College* v. *Woodward*, on constitutional law, as well as *Pawlet* v. *Clark*, *Hampshire* v. *Franklin*, *Greene* v. *Brunswick*, and *Richardson* v. *Brown*, forbid such a proceeding.

There is another objection to the contemplated operation and effect of the act of 1833, grounded on the 7th condition, in the act relating to the separation of this State from *Massachusetts*, which seems to be an immovable foundation. It is in these words: "All grants of lands, *franchises*, *immunities*, *corporate or other rights*, and all contracts for, or grants of land not yet located, which have been or may be made by the said Commonwealth, before the separation of said District shall take place, and having or to have effect within the said District, shall continue in full force, after the said District shall become a separate State." The above paragraph, being part of the seventh condition, is incorporated in our Constitution.

It is an undisputed principle, that every act of the legislature, passed in due form, is presumed to be constitutional. Respect for that body requires such presumption. It is a principle equally clear, that this Court ought not, in a doubtful case, to pronounce such an act unconstitutional; it should be plainly in violation of constitutional requirements or restraints, and beyond the boundaries of correct legislation, to authorize the Court so to adjudge it. But when, upon patient investigation, it is ascertained to be so, we are solemnly bound, steadily to obey the requisitions of duty, by pronouncing it unconstitutional and void. In so doing, however, we may still believe that the same was enacted with the purest motives, under a full conviction that it was, in all its provisions, conformable to constitutional principles. The result to which we have been conducted by our examination of the main question in the cause, is, that the act of 1833 violates the Constitution of the United States and of this State, and therefore we are not authorised to give any operation or effect to its provisions.

Our decision on this point, renders it unnecessary for us to express any opinion as to the merits of the *first* and *second* objections made by defendant's counsel.

The verdict must be set aside and the plaintiffs called.

## WINSLOW *vs.* MERRILL *& al.*

S. and C. were sued on a promissory note made by S. C. & Co. *Held*, that the error could only be taken advantage of by *plea in abatement.*

In actions *on contract*, new plaintiffs or new defendants, can never be added by way of *amendment.*

ASSUMPSIT against *Seward Merrill* and *Charles Merrill* on a promissory note. Plea, the *general issue.* The note produced on trial, was signed *S. & C. Merrill & Co.* and it was admitted, that the firm was composed of the two *Merrills* and *Andrew Scott.* The defendant thereupon moved a *nonsuit*, the evidence not supporting the declaration. And the plaintiff moved for leave to amend his writ, so that it should correspond with the note. But *Whitman C. J.* in the C. C. Pleas, refused the amendment, and ordered a nonsuit, whereupon exceptions were taken and the case brought up to this Court.

And now it was submitted without argument, by *Longfellow*, for the plaintiff, and *Megquier*, for the defendant.

MELLEN C. J. It appears to be settled law that in case of a *joint contract* all must be joined as defendants; but if the contractors are not all joined, advantage can be taken by *plea in abatement only*, if all are living when the action is commenced. *Rice* v. *Shute*, 5 *Bur.* 2611; 1 *Chit. Plead.* 29; 1 *Saund.* 284, *note* 4; *Zeile & al.* v. *Campbell's ex.*, 2 *Johns. Cases*, 382; *Harwood* v. *Roberts*, 5 *Greenl.* 441. It seems also to be well settled that in actions *on contract*, new plaintiffs or new defendants can never be added by way of amendment, unless by the express consent of parties; though in other actions *for torts* a defendant may be struck out. *Redington* v. *Farrar & al.* 5 *Greenl.* 379. We have no doubt the ruling of the Judge was correct in refusing leave to amend, by inserting the name of *Andrew Scott*, as a co-defendant; and according to the authorities, we are equally clear that the objection to the maintenance of the action, on account of the *non-joinder of Scott*, ought to have been overruled also, inasmuch as there was no plea in abatement, and the trial was on the general issue. We must sustain the exceptions. The nonsuit is set aside and the action stands for trial in this Court.

## CHASE *vs.* STEVENS.

The plaintiff sued out a writ against his debtor and put the same into the hands of the defendant, an officer, for service. The defendant attached property, the plaintiff agreeing to take charge of the defence of the replevin suit should one be commenced. The property was replevied. The plaintiff took upon himself the defence of the replevin suit — succeeded, and had judgment for a return. But the principal and surety in the replevin bond proving to be insolvent, and the goods replevied not to be found, the defendant commenced an action against the replevying officer for taking insufficient sureties, in which he was defeated, the jury finding that they were sufficient at the time of the taking. *Held* that, under these circumstances, the defendant was not liable to the plaintiff for the property thus attached and lost.

It is no part of the duty of an officer from whom goods are replevied to see that the sureties in the replevin bond are sufficient; nor can he lawfully resist the writ of replevin on such ground.

THIS was an action of the case against the defendant as a Coroner, for neglecting to take and sell on an execution in favor of the plaintiff, against one *Edward March*, sundry goods and chattels which had been attached by the said *Stevens* on the original writ. The general issue was pleaded accompanied by a brief statement.

On trial before *Parris J.*, *Nov.* term, 1833, it appeared in evidence that, on the 10*th* of *January*, 1829, the plaintiff sued out a writ against the said *March*, returnable to the then next term of the Court of Common Pleas in the County of *Oxford*, and delivered it to the defendant for service, who returned on the 24*th* of *February*, 1829, that he had attached sundry goods and chattels in the return particularly specified, as the property of said *March*; that the plaintiff recovered judgment in his said writ against said *March* on the 4*th Tuesday* of *January*, 1830, and within thirty days thereafter delivered his execution issued on said judgment to the defendant, with directions to levy the execution on the property attached; which the defendant never did, but returned on the 12*th* of *February*, 1830, that, he had demanded the property of *George Small*, and that he had refused to deliver it.

On the 25*th* of *February*, 1829, one *John Hale* sued out a writ of replevin in due form against the defendant, wherein the

officer was directed to replevy the property attached on the plaintiff's writ against *March*, out of the hands and possession of the defendant, and the same property to deliver to *Hale*, the plaintiff in replevin; which writ of replevin was, on the same day, put into the hands of one *George Small*, an officer duly authorised, for service, who on the same day, by virtue thereof, took from the hands and possession of the defendant, the goods and chattels by him attached, on the plaintiff's writ against *March*, and delivered the same to the said *Hale*, at the same time taking a bond, signed by the said *Hale* as principal, and one *David Jones* as surety, as required in the writ of replevin; — that such proceedings were had in the replevin suit, that, at the term of this Court, holden the 1st Tuesday of *Nov.* 1832, the said Stevens recovered judgment against the said *Hale*, for a return of the goods and chattels replevied, and for his damages and costs, and a writ of return was duly issued on said judgment, *Dec.* 24, 1832, and put into the hands of *David Wescott*, a Coroner of said County, for service, who made return on the 16*th* of *April*, 1833, that he had made diligent search for the goods and chattels within specified, and could not find them, and therefore could not cause a return to be made, neither could he find the said *Hale*, or any property of his, wherewith to satisfy the damages and costs.

It further appeared that, on the 21*st* of *October*, 1833, the defendant commenced his action against the said *Small*, for taking insufficient sureties on the replevin bond, in the said suit against the defendant, in favor of *Hale*, and prosecuted the same to trial; but that, on the trial thereof, the jury found that the surety was sufficient at the time of the execution of the bond, and that the said *Small* had reason to suppose that he would continue sufficient until the termination of the replevin suit.

To all this evidence relating to the replevin suit, the taking of the property attached on the plaintiff's writ against *March*, out of the defendant's hands and possession, by *Small*, and the defendant's suit against *Small*, for taking insufficient sureties on the replevin bond, the plaintiff objected as irrelevant, but *Parris J.* admitted it, and instructed the jury that, if from other evidence offered in the case, they were satisfied that *Hale* and *Jones*, the principal and surety on the replevin bond, were insolvent at the

time when the defendant became entitled to maintain a suit on said bond, and that they had not then, or at any time since, any property by law liable to attachment, so that by a suit on said bond, the defendant could not have availed himself of any property, to apply to the satisfaction of the plaintiff's execution against *March*, their verdict should be for the defendant. But if *Hale* and *Jones*, or either of them, had property which could have been attached, at the time when the defendant could have legally commenced a suit on the replevin bond, or at any time thereafter and before the commencement of this action, then it was the duty of the defendant to have secured such property by attachment on a writ on the replevin bond, and their verdict should be for the plaintiff to the amount of what might thus have been secured.

It appeared that *Hale* failed in business and became notoriously insolvent, in 1830, and was not known to have had any attachable property subsequent to that time; but that *Jones* was the owner of one third of a brig, which was sold by him on the 14*th* of *November*, 1832; and it did not appear that he had any attachable property subsequent to that time.

In regard to the question, at what time the defendant could have legally commenced an action on the replevin bond, it appeared that, the term of this Court at which the replevin suit was determined, commenced on the 6*th* of *November*, 1832, and that on the Clerk's docket, under that action, were the following entries: "Plaintiff discontinues 1st day. Costs and a return ordered. Continued nisi. Plaintiff to be heard in taxation of costs. Judgment, *Dec.* 17, 1832. Damages $63,12. Costs $60,93."

The jury found that *Jones* had available property to the amount of $400, up to the 14*th* of *December*, 1832, but none afterwards; and that *Hale* had none then or at any time since.

It was admitted that, previous to the commencement of this action, the defendant tendered to the plaintiff's attorney, an instrument assigning to the plaintiff the replevin bond, and authorising him to prosecute the same for his sole use and benefit, in the defendant's name; which he declined accepting.

The defendant proved, that he was reluctant to make the attachment on the original writ in favor of the plaintiff, against

*March*, being apprehensive that the property would be replevied; that, the said Chase, through his attorneys thereto authorised, engaged that in case the property should be replevied, he, the said *Chase*, would take upon himself the defence of the replevin suit; and that, in pursuance of said engagement, he did procure counsel to defend that suit, and took upon himself the sole and entire management of the defence; and the defendant contended that if it was his duty at all to prosecute the replevin bond, which he denied, it was not his duty so to do until the said *Chase* had procured a judgment for a return of the goods and chattels replevied, and notified him of that fact, and requested him to pursue the remedy on the replevin bond.

A verdict was taken *pro forma* for the plaintiff, subject to the opinion of the whole Court upon the report of the case.

*N. Emery* argued the case for the defendant, and cited *Gibbs* v. *Bull*, 18 *Johns.* 435; *Ladd* v. *North*, 2 *Mass.* 514; 2 *Ld. Raym.* 530; *Buller's N. P.* 243; 5 *T. Rep.* 256; 10 *Johns.* 587: *Kindel* v. *Blake*, 5 *Taunt.* 225; *Rice* v. *Hosmer*, 12 *Mass.* 127.

*Longfellow*, for the plaintiff.

The defendant, as an officer, had a writ against *March* — he made an attachment of sufficient property to have satisfied the debt due to the plaintiff — he is liable for it, if it were the property of the debtor, unless he be relieved by the act of God, or the public enemy. It is matter of policy in the law to prevent collusion between him and the debtor; — and in consequence of this he acquires a special property in the goods attached, a property that neither the creditor or debtor can interfere with. *Ladd* v. *Blunt*, 4 *Mass.* 402.

It is insufficient for the officer to say that the property has been taken out of his hands by a writ of replevin, unless it appear that the plaintiff in replevin succeeded.

If property be taken from an officer by replevin, he has his remedy on the replevin bond — it is the security of the officer, and not of the creditor — the latter has nothing to do with it — the creditor looks to the officer, and the latter to his replevin bond.

The language of the statute, it is admitted, is "sufficient surety or sureties." So was the language of the English statute of bail, and yet if an officer took but *one surety*, who though good at the time, afterward turned out to be otherwise, the officer was held liable. We contend for the same doctrine here. In all cases it it is the duty of the sheriff to satisfy himself of the sufficiency of the bond — the law invests him with power to do this — if the coroner do not furnish such a bond, the officer will decline giving up the property attached. The case of *Ladd* v. *North*, which is similar to this, is confirmed by *Phillips* v. *Bridge*, 11 *Mass.* 247; *Tyler* v. *Ulmer*, 12 *Mass.* 163.

The defendant is further liable, because he did not commence a suit on the replevin bond on the 6*th* day of *November*, as he might, when the surety in the bond had property which could have been attached.

The case against *Small*, was not admissible evidence in this case, because it was between other parties — there was no privity on the part of the present plaintiff.

Weston J. delivered the opinion of the Court at the ensuing *April* term in *York*.

A verdict has been returned in favor of the plaintiff, subject to the opinion of the Court, grounded upon an alleged failure of duty in the defendant, in his official capacity. He attached certain goods at the suit of the plaintiff, as the property of his debtor, *March*. These goods were replevied by *John Hale*, in due course of law, who claimed them as his property. The officer, who was charged with the service of the writ of replevin, was bound to execute it, provided the plaintiff in that writ gave bond, with sufficient surety or sureties, to the defendant, conditioned as the law directs. It was the business of the officer, having the replevin writ, to determine at his peril, whether the condition upon which he was to proceed, had been complied with. He was then to act; and his authority could not lawfully be resisted. It was not for the defendant to refuse to submit to the writ of replevin, on account of the alleged insufficiency of the bond. That would have occasioned an unseemly contest between different officers of the law, tending to bring its authority into contempt.

The responsibility as to the sufficiency of the bond, did not rest upon the defendant, but upon the officer serving the replevin. He was held liable to respond in damages, if he presumed to receive a bond, which was not sufficient.

In yielding to the replevin then, the defendant did not violate, but fulfilled his duty. The defendant must be held justified, for yielding to the requirements of law. In receiving the bond, and defending against the suit in replevin, the defendant acted in trust for the plaintiff, the attaching creditor, to whose use, the damages recovered by the defendant, by law enured. *Revised Laws, ch.* 80, *sec.* 4. The suit brought by *Hale*, was defended with vigilance and with success. *Hale* discontinued that suit on the sixth of *November*, 1832, being the first day of the term. The minute on the docket of that day is, "costs and a return ordered, continued nisi, plaintiff to be heard in the taxation of costs." A further entry on the docket is, "judgment, *December* 17, 1832." Taking the entry together, we must understand that upon the discontinuance, the defendant moved for a return and costs, and the order of that day indicated, that such was to be the judgment, when rendered. The Court did not then render judgment, but continued the cause. The plaintiff was to be heard in the taxation of costs, and time was necessary for that purpose. It does not appear, that the defendant did not move for final judgment as speedily, as the pressure of business before the Court, would admit.

The obligation to return the goods replevied, or to pay the costs was not fixed upon the plaintiff in that suit, or his surety, until it was awarded by the judgment of Court. He was to pay such damages and costs, as the defendant might recover against him, and return the goods, if such should be the final judgment of the court. Until judgment therefore, the replevin bond could not be put in suit. And the case finds that any attempt to proceed with it afterwards, would have been altogether fruitless. Indeed, according to the case of *Ladd* v. *North*, 2 *Mass.* 514, the bond could not have been sued until a later period. *Parsons C. J.* there says, "if the *retorno habendo* was returned unsatisfied, he (the sheriff or his deputy) might obtain indemnity by action on the replevin bond; or, if the pledges were insufficient, by suit against

the coroner." And this he held to be the common law here, as well as in England.

Whether the defendant was bound, acting in trust, to sue the coroner for the insufficiency of the bond, we need not decide. He did so, and in so doing, proceeded with fidelity for the benefit of the plaintiff. If it was a part of his duty, he had a right to prove its performance; if not, as a measure prosecuted in behalf of the plaintiff, it was properly received in evidence; as was the replevin itself and its termination. It was involved in the issue, charging the defendant with a failure of duty, and was necessary for his justification. Indeed, from beginning to end, the defendant appears to have maintained the character of a vigilant and faithful officer. If by great diligence, of which there is no sufficient evidence, the defendant might have obtained judgment against *Hale*, prior to the fourteenth of *November*, when his surety parted with his last property, and if the bond might before that have been put in suit, which is not admitted, the plaintiff, and not the defendant, is chargeable with negligence. In pursuance of a previous agreement, the plaintiff took upon himself the whole charge and management of the replevin suit. If final judgment was not obtained, as speedily as it might have been, the fault was his. In whatever point of view we regard it, there does not appear the least pretence for maintaining the action; and the verdict is accordingly set aside.

*Plaintiff nonsuit.*

## MOSHER *vs.* ROBIE *& al.*

In an action of trespass against Parish assessors, it was holden, that the following vote, *viz:* "*to allow the collector* $10 *for collecting the taxes,*" passed at the same Parish meeting with the vote raising $250 for the support of the minister, and $30 for the music, did not authorise the assessors to include the $10 in their assessment.

The statute of 1826, *ch.* 337, providing, "that the assessors of towns and parishes, &c. shall not hereafter be made responsible for the assessment of any tax which they are by law required to assess; but the liability, if any, shall rest solely with said town, &c. — and the assessors shall be responsible only, for their own personal faithfulness and integrity" — was holden to afford no protection to Parish assessors, for including in their assessment of a tax, a sum not raised by a vote of the Parish, exceeding the authorised overlay of five per cent.

THIS was an action of trespass, for taking and carrying away and converting to the defendant's use, certain goods and chattels, the property of the plaintiff. The general issue was pleaded and joined; and the defendants also filed a brief statement alleging that they were the assessors of the First Parish in *Gorham*, and that all the acts by them done were done in that capacity.

The property was taken and sold by the collector of taxes for the First Parish in *Gorham*, to satisfy a Parish tax assessed on the plaintiff for the year 1832.

From the Parish records it appeared, that at a meeting, on the 3*d* of *April*, 1832, the Parish voted "to assess on the polls and estates, $200 for *Mr. Pomeroy's* salary, $20 for taking care of the vestry, and $30 for the music," which with an overlay of five *per centum* would amount to $262,50; but from the copy of assessment lodged in the assessor's office, it appeared that the whole amount of the assessment was $265,20.

The counsel for the defendants contended, that to the money voted and raised by the Parish, and authorised to be raised as aforesaid, the sum of $10 should be added by virtue of a vote passed at the same Parish meeting, in the following words, *viz:* "Voted, to allow the collector ten dollars, for collecting the taxes." The counsel for the defendants further contended, that if the jury should be satisfied that the assessors in their assessment, *by mistake* exceeded the sum authorised to be raised by the Parish, to be assessed on the polls and estates, they would not be lia-

ble in this action. But *Parris J.* ruled otherwise on both points. If it was correct, the verdict, which was for the plaintiff, was to stand, otherwise, to be set aside and a new trial granted.

*Longfellow*, for the defendants, contended, that it was not necessary for the defendants to show a vote in any particular form of words, raising the sum — or in so many words instructing the assessors to assess a tax to a certain amount — but if it be clearly the intention of the Parish that a sum should be raised, then the assessors are authorised to assess it.

It is manifest, that the $10 to the collector, was to be in *addition* to the $250. The $10 could not be deducted from that sum, because that was all specifically appropriated.

2. But if the defendants were mistaken in regard to their authority, we then contend, that they are protected by the provisions of statute of 1826, *ch.* 337. The object of the legislature being to protect public officers, in a fair and honest exercise of their duties, such construction of the law should be adopted by the Court, as would effectuate this intention. We contend, that by this statute, in no case are assessors liable, unless they act *wilfully and designedly wrong*.

*N. Emery*, for the plaintiffs, cited *Barnes* v. *Hearn*, 11 *Mass.* 59; *Agry* v. *Young*, 11 *Mass.* 220; *Stetson* v. *Kempton*, 13 *Mass.* 272.

Parris J. delivered the opinion of the Court as follows:

By statute, *chap.* 116, *sec.* 14, assessors are authorised and empowered to apportion on the polls and estates, according to law, such additional sum, over and above the precise sum to them committed to assess, as any fractional division of such precise sum may render convenient in the apportionment thereof, not exceeding five *per centum* on the sum so committed. — But the assessment of more than five *per cent.* above the sums voted to be raised, makes the assessment illegal and void. *Libby* v. *Burnham*, 15 *Mass.* 144.

In this case, the assessment was too large, unless the sum allowed to the collector for collecting the taxes, can be considered as constituting a part of the sum committed to the assessors to assess.

Such, we think, cannot be considered the legal construction of the vote, especially when compared with the other vote, passed at the same meeting.

The Parish first vote to *assess on the polls and estates* of the parishioners, certain sums for the minister's salary, for taking care of the vestry, and for music, and this is the only vote for the assessment or raising of money. Subsequently, the Parish vote to allow the collector ten dollars, for collecting the taxes. It is contended, that it must be presumed, that the Parish intended to raise this additional sum for paying the collector, and to have it included in the assessment, as there was no other way of providing the means. That does not appear. We do not know but the Parish had a productive fund, from the proceeds of which this sum was to be paid, or an unexpended balance remaining in the treasury. The vote, allowing the collector a certain sum for his services, is similar, in its legal effect, to a vote, allowing an account for any other services. It authorises the payment of such account, but it does not provide the means. So far as we are acquainted with the mode of transacting business by towns or parishes, it has never been considered that a vote to allow or pay accounts, was a vote to raise or assess money; especially since the case of *Libby* v. *Burnham*, where, as stated by counsel, the excess of assessments arose from the assessors' adding the fees or commissions, allowed by the town to the collector; and the Court decided that such excess rendered the whole assessment illegal and void.

If the assessment made by the defendants is void, it follows, that they are answerable in this action, unless protected by the statute of 1826, *ch.* 337, *sec.* 1. That statute provides, "that the assessors of towns, plantations, parishes, and religious societies shall not hereafter be made responsible for the assessment of any tax, which they are by law required to assess; — but the liability, if any, shall rest solely with said towns, plantations, parishes, and religious societies; — and the assessors shall be responsible only for their own personal faithfulness and integrity."

We readily admit the soundness of the position, taken by the defendants' counsel, that such a construction should be given to this statute as will carry it into effect. In order to understand the object of the framers of the statute, it should be kept in mind,

that previous thereto, assessors were not only answerable for their own neglects, but also for the omissions or illegal acts of others. *Stetson* v. *Kempton*, 13 *Mass.* 272. If they assessed a tax, void by reason of irregularity in the proceedings of the town, or parish, or its officers, the assessors were held responsible to the individual assessed, provided the assessment was enforced.

The object of the statute of 1826 was, no doubt, to relieve them from this hazardous accountability for the omission of others, permitting them to remain answerable only for their own misdoings.

If they assess what they are not by the corporation, of which they are assessors, required or authorised to assess, the protecting statute does not reach them. It could not have been intended, that in such a case, the individual aggrieved should be without redress. The tax is void, in consequence of the proceedings of the assessors. The property of a citizen has been taken by their order, contained in their warrant to the collector, to satisfy this void tax, and can it be that the law affords no remedy?

Is the parish answerable? It has in no way authorised the procedure. It did not require the assessment of the excess; and unless made liable by statute, cannot be holden to the party injured by such assessment.

It is not a faithful discharge of the assessors' duty, to require a collection greater than is authorised by the vote of the town or parish, and the additional five *per cent.* allowed by law.

The question, whether an individual is liable to taxation in a particular town or parish, is often one of very considerable nicety, and which, with the exercise of all personal faithfulness and integrity, may sometimes, by assessors, be decided wrong; and yet it has been held in *Massachusetts*, where assessors are responsible only for their integrity and fidelity, that if the assessors of a religious society, assess a tax on a person who is not a member, they are liable to an action of trespass: — for they do not come within the provisions in the statute, that in certain cases, they shall be responsible only for their own integrity and fidelity. *Gage* v. *Currier*, 4 *Pick.* 399.

We think the true construction of our statute, *ch.* 337, *sec.* 1, is to leave the assessors answerable for their own misdoings, and relieve them from all liability, arising from the misdoings of others.

## THOMES *vs.* MOODY.

A, being the owner and occupant of a farm, was forcibly expelled therefrom by B, C, and D, — the former conveying the premises at the same time to C, and he leasing them to D, for a year. D entered, and improved for a period of about nine months, and raised and gathered the crops. At the expiration of the nine months, A was restored to the possession, by judgment of Court, on a process of forcible entry and detainer. The crops, raised by the labor of D, being then in the barn, on the premises, were taken and converted by A to his own use. In an action of trover, brought therefor by D, it was held that A, under the circumstances, was legally entitled to the crops taken, and that the action could not be maintained.

THIS was an action of *trover* for five tons of hay, four barrels of wheat in the chaff, twenty loads of manure, and a lot of plank and boards, and was tried upon the general issue, before *Parris J.*, *Nov.* term, 1833. The jury found for the defendant, as to all the property described in the writ, except the hay and wheat, and as to these, the following facts appeared in evidence.

On the 14*th* of *May*, 1832, one *Samuel Moody*, not having either title or possession, by deed conveyed to *William Thomes*, the plaintiff's lessor, the homestead farm of *Edmund Moody*, deceased, and put the said *William Thomes* into possession, in the manner hereafter mentioned; and the said *William*, on the same day, leased the premises to the plaintiff for one year; and the plaintiff immediately entered into possession, and improved the premises until the 28*th* of *February*, 1833, and the hay and wheat aforesaid, were grown on said premises, under and during the occupancy of the plaintiff, and were cut and cured by him.

It appeared that *Samuel Moody* was administrator on the estate of *Edmund Moody*, deceased, and that the defendant was one of the heirs at law of said deceased, and was, on the 14*th* day of *May*, 1832, in the possession and occupation of the premises, residing in the house standing thereon, with his family; that the plaintiff, on that day, with *Samuel Moody* and others, made a forcible and unlawful entry into the premises, and forcibly and unlawfully expelled the defendant therefrom, and kept him out of possession until the 28*th* of *February*, 1833, when the defendant was restored to the possession, under a judgment duly rendered in his favor, on a process of forcible entry and detainer.

During the time between the 14*th* of *May*, 1832, and the 28*th* of *Feb.* 1833, the plaintiff had the sole and exclusive possession and occupancy of the premises, under his lease.

When the defendant was restored to the possession, on the 28*th* of *February*, the hay and wheat were in the barn standing on the premises, and he converted said hay and wheat to his own use.

For the purpose of having all the facts settled, so that by a decision of the law the case might be determined, the presiding Judge directed the jury to find the value of the hay and wheat, which they did.

If, in the opinion of the whole Court, the plaintiff could maintain his action on these facts, judgment was to be rendered on the verdict, otherwise the verdict was to be set aside and a nonsuit entered.

*Longfellow*, for the defendants, cited the following authorities, in support of positions which were sustained by the opinion of the Court. *Higginson* v. *York*, 5 *Mass.* 341; *Loomis* v. *Green*, 7 *Greenl.* 386; *Cox & al.* v. *Callender*, 9 *Mass.* 543; *Cummings et ux.* v. *Noyes*, 10 *Mass.* 433.

*Fessenden* and *Deblois*, for the plaintiff, contended that the deeds and acts of *Samuel Moody*, *William Thomes*, and the plaintiff, on the 14*th* of *May*, constituted a *disseisin* of the defendant —and that as a disseisor, the plaintiff had *title*, though subject to be defeated by the true owner. All the defendant's rights therefore to the herbage and produce were suspended until reentry, when he might have had his action to recover the mesne profits. *Knevett* v. *Pool & al. Cro. Eliz.* 464; *Allen* v. *Thayer*, 17 *Mass.* 299; *Fletcher* v. *McFarlane*, 12 *Mass.* 43.

The law makes a distinction between a personal chattel and real estate. In regard to the former the *trespasser* is considered such throughout. Not so in the latter. While he is answerable for the *first* act in *trespass*, for all the subsequent acts he is not until after a re-entry. He becomes *pro hac vice* the owner.

In an action of trespass for mesne profits, the plaintiff recovers what may be deemed a reasonable rent, and not the value of what the trespasser raises. The *labor* of the plaintiff had be-

come incorporated into the hay and wheat, when taken by the defendant, and certainly to this he was not entitled, nor could he appropriate it to his own benefit.

Again, the defendant was not entitled to the crops, because they had been *severed* from the land; it might have been otherwise had they been standing at the time of his re-entry.

MELLEN C. J., at a term holden by adjournment in *August* following, delivered the opinion of the Court.

On the 14*th* of *May*, 1832, the defendant, one of the sons of the late *Edmund Moody*, was peaceably occupying and possessing the farm and dwellinghouse thereon standing, of which his father died seised, and on that day, he was, in a forcible and unlawful manner, turned out of possession of the same by the plaintiff, *Samuel Moody*, and some others; and with force and a strong hand, he was kept out of possession until the 28*th* of *February*, 1833, at which time he was restored to, and regained the possession. It is not pretended that the plaintiff has, or ever had any title to the said farm; he was, during the period of his unlawful possession, merely the lessee of *William Thomes*; and he had no other title than under a deed, from the above named *Samuel Moody*, who at the time of making the deed, had neither a title to the farm, nor even possession. The *hay* and *wheat*, for which the present action of trover is brought, grew on the farm, during the tortious and unlawful possession of it by the plaintiff, and the defendant, when he regained possession, found the above property there, and appropriated the same to his own use. Can the plaintiff maintain this action? The act of the plaintiff and his associates, in turning the defendant out of possession, was a *trespass*, for which he could at once have maintained an action of trespass, against all concerned or any of them. But the plaintiff's counsel says, that the above act of dispossession and exclusion, amounted to a *disseisin*. If we so consider the conduct of the plaintiff, will it aid him in this action? It is a well settled principle of law, that if a disseisee, having a right of entry, enters, he may afterwards have trespass against the disseisor, with a *continuando* for the whole time of his possession. *Co. Lit.* 257, *a*; 2 *Roll.* 550; 5 *Comyn Dig. Trespass B.* 2; *Cox* v. *Callen-*

*der*, 9 *Mass.* 533. In the present case, the defendant was restored to his possession of the premises, in about nine months after his expulsion; and the *manner* of his restoration did not give him less perfect rights, than he would have acquired by a lawful entry in the usual form; he therefore, on regaining his possession, had a legal right to recover damages against the plaintiff, for all injuries done to him by such violence, trespass, and exclusion. This being undisputed law, on what ground can this wrongdoer be permitted to recover the fruits of his wrong, against him whom he has wronged, who is also an owner in fee, of the land which produced the hay and wheat in question? This view of the cause, seems to do away the distinction made by the plaintiff's counsel, between this and the case of *Higginson & al.* v. *York*, 5 *Mass.* 341: as the Court said in the case of *Cox & al.* v. *Callender*, "the entry of the disseisee, when he has a right of entry, changes the *disseisin* into a trespass:" and so, according to *Higginson & al.* v. *York*, the plaintiff, by his wrongful acts, acquired no property in the product of his labor, *as against the owner of the land;* although he might maintain an action of trespass or trover against a *stranger*, for the taking or appropriating such property without his consent. The verdict must be set aside and a nonsuit entered.

## CHESLEY *vs.* BROWN.

In an action of debt brought against one in pursuance of the provisions of *stat.* of 1821, *ch.* 105, *sec.* 5, to recover a penalty for falsely, corruptly and wilfully certifying to a greater number of days attendance as a witness in a cause, than were actually attended, it was held to be sufficient for the plaintiff to prove that the certificate was *false;* — that it was made *corruptly* and *wilfully* would follow as a legal inference, unless proved by the defendant to have been made otherwise.

*Held* also, that it was the duty of the jury to return a verdict merely of the *indebtedness* or *non-indebtedness* of the defendant, and that it was the proper office of the *Court* to assess the fine or penalty.

*Held* further, that where the penalty was not less than $5, nor more than $30, and the plaintiff recovered less than $20, the action having been originally commenced in the Court of Common Pleas, he was nevertheless entitled to *full costs.*

THIS was an action of debt founded on the 5th *sec.* of *ch.* 105 of the revised statutes, which provides that, "if any witness shall falsely, wilfully and corruptly certify that he has travelled a greater number of miles, or attended a greater number of days than he has actually travelled or attended, he shall forfeit and pay, not less than five dollars nor more than thirty dollars for each offence, to be recovered with costs, either by presentment in the Supreme Judicial Court or Court of Common Pleas, in which case the forfeiture shall accrue to the State, or by *action of debt* in any Court of *competent* jurisdiction, in which case the forfeiture shall be for the use of *any person* who may sue for the same."

The declaration set forth a case, in the language of the statute, of a false certificate made by the defendant as to the number of days attendance as a witness in a cause pending in the Court of Common Pleas in the county of *Cumberland.* The general issue was pleaded; on which the case was tried before *Whitman C. J.* in the Court of Common Pleas.

The counsel for the defendant contended that, it was not enough for the plaintiff to support the issue, to prove merely that the certificate of the defendant was false, but that he was bound to prove that it was made *corruptly*, *falsely* and *wilfully*. But the Court ruled that, if the plaintiff proved the certificate *false*, it must be

presumed to have been done corruptly and wilfully, unless the defendant could show it to have been done otherwise, and so instructed the jury. And the Court further instructed the jury that if they should find for the plaintiff, they might find the defendant indebted in manner and form as the plaintiff had alleged, without anything more, and that the Court would fix the amount of the forfeiture or penalty. The jury returned their verdict for the plaintiff according to these instructions, and the Court awarded the sum of five dollars, as the penalty to be recovered by the plaintiff, with *full costs* of suit.

To the above ruling and instructions the defendant filed his bill of exceptions, on which the cause was brought into this Court. He also filed a motion for judgment in his favor *non obstante veredicto*, the jury having neither found or assessed any damages therein; but the Court overruled and refused the motion.

*Fessenden*, *Deblois* and *Haines*, for the defendant, contended that the ruling of the Judge in the Court of Common Pleas was erroneous. It was not the duty of the defendant to show that the act done by him was not done *corruptly* and *wilfully*; but the burthen of proof in this respect was on the plaintiff. The statute is a highly penal one, and should therefore be strictly construed, and the offence strictly proved.

To constitute the offence, the certificate must have been made not only falsely but *corruptly* and *wilfully*. This is a material averment in the declaration, and consequently should be proved. *Gibson* v. *Jenney*, 15 *Mass.* 205; *Esp. Ev.* 128; *Commonwealth* v. *Samuel*, 2 *Pick.* 103; *Little* v. *Thompson*, 2 *Greenl.* 228; *Moore* v. *Bosworth*, 5 *Mass.* 306; *Greenfield* v. *Cushman*, 16 *Mass.* 393; 1 *Stark. Ev.* 377; *Williams* v. *East India Co.* 3 *East*, 192; 1 *Stark. Ev.* 379; *Rex* v. *Rogers*, 2 *Camp.* 654; *Powell* v. *Milburn*, 3 *Wil.* 162; 1 *Phil. Ev.* 158; *Rex* v. *Corden*, 4 *Burr.* 2279.

2. The jury should have been instructed to find the penalty. It is according to the course of the common law that they should thus find. *Little* v. *Thompson*, 2 *Greenl.* 228; *Holloway qui tam* v. *Bennett*, 3 *T. Rep.* 448; *Pushall* v. *Layton*, 2 *T. Rep.* 512. And where a statute gives damages the jury must assess them. *Lobdells* v. *New Bedford*, 1 *Mass.* 153; 1 *Dane's Abr.* 548; *Cross* v. *U. States*, 1 *Gall.* 26.

In this case, there being a *maximum* and *minimum* of damages or penalty, the jury who are to judge of the aggravation should find the penalty. Where, however, the fine goes to the State, the Court may give judgment for it; but when it goes to the individual suing therefor, the jury must assess it. *Dyer* v. *Hunnewell*, 12 *Mass.* 271; *Stilson* v. *Tobey*, 2 *Mass.* 521.

3. But if the plaintiff is entitled to recover any thing, he is entitled to *quarter costs* only. The action was commenced originally in the Court of Common Pleas, and he recovered less than $20.

*J. C. Woodman*, for the plaintiff, being stopped by the Court, as to the first point, cited the following authorities, to shew that it belonged to the Court to assess the penalty: 1 *Chitty Pl.* 97, 325; *North* v. *Wingate*, *Cro. Chas.* 559; *Sayer on Dam.* 63, 71; *North* v. *Musgrave*, 1 *Roll's Abr.* 574; 9 *Dane's Abr.* 457; *Moore* v. *Smith*, 1 *Greenl.* 490; *Eddy* v. *Oliver*, 5 *Dane's Abr. art.* 254, *sec.* 3.

The Court of Common Pleas being, in this case, a court of *competent jurisdiction*, the plaintiff is entitled to *full costs*. *Hathorne* v. *Cate*, 5 *Greenl.* 74; *Burnham* v. *Webster*, 5 *Mass.* 270; *Lyman* v. *Warren*, 12 *Mass.* 412; 9 *Dane's Abr. ch.* 148, *art.* 14, *sec.* 4.

The opinion of the Court was delivered at an adjourned term of the Court, held in this county, in *August* following, by

MELLEN C. J. — This action is founded on the 5th section of chapter 105 of the revised statutes, which provides, that "if any witness shall falsely, wilfully, and corruptly certify that he has travelled a greater number of miles, or attended a greater number of days, than he has actually travelled or attended, he shall forfeit and pay, not *less* than five dollars nor *more* than thirty dollars for every offence, to be recovered with costs, either by presentment in the Supreme Judicial Court, or Court of Common Pleas, in which case, the forfeiture shall accrue to the State, or by *action of debt* in any court of *competent* jurisdiction; in which case, the forfeiture shall be for the use of *any person* who may sue for the same." On the plea of *nil debit* the action was tried in the Court of Common Pleas, and is now before us, on

exceptions taken to the instructions given to the jury. The question is, whether *either* of them was incorrect. The exceptions state, that the certificate of the defendant was *false,* because he certified *two* days attendance, when in fact, he attended as a witness but *one* day.

1. Was the *first* instruction of the presiding Judge correct? He instructed the jury, that if the certificate was proved to them to be *false,* it must be *presumed* to have been made *wilfully* and *corruptly,* unless the defendant could prove it to have been made *otherwise.* It does not appear that he offered any extenuating or explanatory evidence, tending to repel the presumption mentioned by the Court: of course, we may properly conclude, that no such evidence existed. In an action of slander, for words in themselves actionable, the plaintiff is not obliged in the opening of his cause, to do anything more than prove the speaking of the words as alleged. The legal presumption is, that they were uttered maliciously; but the defendant may repel and control this presumption by proving the *truth* of the words; or, if not, that they were spoken *lawfully,* or in circumstances showing that there was *no malice whatever.* These are familiar principles in daily practice. So in actions for malicious prosecution, *malice* is presumed, in the absence of proof of *probable cause.* So in case of homicide, the general rule is, that the law infers malice from the very act of killing; and all the circumstances of necessity, accident, or infirmity which justify, excuse or extenuate the act, are to be proved by the prisoner. *Foster's Crown Law,* 255; 2 *Stark. Ev.* 948. So the law presumes malice, in the case of homicide by poison. *Starkie, vol.* 1. *page* 23, says, "The ground of all presumptions is the necessary or usual *connection* between facts and circumstances, the knowledge of which *connection* results from experience and reflection. A presumption may be defined to be an inference as to the existence of a fact, *not* actually *known,* arising from its necessary or usual connection with others which *are* known." When the defendant certified *falsely* that he had attended as a witness *two* days, when in fact, he had attended but *one,* he must be *presumed* to know that he certified a *falsehood:* indeed, the case states the fact that it was a *falsehood*: why then should not the above principle, quoted from

*Starkie*, be applicable; namely, that facts *not* known, should be presumed from their usual connection with those which *are* known. *Falsehood* and *fraud* are intimately connected; and when a man puts his name to a falsehood, certifying it to be the truth, must he not be *presumed* to have done it *wilfully* and *corruptly*? Could he have done it with any good motive, or under circumstances which would excuse it? If he could, the defendant had an opportunity to prove it in the present case. We are all of opinion that the *first* instruction of the Judge was correct, and consonant to well settled principles.

2. The *second* question is, whether it was the province of the *Court* or the *jury* to decide the amount of the forfeiture incurred by the unlawful act of the defendant. It is clear that he cannot have suffered anything by the assessment of the amount by the Court, inasmuch as the statute *minimum* was the amount. The case of *Holloway* v. *Bennet*, was a *qui tam* action to recover *several* penalties for *several* breaches of the act of 13 of *Geo.* 3. The jury gave a verdict for only *one* penalty of £50. Whether *more* than one had been forfeited, was a question of *fact* for the jury to decide. The case of *Lobdell* v. *New Bedford*, was an action against the defendant for a defect in a highway, for which *double* damages were recoverable. The jury gave a verdict for *single* damages, and the Court entered judgment for double the amount. In the case of *Cross in error* v. *United States*, 1 *Gal. Rep.* 26, it was decided, that in a case where *double* damages were recoverable, the jury might assess them or the Court. But that was an action for a penalty equal to *double* the value of a vessel and cargo, as forfeited under the embargo act of *January* 9, 1808: of course, in such a case it was the exclusive province of the jury to decide the *single value* of the vessel and cargo. The foregoing cases, cited by the defendant's counsel, evidently differ from the case before us; for in this, no value of property is to be estimated, and *only one* penalty is demanded. In the case of *Stilson* v. *Tobey*, 2 *Mass.* 521, in a note, it is stated by *Parsons C. J.* that the issue in that case was joined on the plea of *not guilty*, and that upon *such* a plea, if the jury find the defendant guilty, they ought also to *find the forfeiture*, which they had not done. In the case of *Commonwealth* v. *Stevens*, 15

*Mass.* 195, the plea was, *not guilty.* The counsel for the defendants cited the case of *Stilson* v. *Tobey*, in support of his objection that the Court should not have imposed the fines, but that it was the province of the jury to assess the penalty; yet the Court, in giving their opinion, say, "under the plea of *not guilty* the jury *could not* assess the fine. Had the respondent pleaded *nil debit*, which would have been the most regular, it would have been *otherwise.*" The above prosecution was instituted by complaint before a justice of the peace, to recover two fines for unmilitary conduct on two muster days, and decided on appeal in the Court of Common Pleas. These two cases seem to be in direct opposition to each other. According to the law, as laid down by *Parsons C. J.* in *Stilson* v. *Tobey*, the proceedings in *Commonwealth* v. *Stevens*, should have been quashed; for *both* cases were tried on the plea of *not guilty.* Chapter 51 of the revised statutes, in the 11th section, requires that every executor, knowing of his appointment, shall within thirty days next after the death of the testator, cause such will to be filed in the probate office, for probate; and provides that every executor who shall neglect so to do, without just excuse, accepted by the Judge of Probate, shall forfeit a sum not exceeding sixteen dollars per month, until he shall so file such will; and that judgment may be rendered *by the Court* for *any sum*, not exceeding sixteen dollars per month as aforesaid. Here is a legislative declaration as to the propriety of having the amount of penalty settled by the *Court*, rather than the jury, where no sum *certain* is fixed by law, as in that case and in the case before us. It is very clear, that if the defendant had been prosecuted by indictment for the penalty incurred, instead of an action of debt, the jury could have only found the issue, guilty or not guilty, and the Court would have settled the amount of the penalty to be exacted of the defendant; now what reason can be assigned why they should not do the same in an action of debt? If the amount is to depend on the sound discretion of the Court in *one* case, why not in the *other.* Besides, the declaration alleges that by the offence charged, the defendant has forfeited a sum not less than *five* dollars nor more than *thirty* dollars. The plea is *nil debit;* this does not put the *amount* in issue, but only the question whether

the defendant owes *anything;* or in other words, whether he has *violated the statute*, and incurred any forfeiture. Considering that the authorities seem to sanction either course of proceeding in such cases, and that no possible injury can have been done to the defendant by the decision of the Court, in assessing the *minimum* penalty, we do not feel disposed to grant a new trial on that ground, but sustain and approve of the instruction given by the Judge. See also *Cro. Car.* 559, and *Sayer on damages*, 63, 71.

3. As to the question of costs, it is true that by the 3d section of chapter 59 of the revised statutes, a plaintiff who shall recover no more than twenty dollars debt or damage, in any action originally commenced in the Court of Common Pleas, shall recover no more than one quarter part of such debt or damages, as his costs: but this provision was undoubtedly designed to apply to those cases where the action *might* have been commenced before a justice of the peace; and the loss of a large part of his costs was intended as a sort of punishment upon him for unnecessarily and improperly commencing his action in the Court of Common Pleas, when a less expensive tribunal was open to him. We must, as other courts have done, give a reasonable construction to the above section: hence, it has been decided, that if the plaintiff's damages are reduced below $20 by means of the defendant's offset, still, full costs have been allowed. In the present instance, it will be found on examination, that the plaintiff could not have commenced his action before a justice of the peace of the county of *Cumberland*, because the defendant is an inhabitant of the county of *Oxford;* nor before a justice of the peace in the county of *Oxford*, because the *offence* was committed in *Portland* in the county of *Cumberland*. On this point we allude to the provision in the forty-fifth section of *ch.* 59 of the revised statutes, which is, that in all informations to be exhibited, and in all actions or suits to be commenced against any person or persons on behalf of *any informer*, or on behalf of the State and any informer, for any offence committed against any penal statute, the offence shall be laid and alleged to have been committed in the county where it was in fact committed, and if not proved to have been *there* committed, the issue shall be found

for the defendant. The penalty sued for in this case is recoverable by *any person* who will sue for the same; that is, as *Judge Blackstone* says, by any *common informer;* 3 *Bl. Com.* 161; and in this capacity the present plaintiff prosecutes. We may further remark that in the case of *Carroll & al.* v. *Richardson, Treasurer, &c.* 9 *Mass.* 329, which was an action for a penalty, made recoverable *by the defendants only*, and not by a *common informer*, the Court say, that though the penalty was from *two* to *fifty* dollars, still the defendants, who were the original plaintiffs, had a right to claim and sue for *less* than the *whole* penalty, as they had done, by suing for $20 only; but had the forfeiture been wholly to the *public*, or part to the *plaintiff* and part to the *public*, or to a county, town, &c. the objection would certainly have great weight. On the whole we think the instruction of the Judge on this point also was correct. And we are all of the opinion that the exceptions cannot be sustained.

*Exceptions overruled and Judgment on the verdict.*

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## McLellan *vs.* Lunt, *Adm'r.*

The statute of 1821, *ch.* 52, limiting suits against an administrator to *four years*, may be effectually pleaded in bar to an action of debt commenced *after* the lapse of four years, on a judgment recovered against the administrator *within* the four years.

This was an action of debt against the defendant as administrator of the estate of *Daniel Lunt*, and was founded on a judgment recovered against the defendant, as administrator, within four years from the time of his taking upon himself that trust, this action not having been commenced until after the lapse of said four years. The defendant relied, in his defence, upon the statute of 1821, *ch.* 52, limiting actions against administrators to four years, and the question was, whether it was a good defence.

*Daveis*, for the plaintiff, contended that the four years in the statute apply only to the original demand. The object of the provision was, that administrators may have *notice* of the de-

mands against the estate. See the preamble of *Mass.* statute of 1788, *ch.* 66; statute of 1791, *ch.* 28; *Church* v. *Crocker*, 3 *Mass.* 22; *Roys* v. *Barrell*, 13 *Mass.* 398.

The object of the statute in this case, was answered by the recovery of the first judgment. The filing of a claim before commissioners on an insolvent estate, will save it from the operation of the statute. Why should not the recovery of a judgment have the same effect?

*Megquier*, for the defendant, cited the following authorities: *Parkman* v. *Osgood*, 3 *Greenl.* 21; *Emerson* v. *Thompson*, 16 *Mass.* 432; *Heard* v. *Meader*, 1 *Greenl.* 156; *Brown* v. *Anderson*, 13 *Mass.* 201.

MELLEN C. J. — The intestate died indebted to the plaintiff on simple contract; and about two years and a half after the defendant took administration on his estate, the plaintiff commenced an action on the demand and recovered judgment for the amount, against the goods and estate of the intestate in the hands and possession of the defendant, as administrator upon the same. The present action of debt was not commenced upon said judgment until nearly seven years next after the grant and notice of administration; and the defendant now relies, in his brief statement, upon the statute of 1821, *ch.* 52, *sec.* 26, limiting the liability of an administrator, and a creditor's right of recovery to the term of four years. The question in the case is, whether the statute bar is applicable in this case. The judgment reduced the demand to certainty, and gave the creditor the power to collect its amount on execution; but this power has never been exercised. We do not perceive on what principle the statute should in the present case, be considered inapplicable. The object of the limitation was to compel a speedy settlement of the estates of persons deceased; but should the Court adopt the plaintiff's construction of the act, the object and design of it would be defeated; for if he could with safety delay commencing his action until after the expiration of the limited term, he might in such a case as this, delay it for nearly twenty years, that is so long as the judgment declared on would remain unaffected by the common law presumption of payment. Law and justice require that we should give

the intended effect to the statute provision in question. The consequence of giving to this provision the construction for which the counsel for the plaintiff contends, would not only produce a long and unreasonable delay as before mentioned; but in those cases where an estate is not insolvent, the consequences might be injurious and distracting in respect to heirs and to those claiming portions of the real estate of the deceased under conveyances from the heirs. The titles of such purchasers might be defeated and much confusion be the result. Executions might be extended on lands assigned to heirs and in their possession, or the possession of their assigns after a lapse of nearly twenty years. On these principles and to prevent such injurious consequences it was decided in the case of *Emerson* v. *Thompson & al.* 16 *Mass. Rep.* 429, that the operation of the statute of *Massachusetts*, limiting actions against executors and administrators to four years as before stated, of which our statute in the above particular is a copy, could not be delayed or affected by a promise of payment of a debt by an executor or administrator. We are all of opinion that the action cannot be maintained.

*Judgment for defendant.*

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## Howe *vs.* Thompson.

The payee of a promissory note, having indorsed it *without recourse*, is a competent witness for the indorsee, in an action against the maker, to prove a new promise within six years.

The adding of a date, to an indorsement of a partial payment, on the back of a note, is not an alteration of the instrument, and in no wise affects its validity.

A partial payment of a note, within six years, is sufficient to take it out of the statute of limitations; — and the effect is the same, though the payment be made to the original payee of the note, and the action be brought in the name of his indorsee.

Assumpsit by the plaintiff, as indorsee of a witnessed promissory note, dated *December* 18, 1825, against the defendant as promissor. The writ was dated *December* 11, 1832. The note was payable to one *Stephen Cram* or his order, and by him indorsed *not accountable*.

The defendant pleaded the general issue, and filed a brief statement, alleging that he never promised within six years, and that material alterations had been made in and upon the note declared on.

To take the case out of the statute of limitations, the plaintiff relied on an indorsement in the handwriting of said *Thompson*, on the back of said note, of thirty-five dollars, dated *October* 26, 1831; but it appeared that the *date* was not in *Thompson's* handwriting.

To prove the time when this indorsement and the money therein mentioned was paid, the plaintiff offered the deposition of said *Cram*, which was admitted, though objected to by the defendant's counsel. The deponent testified that the defendant paid the $35 on the 26*th* of *October*, 1831, and that the defendant also made the indorsement on the back of the note at the same time, but that he, the deponent, added the date of the indorsement, the next day after the payment was made; but the defendant was not present and consenting to the addition of the date.

The defendant's counsel insisted that this was such a material alteration as rendered the note void. But *Parris J.* ruled otherwise. He also contended that if the sum of $35 was paid to the promisee, on account of said note, on the 26*th* of *October*, 1831, the payment would not take the case out of the statute of limitations, in the hands of the plaintiff as indorsee. But the Judge ruled otherwise.

*Cram* testified further, that when the sum of $35 was paid by the defendant, he said it ought to have been paid some time ago, and that he would pay the remainder as soon as he could.

The defendant consented to be defaulted with liberty to move to have the default taken off, if in the opinion of the whole Court, upon a consideration of the facts reported, he had a good defence.

The question was submitted without argument, by *G. W. Peirce*, for the plaintiff, and *R. A. L. Codman*, for the defendant.

Parris J. delivered the opinion of the Court.

The first question presented by the report of this case is, whether *Cram*, the promisee and indorser, is a competent witness

to prove the time when the last payment was made. He had parted with all his interest in the note, and, by his special indorsement, had shielded himself from all liability as indorser; so that whatever might be the result of this suit, he would be in no manner responsible. The case is not distinguishable from *Rice* v. *Stearns*, 3 *Mass.* 225, where the payee ordered the contents of the note to be paid to the indorsee, *at his own risk*, and the Court held that the indorser had no interest in the event of the suit, and was a competent witness. See also *Baskins* v. *Wilson*, 6 *Cowen*, 471; *Barretto* v. *Snowden*, 5 *Wend.* 181.

*Cram* was unquestionably a competent witness.

The indorsement of part payment was made by the defendant himself, and, therefore, no question could arise as to its being, at that time, a sufficient acknowledgment of indebtedness to remove the presumption of previous payment. But the date of this indorsement was not entered by him, and consequently it became material to prove when that entry was made.

The indorsement on the back of the note forms no part of the original instrument, and the addition of the date to this indorsement, by *Cram*, can have no effect upon the legal validity of that instrument. It is no alteration of it, and can neither destroy its efficacy or give it force.

*Cram* testified as to the time when the payment was made, and he further testified that the defendant, at the same time, stated that the money ought to have been paid some time ago, and that he would pay the remainder, as soon as he could. Here was abundant evidence, not only of an unambiguous acknowledgment of the debt, as existing and due at that time, but of a promise to pay, either of which is sufficient to rebut the presumption of previous payment arising from lapse of time.

The next point relied upon is, that the admission or promise to *Cram*, will not take the note out of the statute of limitations in the hands of the plaintiff, as indorsee. It has been settled, that an unambiguous acknowledgment of the debt, as existing and due at the time of such acknowledgment, will take a demand out of the operation of the statute of limitations. *Porter* v. *Hill*, 4 *Greenl.* 41; and that it is not necesssary that such acknowledgment should be made to the plaintiff himself, but if made to a

stranger, in the absence of the plaintiff, it will defeat the operation of the statute. *Whitney* v. *Bigelow*, 4 *Pick.* 110; *Soulden* v. *Van Rensselaer*, 9 *Wend.* 293.

It is, therefore, unimportant whether the acknowledgment of indebtedness was made to *Cram*, or to the plaintiff. Proof of that acknowledgment removed the presumption of payment and obviated the bar, which the statute of limitations would otherwise have interposed to a recovery on the note. Such seems to have been the opinion of the Court, in *Frye* v. *Barker*, 4 *Pick.* 382, where the admisssion of indebtedness and promise to the payee were deemed sufficient to enable the indorsee to avoid the statute; and in *Dean* v. *Hewett*, 5 *Wend.* 257, where the Court expressly decided, that an action may be maintained by the *indorsee* of a promissory note, where the statute of limitations has attached, on proof of a promise to the *payee* to pay the debt, within six years before the commencement of the suit.

We think all the points, ruled at the trial, are well sustained by authorities.

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## ALLEN *vs.* KINCAID.

G. extended an execution on the land of K. taking the whole front of his farm, except a strip of five rods in width on one side, connecting the back land with the County road, but which could not be made passable for carriages, at an expense less than from $25 to $300. *Held*, that this did not create *a way of necessity* over any part of the *land levied on*.

THIS was an action of trespass *quare clausum fregit*, and was submitted for the opinion of the Court upon the following agreed statement of facts. The *locus in quo* was originally a part of the farm of the defendant, and was set off to one *Sally Godfrey* on execution against *Kincaid*. The levy included the whole front of said farm, exclusive of five rods on one side, which was left as a way from the County road to said *Kincaid's* back land, which he still owns. It was agreed that, it would cost from $25 to $300 to make said road, thus reserved, passable with carts and carriages. The plaintiff derived title from *Sally Godfrey*—

and the trespass complained of, was the attempt of the defendant to pass from his back land to the County road over a portion of the land other than the five rods aforesaid.

*Alden*, for the defendant, insisted that, the leveying creditor was bound to leave a convenient way — one that could be made passable by the debtor without being subjected to an unreasonable expense, which in this case was not done. And that, when such way is not left, the debtor has a right to select one for himself over the most convenient part of the land. 3 *Stark. Ev.* 1678.

*Mitchell*, for the plaintiff.

WESTON J. — The front land lying upon the road, being taken by the creditor, leaving the rear to the debtor, the latter was entitled to access thereto, and if none was reserved, he was entitled to a way of necessity. What the distance was the case does not find. It appears that the way reserved was not passable with carts and carriages, without incurring an expense of from twenty-five to three hundred dollars. It rarely happens that an unwrought road is convenient or suitable for carriages. To make it so, requires labor and expense. This is a charge, which does not fall upon the creditor. The defendant, in common with other citizens, could doubtless have the aid of the town in making the way, upon proper application. The way reserved might be so inconvenient or impracticable, as to be evidence of fraud upon the debtor's rights. No sufficient ground is afforded us, to justify such a conclusion. The defendant is not shut out from his land, and for any thing appearing in the case, a road may be made, over the reserved land, at a reasonable expense. The fee of the whole land levied on, passed to the creditor, whose title the plaintiff has, unless the defendant has therein a way of necessity. We cannot regard the facts agreed as affording sufficient evidence of such a right.

*Judgment for the plaintiff.*

## POTTER *Judge vs.* TITCOMB *Adm'r.*

A "brief statement" offered by the defendant, after the pleadings in the case had been closed, was rejected by the Court, though it was subsequent to the passage of the law abolishing special pleading.

The defendant also offered his affidavit that certain notes which constituted the subject of controversy had once been given up to him by the holders thereof, and that they had been taken from him by *accident* with other papers; but it was not admitted by the Court.

Where an action was brought against an administrator on his bond for an alleged breach in neglecting to inventory certain notes of hand given by himself to the intestate, and it appeared, that the notes had lain in the possession of one of the heirs for a period of about thirty years, without his setting up any claim on them, or communicating the fact of their existence to the other heirs, it was held, that these circumstances were a sufficient bar to the recovery of his part of the claim; but that the other heirs were not to be affected by his concealed knowledge, though for certain of them who were minors, he was their guardian.

A verdict in the above case having been returned against the defendant for the penalty of his bond, execution issued directly from the S. J. Court in favor of those heirs for whose benefit the suit had been prosecuted, for the aggregate amount of their respective shares; instead of the whole amount being remitted to the Probate Court for distribution there.

THIS was an action of debt on a probate bond bearing date *Nov.* 28, 1804, in the penal sum of $10,000, commenced under an order of the Judge of Probate for this county; said bond was given by the defendant, on his appointment as administrator on the estate of his late brother, *Moses Titcomb.*

The defendant, after oyer pleaded *first, non est factum,* on which issue was joined.

*Secondly,* a general performance of the condition; to which the plaintiff replied, that the defendant at the time of the death and granting letters of administration to him, was justly indebted to the estate of said *Moses* in divers large sums of money according to the tenor and effect of two several notes of hand, one dated *August* 26, 1799, for $454, payable in two years with interest, and the other dated *August* 10, 1804, for $4450—payable in three years with interest; of which said sums of money so due from the said *Joseph Titcomb,* to the estate of the said *Moses Titcomb,* he the said *Joseph,* as administrator of the estate

of the said *Moses*, never did render to the Judge of Probate any account, or in any manner charge himself on account therefor. To which the defendant rejoined, that he was not justly indebted at the time of the death of said *Moses*, and granting administration, and tendered an issue to the country, which was joined.

*Thirdly*, *nil debet*, on which issue was joined.

The *fourth* plea resulted in demurrer, which had been previously determined by the Court. (See 1 *Fairf.* 53.)

*Fifthly*. That on the 28th of *Nov.* 1808, the defendant paid to *Samuel Freeman*, Judge of Probate, &c. all the money mentioned in the penal part of said bond; to which there was a replication, traversing the payment, which resulted in an issue to the country. The defendant offered a brief statement, but *Parris J.* before whom the cause was tried, declined receiving it, at the same time stating that under the issues made up, he would be permitted to avail himself of every thing in defence, which he could offer under his brief statement; and he was so permitted on the trial. The plaintiff offered in evidence the notes mentioned in his replication to the second plea, together with a mortgage executed by the defendant, to secure the payment of the note of the 10*th* of *August*, 1804, and other evidence tending to shew the origin and consideration of the notes, and that they remained due and unpaid at the time of the decease of *Moses Titcomb*, which took place in *September*, 1804, at *Ballstown Springs*, in the State of *New York*. It appeared that the large note was in the possession of *Henry Titcomb*, at the time of *Moses'* death, having been deposited with said *Henry*, as the agent of *Moses*, and that it was found among *Henry's* papers, together with the mortgage, after his decease, by his administrators.

It was contended by the defendant, that the great length of time that had elapsed since these notes were given, raised a presumption in law that they had been paid. On the other hand, it was contended by the plaintiff, that the notes were kept from the knowledge of the other heirs, by *Henry* and the defendant, for their exclusive benefit; and certain facts existing in the case were urged as evidence of this fraudulent arrangement. As the large note and interest would amount to more than the plaintiff could recover in this action, if he prevailed, he gave up his claim upon

the small note, and the Jury were instructed that they might throw that note out of the case. The presiding Judge called the attention of the jury to the fact, that the large note was given but about one month previous to the death of *Moses*, and was not payable under three years, and added, that as the defendant, after his appointment as administrator, was the legal representative of *Moses*, and the only person who had a right to collect the debts due to the estate, and had continued in that capacity, the presumption of payment could not apply, as it would if *Moses* had continued alive, or if another person had been appointed his administrator. But that if the heirs of *Moses*, for whose benefit this action was prosecuted, knew of the notes and suffered them to remain, it would be strong circumstantial evidence that they did not consider them due. That it was incumbent on the heirs to explain it. If they had claims, and they knew it, for their proportion of this property, it was to be presumed that they would enforce their claims; if they omitted to do so, the presumption would be that they had a consciousness of an equitable, if not a legal right against them. That such would be the inference if they knew of the existence of the notes. But that if they were secreted in *Henry's* possession, by contrivance between *Henry* and the defendant, as contended by the plaintiff, and the heirs knew nothing of them, no such inference would arise. He then called the attention of the jury to the evidence of their being secreted, and the evidence of knowledge of the existence of the notes in each of the heirs for whose benefit this action was prosecuted; and upon this branch of the case, concluded by saying to the jury, that if they should find that the heirs all knew of the existence of the notes, and had lain by under this knowledge without claiming any benefit from them, the jury would be justified in presuming from such acquiescence that the notes were not due; and the jury were particularly requested, in writing, to inquire and find whether either of the heirs knew of the existence of the notes, except *Henry;* and if either of the others did so know it, which one; and the jury returned a written answer, that they found that none of the heirs knew of the large note except *Joseph* and *Henry*.

The defendant offered to read to the jury his own affidavit, setting forth the circumstances of his once having possession of

the notes in question, and how they came out of his possession, but the Judge ruled that it was inadmissible.

To shew that the defendant had never accounted for the notes, or either of them, the plaintiff introduced the inventory returned by the defendant as administrator, into the Probate Court; and the defendant thereupon contended, and requested the Judge to instruct the jury, that the inventory thereupon became evidence in favor of the defendant, that the notes not inventoried were not due; which instruction he declined to give.

There was evidence tending to shew that it was not the practice of the Probate Court, at the period of granting letters of administration to the defendant, and long afterwards, to require the inventorying of notes and demands due estates of deceased persons; and that the Judge of Probate had sometimes informed parties applying for information, that it was not necessary so to do. Upon this point, the Court instructed the jury that although this might be morally an excuse for not inventorying the notes, yet it formed no legal excuse to the administrator for not charging himself with them, or accounting for them, in his settlement with the Judge of Probate.

There was evidence in the case tending to prove that the deceased left no children, and that *Henry Titcomb* had received from the widow of the deceased a conveyance of her share of the personal estate, within this jurisdiction, and had given the defendant a receipt therefor; and there was also evidence proving that the said *Henry* was the legal guardian of the representatives of *Eunice Storer*, a deceased sister of *Moses Titcomb*. But the Court did not direct the jury to make any deduction in consequence thereof, or in consequence of the defendant's being one of the heirs of said *Moses*; but did direct them, if they found the several issues for the plaintiff, to assess damages without regard to those facts.

It was contended to the jury, in behalf of the defendant, that it was the intention of *Moses Titcomb*, deceased, to have his personal property in this jurisdiction, particularly what might be in the hands of his brothers and sisters, and owing him from them, disposed of without the forms of legal administration; and that they and their representatives assented thereto.

The presiding Judge instructed the jury, that if all the heirs knew of the existence of these notes, the legal presumption would be that they were settled among the heirs according to the intention of *Moses*, or to their mutual satisfaction; and that if the debts due from the heirs were intended to be settled, without the forms of administration, in any manner, the presumption that they were so settled, applied to all debts known to the heirs; and that if all the heirs, for whose benefit this suit was prosecuted, or persons through whom they claim, knew of the existence of these notes, and assented that the defendant should not include them in the inventory, or charge himself with them, then their verdict should be for the defendant.

The jury found all the issues for the plaintiff, and assessed damages in a sum less than the amount of the large note and interest.

Before the cause was opened to the jury, the defendant moved for leave to withdraw his rejoinder to the plaintiff's replication to his fourth plea, and to rejoin anew, which motion was overruled.

The following summary of the evidence was reported by the Judge, at the request of the defendant, as applicable to the *first* and *second* causes mentioned in his motion for a new trial.

It appeared that on the 3d of *September*, 1799, *Moses Titcomb* appointed his brother *Henry Titcomb*, his attorney, by power under seal, and that the large note of $4450, and the mortgage as collateral security, were taken by *Henry*, in his capacity as agent, and remained with him at the time of *Moses'* death. The small note of $454,04, was deposited with *Andrew Titcomb*, and it did not appear when or how it passed from him into the possession of *Henry*. *Andrew* was the elder brother, and hearing of *Moses'* sickness at *Ballstown Springs*, visited him there; arrived there some time previous to *Moses'* death, and continued there until his death, on which event, he took charge of the portable writing desk containing the papers and letters of the deceased, and brought them to his residence at *Stroudwater* village, where they remained in *Andrew's* possession some weeks, before they were handed over to the administrator. The said *Andrew* called on the *Messrs. Bradbury*, at *Boston*, on his return from

*Ballstown.* They were commission merchants; had transacted business for the deceased; and there was at that time, an unsettled account between them, a copy of which was in the case. After the decease of *Moses*, *Henry* was employed by the heirs as their general agent, to settle the affairs of the estate in the *West Indies*, and with the widow, from whom he received an assignment, which the defendant contended, was with the knowledge of the heirs. The evidence of such knowledge was in letters which were in the case. The defendant, contended that there was evidence of *Moses'* intention to have his estate here, especially dues to him from his brothers, settled and disposed of without the forms of law; all the evidence bearing upon that point was contained in numerous letters which were referred to in the argument. The defendant settled his first administration account in *Nov.* 1805, and a second account in *Dec.* 1806.

The defendant also moved the Court, that the verdict rendered by the jury should be set aside and a new trial had, for the following causes:

1. Because the said verdict was against the law, and contrary to the direction of the Judge, who tried the same, in matter of law.

2. Because it was without evidence, and against the evidence, and contrary to the legal weight and rules of evidence.

3. Because the defendant offered and requested leave to exhibit and file a brief statement of the special matter of his defence in law and fact, according to the statute, which was refused and rejected by the Judge.

4. Because the defendant offered his affidavit of the fact, that the notes set forth in the plaintiff's pleadings and produced upon the trial, had been delivered up to him by *Andrew Titcomb* and *Henry Titcomb*, two of the heirs in whose hands they had been placed by the directions of the deceased, and presented the same to the Court, in order to call upon the plaintiff and parties prosecuting in the suit, to show when, where, and how, the said notes came into their possession, and to lay the foundation for the legal presumption therefrom in favor of the defendant: but the Judge refused to receive or consider the same.

5. Because the Judge instructed the jury that the burden lay on the defendant, to prove the knowledge and acquaintance of all the heirs of *Moses Titcomb* and representatives of heirs, directly of and with the existence of the said notes, and of the facts necessary to constitute his defence, at the time of the death of said *Moses* and the granting letters of administration.

6. Because it was proved in the case that one of the notes aforesaid was in the knowledge and possession of *Andrew Titcomb*, aforesaid, and the other in the possession of *Henry Titcomb*, aforesaid; and because it was further proved that it was not the practice of the Probate Court, at the period of granting said letters of administration, and long afterwards, to require the inventorying of notes and demands due estates of deceased persons; and that the Judge of Probate used to inform administrators that it was not necessary; and because the defendant had never been requested or cited to inventory or account for said notes, as administrator, and objected that the plaintiff ought not to have and maintain his action thereof against him, by reason of the foregoing, which objection the Judge overruled.

7. Because the plaintiff introduced the inventory exhibited by the defendant as administrator, under oath, to the Judge of Probate, of all the goods, chattels, effects and credits of the deceased, which had come to his hands, possession or knowledge, or into the hands or possession of any other person for him, and requested the Judge to instruct the jury, that the same was evidence for the defendant of the truth thereof, which instructions the Judge declined to give.

8. Because it was proved, as aforesaid, that one of the notes was in the knowledge and possession of *Andrew Titcomb*, aforesaid, ancestor of certain representatives, for whose benefit this suit was prosecuted, and no certain or definite direction was given by the Judge to the jury, in respect thereto; and because the finding and verdict of the jury is uncertain respecting the same; and because it is uncertain whether the said note is not included in the amount for which the jury rendered their verdict.

9. Because the jury have undertaken in their verdict, to assess the damages in this case, as by law they are not authorised to do.

10. Because the Judge directed the jury to assess damages for the plaintiff, if they found their verdict in his favor, and further directed the jury to render the same for the whole amount of such note or notes with interest, not exceeding the penalty of the bond and interest from the date of the writ, in which instructions there was error and misdirection.

11. Because the defendant proved that one half of the personal estate of said deceased in this jurisdiction, was the property of *Henry Titcomb*, aforesaid, by purchase thereof, with the assent of the heirs, and the said *Henry* had discharged the defendant from all demands, and the Judge did not direct the jury to deduct one half of the amount of said notes from the damages on account thereof.

12. Because it was proved that said *Henry Titcomb* had possession of the larger note and discharged the defendant from all demands and the Judge did not instruct the jury to deduct the proportion accruing to said *Henry*, as one of the heirs of said deceased.

13. Because it was further proved that said *Henry Titcomb* was legal guardian of the representatives of *Eunice Storer*, a deceased sister of the deceased, namely *George L.*, *Charles*, *Elizabeth*, and *Mary Ann*, and had likewise discharged their claims; and the Judge did not direct the jury to deduct their proportion from the amount of damages.

14. Because the Judge did not direct the jury to deduct such proportion of said notes or debt as belonged to the defendant, who was coheir to the deceased.

15. Because the Judge did not instruct the jury to deduct the proportion of *Elizabeth Harris*, it being proved that her husband, *John Harris*, who was entitled to the same, had received an amount of said deceased's estate fully equal thereto, and had never accounted therefor in any other manner.

16. Because it was the intention of *Moses Titcomb*, deceased, as appeared by evidence, to have his personal property in this jurisdiction, particularly what might be in the hands of his brothers and sisters, and owing him from them, disposed of without the forms of legal administration, and they and their representatives assented thereto. And because it appeared that the parties

aforesaid, for whose benefit this suit was prosecuted, are heirs at law and representatives of brothers and sisters of *Henry Titcomb*, from whom they inherit and have received their parts of an estate of forty thousand dollars, and because they were and are privies to the said *Henry Titcomb*, who held said note and discharged this defendant from all demands and because they never called his acts therein in question during his lifetime, they having full means and opportunity of knowledge, enquiry and information in relation to the premises; and the said *Benjamin Titcomb* and *Luther Fitch*, in particular, are his administrators, and they ought now to be precluded in law and equity from making and maintaining any further claims thereon; and upon the evidence thereof before the jury, and the instruction of the Court thereon, their verdict ought to have been for the defendant.

*N. Emery*, *Longfellow*, and *Daveis*, for the defendant, argued at great length in support of the positions taken by them at the trial, principally relying however upon the 1st and 2d points under the motion at common law.

As to the *legal presumptions* in favor of the defendant, arising from lapse of time, they cited *Co. Inst. p.* 232 *b.*; *Bridges* v. *Chandler*, 2 *Bur.* 1073; *Gray* v. *Gardiner*, 3 *Mass.* 399; *Jennison* v. *Hapgood*, 7 *Pick.* 18; *Roscoe's Ev.* 41; *Monk* v. *Butler*, 1 *Rolles*, 89; *Ld. Halifax's* case, *Bul. N. P.* 298.

And that the presumption was, if *one* of the heirs knew of the existence of the notes, they *all* knew it, they cited, *Parker* v. *Merrill*, 6 *Greenl.* 43; *Carey* v. *Shephard*, 11 *Pick.* 400; *Rex* v. *Harding*, 11 *East*, 588; *Bell* v. *Ansley*, 16 *East*, 143; 2 *Maddox*, 326; 3 *Melody*, 222.

That the defendant was entitled to his brief statement, *Potter* v. *Sturdivant*, 4 *Greenl.* 154.

That the affidavit also of the defendant should have been admitted, to prove the loss of the notes from his possession, *Poignard* v. *Smith*, 8 *Pick.* 278.

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

At the term holden in this county by adjournment in *August* following, the opinion of the Court was delivered by

Weston J. — The counsel for the defendant has moved the Court for leave to withdraw his rejoinder to the replication to his

fourth plea; and for leave to rejoin anew. That set of pleadings has twice resulted in joinder on demurrer. The judgment of the Court has been given, after repeated and solemn arguments. When the opinion of the Court had been pronounced upon the pleadings as they first stood, leave was given to amend, after which, to the plaintiff's surrejoinder, the defendant demurred specially, and the plaintiff joined in demurrer. After argument, the demurrer was again decided. The cause having been greatly protracted, and the most ample opportunity afforded on both sides for deliberation, the claims of justice do not, in our judgment, require that the pleadings should be again opened. The defendant's motion is accordingly overruled.

All the issues to the country, have been found in favor of the plaintiff. The defendant moves that the verdict may be set aside, and a new trial granted; upon various grounds, set forth in his motion. A brief statement was offered by the defendant, under the act of 1831, *ch.* 514, to abolish special pleading, which was rejected, and we think properly, by the Judge, who presided at the trial. The pleadings upon these issues had closed, before the passage of that law. That permitted no other plea than the general issue; here the defendant had the benefit of four other pleas; and was besides permitted by the Judge to give in evidence every thing, set forth in his brief statement.

The defendant's affidavit was very clearly not competent evidence of the facts therein detailed; and could not have been legally received.

The jury have found that none of the heirs, for whose benefit this suit was brought, except *Henry Titcomb*, deceased, who is represented by his administrators, knew of the existence of the notes in controversy. We cannot regard the other heirs as affected by the knowledge which *Henry* had and concealed. Nor do we think that his knowledge and unfaithful acquiescence, in his character as guardian, can or ought to conclude his wards.

The verdict is objected to as against evidence, or against the weight of evidence. We have examined it with care; and do not feel ourselves called upon, in the exercise of a sound discretion, to disturb the verdict on this ground. Two juries, to whom the case has been submitted, have come substantially to the same result.

The law of *Massachusetts*, in force when the bond was given, clearly made it the duty of the administrator, within three months, to cause an inventory to be made of the estate of the deceased. And by the condition of the bond, it was to be a true and perfect inventory of all and singular the goods, chattels, rights and credits of the deceased, which have or shall come to the hands, possession, or knowledge of the administrator. The Judge of Probate had no power to dispense with this duty. His authority was limited by law; and the bond was for the security of all persons interested in the estate. No citation in the Probate Court was necessary, as this Court has holden in this case, to render the administrator liable upon his bond, for not returning a true and perfect inventory.

The plaintiff had proved that certain credits of the deceased, within the knowledge of the defendant, existed when the inventory was made, and that they were omitted therein, notwithstanding which, the Judge was requested to instruct the jury that the inventory returned, verified by the oath of the administrator, was evidence that it contained all the goods, effects, and credits of the deceased, which had come to his knowledge. The burthen of proof was on the plaintiff, to show the inventory defective; but that being shown, there was nothing in the inventory to justify the omission, or which would amount to repelling proof. The inventory, coupled with the proof, became evidence that that duty had been omitted, not that it had been performed.

With regard to the eighth ground of the defendant's motion, the small note was waived by the plaintiff at the trial, and the jury were instructed to throw that out of the case. And as to the ninth, the statute of 1830, *ch.* 463, does make it the duty of the jury to assess the damages in these cases; and because this was not done at a former trial, the verdict was set aside. *Potter* v. *Titcomb*, 7 *Greenl.* 334.

The note allowed by the jury, against the defendant, was on interest by its terms; and he was in our opinion rightfully chargeable therewith, not exceeding the penalty of the bond.

It is objected, for reasons set forth in the motion, that the jury should not have awarded the whole sum against the defendant, but that they should have deducted from their verdict the defend-

ant's own proportion, as heir of part of the fund, the widow's share, which was one half, there being no children, and the proportions of certain of the other heirs. On the part of the plaintiff, it is insisted that he ought to have execution for the whole sum, to be distributed in the Probate office according to law; and as the rights of the parties may be there made to appear. We do not find, that by law, the Judge is any where made the trustee or holder of moneys belonging to an estate, of which he has jurisdiction, in due course of administration. It would impose upon him an onerous and unnecessary duty. If any such had been contemplated, he would doubtless have been holden to give bonds, which is uniformly required of public officers, who receive money in trust for others. The Judge of Probate is merely nominal in the suit. The act to regulate the jurisdiction and proceedings of the Courts of Probate, revised laws, *ch.* 51, *sec.* 71, provides that in all suits, brought in the name of any Judge of Probate upon a Probate bond, the writ, in addition to the usual indorsement of the name of the plaintiff or his attorney, shall also have the name of the person or persons, for whose particular use and benefit the suit is brought, written thereon. The money is recovered for their use, and not for the Judge; and we can only award execution, so far as they are interested in a failure of duty, on the part of the administrator. If others have suffered, they cannot participate in the remedy, but it must be limited to those, for whose particular use the suit is brought.

By the 72d section of the same law, it is provided, that where any administrator shall have received the personal property of an intestate, and shall not have exhibited upon oath, a particular inventory thereof, which is the case before us, execution shall be awarded against him for such a part of the penalty of his administration bond, as the Supreme Court of Probate shall, on full consideration of all the circumstances of the case, judge reasonable; to be distributed among the parties interested, agreeably to the directions of law. The fruit of the remedy is not a decree or adjudication of the Supreme Court, that the administrator perform the neglected duty, and account in the Probate office; but he is at once made liable to an execution, not exceeding the amount of the penalty, by way of indemnity to the party injured;

and beyond this, he cannot be made chargeable upon the bond. There is no reason why the parties, for whom the suit is brought, should await further proceedings in the Probate office. What the administrator is to pay, the Supreme Court determine; and the amount is not subject to the revision of the Judge of Probate. The provision for a distribution of the amount awarded, is in the same sentence, which authorises the award, and must be intended to form a part of it. There is certainly nothing in the section, which can justify the position, that the distribution is to be made by another Court. Certain of the heirs, or their representatives, caused this suit to be brought. The fund is not wanted by creditors. They have been paid, or their claims have been long since barred. The jury have settled the whole amount of damage, arising from the omission in the inventory. From this it is easy to settle the proportions, to which the heirs are respectively entitled.

We are well satisfied that the administrators of *Henry Titcomb* are not entitled to any part of the fund, either as he was one of the heirs of the deceased, or as assignee of the moiety belonging to the widow. He must be understood to have discharged the administrator, with a full knowledge of all the facts. The verdict cannot be permitted to operate in his favor; and as his administrators would be entitled to recover his proportion, upon the verdict as it stands, it must be set aside, unless the administrators of *Henry Titcomb* will release to the defendant all their claim to any portion of the fund, in behalf of their intestate, as heir or assignee. This being done, we sustain the ruling of the Judge at the trial, and overrule the objections made to the verdict. The heirs are entitled to one half the fund. Their proportions are settled by the law, providing for the distribution of intestate estates, and judgment is to be entered in favor of each of the heirs, for whom the suit is brought, except the representatives of *Henry Titcomb*, deceased, for their respective proportions thus ascertained, of the one half of the amount of the verdict. The aggregate of these proportions, with the exception aforesaid, is the amount for which execution is to be awarded against the defendant.

*Judgment accordingly.*

## PORTER *vs.* HOOPER *& al.*

*Assumpsit* for *use and occupation* will not lie where the relation of landlord and tenant does not exist.

Thus, where the joint owners of a saw mill, excepting P., who refused to unite with them for that purpose, rebuilt the mill — and the former retained and used P's share to reimburse themselves for expenses incurred for him in rebuilding it — refusing to give him possession thereof when demanded, and claiming a right to hold until fully reimbursed — it was held, that P. could not maintain assumpsit against them for use and occupation, there having been no *contract* between them, either *express* or *implied.*

THIS was an action of *assumpsit* for the use and occupation of *eight days* in a certain saw mill. It was proved that the plaintiff owned the above proportion of the mill, and that the defendants had occupied the same for a considerable part of the time alleged in the writ. It appeared that the mill had been rebuilt in 1827, by all the owners excepting *Porter*, who had neglected to contribute his proportion of the expense of rebuilding, or any part of it; and that the defendants claimed a right to hold and occupy said *eight days*, as a committee of the owners, for the purpose of reimbursing themselves the said *Porter's* just share of the expense which had been incurred, but no account of such expenses were exhibited or proved. It was also in proof that *Porter*, at one time during the occupancy by the defendants, demanded of one of them the possession of said *eight days*, but he refused to give up the same, the expenses not then having been reimbursed, but said the same should be given up as soon as such expense should be reimbursed and not before, and accordingly in the fall of 1831 it was delivered up to him.

There was no proof that the defendants had been chosen a committee, nor of any proceedings under the statute in rebuilding said mill; — but they claimed to act as such in withholding and possessing *Porter's* share for the above purpose.

Upon this evidence, the *Chief Justice* instructed the jury that to entitle the plaintiff to recover, they must be satisfied by the evidence in the case, that the defendants occupied the said *eight days* under *a contract* with *Porter*, either *express* or *implied*; — and that it was for them to decide from the facts proved, whether

the defendants did so occupy, or *against the permission or consent* of the plaintiff. That the possession of one tenant in common was presumed to be for the benefit of the co-tenants, but that such presumption might be rebutted and done away by proof that the fact was otherwise.

The jury returned a verdict for the defendants, on which, judgment was to be rendered if the above instructions were correct; if they were not, the verdict was to be set aside and a new trial granted.

*Longfellow*, for the plaintiff.

When a co-tenant occupies more than his share, it is presumed to be so done by the *consent* of his co-tenants; and in such case the law will imply a promise to pay for the excess. And it is to be presumed that the defendants thus occupied in the present case. The plaintiff therefore having proved title, and the occupancy of the defendants, was entitled to recover, unless they could show that they occupied in some *other way*.

The statute having pointed out the mode in which owners of mills may proceed to rebuild, and compel all to unite, or coerce a payment of each one's share of the expenses incurred, by retaining the mill when built, they can resort to no other mode with the same consequences attached. Here none of the statute requisitions were shown; — no notice, — organization of meeting, — choice of clerk, committee, &c. — no account of expenses incurred. The defendants, therefore, are liable to the claim of the plaintiff for a reasonable compensation for the use of his mill.

*W. Goodenow*, for the defendants, in support of the position, that to maintain *assumpsit* for *use and occupation*, the relation of landlord and tenant must exist, cited, *Sargent* v. *Parsons*, 12 *Mass.* 149; *Wyman* v. *Hook*, 2 *Greenl.* 337; *Little* v. *Libby*, 2 *Greenl.* 242; *Whiting* v. *Sullivan*, 7 *Mass.* 107; *Jewett* v. *Somerset*, 1 *Greenl.* 125.

Mellen C. J. — This is an action of assumpsit for the use and occupation of eight days in a certain saw mill, in *Biddeford*. The writ contains also a count for money had and received. From the facts reported we are satisfied that the evidence of the plaintiff's ownership, as alleged, is sufficient. The only question,

as to the first count, is whether the defendants did occupy and hold under the plaintiff, as he has alleged: or, in other words, whether the relation of landlord and tenant subsisted between him and them, during any part of the period mentioned. To maintain an action for use and occupation there must be proof of a promise *express* or *implied*. *Little* v. *Libbey*, 2 *Greenl.* 242; *Wyman* v. *Hook*, *Ib.* 335. The question whether there was any such promise, was properly submitted to the jury, and by their verdict they have found that there was no such promise. It appears from the plaintiff's own witness, that when he demanded of the defendants, possession of the eight days which are in question, they expressly declared that they held and occupied the same under the proprietors of the mill, for the purpose of obtaining a reimbursement of the amount expended by the proprietors in rebuilding the plaintiff's share of the mill: that they, the defendants, also declared that they would not surrender to him the possession of his part of the mill till such reimbursement should be realized, but that they would surrender the same to the plaintiff, as soon as it should be so realized and obtained: and the same was accordingly so surrendered to him some time before this action was commenced, and he took possession of it, and it is admitted that he has since occupied it. Thus, instead of acknowledging a tenancy under the plaintiff, during their occupation, the defendants expressly denied it, and held in defiance of his claim and demand of possession. Under such circumstances, we are satisfied that the action cannot be maintained on the first count. It is true, that there is no proof that any regular proceedings were ever had by the proprietors under the 12th and 13th sections of *ch.* 45, of the statute for the regulation of mills; or that the defendants were appointed as a committee of the proprietors: still they claimed to act *as such*, and did exclude the plaintiff and hold and occupy the plaintiff's mill, adversely to his claim and rights as owner, for the period and purposes before mentioned. We think the instruction of the Judge was correct, as to the legal presumption when one tenant in common occupies the whole of a piece of real property; but that presumption may always be rebutted by evidence, as it was in the present case. No complaint is made of the instructions of the Judge; and by

the terms of the report, if the instructions were correct, judgment was to be entered on the verdict. On these grounds the verdict ought to be sustained. But at the argument (though not at the trial before the jury) it was contended, that the plaintiff was entitled to recover on the second count, for money had and received. On this point the only proof is the occupation of the eight days, and the receipt of the income of the same during such occupation, by way of reimbursing them the amount expended in rebuilding the plaintiff's part of the mill; — they have *received* no more than they *expended;* at least it does not appear that they have received any more. It is true that what they expended was for the plaintiff's essential advantage, though it was so expended without his previous promise of payment or assent: but he has taken possession of the mill and occupied it, which operates as a ratification of what they had done. The defendants built his share of the mill, and he has accepted it and availed himself of all the advantages of their labor and expenditures, and thus a promise of payment was by law implied; and the defendants have, by receiving the *income* to the amount of the *expenditure*, availed themselves of the benefit of that promise, and thus balanced the account. We do not mean in this opinion to say, that if the defendants expended more than was necessary or proper in rebuilding the plaintiff's share, or received from the income of the same more than was expended, it may not be recovered: — but the case before us discloses no facts which have a tendency to shew any balance in the defendants' hands. The witness of the plaintiff proved that the defendants claimed no more than they had expended, and surrendered the possession of the mill to the plaintiff, when they had received it.

*Judgment on the verdict.*

## PURRINGTON *vs.* DUNNING.

Where an administrator, having obtained license from the Judge of Probate to sell the real estate of his intestate, to raise the sum of *eleven hundred dollars*, to pay the *debts* of the intestate and *incidental charges*, the debts being $1077,99, gave a bond preliminary to such sale, in which he recited a license to sell so much only as would produce the sum of $1077,99, for the payment of said intestate's *debts*, it was *held*, that such variance between the bond and license, did not invalidate the sale made under them.

Where an administrator has been duly licensed to make sale of the real estate of his intestate, the regularity of his proceedings in making the sale under such license, is not a subject of inquiry by strangers, but only by those who have a title or interest, or claim to have, in the lands sold.

THIS was a writ of entry. The demandant, in proof of his title, read a deed from *William Stanwood* (the admitted owner of the demanded premises on the 6*th* of *March*, 1824,) to his son, *Charles Stanwood*, dated on that day, and recorded *March* 11, 1824. He then read a license from the Judge of Probate to *Robert P. Dunlap*, administrator on the estate of the said *Charles Stanwood*, dated the 3d Tuesday of *January*, 1832, to sell so much of the real estate of said deceased as would raise the sum of *eleven hundred dollars*, for payment of debts and incidental charges. He then read a bond, bearing date *Jan.* 18, 1832, signed by the said *Dunlap* and two sureties, which contained the following: "The condition of this obligation is such, that whereas the above bounden *Robert P. Dunlap*, at," &c. "obtained license to make sale of so much of the real estate of said deceased, for the payment of his *debts*, as will produce the sum of *ten hundred and seventy-seven dollars and ninety-nine cents*," &c. It was then proved that the administrator took the oath prescribed by law, gave legal notice of the intended sale, and conveyed the demanded premises to the demandant, as the highest bidder at the vendue, by deed dated *April* 16, 1832, under which deed the demandant entered.

The counsel for the defendant contended that the bond was not given according to law, as it recited an authority to sell only to the amount of $1077,99 — but the *Chief Justice* instructed the jury that the sale was not thereby rendered irregular; — and fur-

ther, that it was not competent for the defendant who did not claim under *the intestate*, but under said *William Stanwood*, to object to any irregularity in the proceedings of the administrator in making the sale.

If the above ruling and instruction were not correct, the verdict, which was for the demandant, was to be set aside, and a new trial granted, otherwise judgment to be rendered thereon.

*Fessenden* and *Deblois*, for the defendant, contended that the bond given in this case, not being conformable to the requisitions of *statute* of 1830, *ch.* 470, *sec.* 6, the sale was void. It recites an authority to sell to the amount of $1077,99, when in truth, no such license was ever granted. The tenant was in possession of the premises, and had a right to require a strict compliance by the administrator, with all the statute provisions in the making of the sale. Without such compliance, the sale was a nullity, so far at least as it regarded the tenant. *Wellman* v. *Lawrence*, 15 *Mass.* 326; *Macy & al.* v. *Raymond & al.* 9 *Pick.* 285; *Parker* v. *Nichols*, 7 *Pick.* 111; *Drinkwater* v. *Drinkwater*, 4 *Mass.* 354; *Gibson & al.* v. *Farley & al.* 16 *Mass.* 280.

The bond cannot be aided by a reference to the list of claims against the estate. There is no authority for such reference.

*Longfellow*, for the demandant, insisted that the bond would have been good had *no sum* whatever been named therein; the objectionable words, therefore, are mere surplusage.

But the defendant, not being an *heir*, nor *claiming under one*, had no right to object to any irregularity of proceeding. *Hale* v. *Cushing*, 2 *Greenl.* 218; *Knox* v. *Jenks*, 7 *Mass.* 488.

Mellen C. J. — The administrator was duly licensed to sell the estate of the intestate to the amount of *eleven hundred dollars* for payment of *debts* and *incidental charges*. It is contended that the bond given by the administrator is not predicated on the license, but in reality contradicts it. There certainly is no contradiction; in the condition of the bond it is recited that the administrator had been licensed to sell the estate of the deceased to the amount of *ten hundred* and *seventy-seven* dollars and *ninety-nine cents* for payment of the *debts* of the deceased, omitting the

mention of "incidental charges." He was certainly licensed to sell to the *above* amount, being a sum less than that named in the license. Besides, it appears that the above sum of $1077,99 was the precise amount of the list of claims against the estate, allowed by the commissioners; and to this the recital in the condition must have had reference. We cannot allow this variance as having any effect to invalidate the sale. But if our opinion on this point were different, still there is another ground on which the motion for a new trial must fail, because the report states that the defendant does not claim under the intestate as one of his heirs or in any other manner. It has long been settled that where an executor or administrator has been duly licensed to sell the estate of a testator or intestate, the regularity of his proceedings in making the sale under the license is not a subject of inquiry by strangers, but only by those who have a title or interest, or claim to have in the lands sold. This principle is expressly laid down in the case of *Knox & al.* v. *Jenks*, 7 *Mass.* 488, and a similar principle is recognized in the case in 2 *Greenl.* 218, in respect to the want of a bond. In the above case of *Knox & al* v. *Jenks*, there was no proof that the officer, appointed to make the sale, had been duly sworn. This construction by the Supreme Court of *Massachusetts* of a statute, of which ours is a transcript in relation to the provision we are considering, we feel bound to respect, because our Legislature must be considered as having adopted the construction by enacting the law, almost ten years after that construction had been made. We believe the practice has always been adhered to in this State, conformable to the above construction. There must be

*Judgment on the verdict.*

## PORTER *vs.* HASKELL *& al.*

In an action of trespass *de bonis asportatis*, the defendant justified the taking, as an officer, on an execution issued by a Justice of the Peace, on a recognizance for debt; but it appearing that the execution, at the time it issued, and at the time of the taking, had *no seal* affixed to it, it was held to constitute no legal defence.

*Held*, also, that the Justice of the Peace had no authority after the sale — return of execution — and action commenced against the officer, to *amend* the execution by affixing a seal.

THIS was an action of trespass *de bonis asportatis*. The defendants in their brief statement, justified the taking under the alleged authority of an execution, issued on a recognizance in favor of *William S. Davis*, one of the defendants, against *Porter*, the plaintiff, — said *Haskell* being a duly qualified constable of *Portland*, and the other defendant his aid.

It appeared that the execution when issued by the magistrate, and when the goods of *Porter* were taken thereon, was not *under seal;* but that since the commencement of this action, the Justice by whom it had been issued, affixed a seal to it.

Intending to reserve the question, the *Chief Justice* admitted it to go to the jury as evidence, though objected to by the plaintiff's counsel.

There was another question raised at the trial, with regard to the legality of the sale of a part of the goods, by the officer; he having sold 116 phials containing medicine, in one lot; and "*a case of drawers and contents*" in another lot. The Judge ruled that the return of the officer was illegal in respect to those articles sold, where the *price* of *each article* was not stated; but that the whole return was not vitiated by those instances of illegality; and that as to all the residue of the articles sold, the return constituted a good justification.

A verdict was returned for the plaintiff for the value of the articles aforesaid, sold in lot, without a specification of the price of each, on which judgment was to be rendered if the ruling and instructions of the presiding Judge were correct, otherwise it was to be set aside and a new trial granted.

*N. Emery*, for the defendants, insisted that the magistrate had the power and right to make the amendment by affixing a seal, and that when made it operated retroactively and justified the officer; and cited the following authorities: *Sawyer* v. *Baker*, 3 *Greenl.* 29; *Howard & al.* v. *Turner*, 6 *Greenl.* 106; *Buck* v. *Hardy*, 6 *Greenl.* 162; *Means* v. *Osgood*, 7 *Greenl.* 146; 1 *M. & S.* 427; *Albee* v. *Ward*, 8 *Mass.* 84; *Twambly* v. *Hunnewell*, 2 *Greenl.* 221; *The People* v. *Steuben*, 5 *Wend.* 103.

He also endeavored to show, that the sale by the defendant, in all other respects, was in conformity to the requisitions of law.

*Longfellow*, for the plaintiff.

MELLEN C. J. — Two questions are presented on the report of the Judge, the most important of which arises out of the objection to the admission to the jury of a copy of the execution, by virtue of which the defendant, *Haskell*, seised the goods of the plaintiff and sold them. By law the original execution should have been, not only under the *hand* of the magistrate who took the recognizance for the debt, but also under *seal*. Such however was not the fact. Since the commencement of this action, the Justice, who was also the counsel for the defendant, placed a seal on the execution, while the cause was pending in the Court of Common Pleas. If no seal had ever been affixed to the execution, it is clear that the same could have furnished no defence for the defendants. The question then, is whether the Justice had any legal right to affix the seal as he did, and whether it legalized the precept and the act done under it. In the case of *Sawyer ex parte*, cited in the argument, this Court permitted the clerk to affix the seal of the Court to an execution, after the same had been extended on real estate; and this is relied on as an authority for the act of the Justice, in the present case. No other authority has been cited. We have found a case in 5 *Wend.* 276, *Toof* v. *Bentley*, in which a Justice of the Peace affixed a seal to an execution which he had issued, after the same had been executed; but the Court decided that he had no legal right so to do. In that case the Justice had acted judicially in the cause, and rendered the judgment on which the execution was issued; but in the case before us, the Justice never acted ju-

dicially. He merely received the acknowledgment of the debt and took the recognizance; in doing which, he acted ministerially. There is, therefore, less reason for allowing the Justice, in this case, to affix the seal as he did, than there was to allow it in the case in *New York*. So long as a seal is required to be affixed to writs and executions, though we may not be able to discover its real use, yet we must not dispense with what the law requires. For the reasons above stated our opinion is, that the execution gave the defendant no authority to seise and dispose of the goods; and that the copy of it was improperly admitted in evidence. In the above case of *Toof* v. *Bentley*, the Court noticed a distinction between the amendment there made, and those made in the higher Courts, where processes are issued by their clerks. In such cases, the Court order the clerk to correct the errors he has made in issuing executions; but in Justices' courts it has not been allowed. The duty of the Justice, having by law no clerk, is to make out executions himself, and to do it correctly; and he is bound to know what that duty requires. Should we sanction what was *omitted* and then what was *done* by the Justice, it may lead to dangerous consequences, considering what a vast number of magistrates there are in commission within the State — all liable to mistakes of a similar character. On the whole, our opinion is, that the verdict must be set aside and a

*New trial granted.*

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## Swett *vs.* Patrick.

Tenants in common, holding under one and the same deed, are not obliged to *join*, in an action against their grantor for a breach of the covenant of warranty in such deed.

In an action of covenant broken, the plaintiff declared in two counts: 1. for a breach of the covenant of *warranty*, and 2. for a breach of the covenants of both *warranty* and *seizin*. On *general demurrer*, the plaintiff prevailed, — for though the second count was a *felo de se*, yet the first, considered *independently* of the second, as it should be, was good.

This was an action of *covenant broken*. The first count in the writ set out a breach of the covenant of *warranty*, in the de-

fendant's deed of a certain mill privilege. The second, set out *all the covenants* in the deed, and alleged a *breach of all.* The defendant craved oyer of the deed declared on, and then demurred generally. The deed set out in the pleadings, was in the usual form of a warranty deed, by which the defendant conveyed to the plaintiff, *J. & N. Warren* and *N. Partridge*, a certain mill privilege in *Gorham*, to be held by them one third each, in common and undivided.

*Longfellow*, for the defendant, contended, 1. that as the covenants in the deed were to the defendant and others *jointly*, the action should have been in the name of all. *Anderson* v. *Martindale*, 1 *East*, 497.

The covenant of *seizin* is a *personal* covenant, and does not pass with the land, therefore the action cannot be sustained, except in the names of all the covenanters.

2. Nor can the plaintiff recover on the covenant of *warranty*, because he has alleged that there was *no seizin*, — and this he is now *estopped* to deny. If therefore, there has been a breach of the covenant of *seizin*, there cannot be a breach of the covenant of *warranty* — and so the plaintiff must fail.

*Deblois*, for the plaintiff, cited the following authorities: *Buller's N. P.* 157; *Co. Litt.* 311, 315; *Hammond on parties*, 29; 1 *Levinz*, 109; *Ld. Raym.* 81; *Harrison* v. *Barnwell*, 5 *T. Rep.* 246; 1 *Saund.* 154, *note*, and cases there cited; 5 *Bac. Abr.* 460; *Martin* v. *Williams*, 3 *Johns.* 264; *Dole v. Weeks*, 4 *Mass.* 452.

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

The deed of which oyer is prayed and which is set out by the defendant in his demurrer, conveyed an estate *in common* to the three grantees, *Swett*, *Partridge*, and *Warren*. Tenants in common have *several* freeholds, and if disseised, could not, at common law, join in a writ of entry against the disseisor; though by our statute of 1826, *ch.* 347, they may *now* join in such an action, if they are inclined so to do; but they are not obliged to; nor, if they do join, is the nature of the estate and the tenancy thereby changed. The authorities cited by the plaintiff's counsel, clearly shew that the covenant of warranty, which runs with the land, where there are two or more grantees and covenantees,

is a several covenant with each of the grantees in common; and each, on eviction by elder and better title, may sue alone for his damages. In the present case, it does not appear that either of the other grantees has been evicted or has any cause of action; we are not to presume that, as to either of *them*, the covenant of warranty has been violated. The *first* count sets forth *that* covenant *only*, and alleges a breach of it, and if there had been no *other* count, there could be no question that the action would be maintained on undisputed principles. But it is contended by the defendant's counsel, that the *second* count, in which *all* the covenants in the deed are declared upon, and the breach of *all* is alleged, contains an averment which is fatal to the plaintiff's asserted right of action, set forth in the *first* count; namely, that at the time of the execution of the deed, the defendant was *not seised;* and that so, no estate whatever passed by the deed; and, of consequence, that the covenant of warranty was not broken; because, as no estate passed, the plaintiff could never be evicted of any estate. Supposing then, that the action for breach of the covenant of *seizin* must be joint, still if the averments in the *second* count cannot have any influence on the *first* count, the action is well maintained. In the case of *Hacker* v. *Storer*, 8 *Greenl.* 228, it was decided, that where the declaration contained but one count in which the plaintiff declared on all the covenants in the deed, being the covenant of seizin, of freedom from incumbrances and to warrant and defend the premises, the action could not be maintained, as the count was a *felo de se:* but we consider the principle of law to be otherwise where there are several distinct counts, as in the case before us. Both the counts are good, separately considered; and where there are several counts, the merits of each are to be considered without reference to the others. No one count can be aided by another; averments in one count cannot be applied to *sustain* another; and for the same reason, they cannot be applied to *defeat* another. Each *count*, like each *plea*, where there are several, must stand by itself and be judged of independently. The authorities cited to this case seem clearly to establish it. Our opinion therefore is, that the demurrer must be overruled and judgment be entered for the plaintiff: because upon a general demurrer to a declaration, if any one count is good, the action is maintained.

## Bowes *vs.* French.

A and B submitted a claim of the former against the latter, to C D *sole* referee, under a rule from a Justice of the Peace, drawn in the usual form; and requiring the report of the referee to be made to the C. C. Pleas. After a hearing and award made, the parties agreed in writing, that it might be opened, and that they would abide by it. *Held*, that the submission was not binding, being to *one* referee only and not to *three*; — that, if it were good as a submission at common law, *debt* or *covenant* would be the proper remedy, and not *assumpsit*; — that, the subsequent agreement could not be regarded as separate from the submission and founded on a new consideration, so that *assumpsit* might be maintained thereon.

This was an action of *assumpsit*, founded upon the award of an arbitrator and a written agreement touching said award. The submission was in the usual form of a rule from a Justice of the Peace, signed, *sealed* and acknowledged by the parties, but there was one referee only therein appointed. The rule also required a return of the report of the referee to the then next term of the C. C. Pleas.

The award was in writing on the back of the rule, and in favor of the plaintiff for $44, 39.

After the making of the award, the parties entered into the following agreement in writing, with regard to it, *viz:* "We hereby agree and consent that the decision of the arbitrator in the case between us may be this day opened and made known; and we do further agree to abide by said decision."

The writ contained four counts. The first was on the award. The second was on the written agreement entered into after the award was made. The third and fourth were on the account annexed, and for money lent and accommodated. In support of these counts the plaintiff offered in evidence the submission, award, and subsequent agreement — to all which the defendant objected. But *Ruggles J.* admitted them. The defendant also contended that the action should have been *debt* or *covenant* on the agreement of submission, and not *assumpsit*. But the Court ruled that the action was rightly brought — and the jury thereupon returned a verdict for the plaintiff.

To the ruling of the Judge the defendant took exceptions and brought the case up to this Court.

*Adams*, for the defendant, maintained that the action should have been *covenant* or *debt*, and to this point cited, 1 *Dane's Abr.* 260; 5 *Dane's Abr.* 125; *Tullis* v. *Sewall, Ohio Rep.* 653.

By the submission, the defendant was to be liable only *conditionally*, to wit, on the return of the report to the C. C. Pleas and judgment thereon. This has not been done, and no action therefore can be maintained. *Kingsley* v. *Bill & al.*, 9 *Mass.* 198; *Worthing* v. *Stevens*, 4 *Mass.* 448; *Monosiet* v. *Post & al.*, 4 *Mass.* 532.

Again, this submission is not binding because made to only *one* referee, instead of *three*, the number required by statute.

Nor can any action be maintained on the subsequent agreement, it being *without consideration.*

*P. H. Greenleaf*, for the plaintiff.

Where there is a subsequent parol agreement not inconsistent with the deed and founded on a sufficient consideration, *assumpsit* lies upon such agreement. *White* v. *Parkins*, 12 *East*, 578.

In this case, the submission and award were a sufficient consideration for the agreement.

The parties have a right to alter and modify the terms of sealed instruments. *Hall* v. *Brown*, 15 *Johns.* 194.

This case is analagous to that, where *assumpsit* was brought for the balance of a sum agreed to be paid by a sealed instrument. *Danforth* v. *The Scoharie Turnp. Corp.* 12 *Johns.* 231.

Or where money is awarded to be paid at different times — there assumpsit lies for each sum as it becomes due. *Cooke* v. *Usherwood*, 2 *Saund.* 337.

Or where the assignee of a respondentia bond might bring *assumpsit*, the obligor having agreed to pay to any assignee. *Fenner* v. *Mears*, 2 *Blk.* 1269, commented on in *Weston* v. *Barker*, 12 *Johns.* 282.

Or where the time named in an arbitration bond for the award to be made, was enlarged by agreement, no action would lie on the bond — it should have been *assumpsit*. *Caldw. on Arbit.* 190.

So where two enter into articles of copartnership for seven years, in which was a covenant to account yearly and to adjust;

and they dissolve before the seven years expire, and strike a balance, and the defendant promises to pay, *assumpsit* lies on the promise. *Foster* v. *Allanson*, 2 *T. R.* 480; *Monrovia* v. *Levy*, *ib.* 483, *note*.

The authorities cited on the other side all relate to cases brought on the *submission* and therefore do not apply.

It is admitted that the submission in this case is not good under the statute — but it is good at common law. The provision requiring a report to the C. C. Pleas may be rejected as surplusage. Or it may be considered as having been waived by the subsequent agreement to have the report opened out of Court.

Weston J. delivered the opinion of the Court.

The parties agreed to submit the demand, made by the plaintiff upon the defendant, to arbitration; and for that purpose executed under their seals an instrument of submission, which they acknowledged before a Justice; it being what is usually called a Justice's rule. On the back of the instrument, also under the seals of the parties, is an extension of the liability of the defendant. The arbitrator, having made his award, the parties on the eleventh day of *May*, 1833, by a writing under their hands not under seal, agreed and consented that the decision of the arbitrator, in the case between them, might be on that day opened and made known; and they further agreed to abide by said decision.

An objection is made to the form of the action, it being insisted that it should have been debt or covenant, and not assumpsit. To this it is replied, that the action is brought, not upon the instrument of submission, but upon the subsequent promise to abide the result. We cannot regard that promise as any thing more than a recognition of what they had before agreed, under their seals. It was founded upon no new consideration. It did not vary or extend the terms of the submission, nor was it applied to any new subject matter whatever. A parol or written promise to pay a bond, or fulfil a covenant, will not change the remedy of the party to whom made. The higher security remains in force, and the proper action, if not paid or fulfilled, is debt or covenant.

By the terms of the submission, the report was to receive the sanction of the Common Pleas. The defendant had a right to

insist upon this condition. The plaintiff, however, had it not in his power to obtain this sanction, the submission not having pursued the statute, having been made to one arbitrator, instead of three. The intention of the parties might thereby be defeated; but the acceptance of the report by the Common Pleas, was made a condition precedent to the liability of the defendant. If impossible, the judgment of the referee could not be enforced. But it is contended that this condition might be, and was, waived by the defendant. If it was, his liability to abide the award depended upon the submission, for which the appropriate remedy was debt or covenant.

In *White* v. *Parkins*, 12 *East*, 578, assumpsit was sustained upon an agreement, which formed no part of the charter party. It was a separate contract, covering a period, and embracing services, not provided for in the instrument under seal. So in *Foster* v. *Allanson*, 2 *T. R.* 480, the account settled between the parties, the balance of which the defendant expressly promised to pay, contained matter not included in the previous covenant. The note of *Monravia* v. *Levy*, appended to that case, is very brief. It was at Nisi Prius, before *Justice Buller*. The defendant had covenanted to account. He did so; and a balance was struck, which he expressly promised to pay. Upon this promise, *Buller J.* sustained assumpsit; probably upon the ground that the covenant was fulfilled, when the party accounted.

*Exceptions sustained.*

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## WAITE *& al. vs.* OSBORNE *& trustee.*

An administrator is not chargeable as trustee, in a process of foreign attachment brought to recover a debt due from a creditor of the intestate, though the effects in the administrator's hands be the proceeds of a sale of the real estate, by consent of heirs, but *without license from the Judge of Probate.*

THE only question in this case was, whether *Joseph Fowler*, summoned as trustee, was chargeable or not.

He stated in his disclosure, that he was *administrator* of the estate of *Clement Fowler*. That the intestate, at the time of his

death, was indebted to the principal defendant in about the sum of fifty dollars. That the estate consisted of a house and land valued at - - - - - $1000
and household furniture, - - 63

$1063

That the widow's dower in the estate had been assigned by the Judge of Probate, and that by agreement of the heirs, the personal property had also been given to her.

That the real estate, by consent of the heirs had been sold by him, without license therefor from the Judge of Probate; and with the proceeds of the sale the debts had all been paid, except that due to the prsncipal defendant. That for the payment of this, he had appropriated the balance in his hands, but had not yet actually paid it.

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

In the case of *Brooks* v. *Cook*, and *Barrett* as trustee, 8 *Mass.* 276, the *general principle* was decided, that "no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind." *Barrett*, having no property in his hands belonging to *Cook*, except as administrator of *Peter Barrett*, was discharged. Though in that case the estate of the intestate was insolvent, yet the Court in their opinion, do not allude to that circumstance as in any manner affecting the general principle. The plaintiff's counsel contends, that the case before us does not fall within that principle, because, he says, that the trustee holds the money in his hands as an individual in his *private capacity* and not as *administrator*. It is said he holds the money wrongfully — that he sold the *real estate* without license from Court; but he acted, in so doing, with the consent of the heirs of the intestate, and with the proceeds of the sale he has paid all the debts of the deceased, except the demand of the principal defendant; and all the *personal* estate left, was also delivered to the widow, by the consent of the heirs. What wrong has been done to any one who has any right to complain? The estate, when left, was abundantly solvent, and the defendant is the only creditor. The money in question came

into the hands of *Fowler*, by act of law, and not by any agency or consent on the part of the principal debtor : no property has been " entrusted" and " deposited" by the principal, in the hands and possession of *Fowler*. This was used as a strong argument by the Court, in the case of *Cheely & al.* v. *Brewer and trustee*, 7 *Mass.* 259, against charging the trustee, and he was discharged. The money in his hands he held as county treasurer. The case of *Wilder* v. *Bailey and trustee*, 3 *Mass.* 289, was an action in which it was attempted to charge the trustee for moneys in his hands, collected by him as deputy sheriff. In the circumstances of that case he was also discharged. The reason of the law, as laid down in the case of *Brooks* v. *Cook and trustee*, is, that it is the duty of an administrator to account with the Judge of Probate for all the property in his possession belonging to the estate ; his bond is given to secure all concerned against losses occasioned by his negligence and unfaithfulness in his office. To sustain such actions as these, will tend to delay the settlement of estates, and interrupt the proceedings in the Probate Office. If any of the conduct of the administrator in this case, has been irregular, he stands responsible on his bond. Every thing he has done, he professedly did as administrator, and with the express consent of the heirs. His appropriation of moneys in his hands to pay the defendant's demand, cannot make any difference ; it was merely an intention on his part never executed. We cannot perceive any circumstances in this case, of such a nature as to relieve it from the operation of the general principle established in the case of *Brooks* v. *Cook and trustee*, and several other preceding cases ; and accordingly *Fowler* cannot be adjudged trustee.

*Trustee discharged.*

*Greenleaf*, for the plaintiff.
*Fessenden* and *Deblois*, for the trustee.

## KINCAID *vs. School District No.* 4, *in* BRUNSWICK.

A tender made by an inhabitant of a School District, to one having a claim against it, is valid, though such inhabitant was not thereto regularly authorized by the District.

But were it otherwise, if the District in defence of an action brought against it, plead and rely upon such tender, it would be a ratification equivalent to *previous authority.*

IN this case, which came up from the C. C. Pleas on exceptions to the ruling of the Judge, the plaintiff claimed to recover $110, compensation for his services in repairing a school-house. The defendants proved a payment of $63,43 in part, and relied on a tender of $36,67 for the residue. The tender was made by one *Humphrey Snow*, an inhabitant of said District, he having no prior authority for that purpose regularly given him by the inhabitants of said District. The plaintiff refused to receive the tender in full of his claim, but was willing to take it and give a receipt for the amount.

At the trial the plaintiff's counsel denied the sufficiency of the tender, both as it regarded the amount, and the authority of the person making it.

*Whitman C. J.* ruled that *Snow*, as an inhabitant of said District, had a right to make the tender, leaving the question of its sufficiency as to amount to the jury, who returned a verdict for the defendants.

*Mitchell*, for the plaintiff, insisted that *Snow* had no authority to make the tender. *Quasi* corporations can only act in their corporate capacity; and their acts can only be proved by the record. No such evidence of *Snow's* agency or authority being produced, his acts cannot affect the rights of the plaintiff. Nor was the District bound by his tender. Suppose it had been more than the District admitted to be due, could he call upon the District to indemnify him?

But if *Snow* had authority, the tender was made under such qualifications as rendered it of no avail. A party in making a tender has no right to demand a discharge in full for the debt. *Brown* v. *Gilmore*, 8 *Greenl.* 107; *Thayer* v. *Bracket*, 12 *Mass.* 450.

*Packard*, for the defendants, cited 5 *Dane's Abr.* 493; *Bac. Abr. Art. Tender, sec.* 8; *Clement* v. *Jones*, 12 *Mass.* 65.

MELLEN C. J. — This case comes before us on exceptions, and the only question thereby presented is, whether the instruction of the Judge before whom the cause was tried in the Court of Common Pleas was correct in respect to the tender on which the defendants relied. A payment of $63,43 was proved in part of the plaintiff's demand, and a tender was made of $36,67. The Judge instructed the jury that the tender was made by a person lawfully authorized to make it, and that the sum tendered was sufficient — if they should be satisfied that the labor and materials furnished by the plaintiff were not worth more than $100. By the verdict given, the jury have found the claim of the plaintiff not to exceed $100. — It does not appear on what particular ground the tender was refused; but by the offer made by the plaintiff to receive the sum and give a receipt for its amount, (though not *in full* of his demand,) it would seem that he objected to nothing but the amount. But a part of the instruction was, that the tender made by *Snow* was good; that is, that he was empowered to make it. A tender by a mere stranger is not a valid one; but a person who has an interest in the consequences of a tender may make an effectual tender. *Co. Lit.* 208; 5 *Dane*, 495. *Snow* is an inhabitant of the District, and as such stands liable to have his property seized and sold on execution, should the plaintiff obtain judgment in this case. Such a direct interest as this, we think, entitled him to make the tender, according to the spirit of the decisions on this point. But there is another ground on which the tender may be considered good. It is a well settled principle of law, that a tender may be made as well by an authorized agent as by the debtor himself; and it is also a plain principle that a ratification of an act done without authority, is equivalent to a previous authority. No authorities need be cited in support of either of these principles. Admitting that *Snow* was not authorized to make the tender, still his act in making it has been distinctly recognized and sanctioned by the School District, in placing their defence upon this tender made by *Snow*. This is an adoption of *his* act as *their own*; and corporations may thus sanction an act by *implication* as well as individuals.

*Exceptions overruled, judgment on verdict.*

## *The Inhabitants of* RAYMOND *vs. The Inhabitants of* HARRISON.

A pauper, while receiving support for himself, wife and children, in the town of H. — on account of some supposed delinquency of the wife, *abandoned* his family, and went and resided in the town of R. for a period of five years in succession. *Held*, that the support furnished to his *family*, during that period, by the town of H., was not in contemplation of law, furnished to *him*, so as to prevent his gaining a settlement in the town of R. by virtue of the provisions of *stat.* of 1821, *ch.* 122.

THIS action was tried in the Court of Common Pleas, before *Whitman C. J.* and was *assumpsit* for supplies furnished certain paupers, alleged to have their legal settlement in the defendant town. The paupers were the children of one *George Edwards;* and it was in proof, that said *Edwards*, with his wife and children, were supported as paupers by the defendant town, for some time anterior to *August*, 1819; at which time he absconded, and continued absent till *November*, 1820, when he visited his wife and children. But finding, as he supposed, that his wife had been guilty of criminal conduct, he *abandoned* her and his family, and immediately went to live with his father in *Raymond*, with whom he labored for a year upon wages, and afterwards continued in said *Raymond* and its vicinity, working whenever he could find employment till the time of bringing this action. That, in 1820, he bargained for a lot of land in *Raymond*, and went into the possession of it, and had continued his possession ever since, occasionally working on it himself, and some seasons letting it out. That, he had been taxed in *Raymond* for the same, from 1820 to the present time; and that in 1823–5–7–8 and 9, he had been taxed for his poll in said *Raymond;* the tax bills for 1821–2 not having been found after due search. That he kept a chest at his father's house in *Raymond*, while his father lived; and afterwards at his mother's in the same town, while she lived; and ever since at some other place in the same town, in which chest he kept his apparel. But it did not appear that he had any fixed place of residence in any particular dwellinghouse.

It was proved by the defendants, that the said children of *Ed-*

*wards*, were twins, and became of age in 1829. And the plaintiffs further proved, that said *Edwards'* family continued to be supported by the defendants until 1822.

Upon these facts, the Court instructed the jury, that, if they were satisfied, that *George Edwards* had resided in *Raymond* for the term of five years in continuation, after *March* 21, 1821, and before his said children became of age, the plaintiffs were not entitled to recover; as the supplies furnished to his family after he had abandoned them, could not be considered as furnished to him — but otherwise, the plaintiffs were entitled to recover.

The jury returned a verdict for the defendants. Whereupon the plaintiffs' counsel filed exceptions and brought the case up to this Court.

*Fessenden* and *Deblois*, for the plaintiffs, contended that the supplies furnished the children, were furnished to the father. That here was not such evidence of an abandonment of family, as existed in the cases of *Green* v. *Buckfield*, 3 *Greenl.* 136; *Dixmont* v. *Biddeford*, 3 *Greenl.* 205; and *Hallowell* v. *Saco*, 5 *Greenl.* 143. In those cases the head of the family had been absent 7, 8, and 9 years. They also endeavored to distinguish the present case from those cited, on the ground that in this case the supplies had been furnished in part *before* the supposed abandonment.

It was further contended, that *Edwards* had not gained a settlement in *Raymond*, by his residence there, and cited *Westbrook* v. *Bowdoinham*, 7 *Greenl.* 363; *Parsonsfield* v. *Perkins*, 2 *Greenl.* 411; *Boothbay* v. *Wiscasset*, 3 *Greenl.* 354; *Turner* v. *Buckfield*, 3 *Greenl.* 229; *Knox* v. *Waldoborough*, 3 *Greenl.* 455; *Parsonsfield* v. *Kennebunkport*, 4 *Greenl.* 47.

*Longfellow*, for the defendants, relied on the cases of *Green* v. *Buckfield*, 3 *Greenl.* 136; *Dixmont* v. *Biddeford*, 3 *Greenl.* 205; *Hallowell* v. *Saco*, 5 *Greenl.* 143.

Mellen C. J. at an adjourned term in *August* ensuing, delivered the opinion of the Court.

The defendant town resists this action on the ground that the paupers have their legal settlement in *Raymond*, in virtue of the residence of their father, *George Edwards*, in said town five suc-

cessive years between the 21st of *March*, 1821, and the year 1829, during which five years the said *George* did not receive any supplies as a pauper, according to the seventh mode pointed out in the second section of the act of 1821, *ch.* 122. The jury have found that the said *George* in *November*, 1820, in consequence of the criminal conduct of his wife, as stated in the report, *abandoned* her and his family immediately and went to live with his father in *Raymond*, where he continued to reside during the period abovementioned, and it does not appear, nor is it pretended that he has had any connection with her or the family since he abandoned her, or that he has had any care of them or control over them. On these facts, why did not the father gain a settlement in *Raymond*, by such residence for five years, during the minority of the paupers, his children? It is said that the supplies furnished to the family, or rather to his wife and children, were constructively and in legal contemplation furnished to the father as a pauper, as provided in the said section. We apprehend such is not the legal consequence. In the case of *Green* v. *Buckfield*, which has been cited, we think this question has been settled, upon deliberate consideration. The Court say, "we are of opinion that supplies cannot be considered as furnished to a man as a pauper, unless furnished to *himself personally*, or to *one of his family*; and that those *only* can be considered as his family, who continue under his care and protection." The case of *Dixmont* v. *Biddeford*, also cited, and *Hallowell* v. *Saco*, were decided on the same principle. We cannot distinguish those from the present case in regard to the point above adjudged. Surely after *George Edwards* had perfectly abandoned his wife and children, which abandonment has continued to this hour, they cannot in any reasonable construction be said to have remained under his care and protection, when the supplies were furnished — accordingly, our opinion is that there must be

*Judgment on the verdict.*

## WILEY *vs.* COLLINS *& al. and* WESCOTT *trustee.*

To render an assignment for the benefit of creditors valid and effectual, it is not necessary in all cases, that they should become parties by *signing*. But, the property being passed over by *delivery*, the instrument may be drawn so as to require only the signature of the *trustee*: — and in such case the mere *verbal* assent of the preferred creditors is sufficient to protect the property from the attachment of other creditors.

IN his answers *Wescott*, the supposed trustee, disclosed that the principal defendants, prior to the service of the writ in this case, had placed certain notes in his hands to collect and appropriate in payment of certain debts due from them, and that he gave them the following receipt, viz:

"*Jan.* 25, 1833. Received of Messrs. *Collins & Danforth* three notes of hand against *Hay & Norton*, for collection, dated *Jan.* 24, 1833 — one for $400 in 4 months — one for $400 in 6 months — and one for $417,66 in 9 months — and the money when collected I am to pay the following persons, creditors of *Collins & Danforth*, viz: *A. P. Knox* and *Peter Morrill*, $291,63 — *William Stimpson*, $104 — *Benjamin Danforth*, $105 — *John Gammell*, $75 — $250 to the *Exchange Bank*, being for a note signed by *Isaac Robinson* and indorsed by said *Collins & Danforth*, and *James C. Churchill* — $250 to said *Exchange Bank*, being for a note signed by said *Robinson*, and indorsed by said *Collins & Danforth* — $93 to *Isaac Robinson* for borrowed money — and $49,03 to the *Casco Bank*, in part payment of a note in said Bank, signed by said *Isaac Robinson* and indorsed by said *Collins & Danforth*."

The trustee stated further, that the notes had been collected but that the money had not been paid over — that the persons entitled to receive said money, *all assented* to said arrangement for their benefit before service of the plaintiff's writ.

In answer to interrogatories proposed by plaintiff's counsel, the trustee stated further, that none of them had assented *in writing* — that some of them had spoken to him, and others had sent word to him by third persons of their assent.

*W. Goodenow*, for the plaintiff, claimed that the trustee should be *charged*. The creditors should have become *parties to the*

*assignment*, to prevent the fund from being reached by other creditors with trustee process. *Widgery* v. *Haskell*, 5 *Mass.* 144.

The creditors in this case had not only neglected to become parties to the instrument of assignment, but some of them had never given their assent even *verbally*. The trustee's hearsay source of information with regard to the assent of some, is altogether of too loose a character to protect this fund from attachment by other creditors.

Besides, there is no obligation on the part of the creditors to give up their claims, or not to sue, or not to pursue their remedy in any other way. No one is bound but the trustee, and by his receipt he would be bound to pay to the creditors named therein in a reasonable time, unless he should be prevented by the law intercepting the fund in his hands, as has been done in this case.

*Preble* and *Megquier*, for the trustee, cited *Curtis* v. *Norris & trustee*, 8 *Pick.* 280.

Weston J. delivered the opinion of the Court.

A debtor has a right to prefer one or more creditors to others; and for that purpose may, in good faith, transfer or make over any property he has, for their payment or security. It was competent for the principal defendants to have called together their creditors, named in the receipt given by the trustee, and to have placed in their hands the notes therein described, which they might have received, either in payment, by way of collateral security; or under a promise to allow to the defendants, whatever they might be able to collect. Such an arrangement is lawful in itself; and being once made, could not be defeated, either by the defendants, or by any of their other creditors. And the creditors, to whom such notes might have been passed, might depute one of their own number to make the collection, or appoint an agent for that purpose. Any direct transfer or assignment, thus accepted, could not be disturbed. But the law does not permit a debtor to put his property into the hands of his friends, or of persons of his own appointment, even for the benefit of his creditors, without their assent. His property is by law subject to their attachment; and cannot be put out of their reach, without their privity.

If it were not so, a debtor might defeat altogether the policy of the attachment laws, and prescribe his own terms to his creditors. In *Widgery* v. *Haskell*, 5 *Mass.* 144, the assent of creditors was required, to give validity to an assignment, so that it could not be defeated by attachment; and this requirement has been since enforced, both in *Massachusetts* and in this State. The instrument of assignment sometimes requires that assent to be given in a certain manner, and with certain limitations and conditions. If these conditions are reasonable, and such as a debtor may lawfully impose, whenever a sufficient number of the creditors to exhaust the fund, have assented in the manner prescribed, other creditors cannot affect the assignment.

In the case before us, the notes received by the supposed trustee, were put into his hands for the use of certain specified creditors of the defendants. They were indebted to them in the whole amount of the notes, all of which were to be applied for their benefit. To this arrangement these creditors assented, before the service of the trustee process; as appears more distinctly by the additional disclosure. They were willing that the business should be confided to the trustee, as the common agent of the parties. We are not aware of any legal principle, requiring this assent to be in writing. It might even be given prospectively. No conditions were imposed, except what the law would imply. The money, when received, would discharge the defendants' debts, to which it was to be applied if sufficient; if not, it would discharge them *pro tanto*. There is substantially no difference, whether the notes were put into the hands of the creditors themselves, or whether they were passed over to a third person for their benefit, with their assent. The arrangement would be as effectual before the money was received, as afterwards.

In the case of *Curtis* v. *Norris & trustee*, 8 *Pick.* 280, *Haven*, the trustee, had received a quantity of molasses belonging to *Norris*, for sale, on which he had made advances. He was requested by *Norris* to inform *Swett & Co.* who had accepted a bill for his honor, that they should be indemnified out of the proceeds of the molasses when sold, and he did so. This assignment was sustained; although neither the direction of *Norris* nor the notice and promise in pursuance of it, were in writing.

When the property of a debtor is agreed to be applied, according to its just value, to *bona fide* creditors, whose claims equal its amount, and all this is done to their acceptance, it is a transaction free from fraud, actual or constructive. The policy of the law is answered and promoted, when the funds of the debtor are fairly applied to the payment of his debts.

*Trustee discharged.*

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## Portland Bank *vs.* Gershom Hyde *& al. and trustees.*

G. H. & Co. gave to W. H. a member of the firm, their promissory note, in the company name, for a valuable consideration. W. H. failed in business and assigned this note, and a claim in account against G. H .& Co., with other property, to trustees for the benefit of his creditors. G. H. & Co. also failed, and assigned all their property to trustees, for the benefit of their creditors. The assignees of W. H. became parties to the assignment of G. H. & Co. for the amount of the note and account aforesaid. The assignees of G. H. & Co. were then summoned in a trustee process by the creditors of the company, and by the Court it was *held*, that the trustees could not retain the property of G. H. & Co. to pay the assigned claim of W. H. to the exclusion or injury of the creditors of the Company.

Where two companies are composed in part of the same individuals, no action at law can be maintained by one against the other.

The facts in this case are clearly stated in the opinion of the Court.

*Willis*, for the plaintiffs, contended that the claim of *William Hyde* should be rejected, on the ground that he, being a partner, had no right to draw upon the company fund to satisfy his own claim until after the partnership debts were paid, and cited the following authorities: 1 *Chitty's Dig. of Chan. Rep.* 113; *Ex parte Ellis*, 2 *Glyn & Jameson*, 312; *Ex parte Sillitoe*, 1 *Glyn & Jameson*, 312; *Ex parte Taylor*, 2 *Rose Rep.* 734; 3 *Kent's Com.* 115.

His assignees stand on no better ground than *Hyde* himself. *Fox* v. *Hambray*, *Cowp.* 449.

*Fessenden* and *Deblois*, for the trustees, insisted that, though *Wm. Hyde*, while owning the note, could not come in and claim

a satisfaction out of the partnership property, yet that the note being in the hands of an assignee, for a valuable consideration, payment might be enforced. *Russell* v. *Swan*, 16 *Mass.* 314.

The mere mode of transfer of the note cannot affect the main question. Assignment is equal to indorsement, so far as respects the property, though not in respect to the action. Courts will ever protect equitable interests under assignments. *Jones* v. *Witler*, 13 *Mass.* 304; *Dunn* v. *Snell*, 15 *Mass.* 481; *Vose* v. *Handy*, 2 *Greenl.* 322.

All the cases cited on the other side are where the individual member of the firm came in and claimed, and not his assignee.

The opinion of the Court was delivered at a term held in *August* following, by adjournment from *April*, by

PARRIS J. — The persons attempted to be charged as trustees in this case, are the assignees of *Gershom Hyde & Company*, a firm composed of *Gershom Hyde* and *William Hyde*. The assignees claim to hold the property for the purpose of paying such creditors of *Gershom Hyde & Company*, as had become parties to the indenture, previous to the service of the writ in this case on the trustees; and among others, of paying a debt alleged to be due from the firm of *Gershom Hyde & Company* to *William Hyde*, one of the partners, and claimed by *Gray* and *Willis*, as assigned to them by the said *William Hyde*, for the purpose of paying his separate creditors.

If the assignees can appropriate the partnership property of *Gershom Hyde & Company* for the payment of this debt, considering it as entitled to the same preference as other debts due from the company, then they are not holden as trustees in this action, inasmuch as the partnership property would all be absorbed in paying such of the creditors of the company as had become parties to the indenture previous to the service on the trustees. The assignees disclose that *William Hyde* was a creditor of the firm, holding a note against *Gershom Hyde & Company*, for $6422,04.

If this note had remained in the hands of the payee, what would have been his rights and remedy, especially in relation to the other partnership creditors?

As to his remedy, it is clear that he could have none at law against the company. He could not be both plaintiff and defendant in the same suit, as must necessarily be the case in any action that could be brought on the note. He is the payee of the note; the creditor to whom the amount purports to be due. He is also one of the promissors, and must be particularly described as such in any process that should be instituted to compel payment. How then could any action be maintained on the note in the name of *William Hyde?* The authorities are abundant against it. A plea in bar that the promise was made by the defendants jointly with the plaintiff would be sufficient. 1 *Chitt. plead.* 26; 1 *Wentw.* 17, 18; *Moffatt* v. *Van Millingen,* 2 *Bos. & Pull.* 124 *note,* where *Buller J.* says, "The promise was made jointly with one of the plaintiffs. How can he sue himself in a court of law? It is impossible to say, that a man can sue himself." *Bosanquet* v. *Wray,* 6 *Taunt.* 597; *Griffith* v. *Chew,* 8 *Serg. & Rawle,* 30. The two cases last cited are authorities to the point, that partners in one house of trade cannot maintain an action against partners in another house of trade, of which one of the plaintiffs in the partner's house is a member, for transactions which took place while he was a member of both houses; — and the same principle is recognized in *Cary on partnership, page* 69, where it is said that where the same individual is a member of two different firms, an action of assumpsit cannot be brought by one firm against the other, for in such case the same person would be both plaintiff and defendant in the action; nor after the death of such member, by one firm against the other, for a debt due in his lifetime, — see also page 114, 115. *Gow,* in his treatise on partnership, *page* 132, says, where the same persons are engaged in two different firms, and a contract is made by the one concern with the other, or the negotiable paper of the one gets into the possession of the other concern, damages cannot be recovered at law for the breach of the contract, nor can payment of the negotiable instrument be enforced by any legal remedy. The individuality of the person of the common partner cannot be severed; no man can contract with himself, nor can he bind himself in the society of one set of persons to another in which he is also a partner. Neither the contract or the negotiable security can be made the foundation of an action at law.

*Gray* and *Willis*, as the assignees of *William Hyde*, would seem to stand in no better situation. The objection goes to the root of the contract. As was said by the Court in *Bosanquet* v. *Wray*, before cited, no legal contract could subsist between an individual and the company of which he was a member; and by *Gow*, *page* 132, "it makes no difference whether the action be brought in the lifetime or after the decease of the common partner, because as no legal contract ever existed, it cannot in any event be rendered available at law." See also *De Tastet* v. *Shaw*, 1 *Barnw. & Ald.* 664. In 5 *Comyn's Digest*, *Day's ed.* 85, it is said that an assignee, executor or separate creditor, coming in the right of one partner against the joint property, comes into nothing more than an interest subject to an account between the partnership and the partner, and therefore to the joint debts.

This principle has long been recognized in the American and English Courts. It was said by *Kent*, *Chancellor*, in *Nicoll* v. *Mumford*, 4 *Johns. Ch. Rep.* 523, that no separate creditor of a partner can be entitled to more than the person in whose place he stands. In the case of the assignees of *Lodge & Fendal*, 1 *Ves. jr.* 166, it was decided by *Lord Thurlow*, that assignees under a separate commission against one partner, cannot come upon the joint estate for a sum brought into the partnership beyond his share, and this was recognized as law in *Ex parte Reeve*, 9 *Ves. jr.* 589. So in *Ex parte Burrell*, *Ex parte Parker*, and *Ex parte Pine*, *Cooke's B. L.* 544, the application in each case was by the assignees of the individual partner, that they might be allowed out of the joint estate for money brought by their principal into the partnership beyond his share, and as being, therefore, a creditor on the partnership for that sum, and the applications were refused on the principle that an individual partner cannot be a creditor on the partnership in competition with the joint creditors.

In *Ex parte Harris*, 2 *Ves. & Beames*, 210, *Lord Elden* said, "There has long been an end to the law, which prevailed in the time of *Lord Hardwicke*, whose opinion appears to have been, that if the joint estate lent money to the separate estate of one partner, or if one partner lent to the joint estate, proof might

be made by the one or the other in each case, (alluding to the case *Ex parte Hunter*, 1 *Atkyns*, 225.) That has been put an end to; a partner cannot come in competition with separate creditors of his own, nor, as to the joint estate, with the joint creditors. The consequence is, that if one partner lends £1,000 to the partnership, and they become insolvent in a week, he cannot be a creditor to the partnership, though the money was supplied to the joint estate; — that is, he cannot be a creditor so as to affect the other partnership creditors, though he may have a right against the individual partners." It is said by *Cary*, in his treatise before cited, that it is established that one partner cannot prove a debt due to him from the firm in competition with the joint creditors. *Cary on partnership*, 237, — and the same principle is recognized in *Ex parte Ellis*, 2 *Glyn & Jameson*, 312; *Ex parte Taylor*, 2 *Rose*, 175; *Ex parte Hargreaves*, 1 *Cox*, 440.

In *Lyndon* v. *Gorham & trustee*, 1 *Gall.* 367, *Story*, *J.* said, "he considered the trustee process in the nature of a bill in equity to reach the funds of a debtor, and subject to all the liens and equities between the original parties." Now what are the equities in the case at bar? Which set of creditors are most equitably entitled to the partnership effects of *Gershom Hyde & Company*, — the creditors of the company or *William Hyde*, one of the partners, and his creditors? This amount of property was, by *William Hyde*, suffered to remain as a portion of the funds of the company, and upon the faith of these funds the company were enabled to obtain a credit. *William Hyde*, being one of the partners, must have known the embarrassed pecuniary condition of the partnership, and having advanced this sum to the firm, or permitted it to remain apparently as partnership funds, ought not to withdraw it to the injury of those who, upon the faith of it, gave credit to the company. It is upon the same principle as where a person who suffers his name to be used as a copartner, cannot avoid the liabilities of that relation, although in fact he may have no interest in the partnership funds, or right to the partnership profits. He permits the use of his name as a co-partner, whereby the company may be enabled to obtain greater credit, and it would be inequitable to permit him to escape from the liabilities of the company, which had been incurred in conse-

quence of the use of his name. Equally inequitable would it be to permit a partner, either directly or indirectly, through his individual creditor, to withdraw a portion of the partnership funds, on the faith of which extensive credits may have been obtained, when by such withdrawal the company funds would be so diminished as to be inadequate to the payment of the company debts.

The general principle is, that those funds shall be liable upon which the credit was given. Those who sell goods or make contracts with a company or firm, are supposed to trust to the ability or property of the firm. Those who trust the individual member rely upon his sufficiency alone. The former are equitably entitled to be first paid out of the joint stock. *Lord* v. *Baldwin*, 6 *Pick.* 348. Accordingly, if a partner is a creditor upon the partnership fund, he can have no satisfaction, but out of the surplus which shall remain after the joint creditors are paid, *for the joint creditors rely upon the ostensible state of the fund, and give credit to it accordingly. Cook's B. L.* 541.

Suppose a company of three, each member contributing to the common stock $5000, and taking a company note as his security. Would it be equitable after the company had contracted debts far beyond the amount of their joint stock and become deeply insolvent, to permit the partners to come in equally with the company creditors and share in the company effects?

We think not. The partnership creditors, those who had given credit upon the faith of the partnership effects, should be first paid, before either the equitable or legal rights of the individual partners upon the partnership property can attach. And it can make no difference whether the individual partner comes in by himself or by his assignees or representatives. The injustice to the company creditors would be the same.

What would be the legal effect of a negotiable note given by the firm to a partner and by him indorsed, we are not called upon to decide. If it would enable the indorsee to come upon the partnership effects of an insolvent company, having the same priority as other partnership creditors, it would be in consequence of the law peculiar to bills of exchange and other negotiable paper, by which they are upheld in the hands of innocent purchasers. Such seems to have been the ground upon which *Smith* v.

*Lusher*, 5 *Cowen*, 688, was decided. But there are very marked distinctions between that case and the one before us. There the note was negotiated by indorsement, and the action brought in the name of the indorsee. Here, if the note was assigned at all, which from the phraseology of the indenture is a question, perhaps not free from doubt, it was not transferred by indorsement as negotiable paper, but by the general assignment, it passed as a chose in action, and no suit could be maintained upon it except in the name of the payee. In the case referred to, the firm was solvent, so that there was no question between conflicting creditors. The company creditors interposed no objections; the resistance came from the partners themselves. Not so here. The great controversy is between the creditors of the company, and the creditors of the individual. We, therefore, avoid giving any opinion upon a case like that of *Smith* v. *Lusher*, until it shall come before us; — but we are of opinion that the persons summoned as trustees in this action cannot retain the partnership funds of *Gershom Hyde & Company*, to pay the company note to *William Hyde*, or his individual account against the company.

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## Blake *vs.* Howard.

A party attempting to impeach a conveyance as fraudulent, will not be permitted to give evidence of another conveyance by the same grantor, of other land, and at another time, without connecting it by proof of privity or knowledge on the part of the grantee, upon whom the testimony is intended to bear.

This was a writ of entry upon the demandant's seizin and a disseizin by the tenant, and was tried upon the general issue before *Parris J.*, *Nov.* term, 1833.

Both parties claimed title under *James L. Blake;* the plaintiff by deed dated *June* 30, 1830, the tenant by the levy of an execution, *Nov.* 1, 1831. The tenant contended that the conveyance to the plaintiff was fraudulent and void, as against the creditors of said *Blake;* and much evidence was introduced upon that question by both parties. The tenant among other things, introduced a deed from said *Blake* to his father, *Freeman Blake*,

dated *Nov.* 4, 1829, purporting to convey certain real estate lying about four miles from the demanded premises, and in a different town, and offered to prove that the grantor remained in possession, and made repairs, and other facts tending to show that said last mentioned conveyance was fraudulent as against creditors, and claimed to urge that to the jury, as evidence that the conveyance, under which the plaintiff claims, was fraudulent. But the presiding Judge ruled that it was improper for him so to do. If this ruling was incorrect the verdict, which was for the demandant, was to be set aside.

*Longfellow*, for the tenant, to show that the proposed evidence was admissible, cited *Bridge* v. *Eggleston*, 14 *Mass.* 245; *Smith* v. *Hale*, 6 *Greenl.* 416.

*Fessenden* and *Deblois*, for the demandant, cited *Flagg* v. *Wellington*, 6 *Greenl.* 386; *Gore* v. *Brazier*, 3 *Mass.* 541; *Connecticut* v. *Bradish*, 14 *Mass.* 296; 5 *Dane's Abr.* 341.

Weston J. — In *Bridge* v. *Eggleston*, the declarations of the grantor prior to the conveyance, related to the property then in controversy. So did the declarations of the vendor, in *Hale* v. *Smith*. In *Flagg* v. *Wellington*, 6 *Greenl.* 386, evidence of fraud in another conveyance was rejected. The evidence offered by the tenant, was of an unconnected transaction, between other parties. Suppose that was fraudulent, and within the knowledge of the demandant, it subjected him to no imputation. He was not responsible or affected by the conduct of others. He might notwithstanding purchase in good faith, and for a valuable consideration. It would be opening a wide field, to investigate the character of other sales. We are inclined to think such testimony inadmissible. But we are very clear, that it ought not to affect the cause, unless connected with proof of privity or knowledge on the part of the grantee, upon whom the testimony is intended to bear. In the case before us, no intimation was made at the trial, that any such proof was to be adduced, in relation to the demandant; and the testimony offered was, in our opinion, properly rejected.

*Judgment on the verdict.*

## SPRINGER & *al.* *vs.* SHIRLEY & HYDE.

A. drew a bill at four months, payable to his own order, on B. C. & Co. which was accepted, and by him negotiated to a Bank. At maturity the draft was paid by a like bill drawn on *B. alone*, the firm in the meantime having been dissolved; which last bill, A. as indorser, was compelled to take up. *Held*, that he could not maintain an action against *the firm* to reimburse the amount thus paid.

THE facts in this case are briefly and clearly stated in the opinion of the Court.

*Longfellow* and *P. H. Greenleaf*, for the plaintiffs.

Although there was a dissolution of the partnership, yet for the purpose of settling the partnership it still continued. And the creditors of the firm could not lose their lien upon each member of the firm, without the consent of such creditors. *Lodge* v. *Dicas*, 3 *B. & A.* 614; *Smith & al.* v. *Rogers*, 17 *Johns.* 340.

In this case, the plaintiffs have a right to resort to the original cause of action, because it was not shown, that at the drawing and acceptance of the bills the account was cancelled. *Bedford* v. *Deaking*, 2 *B. & A.* 210; *Featherstone* v. *Hunt*, *B. & C.* 113; *Heath* v. *Percival*, 1 *P. Will.* 682; *Wallace* v. *Agry*, 4 *Mass.* 343.

The original draft was on *Shirley, Hyde & Co.* and if they cannot show a discharge, the defendants should be holden. They cannot now object that all three are not sued; that should have been pleaded in *abatement*.

*Deblois*, for the defendants, cited *Allen & al.* v. *Ayers & al.* 3 *Pick.* 298; *Church & al.* v. *Barlow*, 9 *Pick.* 547; *Thacher & al.* v. *Dinsmore*, 5 *Mass.* 299; *McGee & al.* v. *Maneely*, 6 *Mass.* 143; *Watkins* v. *Hill*, 8 *Pick.* 522; *Goodenow* v. *Tyler*, 7 *Mass.* 36; *Durant* v. *Chapman*, 10 *Mass.* 47; *Johnson* v. *Johnson*, 11 *Mass.* 361; *Varner* v. *Nobleboro'*, 2 *Greenl.* 124.

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

This being a joint action against the defendants, it cannot be maintained unless they are jointly liable to the plaintiffs. It is equally true, that if the late firm of *Shirley, Hyde & Co.* are

liable, although *Gershom Hyde*, one of that firm, is not sued, yet as his nonjoinder with the present defendants was not pleaded in abatement, it is now too late to object to the plaintiffs' right to recover, on that account. 1 *Chit. Pl.* 29, and cases there cited. Both the above principles are undisputed. A brief statement of the facts is this. There were for some years prior to *January*, 1831, two firms; one consisting of the present defendants, under the name of *Shirley & Hyde;* the other consisting of the defendants and *Gershom Hyde*, under the name of *Shirley, Hyde & Co.* Both these copartnerships were publicly dissolved on the first day of *January*, 1831. In *September* preceding, the plaintiffs drew on *Shirley, Hyde & Co.* for $1500, and the draft was duly accepted by them, and they charged the plaintiffs with the amount. The draft did not arrive at maturity till after the dissolution of the partnership. On the 15th of *January*, 1831, another draft was made by the plaintiffs on *William Hyde*, for $1600, payable to themselves or order, and by them indorsed. This draft was delivered to the bank, and thereupon the draft for $1500 was given up and cancelled; no money having been paid by the plaintiffs. When the above draft, accepted by *William Hyde*, became due, the same was delivered up and cancelled, and the third draft on *Shirley* was made and accepted as the one last named and delivered to the bank. The other drafts were all made and indorsed in the manner before stated, and accepted by *Shirley*, and successively given up as succeeding drafts were substituted in their stead, until the sum originally due was reduced to $900, when the last draft was made for the above named sum, and discounted for the benefit of *Shirley*. This draft the plaintiffs, as indorsers, were compelled to pay to the bank; and the present action is brought to recover the amount of the defendants. The plaintiffs have not declared upon any of the before mentioned drafts, but rely on the general count for money paid and advanced. They describe the defendants as the *late firm* of *Shirley and Hyde*, and without any allusion to the other firm of *Shirley, Hyde & Co.* The jury have found and certified to the Court that the firm, consisting of the two defendants, never assumed the debts of the other firm of *Shirley, Hyde & Co.* and the report of the case does not show any connection between them.

On whatever principle the plaintiffs expect to recover, the defendants insist that, whether the claim is made upon them as two of the firm of *Shirley, Hyde & Co.* or as the firm of *Shirley & Hyde*, still that they have a substantial defence which they have placed on several grounds, each of which has been deemed by them sufficient to sustain it.

The plaintiffs contend, that as the firm of *Shirley, Hyde & Co.*, when they accepted the plaintiff's first draft, charged them with the amount of the acceptance, it must be considered that the plaintiffs, in settlement of accounts with the firm, allowed them the amount; but as the firm did not pay according to their acceptance, and the plaintiffs have been compelled to pay it to the bank, that therefore they are now entitled to recover the money sued for by way of reimbursement. This argument is not supported by any facts in the case. We know of no settlement of accounts, and we can judge only from what we know. The draft was on four months, and at its maturity all parties knew that it was not paid in any other mode than by the draft on *William Hyde*, and his acceptance of it. The above assumed fact may therefore be laid out of the case, and then the inquiry is, whether the acceptance of the second draft by *William Hyde*, bound the *firm of Shirley, Hyde & Co.* or *William Hyde, only:* for if it bound *him only*, then the law will not *imply a joint promise* by the defendants to reimburse the plaintiffs the sum paid by them to the bank as indorsers of the draft. On this point we apprehend there can be no doubt. In *Evans* v. *Drummond*, 4 *Espinasse's Rep.* 93, *Lord Kenyon* decided that if two partners give a bill of exchange for a partnership demand, and when the bill becomes due, the holder takes the separate bill of one of them, the other is discharged. His language is, "Is it to be endured that when partners have given their acceptance, and perhaps one of two partners has made provision for the bill, that the holder shall take the sole bill of the other partner, and yet hold both liable? I am of opinion that when the holder chooses to do so, he discharges the other partner. Laying the idea of a pre-existing partnership which had been dissolved, out of the case, and considering *Shirley* and *Hyde* as two unconnected individuals, if *Hyde* owed a debt to *Springer*, and gave his note for

it, payable in sixty days, and at the end of the sixty days he took up his note, and *Springer* consented to receive *Shirley's* note for the amount at a future day, could he after this transaction have any claim on *Hyde?* If a person has a demand on the estate of an intestate and accepts a note signed by the administrator for its amount, we apprehend that his claim against the estate would be discharged thereby. In the case before us, the first draft on the firm was given up and cancelled at the time the draft was accepted by *William Hyde*, and received by the bank in its stead; and this second draft, so accepted, was given up to *Hyde*, and cancelled, when the third draft was made and accepted by *Shirley*.

The second ground of defence is, that this acceptance by *Shirley*, was several months after dissolution of both partnerships: on what principle then could it bind *William Hyde?* "The very act of dissolution implies a discharge from all liabilities growing out of subsequent transactions; inasmuch as the parties have become distinct persons, and are no longer members of the association. Indeed the whole range of decisions, both in the American and English books, upon this point, concur that whenever a new debt or a new cause of action is to be created after the expiration of the partnership, it can only be done by the *individual act of each* co-partner." *Parker* v. *Merrill & al.* 6 *Greenl.* 41. On this point we need not cite other cases. Beyond all this, the report states expressly that the money which the plaintiffs paid to the bank was to take up the last draft; and that draft was discounted for the benefit of *Shirley*. This fact is an important one in either of the views which we have thus far taken of the cause; and it at once repels the idea of an *implied* promise on the part of *both* of the defendants to reimburse the amount so paid.

But there is another principle of law applicable to this defence which must bar the action. The principle is, that when a creditor receives a negotiable security for a pre-existing demand, it completely extinguishes the original cause of action; or, in other words, *that* demand, unless it appears from the facts attending the transaction, that it was not intended to have that effect. The authorities cited in support of the principle are direct and unanswered. While the bank held the draft, accepted by *Wil-*

*liam Hyde, he* was the only principal debtor, and the plaintiffs were held as indorsers; but when that draft was given up and cancelled by the bank on receiving the draft which was accepted by *Shirley*, the acceptance of that, was an extinguishment of all right of action against *Hyde*, on the preceding draft. There is no fact shewing that it was not intended to operate *as such;* but, on the contrary, the cancellation of that draft and its delivery up to the parties chargeable, prove that it *was* so intended; and in this respect it clearly differs from the cases cited by the plaintiffs' counsel in reference to this part of the cause. The application of the above principle to the draft in question is the same as to a negotiable promissory note.

For the reasons assigned we are all of opinion that the action cannot be maintained.

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## Adeline G. Nott's *case.*

The 6th and 7th sections of *ch.* 124 of the statutes, by which two or more of the overseers of the poor in any town, are empowered and directed to commit to the Work-house, by writing under their hands, "all persons able of body to work, and not having estate or means otherwise to maintain themselves, who refuse or neglect so to do; live a dissolute, vagrant life, and exercise no ordinary calling or lawful business, sufficient to gain an honest livelihood," violate no provision of the *constitution.*

Adeline G. Nott was brought before the Court on a writ of *habeas corpus*, addressed to *Curtis Meserve*, master of the work-house in *Portland.* By the return of the writ it appeared, that on the 2d day of *April*, 1834, two of the Overseers of the Poor of *Portland*, had set forth under their hands that it appeared to them, "that *Adeline G. Nott*, now resident in said *Portland*, is a person able of body to work, has not estate or means otherwise to maintain herself, and neglects and refuses so to do, lives a dissolute, vagrant life, and exercises no ordinary calling or lawful business sufficient to gain an honest livelihood, and in our opinion is liable to become chargeable to the city." The master of the work-house in *Portland* was therefore directed to receive her into said house, and there employ and govern her, according to the

rules and orders of the same, until she should be discharged by order of law. This was directed to either of the Constables of *Portland.*

The authority for the committal was derived from statute of 1821, *ch.* 124, *sec.* 6, 7, which says "that any two or more of the overseers in any town," "are hereby authorised, empowered, and directed to commit to such house [work-house] by writing under the hands of the said overseers, to be employed and governed, according to the rules and orders of the house," &c. "all persons able of body to work and not having estate or means otherwise to maintain themselves, who refuse or neglect so to do; live a dissolute vagrant life, and exercise no ordinary calling or lawful business, sufficient to gain an honest livelihood."

*R. A. L. Codman*, of counsel for the said *Nott*, moved for her discharge, on the ground that the section of the statute under which the committal was made, was *unconstitutional* and *void.*

1. Because it is in derogation of the absolute and natural rights of every citizen of the State, in authorising the commitment to a dungeon or work-house, of a citizen without trial or hearing, and that too, by persons invested with no judicial power.

2. Because it violates the spirit and genius of the constitution and laws of the land. The constitution declares that "all men are born equally free and independent, and have certain natural inherent and unalienable rights, among which are those of defending life and liberty." But how can it be said that the citizen of this State can enjoy liberty, if at any time he may be committed by two others, to a dungeon, without a hearing, without a trial — without even a *complaint on oath*, and the imprisonment being, as by the law it may be, *for life.*

3. Because it is an infraction of the express terms and letter of the constitution. The 6th *sec.* of the 1st. *Art.* of the constitution provides, that "in all criminal prosecutions the accused shall have a right to be heard by himself and counsel, confronted by witnesses, to have compulsory process for obtaining witnesses in his favor. All these rights are clearly violated by the law in question.

But if the law were constitutional, still it was contended that, the imprisonment in this case was unlawful.

Because the warrant was not signed and issued by the order of the board of overseers at any regular or stated meeting thereof.

The statute speaks of "quarterly meetings" and "intermediate" ones — from which, and other parts of the statute, it is plainly inferrible, that their powers should be exercised in such mode.

*Longfellow*, City Solicitor, *e contra*.

WESTON J. delivered the opinion of the Court.

The overseers of the poor have no criminal jurisdiction. They had no right to act upon the complainant as an offender; or to punish her as such. Unless the course taken by them can be justified, as falling within their proper department, the complainant must be discharged. The maintenance and support of the poor, has been the subject of legislative provision, from the first settlement of the country. The objects of the public bounty, must necessarily be more or less subject to the public control. It is not unreasonable that they should be made to contribute to their own support, by some suitable employment. This cannot often be effected, without subjecting them to a degree of coercion and restraint, which would be an invasion of the rights of any citizen, competent to take care of himself. Idiots and insane persons cannot, from their imbecility, exercise the rights of citizens. Their persons and property, if they have any, must be confided to others.

The indigent have no claim to be supported in idleness; and it is but just that they should remunerate those, charged with their maintenance, by their own industry. Their poverty generally grows out of an unwillingness to labor, or is occasioned by reckless and improvident habits. Thus circumstanced, and while receiving alms from the town, they have no just right to complain, if they are sent to, employed and governed in a work-house, provided for the purpose of making their support less burthensome. It would probably not be contended that their rights would be thereby infringed; unless the restraint should be continued beyond the necessity which occasioned it.

The case of the complainant is not precisely of this character. The overseers have certified, in the writing under their hands, directed to either of the constables of *Portland*, that she is there

resident, "that she is a person able of body to work, has not estate or means otherwise to maintain herself, and neglects and refuses so to do, lives a dissolute vagrant life, and exercises no ordinary calling or lawful business, sufficient to gain an honest livelihood, and in their opinion is liable to become chargeable to the city." Assuming for the present the truth of these facts, are her constitutional or legal rights invaded by the course pursued? She has not actually claimed or received alms. Such a claim is however impending, and must be met by the town. Her health and strength constitutes a fund, of which they have a right reasonably to avail themselves, to contribute to her maintenance. She is prostrating both by dissolute habits. Unless her course can be arrested, she may become entirely unable to do any thing towards her own support. She is but one degree removed from persons actually chargeable; and that because she is able for the present to obtain subsistence, by unlawful means. Can we believe that the people have, by constitutional barriers, deprived the legislature of power to make provision for such a case? Certain parts of the constitution have been referred to by her counsel, intended for the protection of a party, charged in a criminal prosecution. We cannot regard her case as of that character. What has been done, is to preserve her health and strength, and to render it productive. For whose benefit? For her own. That she may thence draw an honest livelihood. That she may be removed from temptation, and compelled to cultivate habits of industry, to be again restored to society, a useful member, as soon as may be. It is, under the circumstances, a measure calculated for her good, however unacceptable. When enlightened conscience shall do its office, and sober reason has its proper influence, she will regard the interposition as parental; as calculated to save instead of punishing. We have thus considered her case as properly belonging to the department of the overseers of the poor, being a measure taken to enable the town, with less expense, to provide for her support, which is about to be thrown upon them. But collaterally and incidentally, it may be viewed as a police regulation, to preserve the community from contamination.

The victim of contagious sickness, to whom no fault can be imputed, may at the discretion of the selectmen, be taken from his own house, from the aid and solace of his family, and assigned to such place, and subjected to such care, as they may adjudge necessary. *Revised laws, ch.* 127. The public health is deemed paramount to every other consideration. There may be cases of so pressing a character, that they cannot await the forms of law, ordinarily provided for the protection of right, and the suppression of wrong. Might not a judge lawfully refuse a *habeas corpus*, for the enlargement of a man infected with the plague, and restrained in a separate house? Might not disobedience to the writ, in such a case, be justified? And yet the right to this writ is secured by law; but it must receive a reasonable construction; and not be extended to cases, which, in the nature of things, could not have been contemplated.

It is urged, if this course is held lawful, there is no remedy, if a citizen is ever so unjustly charged, by the overseers. We do not so understand the law. They act at their peril. If they cause a citizen to be arrested and restrained, upon an unwarranted assumption of facts, they are answerable in damages. This Court in term time, or any one of its members in vacation, will, upon *habeas corpus*, inquire into the facts, if they may be controverted, and discharge the party, if they are not satisfactorily established, or if there be no further occasion for his or her detention. The authority is given to any two or more of the overseers. It is insisted, that it should have been exercised at a regular meeting. If necessary, such might have been the fact; we have no evidence that it was not so.

We sustain the power of the overseers, receiving the writing under their hands, as *prima facie* evidence of the facts therein stated. And upon that evidence, she is to be remanded. If there is any reason to doubt the facts, we will examine their truth; and discharge the complainant, if her detention is not justified.

## GORDAN *vs.* PEIRCE.

The *stat.* of 1831, *ch.* 514, abolishing special pleading, is to be understood as limited to *pleas in bar.*

In practice, *double pleading* is allowed in *real* as well as in personal actions.

Where there is more than one plea, they are not to be regarded as bad, merely on account of their *inconsistency.*

If the defendant, in a writ of entry on disseizin done by *him*, would avail himself of a disseizin done by his *ancestor* and a descent cast, it should be by plea in *abatement.*

THIS was a writ of entry in which the demandant declared on his own seizin and a disseizin by the defendant within twenty years.

The defendant pleaded the general issue and filed a brief statement, setting forth:

1. "That, said *John Gordan* was not seised within twenty years.

2. "That, if any disseizin were done, it was done by *Josiah Peirce*, the father of the defendant, and that he died, and the lands descended to the defendant prior to the commencement of this suit.

3. "That, the title of said *John Gordan*, if any he have, is by virtue of a mortgage deed made to him of the lands demanded, among other lands, by *Joshua Webb*, *April* 14, 1812; and that said *Gordan*, on the 23d of *January*, 1832, conveyed the demanded premises, and assigned all his interest therein, to wit, in the mortgage aforesaid, to one *Jesse Gordan*, as by deed to him duly executed and recorded appears.

It was stated by the defendant's counsel, that he held under a subsequent conveyance in mortgage from the same *Joshua Webb*, to *William Crabtree* and *Lemuel Weeks*, *Jr.* and a conveyance by deed of general warranty by them to *Josiah Peirce*, the defendant's father, deceased, duly executed and recorded, and contended that it was competent to show this title and the descent under the second specification in the brief statement.

The demandant's counsel objected to the matter and form of the brief statement as inadmissible under the general issue; and that he was not bound to receive it or go to trial upon it; — and in particular he objected: —

That, the 1st and 3d points or specifications were inconsistent.

That, the 2d point was an exception that could only be presented in abatement.

That, the 3d went to the action, and was incompatible with the first, and with the general issue.

Before joining issue, the demandant's counsel moved for leave to amend his declaration by introducing a new count, declaring on a disseizin done to the demandant by the said *Josiah Peirce*, which was objected to by the defendant's counsel.

With a view to settle these preliminary questions, and the proper issue or issues to be raised for determination under this form of pleading, the presiding Judge ruled that the several points of defence presented by the general issue and brief statement were open for the defendant under the form of pleading adopted, and refused the amendment; and as the facts stated were admitted to be true, directed a nonsuit, with liberty to have it removed, and the action to proceed to trial, if in the opinion of the Court the nonsuit was improperly ordered.

*Daveis*, for the demandant. The allegation under the 2d point in the brief statement is, substantially, that the demandant has mistaken his action; which, we contend, should have been pleaded in *abatement;* and such was the decision of this Court in *Porter* v. *Cole*, 4 *Greenl.* 20. The statute authorising the filing of brief statements was not intended to affect pleas in abatement.

In order to entitle the defendant to make the defence he sets up, he must come in under *Josiah Peirce* as a *disseisor;* but he in fact was no disseisor, having come in under title. *Tinkham* v. *Arnold*, 3 *Greenl.* 125; *Richard* v. *Williams*, 6 *Wheat.* 107.

The defendant cannot deny the seizin of the demandant and at the same time show a conveyance by him to one under whom the defendant does not claim. These pleas are inconsistent, and cannot be received in a brief statement. *Jackson on R. Actions*, 153.

Under the *general issue* the defendant cannot show title in a stranger, without claiming title from him. *Howard* v. *Chadbourne*, 5 *Greenl.* 15; *Wolcott* v. *Knight*, 6 *Mass.* 418; *Parlin* v. *Haines*, 5 *Greenl.* 180; *Stanley* v. *Perley*, 5 *Greenl.* 172.

If it were not competent for a defendant, before the statute abolishing special pleading, to plead two or more special matters in real actions, neither can he do it now in a brief statement. *Selvey* v. *Bardens*, 3 *Serg. & Lowb.* 2; *U. States* v. *Sawyer*, 1 *Gall.* 93; *U. States* v. *Burnham*, 1 *Mason*, 70; 1 *Chitty*, 541.

*Fessenden* and *G. W. Peirce*, for the defendant, denied that the objection to the matters in the brief statement as being inconsistent, was well founded. Since the *statute* of *Ann*, allowing double pleading, there can be no legal incompatibility.

They contended that it was not necessary for the defendant to plead in *abatement*. The statute abolishing special pleading was intended to embrace *all special pleas*, those in abatement as well as in bar. But before the statute, a plea in bar would have been good in this case, as well as abatement. *Booth on Real Actions*, 179; *Jackson on Real Actions*, 114.

The cases cited on the other side were none of them cases of *descent*, but of *conveyance*. The party was there a wrongdoer himself by taking a deed, and then the plea must be in *abatement*, but it is otherwise in case of *descent* cast upon the heir.

*Josiah Peirce*, the ancestor, was a disseisor, for though he entered under title it was not good.

The amendment ought not to be allowed, because it would necessarily require more than one plea. The defendant would then be compelled to plead that *he* never disseised, and that his *ancestor* never disseised.

Weston J. delivered the opinion of the Court.

The act to abolish special pleading, *stat.* 1831, *ch.* 514, must be understood to be limited to pleas in bar. Every defence, either in law or fact, upon the merits, is made available to the defendant, under the general issue. He is relieved from the necessity of double pleading, or of setting forth the ground, upon which he relies in a special plea. Pleas in abatement are of a different character. They are dilatory in their nature; and turn upon points which do not affect the merits. Hence at common law, they could not be pleaded after a general imparlance; nor by our statute, in the Common Pleas, after the jury are empannelled. If the plaintiff was wrong in point of form, and the defendant

would take advantage of the defect, he was required to do it, upon the entry of the action, that the plaintiff might not be subjected to unnecessary expense, and that he might the more speedily bring a better writ. The force of these reasons still remains unimpaired; and we are satisfied that the act before cited, was not intended to apply to, or to affect, pleas in abatement.

Whether the disseizin, of which the demandant complains, was committed by the tenant or his ancestor, he is equally entitled to recover. The tenant has no right to hold the land against him. If then the disseizin is alleged to have been done by the one, when it was done by the other, it furnishes ground of objection to the form, and not to the substance, of the action. *Coke* says, if the degrees are not observed, the writ is abateable. *Coke Lit.* 238, *b.* This point was directly decided in *Porter* v. *Cole*, 4 *Greenl.* 20. It was there holden, that an exception of this sort must be taken in abatement. The demandant is often a nonresident proprietor, living at a distance, and may not know under what circumstances the tenant became seised. He knows the land to be his, that he has been disseised of it, and that the tenant has no lawful title to it; but whether he committed the disseizin, or holds by descent or conveyance from him who did, he may not be informed. The tenant must be conusant of the origin and source of his own title; and if he would object to the form in which he is called upon by the true owner, the reasons upon which pleas in abatement are founded, apply with as much force to this case, as to any other. If not holden to plead in this manner, the demandant may be defeated, upon a formal objection, after years of unnecessary delay. The law was thus settled in *Porter* v. *Cole*. It is a convenient rule, calculated to serve the purposes of justice, and sustained by the analogies of the law; and we are not satisfied that it ought to be disturbed.

*Jackson on real actions*, 114, gives the form of a plea of this kind in abatement. He says this matter may, according to the English practice, be pleaded also in bar, giving color to the demandant; and he supposes it might here be pleaded in bar, without giving color. He cites no authority for this position. It has seemed to us that the law should be otherwise settled; and however we may respect the learning and experience of that eminent

jurist, we feel constrained to abide by the rule established in *Porter* v. *Cole*. If, however, we were less clear upon this point, we entertain no doubt the objection might be removed by an amendment of the declaration, which we think, if necessary, ought to be granted. As this objection constituted one of the grounds of the nonsuit, it is to be set aside, and the action is to stand for trial.

The third point, taken by the tenant in his brief statement, was open to him under a special plea in bar, before the act abolishing special pleading. *Wolcot* v. *Knight*, 6 *Mass.* 418. It is said that before that act, double pleading was not allowed in real actions. Our practice has been otherwise; in support of which, *Kent* v. *Kent*, 2 *Mass.* 338, may be cited. But it is urged that if double pleading is allowed, inconsistent pleas could not be received. In certain cases they may have been rejected; but in others, as is well known, they have been admitted. The books are full of double pleas, not to be reconciled with each other. It is not necessary to cite examples; as our statute requires imperatively the general issue, but admits under it, with a brief statement, any special matter in defence.

Whatever then bars the action, is admitted under the general issue; and cannot be otherwise admitted. Hence in practice, necessarily, there is often the greatest inconsistency between the general issue and the brief statement. Thus in replevin, under the plea of *non cepit*, the ground of defence, disclosed in the brief statement, is very generally property in another, denying property in the plaintiff. If the demandant can repel the third ground, set up by the tenant in his brief statement, by showing that, by reason of an existing disseizin, nothing passed by his deed to *Jesse Gordan*, he may give evidence to this effect, under a counter brief statement, which he is at liberty to file.

*Nonsuit set aside.*

## TITCOMB *vs.* POTTER.

Where a defendant, in an action at law, has not used due diligence in making his defence, or in applying to Chancery for a discovery to assist his defence at law, he cannot, after a verdict against him, obtain the aid of that Court to stay the proceedings at law, or have a new trial.

THIS is the same case, in a subsequent stage of its progress, with those reported in 7 *Greenl.* 302; and 1 *Fairf.* 53. The additional facts with the arguments of counsel, appear in the opinion of the Court, which was delivered by

PARRIS J.—The respondent, having as Judge of Probate, prosecuted an action on a probate bond, given by the applicant, and obtained a verdict, we are now moved as a court of law, to order a new trial, and as a Court of Chancery, for an injunction upon the defendant to stay further proceedings in his suit, or in other words, to deprive him of the fruits of his verdict.

Our first inquiry is, shall a new trial be granted. The ground upon which this is moved is, that since the trial the applicant has, under a bill for discovery, obtained possession of sundry letters and papers important to his defence, which were in the possession of the adverse party. The action was against the applicant as administrator of the estate of *Moses Titcomb*, on an alleged breach of his probate bond, for not inventorying certain notes given by the applicant to the intestate; and was brought for the benefit of the heirs at law of said *Moses*. The grounds of defence were, *first*, that the notes were forgiven in the lifetime of the intestate; and, *second*, that the whole estate, including the notes, was amicably settled among the heirs. The principal circumstance in support of the latter point in the defence was, the great length of time since the decease of the said *Moses* and the taking of administration by the applicant, which was in 1804;—and permitting the notes to remain uncalled for, and the whole business to sleep until an adjustment might fairly be presumed to have taken place among all parties interested in the estate.

To rebut this it was contended, that none of the heirs for whose benefit the suit was prosecuted, knew of the existence of the notes, and, therefore, the presumption of settlement could not arise. To account for this want of knowledge, it was proved, that the large note was taken by *Henry Titcomb*, as agent of

*Moses*, the intestate, together with a mortgage to secure its payment, a short time previous to *Moses'* death, which took place at *Ballstown* springs, in *New York*, in the autumn of 1804; — that the note and mortgage remained in *Henry's* possession and were found among his papers, after his death, by his administrators, in the summer of 1820; soon after which, the suit against the applicant, for not accounting for, or inventorying the note, was commenced. There was no evidence tending to show that either of the heirs, for whose benefit the action was prosecuted, had any knowledge of the existence of the note, or the indebtedness of *Joseph*, the administrator; — and to account for this want of knowledge, the plaintiff showed, by sundry accounts of *Francis* and *Charles Bradbury*, commission merchants of *Boston*, who were the agents and bankers of *Moses*, the intestate, that moneys, particularly a sum of $2400, had been advanced or loaned to *Henry*, by said *Moses*, a short time previous to his death, in 1804, and that this sum had never been collected or accounted for by *Joseph*, the administrator. From these facts, it was argued to the jury, that *Joseph* and *Henry* colluded together to keep from the other heirs a knowledge of the note due from *Joseph*, and the amount advanced or loaned to *Henry* through the *Messrs. Bradbury*.

It is now contended, that the newly discovered evidence does away the foundation of this argument. We do not so understand it. To be sure, it does appear that a small portion of this $2400, to wit, about $300, was applied by *Henry*, under directions from *Moses*, to pay *Mrs. Clark* for the board of one *Samuel Fox*, the ward of said *Moses*. The residue of said sum remains unaccounted for by any evidence offered in the case, either at the trial before the jury, or on the hearing of this motion, and would constitute the basis of an argument proving collusion between *Joseph* and *Henry*, as it did at the trial. In addition to this, there is strong proof in aid of the argument arising out of the books and accounts of *Henry*, which were not used at the trial, but which are admissible in the consideration of this motion, addressed as it is, to the discretion of the Court. The attempt to show that the residue of the $2400 was expended by *Henry* as *Moses'* agent, in certain improvements on his lot and wharf has wholly failed. There are strong reasons for believing that all

those expenses were defrayed out of other advances. Take the case as it now stands upon this point, and the argument of collusion would be bottomed upon the $2100 received by *Henry* through the *Messrs. Bradbury*, and nearly $2000 received by him as rents unaccounted for. In our opinion the whole of the newly discovered evidence upon this point, does not present the case for the applicant, in a point of view at all more favorable than that under which it was presented to the jury.

Again; it was argued to the jury that there was an inducement for collusion between *Joseph* and *Henry*, growing out of *Henry's* private letter, which held out encouragement to *Joseph* that the affairs were so arranged that the "five thousand pieces of eight," originally intended for his son might be secured to him. Such an argument could have had little force, as it is not perceived how an assurance from *Henry* to *Joseph* that he was desirous to accomplish such an arrangement, would have influenced *Henry* to release *Joseph* from his liability on this note; — or to keep the knowledge of its existence from the other heirs. But whatever force it might have had is not at all diminished by the newly discovered evidence. It does appear that *Henry* had given the same assurance to *Harris;* but that could have had no influence upon his arrangements with *Joseph*. It does not appear that these assurances to *Joseph* or *Harris* were ever fulfilled by *Henry;* — and whether they were or not, does not at all bear upon the great question involved before the jury, viz. whether the heirs had a knowledge of the existence of the note.

The money, for which the note was given, was furnished by *Moses*, through the *Bradbury's*, as well as that furnished *Henry;* but there was no evidence at the trial, and none has been furnished under this motion tending to show that either of the heirs, for whose benefit the suit was brought and prosecuted on the probate bond, had knowledge of, or inspected the accounts of the *Messrs. Bradbury*. *Andrew* had an opportunity of doing so; but the jury found he did not. That question was distinctly presented to them; — they have passed upon it, and no new evidence material to the point has since been discovered.

But it is urged that *Andrew* had knowledge of the existence of the notes derived from letters in the possession of *Moses*, at

the time of his death, and especially a letter from *Henry*, in which the note and mortgage are particularly mentioned. It was proved at the trial that *Andrew* was with *Moses*, at, and for some time previous to his death; — that he took possession of the papers of the deceased immediately after his death, and brought them to *Stroudwater*, *Andrew's* residence, and retained the custody of them until they were delivered over to *Joseph*.

The jury were told by the Court, in charging upon the facts, that here was an opportunity for *Andrew* to have become acquainted with the contents of the letters in *Moses'* possession, at the time of his death; and if *Andrew* did, by examining the letters from *Henry*, obtain a knowledge of the note in controversy, then he and his representatives ought not to recover.

There is nothing in the newly discovered evidence which shews that *Andrew* did examine the letter from *Henry*, which speaks of the mortgage; — nothing which shews that he made any examination of any of the papers, while at *Ballstown*. After his return, he probably did search for a will, as *Henry* in a letter to *Harris*, says *Andrew* would do so. He might have done so, or he might have delivered all the papers to *Joseph*, the administrator, leaving him to make the search promised by *Henry*. Even if *Andrew* made the promised search, it by no means follows, that he particularly read every letter of recent date, more especially a letter from *Henry*, who was the very person inquiring for the will, and wishing the search. Although it is admitted that the newly discovered evidence, so far as it relates to *Andrew's* attention to *Moses*, during his sickness, and examining or searching for a will after his decease, and *Moses'* ability to give directions as to the disposition of his property, while attended by *Andrew*, is somewhat stronger than that exhibited at the trial, still it falls far short of establishing the fact of knowledge in *Andrew* of the existence of the note or the indebtedness of *Joseph*. As to the alleged forgiveness of the note, there never has been and is not in the case a particle of evidence that the debts due from the relatives were forgiven, or that it was *Moses'* intention, at the time of his death, that his estate in this country should be settled in any other manner than by a just division among all the heirs. On the contrary, there are reasons for concluding that *Moses* gave no

directions upon the subject. He had, but a short time before, directed that this debt against *Joseph* should be secured by mortgage, clearly negativing the idea of gift or forgiveness. He did not think himself dangerously sick, but expected to recover, and this expectation was as lasting as his reason; — and notwithstanding the research that has been made for facts in this case, it remains wholly destitute of an intimation from *Moses*, during his last sickness, of any intention to forgive his debtors, or make an unequal distribution of his property among his relatives. In addition to this it is manifest that the brothers of the intestate did not understand or consider that the debts which they owed *Moses*, at the time of his death, had been forgiven. *Andrew*, to whom it is now contended, that the intention of forgiveness was made known; and who is alleged to have received the direction from *Moses* in his last sickness, could not have so understood it, for he, subsequently, paid the debt, which he owed the estate, to *Joseph*, as administrator. *Benjamin* could not have so understood it, for he also paid the note which *Moses* held against him, to *Joseph*, as administrator; — and the conduct of *Joseph*, in collecting these demands, or even receiving them, is wholly inconsistent with the defence by him now set up, founded on the alleged forgiveness of *Moses*.

Much reliance has been placed, in the argument, upon the fact, that in the month of *February* previous to the death of *Henry*, he exhibited this note to *Benjamin*. It is contended, that if this proof had been exhibited to the jury, they could not have found that *Benjamin* had no knowledge of the existence of the note.

In order to understand the relevancy of this new evidence relating to *Benjamin's* knowledge it is necessary to advert to the points made in the defence before the jury.

The note was given in 1804, and the defendant contended, that the great length of time which had elapsed since the note was given, raised a presumption in law that it had been paid. In answer to this, it was replied, that the note had been kept from the knowledge of the other heirs, by *Henry* and *Joseph*, for their exclusive benefit. The jury were instructed, that if the heirs, for whose benefit the action was brought, knew of the notes and suffered them to remain, it would be strong circumstantial evidence

that they did not consider them due. That it was incumbent on them to explain it. If they had claims and they knew it, it is to be presumed that they would enforce their claims. If they omitted to do so, the presumption would be that they had a consciousness of an equitable, if not a legal right against them. But if the note was secreted, as contended by the heirs, no such inference would arise. The charge of the Court, to which neither party excepted, was predicated upon the position, that no presumption could arise unfavorable to the plaintiffs in interest, on account of the delay to commence a suit, unless they knew of the note, on which their claim was founded; — and, inasmuch as it is not now pretended that *Benjamin* knew of the note until within a few months before the commencement of the suit, we think the presumption does not arise to his prejudice. There is not a particle of evidence that *Benjamin* had any knowledge of the note or mortgage, from 1804, when *Joseph* took letters of administration, until 1829, of course his silence during all this period is satisfactorily accounted for. In *February*, 1829, he, for the first time, became acquainted with the fact of the existence of the note; and a suit was commenced in *October* of the same year. Surely no presumption unfavorable to his claim could arise from this short delay.

It was also contended to the jury, that it was the intention of *Moses* to have his personal property in this jurisdiction, particularly what might be in the hands of his brothers and sisters, disposed of without the forms of legal administration, and that they and their representatives assented thereto. The jury were instructed, upon this point, that if all the heirs knew of the note, the legal presumption would be, that it was settled among them according to the intentions of *Moses*, or to their mutual satisfaction. The knowledge of *Benjamin* in 1829, clearly could have had no effect or influence upon the jury in their decision upon this point. He knew nothing of the note prior to 1829, and, consequently, could not have taken it into consideration in any settlement to which he might previously have been a party.

It is urged that from the newly discovered evidence it appears that *Mrs. Harris* had knowledge of the note and mortgage. — The only fact, from which this conclusion is drawn, is, that on a

certain occasion, as *Mrs. Harris* says, *Henry* told her that "*Joseph* little thought he had a mortgage of his property," or words of a similar import. What is there in this language that would lead *Mrs. Harris*, or any one else, to suspect that *Henry* alluded to a mortgage given to *Moses*? *Moses*' name was not mentioned. Nothing is said concerning *Moses*' affairs; and yet it is argued that because *Henry* said he had or held a mortgage of *Joseph's* house, *Mrs. Harris* must have understood it to be the mortgage given to *Moses* to secure the payment of this note. Far otherwise would be the impression ordinarily made by such language. *Mrs. Harris* might well suppose, she undoubtedly did suppose that it referred to transactions between *Joseph* and *Henry*, in his private capacity, and not having any reference to concerns in which she was interested.

If we were satisfied that it would be promotive of justice to open this case to a new trial, and that the newly discovered evidence is of such weight as ought to influence a jury to give a different verdict, we should, most willingly, grant the motion. But whatever additional evidence has been discovered is so remote from the main questions in the cause, viz. a forgiveness of the debt, a settlement by the heirs, or a knowledge of the note by the heirs, that we do not think it would have weight with a jury sufficient to change the verdict. Two juries have passed upon the facts, and have come to a like conclusion, and although the first verdict was set aside, it was not on account of any irregularity in the trial, as far as it proceeded, but because the jury omitted to assess the damages. Two juries have sanctioned the validity of the claim of these heirs, and we perceive nothing in the additional evidence of sufficient weight to influence another jury to come to a different result.

In addition to the motion for a new trial, we are applied to, in the exercise of our chancery powers, to enjoin the plaintiffs in interest, from further prosecuting their suit at law. The bill, which contains this application as well as a prayer for discovery, was not filed until after the verdict in the action at law; and the motion for injunction is founded on the evidence disclosed under the bill for discovery. We cannot forbear to notice the great delay, which has attended the prosecution of the original suit, and

to advert to the impropriety of lying by, until after a trial at law and verdict, and then coming in with a bill for discovery in the expectation of eliciting something on which to urge a new trial or injunction.

The original action was commenced in 1829, was tried by jury in this Court in 1830, and again in 1833; — and yet, during all this protracted litigation, no application is made by the defendant to enforce discovery. It is an established principle in chancery, that where a defendant, in an action at law, has not used due diligence in making his defence, or in applying to chancery for a discovery to assist his defence at law, he cannot, after a verdict against him, obtain the aid of that court to stay the proceedings at law, or have a new trial. *Barker* v. *Elkins*, 1 *Johns. Ch. R.* 465, and *Dodge* v. *Strong*, 2 *Johns. Ch. R.* 228, are authorities to this point. It would seem, therefore, that the aid of this Court ought not to have been granted to compel the discovery prayed for, inasmuch as the application was not made in proper season.

But passing by this consideration, what is there in the evidence, either new or old, that would justify us in enjoining this judgment? The debt existed in 1804. The consideration is proved to be money advanced. It is secured by mortgage by special directions of *Moses Titcomb*, the creditor, about one month, only, previous to his death. There is no evidence that this particular debt was forgiven, nor any circumstances in the case tending to show a probability that *Moses* would be more likely to forgive this debt than the debts due from his other brothers. The debts from the others were not forgiven, as is manifest from their conduct in paying, as well as *Joseph's* in receiving them. There was no settlement among the heirs, which included this note. None such has been exhibited. *Benjamin* negatives it in his answer. *Mr. Storer* negatives it in his; — for they both declare that they had no knowledge of the existence of any such note. If there had been any settlement among the heirs including this note, it could not have escaped the knowledge of *these* heirs. *Mr. Storer* was not only an heir acting in his own right, but was a lawyer, counseling and advising, preparing papers and corresponding with *Mr. Metcalf*, relative to the estate at *St. Croix*.

There has never been exhibited a *scintilla* of evidence of any arrangement or adjustment of this note among the heirs, except what grows out of the lapse of time; and the answers of *Benjamin Titcomb* and *Mr. Storer*, expressly denying knowledge, is a complete avoidance of any presumption arising from that fact.

If these answers speak the truth, it is impossible that this note could ever have been included in any settlement among the heirs. If *Andrew* and *Benjamin* paid the notes, which they owed the estate of *Moses*, and *Joseph* received the payment, which is not even controverted, how can we believe that *Moses*, in his last sickness, forgave to his brothers the debts, which they severally owed him, and communicated the forgiveness to *Andrew*, himself? How can it be that *Andrew* should pay a debt to *Joseph*, as administrator, which *Andrew*, at the same time knew had been forgiven; — and how can it be that *Joseph*, with the same knowledge, should receive it? And, we repeat, there is nothing in the case tending to show that *Moses* would have been more likely to forgive this note to *Joseph*, than the note to *Andrew*, who was with the deceased, manifesting the kindest attention, during his sickness.

Whatever obscurity may have been thrown over this case, growing out of the lapse of time, when examined in a court of law, in Chancery that obscurity is wholly removed, at least, so far as it respects *Benjamin* and *Mr. Storer*, by force of their several answers under oath.

If all the heirs, who were living at the time of *Moses*' death, were now living, and should unite in answers similar to those filed by these respondents, a court of Chancery would find no hesitation in disposing of this case with all its incidents.

From the best examination which we have been able to give this case, we do not feel authorised to interpose any obstacle to the rendition of a proper judgment on the verdict, which has already been sustained by the former opinion of this Court; neither can we grant any injunction to prevent the heirs, the plaintiffs in interest, from realising the fruits of that verdict.

*N. Emery*, *Longfellow* and *Daveis*, counsel for plaintiff.

*Fessenden* and *Deblois*, for the defendant.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF YORK, APRIL TERM, 1834.

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## TROTT *& al. vs.* WARREN.

Where it appeared, that the persons named in an act of incorporation, had held meetings under it, adopted by-laws, chosen officers and done other corporate acts, it was held to be sufficient evidence of the existence of a company capable of taking and holding property, though there was no legal record of the first meeting and the formal acceptance of the charter.

A contract is not valid, made by the *minority* of a committee of a corporation, and not assented to by a majority, nor by the corporation.

Though a sale of goods made fraudulently and without consideration, may be void as to the creditors of the vendor; yet, if prior to their attachment, the goods pass into the hands of a *bona fide* purchaser not conusant of the fraud, and for a valuable consideration, the latter would be entitled to hold.

THIS action was *replevin* for twenty-three boxes of cotton machinery, forty-five yarn beams and eight soap stone rollers, alleged to be of the value of $550.

The defendant pleaded *non cepit*, and also filed a brief statement justifying the taking as a deputy sheriff, on a writ in favor of *Moses Whittier* against *Isaac Wendell* and *George D. Varney*, the property being, as was alleged, that of said *Wendell* and *Varney*, or one of them.

The plaintiffs claimed property through *Isaac Wendell*, who it was admitted, prior to *April* 1, 1828, was sole owner thereof. On that day, said *Wendell* sold the goods replevied, with other property to a large amount, purporting to be of the value of $14,000, to the *Kennebunk Manufacturing Company*. On the

28th of *November*, 1828, said goods were seized as the property of said Company, on an execution in favor of *Jesse* and *Mose Varney*, and were regularly sold at public vendue, *December* 2 1828, the plaintiffs being the purchasers.

The defendant contested the validity of the sale from *Isaac Wendell* to the Company. To prove it, the plaintiffs produced a written agreement, dated *April* 1, 1828, signed by *Isaac Wendell* on the one part, and *Jesse Varney* and *Abraham Wendell*, as a "purchasing committee," of the other part; by which the said *Isaac Wendell* agreed "to sell and deliver" to the *Kennebunk Manufacturing Company*, and the said Company "agreed on their part to purchase" a certain quantity of machinery, tools, &c. then in the *Hanson factory* at *Dover*, for the sum of $20,000, to be paid in five several equal payments, in six, nine, twelve, fifteen and eighteen months.

On the back of this agreement was the following indorsement, of the same date as the agreement. "Received of the within contract, one picker, ten cards, &c., &c., [being a part of the property described in the contract,] for which there has been paid the said *Wendell* $14,000 in drafts on the Treasurer, at 6, 9, 12, 15, 18 months, with interest after six months.

"*Jesse Varney* — for the Company,
"*Isaac Wendell.*"

The admission of this paper was objected to by the defendant, because it did not appear, that there was such a Company in legal existence; and if there was, that it did not appear that the purchase was made and the memorandum signed by any person or persons thereto authorized by said Company.

To show the existence of such Company, the plaintiffs read an Act passed by the Legislature of this State, *February* 14, 1826, incorporating *Jesse Varney* and others as a Company, by the name of the "*Kennebunk Manufacturing Company*" — and also offered in evidence a book, which *Daniel Sewall, Esq.* testified contained the records of said Company. The records were all in the said *Sewall's* handwriting, although he testified that the doings of the Company, at some of the first meetings, say four or five, were noted on loose papers by other clerks, and that he copied and signed them. He was chosen clerk, *March* 22, 1827,

and was duly sworn, and recorded the doings of that and all subsequent meetings. *Sewall* further testified, that no certificates of shares were ever issued.

It appeared by the testimony of *Horace Porter*, one of the associates, that, the Company was to be formed in the first instance, on condition that eighty shares were subscribed for — that, *Jesse Varney* subscribed twenty-three for himself and friends; and that, the associates suspecting it was not genuine, made an assessment to test it, but nothing was paid in, and the witness took the leaf on which the subscription was written, tore off his own name and a *Mr. Smith's*, and detained the paper — that, the eighty shares were never made up, and that so far, it was all moonshine. It appeared in evidence that subsequently there was a new subscription, and sixty or seventy new shares subscribed for.

It appeared by the records, that on the 22*d* day of *February*, 1827, by-laws were made, by the 2d article of which, officers were to be chosen for one year and until removed or others were chosen in their stead.

"*Article 5th.* — The capital stock of the Company shall be divided into 200 shares; all not subscribed for to belong to the Company, but not liable to assessment, nor entitled to the privilege of voting."

"*Article* 10. — The Treasurer shall pay only for such purposes as he shall be ordered by the directors."

*June* 6, 1827, *Samuel Snelling, Jr.* was chosen Treasurer.

*March* 13, 1828, it was "voted that, *Abraham Wendell, Jesse Varney, Daniel Osborne, Abner Jones*, and *Gideon C. Smith* be a committee to purchase machinery."

*March* 29, 1828, *Jesse Varney* was chosen Agent, and *Daniel Osborne* Assistant Agent.

It appeared that no assessments had been made, or moneys paid into the treasury; but it did appear that a store was kept at *Kennebunk* in the name of the Company; that, goods to a considerable amount were purchased and sold in the Company name; that workmen were employed by them, and steel and iron purchased — that, *Jesse Varney* was acting as the agent of the

Company, purchasing goods and employing men — that, *Daniel Osborne* kept the account books, and that *Abner Jones* appeared to be overseer of the joiner work.

There was much other evidence in the case, the reporting of which is rendered unnecessary by the special finding of the jury.

*Parris J.* instructed the jury, that from the evidence in the case, the *Kennebunk Manufacturing Company* was to be considered competent in law to purchase and hold property, and that if they actually purchased this property, it became liable for their debts. That, if a committee was appointed by said Company to purchase machinery, a contract to be valid, must be made or assented to by a majority of such committee; that in this case it was not pretended that the purchase was made in any other manner than through the committee — and inasmuch as but two of the committee, being a minority, had signed the memorandum of agreement of the 1*st* of *April*, the jury would inquire whether the contract had been assented to by a majority, either by parol or otherwise, and if so, the sale would be valid between the parties, and the property in the machinery thereby vested in the Company; but if such contract was not made or assented to by a majority of the committee, the property did not pass, and was not liable for the Company's debts. That, if the sale of the machinery from said *Isaac Wendell* to the Company was fraudulent and not for a valuable consideration, still as between him and the Company, such sale would be valid; but that, the machinery would be liable in the possession of said Company for *Wendell's* debts contracted previous to such sale — but if the machinery had, previous to any attachment by *Wendell's* creditors, passed out of the hands of the Company to a *bona fide* purchaser not conusant of the fraud, and for a valuable consideration, such purchaser would be legally entitled to hold it. That, if the contract between *Isaac Wendell* and *Abraham Wendell*, and *Jesse Varney* was not ratified or assented to, by a majority of the committee, as before specified, then their verdict should be for the defendant; as it also should if the sale was so ratified, provided they found that the sale was without a valuable consideration, and fraudulent as against the creditors of *Isaac Wendell*, and that the plaintiffs were conusant of the fraud. But if they should find

that the contract was ratified or assented to by a majority of the committee and was not fraudulent, or if it was fraudulent, that the plaintiffs were not conusant of the fraud, and that they were *bona fide* purchasers under the Company, for a valuable consideration, then their verdict should be for the plaintiffs.

The jury returned a general verdict for the plaintiffs, and also found specially that there was no other company at *Kennebunk* in 1828, known and called by the name of the *Kennebunk Manufacturing Company*, except that claiming and pretending to act under an Act of incorporation. That the sale from *Isaac Wendell* to the Company was fraudulent — that it was for the purpose of securing the property of *Isaac Wendell* from his creditors, and that, it was not made for a valuable consideration. That *Trott & Bumstead*, the plaintiffs, were innocent purchasers. That a majority of the committee did not, either by parol or otherwise, ratify or assent to the sale of the 1*st* of *April*. That, the judgment in favor of *Jesse* and *Moses Varney*, was not fraudulent, and that *Trott & Bumstead* gave no consideration for the property except the discharge of the judgment of *J. & M. Varney* against the *Kennebunk Manufacturing Company*, of which they were the assignees.

What judgment should be rendered upon the whole case, under the above instructions, was submitted to the consideration of the whole Court.

*J. Shepley*, for the defendant, contended that there was no sufficient evidence of the organization of a Company — a Company capable of taking and holding property. There is no legal evidence of the calling of the first meeting, in pursuance of the directions of the statute. The Clerk made up the records from minutes made by another person, which it was not competent for him to do. The record then, *pro tanto*, is no more evidence than blank paper. *Taylor* v. *Henry*, 2 *Pick.* 402.

If the book produced be not a *record*, it is not evidence of a fact. And the acts of a corporation can only be proved by record. *Moore* v. *Newfield*, 4 *Greenl.* 44; *Owings* v. *Speed*, 5 *Wheat.* 420. And in this respect it is immaterial whether the corporation be a party, or whether it be between third parties. *Manning & al.* v. *Gloucester*, 6 *Pick.* 16.

Again, there was no way for the the corporation to vote but by shares. Here, to no legal intent, was stock subscribed, or shares created. It was not done in fact — but whatever was done, was before *Sewall* was Clerk, and there is no legal evidence of it. *Salem Mill Dam Co.* v. *Ropes*, 6 *Pick.* 23; *Ex parte Holmes*, 5 *Cowan*, 426.

But if the Company was a corporation duly organized, we still maintain, that there was no purchase by the Company of the property in controversy. The contract could not be binding unless assented to by *a majority* of the committee, which is expressly negatived by the finding of the jury. *Kupfer* v. *First Parish in Augusta*, 12 *Mass.* 189.

What judgment, then, shall be rendered on the whole case? The general verdict amounts to nothing. It is not the issue between the parties — but the Court, notwithstanding the general verdict, will render such judgment as the law on the whole case would require. *Brewer* v. *Elsworth*, 11 *Pick.* 316.

The judgment here should go for the defendant, because the jury have found facts that show conclusively that the action cannot be maintained.

*J. Holmes* and *D. Goodenow*, for the plaintiffs, contended that it was not necessary for the plaintiffs to show that the Act of incorporation was accepted, and that the Company was duly organized under it. It is sufficient to show that there was a corporation by reputation.

But if more be necessary, the proof has been furnished, the evidence of acceptance of charter, and organization is sufficient. *Chester Glass Co.* v. *Dewey*, 16 *Mass.* 94; *Foster & al.* v. *Essex Bank*, 16 *Mass.* 245; *Proprietors of Canal Bridge* v. *Gordon*, 1 *Pick.* 297.

With regard to other points, they contended that it was the *general duty* of the Agent of the Company to purchase machinery without express authority given for that purpose. And the committee may be considered as having been raised for the purpose of advising and aiding the Agent. But if it were otherwise, and the committee alone were to purchase, it has been done. It is true, the jury have found that a majority of the *committee* did not ratify the contract of purchase — but they have not found that the *Company* did not ratify. And the Company did ratify,

by implication, at least. The jury could have found the property in the plaintiffs only on the ground that the contract was a good one, and had been ratified by the Company, though not by the committee.

The defendant fails in the justification set up, which was that the property was in some one else, and the plaintiffs are therefore entitled to judgment on the general verdict.

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

This case presents several questions for consideration; and as we are all satisfied that the verdict must be set aside and a new trial granted, it may be useful to the parties for the Court to express their opinion as to all the points which have been the subjects of examination. It appears that on the first of *April*, 1828, *Isaac Wendell* was the sole owner of the property replevied and in controversy in this action. The *first* question in the order of events is, whether by the alleged agreement between him and the *Kennebunk Manufacturing Company*, of the said first of *April*, 1828, the property in dispute was legally conveyed to, and vested in said Company. As the plaintiffs claim under a sale of said property, on execution against said Company, as the property of the Company, the above mentioned question is one of vital importance to them. Unless they can substantiate *their* title to the goods and chattels replevied, it is of no importance to examine the rights of the defendant.

The *first* objection urged against the title of the plaintiffs is, that the *Kennebunk Manufacturing Company*, on the said first of *April*, were not a corporation, capable of contracting for the property in dispute, and of *taking* and *holding* the same; inasmuch as it had not then been organized completely, nor all the shares subscribed for. The Court are of opinion that the facts stated in the report of the Judge shew the existence of the Company as a corporation, capable of taking and holding property. In addition to the authorities cited by the counsel for the plaintiffs to this point, we would merely refer to the act establishing *Bowdoin College*, which contains a grant to the corporation of certain lands, which, of course, preceded the organization under the charter. The case of the *Salem Mill-dam Corporation*, 6

*Pick.* 23, was a question as to the legality of an assessment, which depended on the peculiar language of the Act. In the case before us, many officers had been chosen and important corporate acts had been done, to all of which we refer without a *re-statement* of them in this opinion.

The next question is, whether any contract was made by the corporation with *Wendell*, by means of which the property in question was conveyed to the corporation. The only evidence relied on of such sale is the written contract or agreement of *April* 1, 1828. This was signed by *Wendell* and by only *two* of the purchasing committee, being a *minority* — and the jury have expressly found that *the committee* did not ratify or assent to the sale of the first of *April;* or, as the Judge has certified, that a *majority* did not by *parol* or *otherwise*. This fact, thus found, is decisive against the plaintiffs, in respect to their right to retain the verdict. We are of opinion that the instruction of the Judge was correct as to the question of alleged fraud in the supposed sale, in respect to the creditors of *Wendell*, as also in respect to innocent purchasers of, or under the Company, for a valuable consideration and *bona fide*, and without notice of fraud in a prior sale. It has been contended that there are two questions to which the attention of the Court and jury were not particularly directed at the trial, and in respect to which the jury have expressed no opinion. In the first place, it is said there are facts in the case, shewing that the *Company* ratified, or such as would authorize a jury to *infer* a ratification by the *Company*, of the contract of *April* 1, 1828, as a sale to them of the property in question: or if not, that there is evidence of a *parol* contract of sale of property to the amount of $14,000: — but to which the attention of the Court and Jury was never directed. These may constitute subjects of interesting inquiry on another trial, and on which the jury may pronounce their verdict; but as the *written* agreement of *April* 1, 1828, and its legal character, was the only evidence of sale relied on, and as this agreement was never ratified by a majority of the committee in any manner, the consequence is, that the verdict which was for the plaintiffs, is contrary to law and inconsistent with itself: of course it cannot stand.

*Verdict set aside and new trial granted.*

## Frost *vs.* Frost.

Where a sum of money had been paid as part consideration for the conveyance of land upon certain conditions subsequently to be performed by the grantee, but which had not been performed, and the grantor had reclaimed the land for condition broken, it was *held*, that the grantee could not recover back the amount thus paid.

Nor could the grantor after availing himself of the forfeiture and reclaiming the land, recover that part of the consideration which remained unpaid.

This was an action of *assumpsit*, in which the plaintiff sought to charge the defendant for certain sums of money paid, laid out and expended by him, at the request, and for the benefit of the defendant.

It appeared in evidence, that on the 19th of *December*, 1827, the defendant being the owner of a farm, conveyed it to the plaintiff upon certain conditions named in the deed. [See *Frost* v. *Butler*, 7 *Greenl.* 225.] The plaintiff at the same time giving to the defendant his promissory note of hand for $250, payable on demand — another for $100 payable in one year — and a third for $100 payable in two years. At the time of the delivery of the deed and notes, the plaintiff stated to the defendant that he had not the money to pay the $250 note, and asked him if he might not pay to the persons to whom the defendant was indebted, and take up his debts in payment of the $250 note, to which the defendant agreed. And the plaintiff accordingly paid and took up demands against the defendant to the amount of said note.

Afterwards, the conditions upon which the conveyance was made to the plaintiff not having been performed, the defendant brought his action against the plaintiff's assignee to recover the land and succeeded. Prior to which however, the defendant called upon the plaintiff for payment of the note for $250, when the plaintiff produced the notes, receipts and evidences of payment of the defendant's debts, to the amount of his note, and tendered them in payment. But the defendant refused to take them, and insisted upon having the money, inasmuch as the plaintiff had not fulfilled the condition in the deed. It also appeared that at a subsequent time, when one of the other notes became

due, the plaintiff and his agent again tendered the notes, receipts and other evidences of payment of the defendant's debts, in payment of the $250 note, but the defendant refused to receive them in payment. And for these payments for the benefit of the defendant, the plaintiff brought this action — and the defendant filed in set-off the three notes aforesaid.

Upon these facts, the counsel for the plaintiff contended, that he was entitled to recover for the sums thus paid for the defendant, and that the latter was not entitled to recover on the notes filed in offset. And the counsel for the defendant contended, that he was entitled to recover for the notes filed, and that the plaintiff was not entitled to recover for the debts so paid by him. But *Parris J.* who presided at the trial, instructed the jury, that neither the plaintiff nor defendant were entitled to recover any thing against the other, for these notes, or debts paid. And the jury found accordingly, returning their verdict for the plaintiff for a small sum, another payment made by the plaintiff for the defendant, which was undisputed. The verdict was to be set aside, or confirmed, as the opinion of the whole Court should be upon the ruling of the presiding Judge.

*J. Shepley*, for the defendant, argued that, this being a cash note, the conversation between the parties at the time, as to the mode of paying it, could not in any way affect the note, or defeat an action on it. *Dow* v. *Tuttle*, 4 *Mass.* 414; *Rose* v. *Learned*, 14 *Mass.* 154; *Hunt* v. *Adams*, 7 *Mass.* 518; *Trustees, &c.* v. *Stetson*, 5 *Pick.* 506; *Frost* v. *Everett*, 5 *Cowen*, 497; *Spring* v. *Lovett*, 11 *Pick.* 417.

In *Rowe* v. *Smith*, 16 *Mass.* 30, the Court permitted *Rowe*, the maker of a note, to recover back a payment that he had made towards it, *Smith* not having indorsed it, and taking judgment for the whole amount of the note. Upon the same principle, the plaintiff is entitled to recover back the sums he has paid for the defendant, and which he refused to allow to go in payment of the note.

When the defendant refused, as he had the legal power to do, to fulfil the agreement on his part, then the plaintiff's right of action attached, for the sums he had paid for him. *Whipple* v. *Dow et ux.* 2 *Mass.* 415; *Goodrich* v. *Lafflin & al.*, 1 *Pick.* 57; *Hill* v. *Green*, 4 *Mass.* 114.

*Goodenow* and *Appleton*, for the defendant, cited *Westbrook* v. *North*, 2 *Greenl.* 179; *Howard* v. *Witham*, 2 *Greenl.* 390; *Lloyd* v. *Jewell*, 1 *Greenl.* 355; *Fonbl. Eq.* 1, 373; *Saco Manufacturing Co.* v. *Whitney*, 7 *Greenl.* 260.

WESTON J. delivered the opinion of the Court.

If the money, sought to be recovered in this action, was paid by the plaintiff, on account of a note held by the defendant against him, in part consideration for the farm conveyed to the plaintiff, before it was reclaimed by the defendant for condition broken, the action cannot be maintained. The breach of the condition was the act of the plaintiff, and he cannot thereby lay a foundation to recover back the money, he had formerly paid. The cases of *Rounds* v. *Baxter*, 4 *Greenl.* 454, and of *Morton* v. *Chandler*, 6 *Greenl.* 142, and such as are there cited, are authorities to this point. The note given to the defendant, was a cash note, payable on demand. It was on its face absolute, without any condition whatever.

A number of cases have been cited by the plaintiff, to show that the note could not be affected by any conditions proved by parol, or by any collateral parol agreement. The authority of these cases is not intended to be controverted. Payment is provable by parol; and it may be made either to the payee of a note, or to any other person he may appoint to receive it. When paid, according to appointment, it is thereby discharged. Before payment, such appointment is revocable; and cannot be insisted on, as modifying or varying the obligation to pay, according to the terms. The evidence in substance is, that at the time the note was given, the plaintiff told the defendant he might pay the amount to certain of his creditors, and take up their demands. This appears to have been intended as an agreement binding upon the plaintiff, and not subject to his control. It is not as an agreement, varying the terms of the note, that it can be enforced. But as an order or direction, having reference to payment, which is an after transaction, it becomes valid and operative, when payment is made accordingly.

When payment was once made, in pursuance of the direction of the defendant, that direction was no longer subject to be coun-

termanded. His creditors, to whom it was paid by his appointment, had a right to retain it ; and the plaintiff, having thus paid the note, was not liable to pay it again. If by mutual consent, or by the act of both parties, the application of these payments to the note had been waived, and the plaintiff had otherwise paid it, he would have been entitled to recover of the defendant what he had paid to his creditors, as so much money paid for his use and benefit. But although the defendant, at two several times, insisted that what was paid for him should not be applied to the note, the plaintiff at the same times contended that it should. If each party now finds it for his interest to take an opposite ground, there is the same reason for holding the plaintiff, as the defendant, to what he then claimed. If what each set up as a claim, is proved as an admission, they neutralize each other, and leave the parties precisely as they were before. The plaintiff paid money to the defendant's creditors by his direction ; but as the payment was made to extinguish the note held against him by the defendant, he did not thereby become the defendant's creditor.

Whatever was paid before the land was reclaimed for condition broken, the defendant may retain ; but he cannot demand further payments, after taking the land. In the opinion of the Court, the jury were properly instructed by the Judge, who presided at the trial.

*Judgment on the verdict.*

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## Murray *vs.* Neally.

The Justices of the *quorum* who have administered the Poor Debtor's oath, within the time allowed by statute, to one committed on execution, have power to make up the record of their proceedings and give a certificate to be filed with the jailer, *after the lapse of* "*nine months and three days*," from the giving of the bond for the liberty of the yard, notwithstanding the provisions of *statute* of 1823, *ch.* 209.

In this action, which was debt upon a bond given by the principal defendant with the others as his sureties, to procure for him the liberties of the prison limits, it appeared by copies of proceedings before two Justices of the *quorum*, produced in evidence

by the defendant, that he had been duly discharged on taking the poor debtor's oath, pursuant to the provisions of the statute. And it was agreed that he had thereupon gone at large. But it was admitted that the plaintiff could prove, if the evidence was admissible, that after administering the oath, the Justices neglected to make up their record and refused to give a certificate of their proceedings, the debtor not having paid their fees. That, nothing further was done until after the lapse of *nine months and three days*, when the Justices made up their record, and gave a certificate, *dating both as of the day when the oath was administered.*

If in the opinion of the Court this evidence was admissible, and the action maintainable, the defendants were to be defaulted, otherwise the plaintiff was to become nonsuit.

*Fairfield* and *Tibbets*, for the plaintiff, contended that the parol evidence was admissible. The Justices acted *ministerially* and not *judicially*, and therefore their record may be contradicted. *Brier* v. *Woodbury & al.* 1 *Pick.* 362; *Burton*, v. *Pond*, 5 *Day*, 160; *Bangs* v. *Snow & al.* 1 *Mass.* 185; 3 *Stark. Ev.* 1046.

2. This evidence shows that the proceedings by the Justices were irregular, and that the principal defendant has never been legally discharged from imprisonment. The making a certificate under the hands and seals of the Justices to the jailer, is a *condition precedent* to the liberation of the prisoner. The statute says, "which oath or affirmation being administered by the said Justices to, and taken by such prisoner, *and* a certificate thereof made under the hands and seals of the Justices administering the same, to said jail or prison keeper, he shall *thereupon* set such prisoner at liberty." Upon two conditions the jailer is authorized to discharge the prisoner, to wit, the administering of the oath, and the making of the certificate. One can no more be dispensed with than the other. And from the care and precision manifested in the *form* prescribed by statute, it would seem that the legislature deemed the certificate of some consequence.

Among other things required to be stated in it, is, that the creditor was duly notified. Now suppose this to be omitted would not the jailer be justified in refusing to discharge the prisoner? If so, then how much more, where there is *no certificate.*

This construction is fortified by reference to the additional statute of 1828, *sec.* 3, which says, that "whenever the body of any debtor, &c. shall be discharged from commitment *on the certificate* of the two Justices," &c.

3. The making up of the record, and giving of the certificate, after the lapse of nine months and three days, cannot cure the previous defects. It is unnecessary to maintain, that the record and certificate should be made at the time of administering the oath, though such it is apprehended was the intent of the statute. But after nine months and three days, if not before, their authority is gone. The bond is then *broken*, and the law has invested no man with power to *heal* the act — the rights of the parties have then become *vested*, and the Justices have no power to *divest* them.

*D. Goodenow* and *Howard*, for the defendants, to show that parol evidence was inadmissible in this case for the purpose for which it was proposed, cited 2 *Stark. Ev.* 1042; *Brier* v. *Woodbury*, 1 *Pick.* 362; *Moor* v. *Newfield*, 4 *Greenl.* 44; *Dole* v. *Allen*, 4 *Greenl.* 527; 1 *Chit. Pleading*, 354.

But if admissible, they still contended that the action could not be maintained. The administering of the oath, of itself, operated a discharge.

Parris J. — It is admitted that notice to the creditor, of the debtor's intention to take the poor debtor's oath, was duly issued and served, and that, at the time appointed, the debtor appeared before two Justices of the quorum, who thereupon legally administered to him the oath prescribed by statute.

According to the decision of this Court in *Kendrick* v. *Gregory*, 9 *Greenl.* 22, the condition of the debtor's bond for the liberty of the yard was saved as soon as he was lawfully admitted to the poor debtor's oath; — and the certificate of the Justices is intended merely as a notice to the prison keeper of what has been done, that he may set the debtor at liberty, if in his custody; — but he may do this upon any other satisfactory information of the fact, taking upon himself the peril of proving it.

As the statute *chap.* 209, *sec.* 14, provides that one of the Justices shall make proper entries and records of their proceed-

ings, and enter judgment in due form as in other cases, a copy of that record is the proper evidence of the proceedings before the Justices.

Such evidence, duly authenticated, appears in the case; — and it is not contended that the record is erroneous.

But an attempt is made to avoid its effect, by shewing that it was not made up until some months subsequent to the transaction.

Suppose that, in a civil action, a Justice of the Peace, before whom it was tried, neglected to extend or enter up his record for years after the trial. The record, notwithstanding, when entered up, might be competent evidence, more especially if its truth was not controverted, and it was extended from minutes made at the time, and original papers filed in the case. The Clerks of this Court do not and cannot, during term, record, at length, all the proceedings of the Court. But the validity and effect of a record, as evidence, was never doubted, because it was not extended or made up until after the adjournment of the Court. The situation of parties would be hazardous, if the law were otherwise.

We think the condition of the bond was saved when the Justices admitted *Neally* to the oath, and that their record is competent evidence of that fact; and we see nothing material to distinguish this case from *Kendrick* v. *Gregory*, before cited.

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## HARRIS *vs.* HANSON *& als.*

The taking of the property of one, by a coroner, on a writ against another, is a *malfeasance* in office, constituting a breach of his bond given for "the faithful performance of the duties of his office."

THIS was an action of debt on the bond given by *Hanson* and the other defendants as his sureties, to the plaintiff, as Treasurer of the State, for the faithful performance of the duties of Coroner. It was submitted for the decision of the Court upon a case stated — the material facts being as follows:

One *Peter Frost*, who was a *deputy sheriff*, sued out his writ against one *John Maddox*, and committed the same to *Hanson*, the defendant, for service. On which, by direction of the cred-

itor, *Hanson* attached a wagon as the property of *Maddox* — but one *Sumner Knight*, claiming to own the wagon, took the same from *Hanson*, on a writ of replevin. In the replevin suit, the right of property was contested, but was settled by the verdict of the jury to be in *Knight*, the plaintiff in replevin, who recovered judgment against *Hanson* for the sum of fifty cents damage, and $172,30 costs of suit. Upon the execution which issued thereon, *Hanson* was committed to jail, from which he was duly discharged by taking the poor debtor's oath. Whereupon *Knight* brought this action in the name of the State Treasurer, on the Coroner's bond.

The defendants were to be defaulted, or the plaintiff nonsuited, according as the opinion of the Court should be upon the points raised.

*J. Shepley*, for the plaintiff, maintained that the act of the Coroner, complained of in this case, was clearly within the condition of his bond, and cited the following authorities in support of his general reasoning upon the subject. *Skinner* v. *Phillips & als.* 4 *Mass.* 68; *Knowlton* v. *Bartlett*, 1 *Pick.* 274; *Marshall* v. *Hosmer*, 4 *Mass.* 63; *Bond* v. *Ward*, 7 *Mass.* 123; *Grennell* v. *Phillips*, 1 *Mass.* 530; *Train* v. *Gold*, 5 *Pick.* 380; *March* v. *Gold & al.* 2 *Pick.* 285. He also cited the following statutes: *ch.* 93, *sec.* 1; *ch.* 91, *sec.* 5; *ch.* 92, *sec.* 1.

*D. Goodenow*, for the defendants.

The act of the defendant complained of, does not fall within the scope and intention of the statute, *ch.* 91, *sec.* 5, prescribing the condition of the bond — which condition is to be merely "for the faithful performance of the duties of said office." Nor is it within the terms of the bond. It is not stipulated that he shall perform his duty *well* — but *faithfully*; that is, *honestly*. There is no stipulation to be answerable for his *neglects* or *misdoings*, as in the case of a sheriff's bond, who stipulates to be answerable for the neglects or misdoings of his deputies.

In the case of a bond given by a clerk in a bank, containing similar provisions, it was held to apply to his *honesty* and not to his *ability*; and that consequently his sureties were not responsible for a loss arising to the bank from a *mistake* of the clerk, but

only for a *breach of trust*. *Union Bank* v. *Clossy*, 10 *Johns.* 271.

So of the Clerk of the Courts, *Crocker* v. *Fales & al.* 13 *Mass.* 260.

In this case, there was no *negligence* on the part of the officer — no want of *faithfulness* — no *misdoing*, — there was really no fault in him. He took the writ and served it, as he was by law bound to do. His name was used as the law required — he was a mere *nominal* party. *Frost* defended the action, and conducted the whole business. If the defendant had refused to receive and serve the writ, on being tendered with sufficient indemnity, that, it is admitted, would be a case within the bond. He would then be refusing to do what the statute required him to do. Why then should his doing what the law required him to do, be deemed an act of official misconduct, and a breach of his bond?

But it is contended further, that prior to a suit on the bond, there should have been an action against *Hanson*, to ascertain the damages. *Stat.* of 1820, *ch.* 91, *sec.* 6. *Knight's* suit against the defendant, was not against him as an officer for *malfeasance* or *nonfeasance*, but against him as an *individual*. The ascertaining the damages by suit, is a condition precedent to an action on the bond. Without the provision in the 6th section, no action could be maintained for the benefit of an individual in the name of the Treasurer. *Commonwealth* v. *Hatch*, 5 *Mass.* 191. But under this section, this action cannot be maintained, because the condition has not been complied with.

PARRIS J. delivered the opinion of the Court.

By statute *chap.* 91, *sec.* 5, it is provided, that all Coroners, who shall be appointed in any county in this State, before proceeding to discharge the duties of their office, shall give unto the Treasurer of the State a bond with sufficient sureties, for the faithful performance of the duties of their said office.

The condition of the bond, in this case, is, that the said *Hanson* shall well and faithfully do and perform all the duties which he is, by law, bound to do and perform by virtue of his holding said office. Although the condition is not in the precise phraseology of the statute, its legal effect and operation is the same. It

binds the principal to the faithful performance of the duties of the office of Coroner, and nothing more.

We have no hesitation in pronouncing it a valid bond, answering the requisitions of the statute under which it was taken. *Allegany County* v. *Van Campen*, 3 *Wend.* 48.

From the facts agreed it appears that the principal defendant, *Hanson*, as a Coroner, took the property of *Knight* on a writ against *Maddox*; — that *Knight* reclaimed it by a writ of replevin, which he prosecuted successfully to final judgment, and which the defendant resisted, claiming to hold the property by virtue of his original attachment on the writ against *Maddox*.

The decision in that case, being in favor of *Knight*, it was thereby settled that the defendant was not justified in interrupting *Knight's* possession. Is this such unfaithfulness in the performance of the duties of his office as amounts to a breach of the condition of his official bond? Is an officer performing his duty faithfully by attaching the property of B. on a precept which commands him to attach the property of A.? By so doing, he may be answerable as a trespasser; — and will the law hold acts constituting a trespass, a faithful performance of duty? There may be cases where the officer might be unable to decide between the different claimants to property. Under such circumstances, it is his duty to remain passive until he is indemnified by the creditor, who urges him to action. This indemnity secures him, secures his sureties, and with it he may indemnify the injured party, provided it should appear that the property did not belong to him on whose account it was attached. But if an officer will heedlessly rush into danger, if he will unnecessarily assume responsibility by acting in doubtful cases, without indemnity, who must suffer, in case he should be unable to meet the damages? Shall it be he from whom the officer has taken property without authority, and who has been in no way privy to his appointment or answerable for his faithful performance of duty, or shall it be those who voluntarily assumed the suretyship?

A Coroner is an officer of high authority, clothed with all the power of Sheriff, in case of vacancy in that office, and sometimes, at least, as is shewn by the case at bar, unable to remunerate for an injury of trifling magnitude.

There are no adjudged cases of Coroner's bonds to be found in the books to which our attention has been called, but there are cases somewhat analogous.

The condition of the Coroner's bond, as prescribed by statute, is similar to that prescribed for sheriffs. The statute, *ch.* 91, *sec.* 1, provides that "every person appointed to the office of sheriff within this State, shall make and execute a bond to the Treasurer of the State, conditioned *for the faithful performance of the duties of their respective offices.*" This is an exact transcript of the statute of *Massachusetts*, *chap.* 44, *sec.* 1, upon the same subject, which requires, that every sheriff shall give sufficient security unto the Treasurer of the Commonwealth for his *faithful performance of the duties of his office;* — and by statute of *Massachusetts*, *ch.* 43, *sec.* 1, Coroners were also required to give security in the same manner as sheriffs by law are obliged to do. Thus, in both States the official bonds of Sheriffs and Coroners are similar.

The phraseology, "*faithful performance of the duties of his office,*" in the Sheriff's bond, received a judicial construction in *Massachusetts*, previous to our separation, and we are to consider that construction as adopted by the legislature of this State, when making use of the same language.

In *Skinner, Treasurer* v. *Phillips & al.* 4 *Mass.* 73, *Parsons C. J.* says, "From the manifest import of this condition it is extremely clear, that the condition of the bond is broken by the *malfeasance* of the Sheriff in his office. And if the condition be thus broken, the penalty at law is forfeited." Malfeasance in office is then a breach of the condition for faithful performance.

And is it not malfeasance in an officer, to attach the property of B on a process commanding him to attach the property of A? By the statute of *Massachusetts*, *ch.* 44, *sec.* 1, the Sheriff is required to give bond to answer for the *malfeasance* of his deputies. In *Knowlton* v. *Bartlett*, 1 *Pick.* 274, the Court say, "If the act from which the injury resulted was an official act, the authorities are clear that the Sheriff is answerable. But an official act does not mean what a deputy might lawfully do in the execution of his office; if so, no action could ever lie against a Sheriff for

the misconduct of his deputy. It means, therefore, whatever is done under color or by virtue of his office."

It is *malfeasance*, if the officer under color of his office does what the law prohibits. *Bond* v. *Ward*, 7 *Mass.* 130. In *Grennell* v. *Phillips*, 1 *Mass.* 530, the Court held, that the taking the goods of a stranger to satisfy an execution, was such *malfeasance* in a deputy as rendered the Sheriff liable in an action of trespass, and such has been considered the settled law. *Campbell* v. *Phelps*, 1 *Pick.* 66.

If taking the goods of a stranger is such *malfeasance* in a deputy as renders him liable to the Sheriff, as it must be if the Sheriff is answerable for the act, can it be that the same act by the Sheriff would not amount to *malfeasance* in himself; — and if the Sheriff is answerable on his official bond to the person injured by such an act of the deputy, is he not in the same manner answerable for the like act done by himself?

We have pursued this mode in examining the case, because it was contended for the defendant, that his liabilities were the same as those of Sheriff. If it be so, we think it is manifest that the Sheriff is liable to all persons injured by his official acts, that is, by acts done under color of his office; — and that one of the objects of his bond is to afford security against such injuries.

But it is said that the action of replevin was not against the defendant as an officer, for malfeasance, but against him in his private capacity. The answer is, the defendant has elected to justify as an officer. He claimed protection under his official character, by alleging that the act done was under color of his office, and *that* was not controverted by the plaintiff in replevin. The question in issue was virtually whether, as an officer, he had a right to do the act. That question was decided against him, and the law resulting from that decision, pronounces the act done, *malfeasance* in office; — as completely so, as if, instead of replevin, the original action had been trespass, and he had been charged by the verdict with the full value of the property taken. The sureties on the bond are not injured by this. Their liability is diminished, as by replevin, the original plaintiff regained possession of his property, and the sureties, consequently, escape

from damages for its value, to which they might have been liable if the action had been trespass.

We do not decide that the sureties are precluded from shewing, if they can, that the taking was not under color of office. If there was collusion between the plaintiff in interest and the defendant to render the sureties answerable for an act done by the defendant, not as Coroner, but in his private capacity, we should hesitate before we should deprive the sureties of an opportunity to show it. *Hayes* v. *Seaver*, 7 *Greenl.* 237; *Foxcroft* v. *Nevers*, 4 *Greenl.* 72. But there is no such pretence in this case. The agreed statement expressly finds that the defendant, *Hanson*, as Coroner, in his said capacity, took the wagon as the property of *Maddox*, and duly made return thereof, it being at the same time the property of *Knight*.

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## MOODY *vs.* MOODY.

Parol evidence will not be received in this Court, sitting as the Supreme Court of Probate, of matters which should properly appear by the record; except for the purpose of directing the Court below to complete and certify the proceedings there.

This Court cannot recognize and entertain an appeal from the Probate Court, unless such appeal appear by the *record* sent up.

An administrator of an insolvent estate, having obtained license, sold the real estate of his intestate, and duly accounted in the Probate Court for the proceeds of sale. Afterwards, it appearing that he had neglected to file a bond in the Probate office, prior to the sale, pursuant to *stat. ch.* 470, whereby the sale was void, he was permitted in another account, to charge back the amount of the former sale, and to have a new license to sell.

THIS was an appeal from a decree of the Judge of Probate, licensing the respondent as administrator of the estate of *Edmund Moody*, to sell so much of the real estate of his intestate as would produce the sum of $1500. *Sally Moody*, the appellant was a daughter and heir to the deceased, and had complied with the requisitions of the statute in giving bond, filing reasons of appeal, &c.

The ground of appeal was substantially, that no legal necessity existed for selling the real estate, either through the deficiency of personal assets or otherwise.

It appeared in evidence that the estate had been represented insolvent — commissioners appointed — and a list of claims returned amounting to $1569,22. By the second administration account settled in Probate Court after the return made by the commissioners, it appeared that there was a balance in the hands of the administrator of $953.09. In that account, however, was credited the sum of $885,50, as the proceeds of the sale of the real estate made under license issued from the Probate Court. But the administrator had neglected to comply with the requirements of *stat.* of 1830, *ch.* 470, *sec.* 6, *in filing a bond in the Probate office, prior to the sale* — and the estate was also bid off at the auction, by one *Benjamin Pike, at the request and on the account of the administrator.* On one or both of these grounds, *Edmund Moody, Jr.* another of the heirs to said estate, resisted successfully the claim of the administrator and his grantees to take possession under the sale.

After which, the administrator presented his third account of administration, in which he charged back against the estate the amount previously credited as the proceeds of the sales of real estate. The allowance of this account was decreed by the Judge of Probate, at a Court held *Jan. 7th*, 1833. From this decree *Edmund Moody, Jr.* appealed, and gave bond and filed his reasons as the law requires. Prior however to the sitting of the Court appealed to, an adjustment took place between *Edmund Moody, Jr.* and the administrator, and the former thereupon agreed in writing to withdraw his appeal in the Probate Court, and accordingly it was not pursued. The Register of Probate, on the written withdrawal of the appeal being filed in the Probate Office, made up the record as if no appeal had ever been entered — and the admission of parol evidence therefore to prove these facts relative to the appeal, was opposed by the administrator as contradicting the record.

The license from which the present appeal was had, was granted at a Court held *March 4th*, 1833, and was predicated on the want of personal assets as exhibited in said third account.

*Fairfield*, for the appellant.

1. Parol evidence is admissible to show the fact of the appeal from an allowance of the third account, though it did not appear

by the record. The proceedings in Courts of Probate are not according to the course of the common law — no writ of error lies to their proceedings — persons interested, therefore, have a right to plead and prove a Probate decree a nullity. *Smith* v. *Rice*, 11 *Mass.* 513; *Davol* v. *Davol*, 13 *Mass.* 264.

2. These facts being duly proved, show that the decree in favor of the account was vacated. The appeal set it afloat, and rendered it entirely inoperative. *Campbell* v. *Howard*, 5 *Mass.* 376.

The agreement by the heir to withdraw the appeal, could have no effect beyond restoring the case to the docket in the Probate Court, there to await further action. It could not restore to legal existence a judgment or decree that had been vacated and annulled by the previous acts of the parties and by the operation of law. The third account, then, being considered as not legally subsisting, there is nothing in the case to show such a deficiency of the personal assets, as would form a proper basis for the license to sell real estate.

3. But if the subject matter of the account may be considered as before the Court, and properly to be inquired into, it is contended that nothing appears to justify the Court in granting a new license. The sale was void, for the reason that the administrator neglected to file a bond in the Probate Office prior to the sale. But there was another ground. Either *Benjamin Pike*, or the administrator, was the purchaser. If the administrator be estopped to deny the allegations in his own deed, then *Pike* was the purchaser. If not thus estopped, then perhaps the administrator may be considered the purchaser. If *Pike* was the purchaser, the amount of the purchase money cannot be charged back by the administrator, nor can it now be taken into consideration by the Court, it not having been shown that the consideration money or any part of it had ever been refunded to *Pike*, or that he had ever claimed it. *Jennison* v. *Hapgood*, 10 *Pick.* 103, 104. If the administrator is to be considered the purchaser, he ought not to be permitted to charge the consideration back, because he cannot set up such claim except through his own fraud and maladministration. A purchase by an administrator, especially where he acts as auctioneer, is void, as against heirs. *Har-*

*rington* v. *Brown*, 5 *Pick.* 519; *Fay* v. *Hunt*, 5 *Pick.* 404; *Rhan* v. *North*, 2 *Yeates*, 117; *Munro* v. *Allen*, 2 *Caines' Cas.* 183; *Colden* v. *Walsh*, 14 *Johns.* 407; 2 *Peere Williams*, 597; 15 *Petersdorff's Abr.* 143; *Wellington's estate*, 1 *Ashmead*, 307; *Jennison* v. *Hapgood*, 10 *Pick.* 93.

*J. Shepley*, for the appellee, controverted the positions taken by the counsel on the other side. He denied that parol evidence was admissible to prove the appeal and the proceedings under it, inasmuch as it would be contradicting, or at least adding to the *record.*

But if the evidence was admissible it merely shows *a claim* put in for an appeal. It cannot be effective as such, without a compliance with *all* the requisites of the statute by the person claiming it. He must not only give bond and file his reasons, but the appellee must be duly served with a copy of the reasons fourteen days before Court, which latter was not done. But, however this may be, the withdrawal of the appeal before it could be entered in the Court appealed to, left the decree in as full force as if no appeal had been originally claimed.

If, however, it were otherwise and the decree of the Judge of Probate was vacated by the appeal, still, without a formal allowance of the third account, the Court may well be justified in granting license. If there are claims against the estate remaining unpaid, as the return of the commissioners shows; and there is a deficiency of personal assets, as the second account and the evidence touching the illegality of the sale show; then license ought to issue.

That the sale was void, no bond having been filed, as between the heirs and purchaser, he cited *Knox* v. *Jenks*, 7 *Mass.* 488; *Williams* v. *Reed & trustee*, 5 *Pick.* 480; *Parker* v. *Nichols*, 7 *Pick.* 111; *Macy* v. *Raymond*, 9 *Pick.* 285.

The administrator having erroneously charged himself with the amount of sales of the real estate, when no sale was made to pass the estate, that error should be corrected.

The right to correct errors and omissions in the settlement of Probate accounts is clearly settled. *Weeks* v. *Gibbs*. 9 *Mass.* 74; *Wyman* v. *Hubbard*, 13 *Mass.* 234; *Stearns* v. *Stearns*, 1 *Pick.* 157; *Saxton* v. *Chamberlain*, 6 *Pick.* 222.

It is sufficient for the administrator to show that the sale was void for any cause. But he denies that the sale is void on the ground that he himself was the purchaser, or if it were so, that the legal consequences would be such as contended on the other side.

*D. Goodenow*, replied for the appellant.

WESTON J. delivered the opinion of the Court.

If the administrator's third account has been duly allowed by the Court below, and is not open for examination here, the decree of that Court of the 4th of *March*, 1833, licensing the sale of so much of the real estate of the intestate, as will produce the sum of fifteen hundred dollars, and which has been brought before this Court by appeal, is sustained by the prior proceedings, and must be affirmed. It is insisted that the decree, allowing that account, was vacated by the appeal, interposed by *Edmund Moody*. No evidence whatever of such an appeal, or that any bond was thereupon given, or reasons of appeal filed in conformity with the statute, appears in the records or proceedings of the Court of Probate. In point of form then, the decree is a legal, valid and subsisting one. If it had the force and effect of a judgment at common law, it could not be impeached while unreversed, except upon the ground of fraud. As however the proceedings of a Court of Probate are not according to the course of the common law, and therefore not examinable upon a writ of error, it is doubtless competent for a party, attempted to be charged by a decree of that Court, to repel its operation upon him by showing in the proceedings a substantial departure from the requirements of law.

The validity of a decree, from which an appeal has been duly claimed, is suspended; and it has no longer any validity or binding force, until affirmed in the Supreme Court. In this condition, it is urged, is the decree allowing the administrator's third account. What evidence will the appellate Court require, that an appeal has been legally made? This should appear from the records of the Probate Court. If the proceedings there are duly and properly conducted, the superintendance of which belongs to this Court, the appeal claimed, the bond to prosecute it, and the

reasons of appeal should be found on the records and files of that Court. And this Court would by order or mandamus cause that duty to be performed, if neglected. Whether without resorting to such a course, the Court would sustain an appeal of which no evidence there appeared, or hold the decree below thereby suspended or vacated, would require consideration. And the interposition of this Court in the manner suggested, should be at the instance, motion or petition of the party claiming the appeal. All other persons must be understood to have acquiesced in the decree. The appellant from the decree, allowing the third account, is not aggrieved, nor does he complain of any neglect or deficiency in the Court below. And if he did, upon the facts proved, this Court would not feel itself called upon at his instance, by mandamus or otherwise, to correct a course of proceeding, which he was active in procuring. Parol is not the best evidence of the appeal, and of the other requisites, essential to its validity, of which the nature of the subject is susceptible. But it may be said that it is admissible, if better evidence is omitted to be entered by neglect, or unduly suppressed. We incline however to the opinion, that parol evidence would be received by the Court, in a case proper for its interposition, only for the purpose of directing the Court below to complete and certify the proceedings there, whereby an appeal was claimed.

But admitting that the decree of *January*, 1833, allowing the third account, was vacated by the appeal, the question more immediately before us is, whether the license of *March*, 1833, ought to have been granted. The third account of the administrator had been filed, its correctness was then recognized by the Judge, and made the basis of his decree. It is now before us as a paper, the validity of which is no longer questionable, or if questionable, subject to our examination and revision.

The former sale was void as against the heirs, by reason of the neglect of the administrator to give the bond required by law. One of the heirs has already avoided the effect of that sale, by judgment of law, and another, the appellant, is now controverting the right of the administrator to sell the land upon a new license; a question in which she could have no interest, unless upon the ground that the first sale was invalid. She should in

justice be held to treat that sale either as operative or void. If operative, the land is gone from her, and she has no remaining interest in the subject matter. If void, there is certainly, so far as she is concerned, no propriety in holding the administrator to account for the proceeds. By appealing from the decree licensing the sale, she does in effect claim the land as heir. And by resisting the correction of the administrator's accounts, she claims to hold it against the creditors at his expense. We see nothing in the case which precludes him, under the sanction of the Probate Court, from correcting an error in his accounts, founded in misapprehension and mistake. Nor do we perceive any reason why that sanction should be withheld. The heirs at law lose nothing thereby, which does in justice or equity belong to them. The expenses of the former sale rightfully fall upon the administrator; for it was owing to his negligence that it was not effectual. Upon the whole we are of opinion, that the administrator's third account is well supported by the evidence, and that the license thereupon for the sale of the real estate is warranted by law. The estate being insolvent, the claim of the creditors, and of the administrator in trust for them, is preferred to that of the heirs.

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## THORNTON *vs.* MOODY *& al.*

A promissory note, when offered in evidence in an action brought thereon, by the payee against the makers, had an indorsement upon it of the plaintiff's name, with the words "without recourse to me;" — *Held*, that such indorsement, though remaining *uncancelled*, constituted no objection to the plaintiff's recovery.

In such action the officer who served the writ being a witness, and stating that his orders in regard to the service were in writing, which he had not then in his possession, was not permitted to testify what those orders were.

THIS was *assumpsit* on a promissory note of hand, given by *Edmund Moody*, *Joshua Moody*, and *Waldo Hill*, to the nominal plaintiff. *Hill* died after the commencement of the action, and *Joshua Moody* was defaulted: but *Edmund Moody* defended, on the ground that the note had been paid by the two last named defendants, and that the suit was prosecuted for their benefit.

The officer who served the writ, on being inquired of, as to whose orders he acted under in making such service, stated that he acted under the orders of *Messrs. J. & E. Shepley*, and of *Moody & Hill*, two of the defendants — that the orders of the latter were in writing, and that they were not then in his possession — whereupon the presiding Judge, on objection made, ruled that no testimony could be received from the officer in regard to the contents of said writing.

The note produced as the basis of the action had the following indorsement thereon, *viz.* "*Without recourse to me, James B. Thornton.*" And it appeared that the note had been left by said *Thornton* with the Cashier of a Bank, for collection, and that on the 29th of *November*, 1833, after the note was due, he received orders from *Thornton* to deliver the note to *Messrs. J. & E. Shepley*, but before doing it, to write over his name, which was then on the back of the note, the words "without recourse to me." The Cashier made the indorsement and delivered the note as directed.

The counsel for the defendant contended, that while such indorsement remained uncancelled, the action could not be maintained. But the Chief Justice ruled otherwise, and the case came up on exceptions to his opinion.

*Fairfield*, for the defendant, contended that the special indorsement and delivery of the note, under the circumstances proved, in connection with the fact that the officer serving the writ was acting under the orders of persons other than the nominal plaintiff, were sufficient to show an actual sale and transfer of the property in the note. Or at all events, that the plaintiff was bound to explain these circumstances — to repel the inference of law by proof.

He also contended, that the proof of the circumstances accompanying the indorsement of the note, and service of the writ, the action could not be maintained while the indorsement remained uncancelled. In *Theed* v. *Lovell*, 2 *Strange*, 1103, the report of the case is thus: "When the note was delivered in, the plaintiff's name was upon it, and the Chief Justice *permitted* it to be *stricken out* in Court, it being only an indorsement in blank."

Here it seems the *indorsement* was an obstacle which it was necessary to remove before a recovery could be had.

So also in *Norris' Peake*, 340, citing a case from 2 *Dallas*, 144, it is said, "In an action by the indorser against the acceptor of a bill of exchange which had been indorsed several times, the *mere possession* of the bill was not considered evidence that the indorser had paid the subsequent indorsee, *which must be proved to entitle him to recover.*" On the authority of this case then, if *Thornton* had the *possession* of this note, (which is denied, the mere bringing the action in his name being no *proof* of it,) still he is not entitled to recover, without showing payment to the subsequent indorsee, (for an indorsement necessarily supposes an indorsee) or at least that the indorsement had been *cancelled* by right or by wrong.

He also cited *Pintard* v. *Tackington*, 10 *Johns.* 104; *Ellsworth* v. *Brewer*, 11 *Pick.* 320.

*J. & E. Shepley*, for the plaintiff.

MELLEN C. J. — This case presents two questions: 1. Was the parol evidence, offered to prove the contents of the paper mentioned by the officer, properly excluded; and 2. Did the Judge decide correctly in declining to give the instructions requested.

As to the *first* point there seems to be no room for doubt. *Starkie, vol.* 1, *page* 102, says, "There is but one rule of policy, which operates as a general principle of evidence — this rule or principle consists in requiring the best evidence to be adduced which the case admits of; or rather, perhaps, more properly speaking, in rejecting secondary and inferior evidence, when it is attempted to be substituted for evidence of a higher and superior nature." Again, *page* 390, he says, "It is a universal rule that the contents of a writing cannot be proved by a copy; still less by mere oral evidence, if the writing itself be in existence and attainable." In the present case, the officer said the writing was in existence and in his possession at home. It might have been in Court, had the defendant taken proper measures to obtain it. Even if the officer had proved that it was in the plaintiff's possession, parol evidence of its contents could not have been admit-

ted, unless notice to produce it on trial had been seasonably given. The *first* objection is overruled. As to the *second* point, there seems to be as little doubt as there is respecting the first. "A note indorsed *in blank* is like one payable to bearer, and passes *by delivery*, and the *holder* may constitute himself, or any other person, assignee of the bill." 3 *Kent's Com.* 59. "In the case of blank indorsements, *possession* is evidence of title," 60. "An indorsement in *blank*, is made by the mere writing of the indorsor's name on the back of the bill, without the mention of the name of any person in whose favor the indorsement is made. It has been adjudged that *such* an indorsement does not *transfer the property* and *interest* in the bill to the indorsee, without some *further* act, but it gives him, as well as any other person to whom it is afterwards *transferred*, the power of constituting himself assignee of the beneficial interest, by filling it up payable to himself, which he may do at the time of trial. *Chitty on Bills*, 117, *Ed. of* 1807. In the case of *Clerk* v. *Pigot*, 12 *Mod.* 192, it appears that *Dunning* drew a bill on *Pigot*, payable to *Clerk* or order; *Clerk* indorsed *his name* thereon and sent it to *Kean* to present it for acceptance; and for nonpayment, according to the acceptance, the action was brought. The defendant contended that the action could not be maintained in the name of *Clerk*, because by his indorsement, the property of the bill had been transferred to *Kean*. The Court did not sustain the objection. *Kean* not having filled up the indorsement, was considered as acting as the agent of *Clerk;* and the action was maintained. In *Theed* v. *Lovell*, 2 *Strange*, 1103, the note declared on, when offered, appeared to have the plaintiff's name indorsed upon it; and it was erased by leave of Court — *it being only an indorsement in blank*. "Upon a transfer, whether by *indorsement* or bare delivery, the bill must, of course, be *delivered* to the assignee." *Chitty on bills*, 121. Let us now apply these principles to the facts of the case before us. In the first place, it does not appear that the *name* of *Thornton* was on the note when the action was commenced, or when, or for what purpose it was placed there. It was never filled up as an indorsement to any one, claiming any interest in the note. In the next place, it does not appear to have been *delivered* to any one as assignee or indorsee. In the

next place, it does appear that the note was lying in the bank for sometime after the suit was commenced; and was withdrawn from thence by the *order of the plaintiff*, and delivered to his attorneys for the further prosecution of the action; and they produced it on trial. We have no *scintilla* of proof that any person has an interest in the note, derived from *Thornton*. If, when a note, indorsed in blank, is in possession of a third person, such possession is evidence of *his* title, why is not the possession of the note by the person whose name is so indorsed upon it, evidence of *his continued* title to it? Unless such be the case, on what principle can a court of law be authorized to allow the name of the indorser to be erased, as was done in the above case of *Theed* v. *Lovell*? Yet no objection lies against such a proceeding. The authorities cited by the defendant's counsel do not seem to have any special application, inasmuch as no *contract* has been created by the act of writing the name of the plaintiff on the back of the note, he still holding it in his possession and under his control. *Two* persons, at least, are necessary to the formation of a contract. In the case before us we can discover only *one*. We are of opinion that the Judge was correct in declining to give the requested instruction, and accordingly there must be

*Judgment on the verdict.*

## HASKELL *vs.* BREWER.

The purchase of the writ is not to be regarded, under all circumstances, as the *commencement of the suit.*

If, at the time of making a tender, the debtor has no knowledge of the commencement of a suit, and the creditor do not inform him thereof, nor make claim of costs, but refuse to accept the amount tendered solely on account of its insufficiency to pay *the debt*, it may be regarded as a *waiver* of all claim for costs.

By contract between A and B, the former agreed to transport in his vessel, for the latter, a quantity of timber from *Newburyport* to *Robbinston*, for a stipulated price, B agreeing to aid and assist in unlading at the port of destination. In an action to recover the freight, it was held that B could not recover damages for the detention of the vessel at R. occasioned by B's refusing to aid and assist in the unlading, under a general count in *indebitatus assumpsit* for the freight, or *quantum meruit* for the same.

THIS was an action of assumpsit. The writ contained three counts: 1. *indebitatus assumpsit* on account annexed — 2. for the freight of certain goods from *Newburyport* to *Robbinston*, and for the wharfage and expenses in taking care of said goods — and 3. *quantum meruit* for the freight, hauling and taking care of the same goods.

The account annexed was as follows, viz:

| | |
|---|---|
| "To freight on 25 tons of timber from *Newburyport* to | |
| " *Robbinston*, at $4, - - - | 100,00 |
| "To 4 thousand trunnels do. - - | 12,00 |
| "To four wharfages on the same, - - | 12,50 |
| "To expense of hauling, - - | 5,00 |
| "To expense for waiting for freight of the vessel, - | 25,00 |
| "To taking care of it, - - | 10,50 |
| | $165,00 |

The general issue was pleaded and joined, and also a tender of $68,93. The tender was admitted by the plaintiff and the money taken out of Court by him.

It appeared that a small portion of the timber, although unladed, was retained by the plaintiff to secure the payment of his freight, and was not delivered until 10 o'clock in the evening of the 9th of *May*: — after which, on the same evening, the writ

was served. It appeared further, that the writ was sued out as early as 10 o'clock in the forenoon of the 9th — and that the tender was not made until 3 o'clock in the afternoon of the same day.

The plaintiff's counsel contended, that the sum tendered should have been sufficient to pay the sum due and the price of the writ. But it appearing in evidence, in addition to the foregoing circumstances, that when the tender was made, the plaintiff did not inform the defendant that he had commenced a suit, nor object to the tender on that account, merely saying that "it was of no use to make a tender as he should not accept of it," — and it not appearing that the defendant had any knowledge of the suit, *Parris J.* before whom the cause was tried, instructed the jury that the plaintiff could not maintain the suit if they found the tender sufficient for all the debt due without the costs.

There was also evidence tending to show that the plaintiff's vessel was detained at *Robbinston*, by the defendant's neglecting to fulfil his contract as to the manner of her unlading; and to show that the defendant did not assist to unlade as he had agreed — but the Judge instructed the jury, that there being no special count in the writ, nothing could be recovered in this action on that account.

Under these instructions the jury found for the plaintiff, assessing damages in the sum of $68,93, being the sum tendered by the defendant — and that the defendant did not promise beyond that sum.

If the instructions were erroneous the verdict was to be set aside and a new trial granted.

*J. Shepley*, for the plaintiff, insisted that the tender should have been sufficient to cover the price of the writ, and thereto cited *Jewett* v. *Felker*, 2 *Greenl.* 339; *Johnson* v. *Farwell*, 7 *Greenl.* 370; *stat.* of 1822, *ch.* 182.

2. No special count was necessary. There was but one contract. If the plaintiff could recover for the freight, he could for the matter excluded. Having performed the contract fully on his part, the plaintiff might well recover on general *indebitatus assumpsit*. *Baylies* v. *Fettyplace*, 7 *Mass.* 329; *Felton* v. *Dickinson*, 10 *Mass.* 287; *Jewell & al* v. *Schroeppel*, 4 *Cowen*, 564;

*Bank of Columbia* v. *Patterson*, 7 *Cranch*, 299; *Chitty on Pl.* 334–9; *Jones* v. *Hoar*, 5 *Pick.* 285; *Huntington* v. *American Bank*, 6 *Pick.* 340.

*N. D. Appleton*, for the defendant, in regard to the sufficiency of the tender without the costs, cited, *White* v. *Bailey*, 3 *Mass.* 272; *Byrne* v. *Crowninshield*, 1 *Pick.* 263; *Wells* v. *Fish & al.* 3 *Pick.* 74; *Badger* v. *Phinney*, 15 *Mass.* 359; 6 *Dane, ch.* 196; *Wood* v. *Newton*, 1 *Wilson*, 141; *Wright* v. *Reed*, 3 *T. R.* 554; *Warren* v. *Main*, 7 *Johns.* 476; 3 *Stark.* 1390, *note*; 5 *Dane*, 486; *Slingerland* v. *Morse*, 8 *Johns.* 474; *Thomas* v. *Evans*, 10 *East*, 101; *Douglass* v. *Petrick*, 3 *T. R.* 683; *Codman* v. *Lubboch*, 5 *Dow. & Ry.* 289; *Harding* v. *Davis*, 2 *Car. & Payne*, 77; 2 *Maule & Sel.* 141; 3 *Stark. Ev.* 1392; 5 *Taunt.* 307; *Alexander* v. *Brown*, 1 *Car. & Payne*, 228; *Brown* v. *Dysinger*, 1 *Rawle*, 408; *Borden* v. *Borden*, 5 *Mass.* 67; *Nourse* v. *Snow*, 6 *Greenl.* 208; *Veazy* v. *Harmony*, 7 *Greenl.* 91; *Boyden* v. *Moore*, 5 *Mass.* 373; *Hallet* v. *East India Co.* 2 *Burr.* 1120.

To show the necessity of a special count in the writ, he cited the following authorities: 1 *Chitty Pl.* 243–294–297–309; 5 *Taunt.* 302; 2 *East*, 145; 1 *Hen. Bl.* 287; 4 *East*, 147; 1 *New R.* 330; 2 *T. R.* 321; 10 *Mass.* 287; 7 *Cranch*, 303; 9 *Mass.* 198; 18 *Johns.* 451; 2 *Mass.* 398; 13 *Mass* 285; 1 *New R.* 104; 16 *Mass.* 161; *Yelv.* 76; 6 *Con. R.* 176; 3 *Johns.* 342.

PARRIS, J. at a subsequent term, delivered the opinion of the Court.

There is no suggestion that the defendant knew, at the time of making the tender, that a writ had been issued against him; — and from the written evidence in the case, particularly the deposition of *Rogers*, it is apparent that, at the time of the tender, the plaintiff had not performed all that he deemed to be necessary to give him a right of action. Subsequent to the making of the writ and the tender, he delivered the timber, on which the freight is charged; and it was not until after this delivery that he manifested any intention to have his writ served. Suppose that, apprehending the necessity of a suit, he had purchased his writ be-

fore his arrival at *Robbinston*, or previous to his departure from *Newburyport*, would it be contended that this was such a commencement of the action as would deprive the defendant of the right to tender payment of the freight without including the cost of the writ, at any time previous to the delivery of the timber? We think not. Under such circumstances, at common law, the defendant might have tendered the amount actually due and such tender would have been good, notwithstanding nothing had been tendered for the cost of the writ.

The case of *Jewett* v. *Felker*, cited for the plaintiff, is altogether different. There, the defendant was a mortgagor. His right of redeeming had been sold on execution. The purchaser, forthwith, brought his writ of entry to obtain possession; and afterwards, and within the year, the defendant tendered to the demandant the purchase money and interest, pursuant to the statute; but did not offer to pay the costs of the suit. It was holden that the tender was no bar to the action. The action was pending in Court, and, by the common law, no available tender could then be made; nor could any be made under the statute, unless it included all costs up to the time of such tender. The question which arises here, as to the commencement of the suit, was not considered or presented in *Jewett* v. *Felker*.

The case of *Johnson* v. *Farwell*, does not support the position taken for the plaintiff, that the time of making the writ is, in all cases, to be considered the commencement of the suit. A writ may be made, to be used or not, as circumstances may thereafter require. It may be filled up and kept in the plaintiff's pocket for months without any determination on his part to have it served. The purchase of a writ is presumptive evidence of an intention to effect a service, but this presumption may be rebutted by the facts in the case; — as if it was purchased before the cause of action arose, or service was delayed until the occurrence of an event upon which the plaintiff's decision, as to effecting a service, depended. In such cases, according to *Johnson* v. *Farwell*, and the authorities there cited, the action would not be considered as commenced until there was a *bona fide* intention of having the writ served. This seems to be in accordance with the whole current of authorities in *New York*. In the case at bar, the

tender, which the jury have found was sufficient, was made previous to the delivery of the timber, and while the plaintiff was claiming to hold it as security for the freight. When made, no intimation was given by the plaintiff that he had purchased a writ, or that he claimed any thing as legal costs arising from the commencement of a suit, or that he intended to resort to any other method than the one he was pursuing, viz. to hold the timber for the freight. The conduct of the plaintiff was such as to induce the defendant to believe that the refusal to accept the amount tendered was solely on account of its insufficiency to pay the debt; — and if, previous to this, he had actually purchased a writ with an intention to have it served, still his concealing the fact from the defendant, and by his conduct inducing a belief that nothing was claimed as costs, giving no intimation that any had accrued, or were exacted, may well be considered as a waiver, by him, of all claim to any costs.

The next question presented by the report is, whether the plaintiff, under the counts in his declaration, could recover for demurrage or detention of his vessel at *Robbinston*, occasioned by the defendant's neglecting to fulfil his contract, as to the manner of her unlading. The first count is general *indebitatus assumpsit* on an account annexed, which specifies six items, one of which is, "*To expense for waiting for freight of the vessel.*" This is understood to be a detention at *Newburyport*, and for which, under the instructions to the jury, the plaintiff recovered, if his charge was supported by proof.

The account annexed contains no charge for detention at *Robbinston*, or for any failure in assisting to discharge the timber, nor any intimation of claim on that account. From any thing disclosed in the first count, or the account annexed, to which it refers, the defendant could not have been apprized that any question was to be raised as to the detention at *Robbinston*.

The second count is *indebitatus assumpsit* for the freight of certain goods, wares and merchandize from *Newburyport* to *Robbinston*, and for wharfage and expense of taking care of said goods. The third count is a *quantum meruit* for the freight, hauling and taking care of the same goods.

One object of a declaration is to give the defendant notice what he is to answer to; — to apprize him of what is meant to be proved, in order to give him an opportunity to traverse it.

We find nothing in either of the counts in this case from which it can even be inferred that the plaintiff claimed for demurrage at *Robbinston.* For every item in his account he was permitted to recover, so far as it was supported by proof, and if the jury had been instructed to include any thing further in their verdict, such instruction would have been manifestly erroneous.

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## Proprietors of Kennebunk Toll Bridge, *Petitioners for Mandamus.*

The acceptance, or rejection, by County Commissioners, of the report of a committee appointed by said Commissioners pursuant to the laws of this State and the agreement of the persons interested, to ascertain the amount of damages caused by the laying out of a highway, was held to be a *judicial*, and not a *ministerial* act — and therefore, an application for a writ of *mandamus* to compel the Commissioners to *accept* such report, was denied.

This was a petition for *mandamus* to the York County Commissioners, to compel them to accept the report of a committee appointed to estimate the damages in the location of a road.

By the certified proceedings of the Commissioners, it appeared that a County road was laid out over the property of the petitioners in the year 1831, of which a return was made and accepted at a regular session of the County Commissioners, on the 2d Tuesday of October, of the same year, and that the sum of $100, as damages, was allowed to said Proprietors. That said Proprietors were dissatisfied with the allowance made them, and at the *May* session, 1832, petitioned for the appointment of a committee to estimate the damages anew — and *Timothy Shaw*, *Archibald Smith, Jr.* and *Moses Hubbard* were appointed such committee by agreement of said Proprietors and the County Attorney. On the 2d Tuesday of *October*, 1832, two of said committee reported in the premises, *Shaw* dissenting, allowing as damages to the Proprietors, the sum of $200. This report the Commissioners refused to accept, for the following reasons, which were entered of record:

Proprietors of Kennebunk Toll Bridge, *Petitioners for Mandamus.*

1. "Because the Proprietors of said Toll Bridge relinquished all right to said bridge and its privilege and appurtenances to the towns of *Kennebunk* and *Kennebunkport* in consideration that the highway aforesaid should be located across said bridge — and in consideration of $100 awarded them by said Commissioners, to be paid by the County aforesaid, agreed with said Commissioners to accept that sum in full of all damages sustained by them the said Proprietors, on account of the location of said highway."

2. "Because if said Proprietors are entitled to any increase of damages, the sum awarded them by said Committee was *excessive.*"

3. "Because the Committee aforesaid were not all agreed on said report, two only signing it, and assenting thereto — the other dissenting, and assigning his reasons therefor."

To compel the Commissioners to accept this report, the present application for a *mandamus* was made.

*Bourne*, for the petitioners.

1. The report of the committee was valid though signed by two only. Whenever a committee is appointed by law, or by the Court, or is of a public character, it may act by a majority. *Grinley* v. *Barker*, 1 *Bos. & Pul.* 229; *Rex* v. *Beeston*, 3 *T. R.* 593; 8 *East*, 319; *Orbis* v. *Thompson*, 1 *Johns.* 500; *Green* v. *Miller*, 6 *Johns.* 39; 1 *Cowen's Rep.* 138; *Barret* v. *Porter*, 14 *Mass.* 143; *Maine stat. ch.* 118.

2. The duty of the Commissioners to accept the report of the committee was imperative — it was not discretionary with them — see *statute, ch.* 500.

The nature of their powers is the same with that of the old Courts of Session — and they were held to be mere *ministerial* officers. *Commonwealth* v. *Balkam*, 3 *Pick.* 281; *Wilbraham* v. *County Com. of Hampden*, 11 *Pick.* 322; 5 *Johns.* 282; *Danvers* v. *Essex County Com.* 6 *Pick.* 20.

3. The Commissioners had no right to reject the report on the ground that the damages were excessive. Or if they had, they should have been bound by the evidence before them, and not by the results of their own previous personal examination. *The People* v. *The Sessions of Shenango, Caines' Cas. in Error*, 319.

*Howard*, County Attorney, resisted the argument for the Petitioners, and cited, *Commonwealth* v. *Justices of the Court of Sessions for Norfolk*, 5 *Mass.* 435; *Grinley* v. *Barker & al.* 1 *Bos. & Pul.* 229; *Cook* v. *Lovelander & al.* 2 *Bos. & Pul.* 31; *Green* v. *Johnson*, 6 *Johns.* 39; *Towne* v. *Jaquith*, 6 *Mass.* 46; 5 *Com. Dig. title Mandamus A.* 3 *Blk. Com.* 110.

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

This is an application to this Court for a mandamus to the *York County Commissioners*, to compel them to accept the report of a certain committee which had been agreed upon by the said proprietors and the agent of the town of *Kennebunk*, pursuant to the first section of *chapter* 118, of the revised statutes, to estimate the damages sustained by said proprietors by the laying out of a highway in said town over their land; which report the said Commissioners, on presentment of it for acceptance, refused to accept, for reasons by them assigned, and appearing on the certified proceedings of the Commissioners now before us. The 4th section of the act above mentioned requires that the return or report of such committee shall be made under their hands and seals, to the Commissioners, and be by them *accepted* and recorded. The validity and legal effect of the report depend on the *acceptance* of it; of course, we must presume that it was never intended that such *acceptance* should be the necessary consequence of its *presentment* for that purpose; for, if so, it could be of no use; but that they should exercise a sound discretion of a judicial character in deciding on the question of acceptance, as the Court of Common Pleas do on deciding on the question of acceptance of a report of referees. In such cases the law requires an acceptance, and in the same language as is used in the 4th section before mentioned. The very idea of a power to *accept* a report seems to imply a power to *refuse to accept* it, if circumstances render an acceptance improper. Such a power ought to reside somewhere. Suppose that the committee, in such a case as the present, could be proved to have acted *corruptly* in forming their report, or to have committed a gross *mistake*, must the Commissioners, at all events, accept the report, contrary to

truth, justice, and the plain dictates of common honesty? We think not. In the case of *Chase & al.* v. *Blackstone Canal Company*, 10 *Mass.* 244; which was an application for a mandamus to the County Commissioners, to award costs to them in a case between the petitioners and the Company, the Court say, "This writ lies either to compel the performance of *ministerial* acts, or is addressed to subordinate judicial tribunals, requiring them to exercise their functions, and render *some* judgment in cases before them, when otherwise there would be a failure of justice from a delay or refusal to act; but when the act to be done is *judicial* or *discretionary*, this Court will not direct what decision shall be made." The Supreme Court of the United States, in the case of *U. States* v. *Lawrence*, 3 *Dallas*, 42, held, "that they had no power to require a Judge to decide according to the dictates of any judgment but his own; that as the District Judge, in the case before him, in refusing to issue a warrant, had acted in a judicial capacity, they could not interfere to control or reverse his decision." See also *Comyn's Dig.* "*mandamus*" *A*, 8 *East*, 213; 2 *Johns. Cases*, 72; 5 *Binney*, 87; 3 *Binney*, 275; 5 *Binney*, 537; 2 *Esp. Dig.* 668. We think these authorities are applicable, as we cannot view the acceptance or nonacceptance of such a report as a *ministerial act.* The Commissioners thought it was not, and after a hearing of the parties, decided not to accept the same, and, being requested, gave their reasons in writing. We forbear entering into an examination of those reasons, because we are satisfied that a mandamus ought not to be granted.

*Writ denied.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF OXFORD, MAY TERM, 1834.

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## ANDREWS *vs.* ESTES *& als.*

The rule of law, that an agent binds himself and not his principal, unless he use the name of the principal, applies only to *sealed instruments*. In contracts not under seal, if the agent intend to bind his principal and not himself, it will be sufficient if it appear in such contract that he acts *as agent*.

Where A, B, and C, in writing promised, "in behalf" of a certain school district, to pay a stated sum for the erection of a school-house, signing as "a committee," and being duly authorized by the district to make such contract it was held that they did not thereby render themselves *personally liable*.

ASSUMPSIT upon the following agreement, viz: "We the undersigned committee for the first school district, south side in *Bethel*, promise in behalf of said district, to pay *William Andrews* one hundred and five dollars and seventy-five cents, by the first day of *November* next, providing said *Andrews* shall complete a school-house in said district to the acceptance of a committee and time specified in a bond which he has given, bearing even date with this. Said *Andrews* is to have the old school-house in said district.

*Richard Estes*,
*Stephen G. Stephens*, } Committee.
*Phineas Frost*.

*November* 28, 1831.

It was proved that the plaintiff had completed the school-house according to the contract.

The defendants offered to prove that they were duly chosen a committee and authorized by said school district to make the

contract on which this action was brought, and to pledge the credit of said district — and that the defendants did not intend to bind themselves — and insisted that said agreement was not sufficient to support this action — the school district being liable and not the defendants personally.

*Whitman C. J.* in the Court below, ruled that the evidence offered was irrelevant and inadmissible — that said agreement bound the defendants personally and not the district, and was sufficient to support the action. Whereupon the jury returned a verdict for the plaintiff and the defendants, brought the case up to this Court on exceptions filed to the ruling of the presiding Judge.

*Virgin*, for the defendants, argued in support of the exceptions, and cited *Maine Stat. ch.* 220 & 117; *White* v. *Westport Cotton Manufacturing Co.* 1 *Pick.* 215; *Damon* v. *Granby*, 2 *Pick.* 345; *Clement* v. *Jones*, 12 *Mass.* 60; *Kupfer* v. *South Parish in Augusta*, 12 *Mass.* 185; *Odiorne & al.* v. *Maxcy*, 13 *Mass.* 181; *Wyman* v. *Hal. and Aug. Bank*, 14 *Mass.* 58.

*Fessenden*, for the plaintiff, contended that where there was no latent ambiguity in a contract, no extraneous evidence could be received to aid in its construction — and that therefore, the evidence offered by the defendants, was properly rejected.

In this case, the contract is the contract of the defendants, and not of the school district. If an agent would bind his principal, he must use the name of the principal, otherwise he will bind himself. *Stinchfield* v. *Little*, 1 *Greenl.* 231; *Combe's case*, 9 *Co. R.* 76; *Frontin* v. *Small*, 2 *Ld. Raym.* 1418; *White* v. *Cuyler*, 6 *T. R.* 176; *Wilkes* v. *Back*, 2 *East*, 142; *Fowler* v. *Shearer*, 7 *Mass.* 14; *Elwell* v. *Shaw*, 1 *Greenl.* 339; *Copeland* v. *Mercantile Insurance Co.*, 6 *Pick.* 198; *Paley on Agency*, 152; *Stackpole* v. *Arnold*, 11 *Mass.* 27; *Arfridson* v. *Ladd*, 12 *Mass.* 173; *Tippets & al.* v. *Walker & al.* 4 *Mass.* 595; *Tucker* v. *Bass*, 5 *Mass.* 164; *Thacher* v. *Dinsmore*, 5 *Mass.* 299; *Clapp* v. *Day*, 2 *Greenl.* 30; 6 *Bin.* 228; *Appleton* v. *Binks*, 5 *East*, 148.

In this case it is manifest that the defendants did not intend to bind the district, but themselves. The promise is expressly their

own. Nor did the plaintiff intend to look to the district, and thereby incur the risk of the legality of the district meeting, or of being delayed in his payments.

WESTON J. delivered the opinion of the Court, at the ensuing *October* term, in *Penobscot*.

School districts are quasi corporations for certain purposes; and among others, for the building and repair of school-houses. *Rev. laws, ch.* 117, *sec.* 8. The plaintiff claims of the defendants compensation for building a school-house, in the first school district, south side in *Bethel*, in virtue of a contract, dated *Nov.* twenty-eighth, 1831; and the question is, whether they are thereby personally bound. They offered to prove their authority, to enter into and make the contract in behalf of the district, and to pledge their credit.

It is insisted on the part of the counsel for the plaintiff, that the defendants, not having contracted in the name of their principals, have bound themselves; and for this he cites *Combe's case*, 9 *Coke*, 75; *Frontin* v. *Small*, 2 *Lord Raymond*, 1418; *White* v. *Cuyler*, 6 *T. R.* 176; *Wilkes* v. *Back*, 2 *East*, 142; *Stinchfield* v. *Little*, 1 *Greenl.* 231; *Elwell* v. *Shaw*, *ibid.* 339, and *Copeland* v. *the Mercantile Insurance Company*, 6 *Pick.* 198. These are all cases of deeds, and have their origin in the authority cited from *Coke*, from which has resulted a technical rule, which has often defeated the apparent intention of the parties. We have not found, nor are we aware of any authority, in which the rule in *Combe's* case, has been applied to an instrument not under seal.

In regard to writings not sealed, it is laid down in *Stackpole* v. *Arnold*, 11 *Mass.* 27, and in *Arfridson* v. *Ladd*, 12 *Mass.* 173, that if one makes a written contract, intending to act therein as the agent of another, and to bind his principal, it is necessary that it should appear in the contract itself, that he acts as such agent. In *Tippets* v. *Walker & al.* 4 *Mass.* 592, which was upon an instrument under seal; in addition to the objection that the defendants had not acted in the name, or affixed the seal of their principal, it appeared that they acted without sufficient authority.

The ground upon which *Thacher & al.* v. *Dinsmore*, 5 *Mass.* 299, was decided, will be found to be, that the guardian had no authority to bind his ward, by any promise which he could make; and was therefore personally bound. In *Tucker* v. *Bass*, 5 *Mass.* 164, the cause turned upon another point, which was discussed and decided. The defendant there acted in behalf of the *Bluehill turnpike*. The writing he signed is not set forth; but as no objection was taken to his personal liability, it may be inferred that he gave the plaintiff his own promise; and did not engage in his character as agent.

*Appleton* v. *Binks*, 5 *East*, 148, was upon a deed, in which the defendant expressly covenanted for himself, that another, in whose behalf he was acting, should pay a sum of money. Nothing is more common than for one man to covenant, that certain things shall be done by another. In *Clap* v. *Day*, 2 *Greenl.* 305, the plaintiff represented a voluntary association, and he was described in the note declared on, as their treasurer; and it was holden, that the addition was a mere description of the person.

*Mayer & al.* v. *Barker*, 6 *Binney*, 228, has been cited. It was an action of covenant upon a charter party. The defendant described himself as agent in the body of the deed, but he executed it in his own name. It did not therefore, according to the rule before adverted to, bind his principals. And the Court were of opinion, taking the whole instrument together, and especially its close, that he meant to bind himself personally.

It has been properly contended, that whether the defendants intended to bind themselves or others, must be determined by the terms of the agreement itself, and that it cannot be made out by extraneous evidence. But it does appear to us that the defendants acted throughout as agents. The service was to be performed for the district, which constituted the consideration; the defendants describe themselves as their committee; they promise in behalf of the district, and they sign as a committee.

Not being an instrument under seal, we are of opinion, that the technical rule deduced from *Combe's* case does not apply. But if it did, that rule has been modified by the statute of 1823, *ch.* 220. That statute could not operate retrospectively; but it affects instruments subsequently made; and the contract in ques-

tion was made since the passage of that act. It was a very proper subject for the interposition of the legislature. It relieved the Courts from the obligation of an arbitrary rule, which often defeated the lawful intention of the parties. They are, by the legislative rule, to look to the instrument to learn what that intention is; and if it thus appear that it was intended, that the principal or the constituent should be bound, such shall be the effect of the contract; if the agent, attorney, or committee had sufficient authority. Of this the defendants offered competent proof; and we are satisfied that they intended to bind their principals, and not themselves.

*Exceptions sustained.*

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## FROST *vs. The Inhabitants of* PORTLAND.

In repairing highways, the extent to which surveyors may incumber them will be limited by the measure of necessity — and of this, they are not the exclusive judges, but act at their peril.

Towns are liable, within the meaning of *stat. ch.* 118, *sec.* 17, as well for injuries received in consequence of obstructions *placed or deposited* in the highway as for *inherent defects.*

THIS was an action on the statute respecting highways, *ch.* 118, brought to recover damages for an injury sustained by the plaintiff by reason of an obstruction in a public street in the city of *Portland.*

It appeared in evidence that a quantity of bricks had been placed in Congress street, opposite the Court-House and outside the curb stones of the side-walk, for the purpose of making and completing the side-walk within the curb stones.

The counsel for the defendants contended, that for an injury arising from obstructions of this kind the defendants were not liable. But *Weston J.* overruled the objection.

It further appeared that the contractor for building an addition to the Court-House, near where the accident happened, had a written permission from the Selectmen to make use of one third part of the street for the purpose of depositing his materials under

the by-law of the city of *Portland*. Whereupon the counsel for the defendants insisted, first, that said permission, if no more than a third part of the street was occupied, justified the obstruction complained of, or, secondly, that it was conclusive evidence that the deposit of the bricks was necessary in making and completing the side-walk.

The presiding Judge instructed the jury, that although the law imposed upon the defendants the duty of keeping their public streets and highways in a state and condition safe and convenient for the public accommodation; yet that in making and repairing the same, such temporary obstructions as were essential and necessary to the discharge of this duty would be justified; but that the justification could not be extended beyond the necessity. That this was the general law, which could not be modified or changed by any by-law of the town. And that, notwithstanding the by-law, if the jury were satisfied from the evidence that the piles of bricks were extended into the street farther than was necessary in the making of the side-walk, and the plaintiff thereby sustained an injury, no want of ordinary care being imputable to him, the defendants were liable.

If the foregoing rules and instructions were erroneous the verdict, which was for the plaintiff, was to be set aside and a new trial granted, otherwise judgment was to be rendered thereon.

*Fessenden*, for the defendants, insisted that for an injury arising from an obstruction of this kind, towns were not liable. Towns are required by statute to keep highways in repair — and by necessity the mode of doing it, and the extent of necessity for incumbering the road, are given by the same statute. The surveyors, as the agents of towns, are the exclusive judges of this necessity. They are necessarily made so, by the duties imposed on them.

The statute upon which this action is founded, was intended to apply to cases of *defects in highways*, and not to the *depositing of obstacles* in them. If the streets are in *good repair*, the town cannot be liable, though incumbrances may have been thrown across them. The person who placed the obstruction in the road would be the only person liable for damages. *Commonwealth* v. *Springfield*, 7 *Mass.* 9; *Todd* v. *Rome*, 2 *Greenl.* 55.

*N. Emery* and *D. Goodenow*, for the plaintiff, maintained that the town was liable under the circumstances of this case — that, the town was not made the exclusive judge of the extent necessary to incumber a road — that the statute applied as well to *obstructions* placed in the road, as to some *inherent defect*, — and cited the following authorities: *Springer* v. *Bowdoinham*, 7 *Greenl.* 442; *King* v. *Bridekirk*, 11 *East*, 304; *Commonwealth* v. *Petersham*, 4 *Pick.* 119; *Commonwealth* v. *Worcester Turnpike*, 3 *Pick.* 327; *Bigelow* v. *Weston*, 3 *Pick.* 267; *Day* v. *Savage*, *Hob. Rep.* 85.

Weston J. delivered the opinion of the Court.

From the evidence, which satisfied the jury, the injury complained of was occasioned by a deposit of bricks in the street, intended to be used in making and completing a side-walk. The effect of the permission, therefore, given by the selectmen of *Portland*, under a by-law of the town, to the contractor employed in building an addition to the court-house, near where the accident happened, to use a third part of the street, it is unnecessary in this cause to settle. Had the injury arisen from deposits placed there by the contractor, it would have been necessary to have considered that question.

The liability of towns to respond in damages for injuries of this sort, clearly arises from statute, as has been contended by the counsel for the defendants. Whether it might not have resulted from the section, imposing the duty to repair, need not be decided, as another section in the same statute gives the remedy to the party injured, in express terms.

The duty enjoined is, that all highways, townways, causeways, and bridges, lying and being within the bounds of any town, shall be kept in repair, and amended from time to time, that the same may be safe and convenient for travellers, with their horses, teams, carts and carriages, at all seasons of the year, at the proper charge and expense of the inhabitants of such town. And a remedy is given against the town for a person, who sustains damage, through any defect or want of necessary repair, in such highway, causeway or bridge. The act must receive a reasonable construction; and time and opportunity must be afforded to towns

to fulfil the duty. Thus, although highways are to be kept in repair, at all seasons of the year, yet if they become defective, as they often do, by reason of causes not under their control, parts of them are often necessarily impassable, while undergoing repairs. All that can then be required is, that travellers should be warned of their danger, by a railing, or by something else which may answer the same purpose. This privilege, growing out of the necessity of the case, must be limited by it. The convenience of the public is paramount to every other consideration, except that which is essential to enable towns to discharge their duties.

It is urged that surveyors of highways, while performing the service assigned them, are the exclusive judges, how far it is necessary to incumber, for the purpose of repairing. Upon this point, they will of course exercise their discretion; as they must as to the degree or extent of the repairs, which the public convenience may require. Both in the first instance must depend upon their judgment; but both are open to public inquiry; the one as much as the other. We are unable to perceive any difference. They determine at their peril, or at the peril of those by whom they are appointed. If a question arises, whether the duty has been performed, or whether legally performed, it must be determined as all other questions are, which arise in the course of judicial proceedings; if of law, by the court; if of fact, by a jury.

It is insisted if roads are otherwise in a state of repair, towns are not answerable for deposits or incumbrances placed upon them; but that the party injured must look to the individual, by whom the nuisance was caused. A deposit in the road as effectually destroys its usefulness, as an excavation, however occasioned. It cannot be tolerated, and must be removed. The individual may not be known, or may not be responsible. The policy of the law fixes this duty upon towns, who have officers charged with its performance. Thus every citizen has an interest, not only to prevent an incumbrance, but to hasten its removal. It is too narrow a construction, to hold that a deposit which, while suffered to remain in a road, renders it impassable, is not a defect in it. The law looks not to the cause of the defect, or to the remedies which a town may have over, or to any cumulative rem-

edy, which the person injured may have against others. It has, for adequate reasons of public policy, imposed upon towns both the duty and the liability. Whether a bridge has been wantonly destroyed by individuals, or accidentally by fire or flood; whether an excavation has been made by design, or by running waters; whether an obstruction in the road has happened by the unauthorized act of individuals, or by the falling of trees uprooted by the wind, the public convenience equally requires, that the necessary amendment and repairs should be speedily made.

This objection was not taken in *Springer* v. *Bowdoinham*, 7 *Greenl.* 442; but if tenable, would have been fatal to the action. It is a decision directly in point; and the force of it is to be avoided only by the suggestion, that this ground of defence was overlooked by the counsel for the defendants and by the Court. In *Tyler* v. *Weston*, 3 *Pick.* 267, the same objection was taken, and overruled.

*Judgment on the verdict.*

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## *The Inhabitants of* LIVERMORE, *petitioners for a writ of certiorari.*

The County Commissioners, on a petition for certain *alterations* in an old County road, have no power to locate a *new road.*

THIS was an application for a writ of *certiorari* to quash the proceedings of the County Commissioners in the laying out of a County road from the town of *Jay*, through *Livermore*, to *Turner*. The facts upon which the application was based are sufficiently stated in the opinion of the Court.

*Washburn*, for the petitioners, contended that the original application being for *alterations* in the old road *merely*, and the County Commissioners having undertaken to locate an entire *new road*, their proceedings were void; — and cited the case of the *Commonwealth* v. *Inhabitants of Cambridge*, 7 *Mass.* 162.

*R. Goodenow*, for the respondents, argued that, the County Commissioners had not by their adjudication departed from the prayer of the petitioners, but that what they had done was substantially an *alteration* of the old road.

2. That if the alteration operated as a discontinuance of the old road, it was no cause for quashing the proceedings.

3. That an *alteration* of a road did not *necessarily* operate as a *discontinuance* of the old road; unless the latter became thereby unnecessary for the public. *Roxbury* v. *Cambridge*, 8 *Mass.* 457.

4. That, the additional or explanatory report of the County Commissioners was extra judicial, without authority and therefore void; and could not in any way control or alter the legal effect of their prior proceedings.

5. That, this being an application to the discretion of the Court, they would not disturb the proceedings unless manifest injustice had been done.

WESTON J. — *Ebenezer Keyes* and others made application to the proper tribunal for several alterations in the county road, leading from the county ferry in *Jay*, through *Livermore*, to *Turner* village. The County Commissioners, having ordered due notice, located and reported a way between the termini; and at their regular term in *October*, 1832, accepted the report, and ordered it to be recorded. At a subsequent term, in *June*, 1833, they declared that it was not their intention to discontinue any part of any county road established in the town of *Livermore;* and that in the opinion of the County Commissioners, the part of the road in that town, supposed to be discontinued by operation of law, in consequence of their location, under the petition of *Keyes* and others, was still necessary for the public convenience and accommodation; and they made an addition to their former report to this effect, and ordered the same to be recorded.

In answer to the objections taken by the town of *Livermore*, it has been contended that the business in relation to that petition was finished at *October* term; and that what the commissioners did in *June* was extra judicial and inoperative, and cannot be taken into consideration as a part of the record. It is true, the proceedings and adjudication of the Court have the appearance of having been perfected at *October* term; and such doubtless was the understanding of the commissioners. But finding that their location was understood to have a different effect from what they

intended, as every thing was done by their agency, it may be regarded as competent for them to explain their doings, according to their intention, in a manner not to be misapprehended. If, however, this proceeding was unwarrantable on their part, we must take the record as they have left it, in determining upon the validity of what they have done. As the record stands then, it appears that a new county road has been laid out in *Livermore*, upon the petition of *Keyes* and others; and that there may be no mistake, the County Commissioners expressly there certify, that this was what they intended to do. But the town of *Livermore*, who have a deep interest in the question, had no notice that such a measure was contemplated. They were notified of the pendency of *Keyes'* petition; but that contained no application for a new road. To that they might be opposed, although not unwilling that the alteration prayed for might be made. The statute in relation to the laying out of public highways in *Massachusetts*, which is similar to our own, has received an elaborate exposition from Chief Justice *Parsons*, in the *Commonwealth* v. *Cambridge*, 7 *Mass.* 158, cited in the argument. The positions there laid down, have not been questioned in any subsequent case. It is there established, and that upon the basis of a former decision, *Commonwealth* v. *Westborough*, 3 *Mass.* 406, that the alteration of a highway is a discontinuance of the old way. That a petition to turn or alter an old road, is a different thing from an application for a new one. The Chief Justice states, that "the issue is the truth or falsehood of the allegations in the petition; and the town can have no motive to appoint agents for any purpose foreign to this issue. If the adjudication be of matters collateral to this issue, and on allegations not made in the petition, the application to the Court is no foundation for this adjudication, neither have the parties had notice, nor have they been heard on the matters adjudged." In the case before us, the town of *Livermore* has not had notice, or had an opportunity to be heard, upon the point adjudged. This we must regard as an objection fatal to the proceedings.

*Certiorari granted.*

## WADSWORTH, *Admr.* *vs.* SMITH.

Where one in selling a mill, dam and slip, reserved the right of "*slipping his own logs free of toll*," it was holden to be a *personal right* merely, and not assignable.

Such little streams as cannot in their natural state be used for the floating of boats, &c. and for the transportation of property, are to be regarded as private property and not as public highways:—and though by the application of artificial means, at the expense of the owner, they become boatable and susceptible of public use, yet they do not thereby become the property of the public.

Whether one can open a way across his land, and then exact *a toll* for the use of a *common passage* through it, without authority from the legislature—*dubitatur*. Though he may, undoubtedly, open a way for his own accommodation, and refuse to permit others to use it without a just compensation.

THIS was an action of *assumpsit* on an account annexed to the writ, which contained several charges for slipping logs on *ten-mile brook*, and for the use of *Clemon's* pond.

The facts in the case appeared at the trial, in the report of *Rufus McIntire, Esq.* who had gathered and stated them by agreement of the parties. That part of the report relating to the points raised and decided, was as follows, viz:

"*Ten-mile brook* is a small stream in *Brownfield*, emptying into *Saco* river. Two or three miles above its mouth, there are mills on a dam across it, where the slip in question is situated. *Clemon's pond* is a few miles further up; at the lower end of which, a dam was erected by the owners of the mills for the purpose of keeping back the water until it was needed at the mills."

"The mills, dam and slip were erected or possessed by *Samuel* and *Thomas Howard*, as early as 1805—who conveyed one half to *Joseph Howard*, who conveyed the same to the plaintiff's intestate by deed dated *October* 7, 1816, which deed contained the following reservation, "*and also the right is reserved to said Joseph Howard of slipping his own mill logs through said dam free of toll.*" At the time of the last conveyance the other half was in possession of the plaintiff's intestate, and in 1818 he rebuilt the mills, dam and slip, and continued to occupy them till his death."

"Logs were driven from the mill pond through the slip, in 1805, and toll claimed and paid therefor, and the same has been done from that time to the death of the intestate."

"In 1811 the brook was cleared out above the mill pond to *Clemon's pond*, for the purpose of floating down logs, by a person not a party to this suit, at an expense of $200. The slip cost about $50, and is made through the dam at the mills."

"The defendant drove all the logs in that brook for certain years, by contract with the owners, and it was agreed that he was chargeable with all tolls and for accommodations, as a facility to him in executing his contract, if any such were chargeable upon the *logs driven*."

Some of the logs were owned by *Pease & Pike*, and had been cut from land lying contiguous to the upper waters of the *Ten-mile brook*, which they had purchased of *Joseph Howard*, in *October*, 1825, whose deed contained the following clause, viz: "*and also all my right to slip logs at Peleg Wadsworth's mills on Ten-mile brook, as reserved in my deed to him dated October* 7, 1816."

"There was no proof that the use of the waters of *Clemon's pond* was any damage or inconvenience to the plaintiff's intestate —but it appeared that the flowing the pond by his dam, afforded a facility in ordinary years when there was no abundance of water, to log owners or drivers, and that, merely incidental to its erection."

It appeared that there had been a settlement of accounts between the plaintiff's intestate and the defendant, in *December*, 1828, in which the latter allowed and paid a charge for slipping logs — but not those which were cut upon the lands sold by *Howard* to *Pease & Pike*.

*Fessenden*, for the plaintiff, cited *Berry* v. *Carle*, 3 *Greenl.* 269; *Angel on Water Courses*, 2, 14, 81, 138; *Sheppard's Touchstone*, 77; 4 *Cruise's Dig.* 327; *Choate* v. *Burnham*, 7 *Pick.* 274.

*N. Emery*, for the defendant, contended, 1. That this brook was a public highway, over which the defendant had as much right to pass with his logs as the plaintiff's intestate, or any other citizen had.

2. The plaintiff's intestate had no right to take toll without a grant from the legislature. *The proprietors of Canal bridge* v. *Gordan*, 1 *Pick.* 295; *Com. Dig. Toll E & F*; *Commonwealth* v. *Heare*, 2 *Mass.* 102; *Robbins* v. *Borman & al.* 1 *Pick.* 122; 7 *Johns.* 179; *Griffin* v. *Howe*, 18 *Johns.* 397.

3. But if he had, he could not charge for the slipping of logs cut upon the *Howard* land. The reservation of *Howard*, in his deed, did not constitute a mere *personal* right — but was intended to apply to the trees standing, and passed by his deed to *Pease & Pike*.

PARRIS J. at the ensuing *May* term in this County, delivered the opinion of the Court.

We are of opinion that the reservation in *Howard's* deed to *Wadsworth*, the intestate, gave the former an unrestricted right to slip his own mill logs through the dam free of toll, but that it was a personal right, to be exercised by *Howard* only, and not assignable. It could have no operation in favor of any person, other than *Howard*, or in favor of any logs other than such as belonged to him. The logs slipped by the defendant, not being *Howard's* logs, were not included in the reservation, and the plaintiff has the same right to claim toll on these logs as on those hauled by *Lowell*, or on logs cut on land which had never been the property of *Howard*. The reservation had no reference to the place where the logs were cut, but to the person who owned them at the time they were slipped.

But whether the owner of the dam and slip had a right to exact a toll on any logs passing down *Ten-mile, brook* is a question of more difficulty. Toll thorough, being against common right, is not to be exacted from the citizens, but upon good consideration, and under license or authority from the sovereign power. No authority is shown in this case, and it becomes material to ascertain what rights the plaintiff had in and over this stream.

The general principle of the common law, applicable to this subject, is that above the flow of the tide, rivers become private, either absolutely so, or subject to the public right of way, according as they are small or large streams. Those which are sufficiently large to bear boats or barges, or to be of public use in the

transportation of property, are highways by water, over which the public have a common right; and the private property of the owner of the soil is to be improved in subserviency to the enjoyment of this public right.

Such rivers, therefore, cannot lawfully be so obstructed, even by the owner of the banks and bed, as to interfere with this public right; — and no toll can be exacted of the citizens for the use of such water as a public highway.

If, therefore, *Ten-mile brook* was naturally of sufficient size to float boats or mill logs, the public have a right to its free use, for that purpose, unincumbered with dams, sluices or tolls; — and no man can lawfully thus encumber it, without the public permission. But such little streams or rivers as are not *floatable*, that is, cannot, in their natural state, be used for the carriage of boats, rafts, or other property, are wholly and absolutely private; not subject to the servitude of the public interest, nor to be regarded as public highways, by water, because they are not susceptible of use, as a common passage for the public. If the *Ten-mile brook* be naturally a stream of this description, then, although *Wadsworth* and his grantor have at their own expense made it *floatable* by artificial means, it did not thereby become public. *Smith* had no common law right to improve it. It was private property; — and when private interests are involved they shall not be infringed without a satisfaction being made to the parties injured; — and it does infringe private interests to suffer the public, without compensation, to pass over private property, not being a common highway, inasmuch as it affects the inheritance of the owner.

There is no *direct* proof in the case, showing the size or character of this stream or brook, and in the absence of such proof upon this point, we must resort to inference and presumption from those facts which are proved.

If a man be owner of the land on both sides of a stream or river, in *common presumption*, he is the owner of the whole river. Whoever claims an easement or right of way over another's land must shew his right. The burden of proof rests upon him who claims the easement.

*Smith* does not claim to be the owner of the soil on either side of this brook. The mill and stream had been in the exclusive

possession of the plaintiff's intestate for many years. The mill, dam and slip were rebuilt by him in 1818, and the slip had for more than twenty years been used as a passage way for logs, during all which time a toll had been claimed and paid. Moreover, *Smith* himself had recognized *Wadsworth's* right to the exclusive control of this brook, by paying him a compensation for the passage of other logs through the slip. From all these facts, it is to be inferred that *Ten-mile brook* was not naturally a water highway, and that the public had no right to its enjoyment as such.

If it were otherwise, the burden of proof being on the defendant, it was for him to show it.

We are then to consider this stream as private, and to be used for such purposes, and in such manner, as the owner of the bed and banks over and through which it runs, should see fit to apply it, subject to the individual and private rights of the owners above and below him.

But there is another question in this case, to which our attention was not called in the argument, but which is, by no means, free from doubt. Can a toll, in any case, be exacted, without a license or grant from public authority? Must not the claim be founded either upon grant or prescription? Although toll traverse is not against common right, and, therefore, the party claiming it will not be required to prove a consideration, as that is implied; still, can he open a way or common passage over his lands or through his waters, for the public accommodation, and, as toll, demand of right a sum certain of each individual who enjoys the accommodation?

*Sir Matthew Hale*, in his treatise *de jure maris, chap.* 3, says, "No man can take a settled or constant toll, *even in his own private land*, for a common passage, without the king's license." All the books, which we have been able to consult, consider toll as a common charge, which it is the prerogative of the government alone to impose and regulate.

But a proprietor may open a passage through his land for his own accommodation, and he may permit others to pass it under an agreement for compensation, which agreement being founded on a valid consideration, to wit, the injury done to his freehold,

may be enforced at law. He may improve his water-course by dams, locks, or otherwise, and withhold their use from all who will not make him a reasonable compensation. He may yield the enjoyment to one and refuse it to another. If he receive compensation for such enjoyment, the law will permit him to retain it;—if he accept a promise as an equivalent, the law will enforce it; and a promise may as well be implied in such a case as any other.

But as toll, as a settled, certain and defined sum exacted for the use of a *common passage*, we doubt whether it can be recovered. It must resolve itself into an agreement of the parties, and will then be treated like all other contracts founded on a sufficient consideration.

In the case under examination, the charge in the plaintiff's account is for slipping 2561 M. feet of timber, at four cents per M. It is not charged as toll *eo nomine*, and whether that is the rate which the plaintiff charged others for the like accommodation does not appear.

The defendant has received the benefit of the plaintiff's services, and in the absence of proof of an express promise, the law implies a promise to pay *reasonably* therefor; and that amount, whatever it may be, we think the plaintiff is legally entitled to receive.

But the charge for the use of *Clemon's pond* is wholly inadmissible from the facts reported. That was naturally of sufficient size to bear boats and rafts, and the dam at the outlet was erected by the owners of the mills merely to keep back the water, until it was needed at the mills.

No damage or inconvenience was sustained by reason of the use of the waters to float the logs;—and it does not even appear that the plaintiff's intestate was the owner of the pond. To support this charge, the plaintiff must show that his intestate had the exclusive right to the pond and its privileges. This he has not done, and, consequently, cannot recover for their use.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF LINCOLN, MAY TERM, 1834.

## THAYER *& al. vs.* SEAVEY.

The act of *January* 21*st*, 1834, providing "that no action should thereafterward be *maintained* to recover damages for an escape of any debtor, committed on execution, except *a special action on the case*," operated upon *actions pending*.

Such act is not *unconstitutional* on the ground of operating *retrospectively* or disturbing *vested rights*.

THIS was an action of *debt* against the defendant as the keeper of the jail in this county, for the escape of certain prisoners who were committed on execution for debt. The prisoners had given bond for the liberty of the jail-yard and had subsequently taken the poor debtor's oath and been discharged — but the bond had been approved by but *one* Justice of the Peace and of the *quorum*. A question was raised as to the sufficiency of the bond, and many others, the facts in regard to which, are not reported, the decision of the cause having been placed by the Court on different grounds.

The commitment was on the 20*th* of *November*, 1829; — the prisoners were permitted to go at large on the 21*st* of the same month. The action was commenced prior to *January* 21*st*, 1834; on which day an act passed the legislature of this State, the first section of which was as follows: "That, no action shall be hereafter *maintained* to recover damages for an escape of any debtor, committed on execution, except a special action on the case." And the question upon which the cause finally turned was, whether this act operated upon actions pending.

*Thayer*, for the plaintiffs.

*Allen* and *Bailey*, for the defendant.

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

Several objections have been urged by the counsel for the defendant, against the right of the plaintiffs to maintain this action. Some of them are of a peculiar character, and all of them have presented doubts and difficulties to the minds of one or more of the Court. We have, however, come to the conclusion that one of them is sustained, and must be fatal to the action. To this we shall confine our attention, and upon this we shall place the decision of the cause.

This is an action of *debt* for an escape of certain prisoners who were committed on execution for debt. This species of action, is given by the statutes of *Westminster* 2, and 1 of *Ric.* 2, *ch.* 12, and the Court observe, in the case of *Porter* v. *Sayward*, 7 *Mass.* 377, that ever since the above statutes, it has been holden that an action of debt lies against a jailer for an escape of a prisoner in execution; and that in such action the plaintiff is entitled to recover from the jailer the amount which was due to him from the prisoner. See also *Bonafous* v. *Walker*, 2 *T. Rep.* 126. The 6th article of the 6th *chapter* of the constitution of *Massachusetts*, as originally formed and adopted, contains this provision: "All the laws which have heretofore been adopted, used and approved in the Province, Colony, or State of *Massachusetts-Bay*, and usually practised on in the Courts of law, shall remain and be in full force, until altered or repealed by the Legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution." And the 3d section of article 10th of the constitution of this State, is in these words: "All laws now in force in this State, and not repugnant to this constitution, shall remain and be in force, until altered or repealed by the legislature, or shall expire by their own limitation." The statute of *Westminster* 2*d*, abovementioned, having been "adopted, used, approved and usually practised upon in *Massachusetts*, was in force in *that* State at the time when the constitution of *this* State was formed and adopted, and thereupon became and

continued in force here until the passage of the law of *January* 21, 1834, hereafter mentioned.

What constitutes a repeal of a statute? "A statute may be repealed by the *express words* of a subsequent statute, or by *implication.*" "If a subsequent statute, contrary to the former, has *negative* words, it shall be a repeal of the former." "So if a statute enacts a thing inconsistent with a former." "So if a subsequent act be contrary to a former in matter, it shall be a repeal of the former, though the words be affirmative." 4 *Com. Digest Parliament R.* 9. "A negative statute does so bind the common law, that a man cannot afterwards make use thereof." 4 *Bac. Abr.* 642. The statute of *January* 21, 1834, which we have above referred to, is in these words: "*Sec.* 1. *Be it enacted, &c.* That no action shall be hereafter *maintained* to recover damages for an escape of any debtor, committed on execution, except *a special action on the case.*" Though this act is not in the *formal language* of a repealing act, yet it expressly takes away the remedy by *action of debt*, and of course is stronger than either of the cases cited from *Comyn's Dig.* The words are not merely *negative*, but *prohibitory.* Whether the statute of *Westminster* 2, and 1 *Richard* 2*d* are to be considered in force in *Massachusetts, in the form and character of statutes*, or as a part of the *common law* of the Commonwealth and of this State, seems not to vary the power and effect of the statute of 1834. In whatever form or character they were the law of the land, binding on Courts and parties *before* that statute was passed, the moment it was passed, the said statutes of *Westminster* and *Richard*, or the spirit or principle of them was abolished and ceased to exist in this State. Such is the declared intention of our legislature. The act contains no saving clause either as to actions then pending, or causes of action then existing.

Our next inquiry is, what the consequences are of such a repealing act, without any saving clause, in respect to pending actions, originated according to the law as it existed when they were instituted. There is no question as to criminal proceedings. "There can be no legal conviction for an offence, unless the act is contrary to law at the time it is committed; nor can there be a judgment, unless the law is in force at the time of the indictment

*and of the judgment.*" 11 *Pick.* 350; 1 *Kent's Com.* 435; 7 *Wheaton*, 551. All the statutes of *Massachusetts* which were in force at the time *Maine* became an independent State, as soon as they were revised and re-enacted in this State, were repealed by the act of *March* 21, 1821, *ch.* 180, but the act contains a saving clause, embracing all rights of action and all actions and causes of action, commenced in virtue of, or founded on said acts, or any of them. So the act of *June* 20, 1809, declares "that no action shall hereafter be maintained on any bond, &c. *provided*, that nothing herein contained shall affect any suit or action *now pending* on such bond as aforesaid." The act of *February* 24, 1827, *ch.* 370, repealing the act of *February* 28, 1823, which authorized this Court to lay out highways in certain cases, contains a saving clause as to all cases respecting highways then pending. So the act of *February* 27, 1826, repealing the act of *February* 10, 1823, respecting lotteries, contains the usual saving clause. So the act of *February* 28, 1829, changing the punishment of certain crimes as before that time established, contains a special and particular saving clause. The act of *March* 4, 1829, repealing a section of a former act on the subject of costs, has a special saving clause. It is true, that in many cases of repeal in our statute book, there are no saving clauses; but if there had been, they would have been of little importance, from the nature of the statutes, and the subjects to which they relate.

The case of *Springfield* v. *Commissioners of highways for the county of Hampden*, 6 *Pick.* 501, has a direct bearing upon the point under consideration. By an act of 1825, certain powers were given to commissioners of highways, and by another statute, passed in 1827, repealing the former act, all those powers were vested in county commissioners; and in this latter act there was no clause saving to the commissioners of highways a power to proceed and act upon complaints and processes instituted before them. The Court decided that they had no authority to proceed in the case before them, though it was pending when the latter act was passed. The jurisdiction was gone. The Chief Justice remarks, "The proposition that every thing *done* under a statute while in force, though the statute may be afterwards repealed, is undoubtedly true, but goes no further than to render

valid things *actually done;* but when those things themselves are merely *preliminary*, the principle does not authorize a further proceeding in order to render them effectual. "There is no such thing as a *vested right to a particular remedy*. The legislature may always alter the *form* of administering right and justice, and may transfer jurisdiction from one tribunal to another." What difference in principle is there between a right in the legislature to transfer jurisdiction from one tribunal to another, thereby defeating and at once terminating all pending proceedings, (as in the above cited case,) where there is no saving clause, and thus subjecting one or both parties to a loss of all costs incurred, and the right to declare that actions of a *certain* description shall not be *maintained* to recover damages, but *another kind* shall be resorted to; by means of which, pending actions are defeated and costs lost? In the former case, the court or tribunal are deprived of all power of acting *as to certain subjects;* and in the latter, of the power of acting, except in a *particular prescribed manner*. In both cases the repealing act operates upon the *Court* and the *parties;* depriving each of the power of proceeding as they had a right to proceed under the authority of the act repealed. We again ask, what is the difference in principle between the two cases? In the case under consideration, nothing has been done by the plaintiffs except commencing their action, and offering their proof in this Court, where a nonsuit has been entered for the purpose of having the decision of the whole Court on the question, whether the action can be maintained. It is not denied that the legislature may constitutionally repeal a law when they please, and without any saving clause. Suppose our legislature should repeal the statute which requires that damages for an injury occasioned to one's land by being flowed by the mill-dam of another, shall be recovered on *complaint to the Court of Common Pleas*, and not otherwise, and the repealing act should not contain any saving clause as to pending complaints and proceedings thereon, would not the complainant lose all costs which he had incurred? And yet that circumstance would not affect the validity of the act; and why should it in the present case? *Miller's case*, 1 *Wm. Blackstone*, 451, is in these words: "Under the insolvent debtor's act of *Geo. 3d*, one *Miller* was compelled

by a creditor, at the sessions at *Guildhall*, to give up his effects, and he accordingly signed and swore to his schedule, &c.; but some circumstances arising, the Court adjourned till the next sessions. In the meantime the statute of 2 *Geo.* 3*d* passed, which repealed the *compelling clause*. Motion for a *mandamus* to the Justices now to proceed to grant *Miller* his discharge, the jurisdiction having attached *before* the clause was repealed. *But by the Court* nothing is more clear than that the jurisdiction is now gone, and that we cannot grant any such *mandamus*. Even offences committed against the clause while in force, could not have been punished, without a special clause to allow it." The case of a road in *Hatfield township, Montgomery county*, 4 *Yeates*, 392, was decided on the same principle on a *certiorari* to the sessions, and their judgment reversed, because the road was accepted and the proceedings had under the *former* laws which were repealed by the act of *April* 6, 1802, and no provision is contained therein to continue proceedings under the old laws. The petition for the road was presented in *May*, 1801. The marginal note of the above case is this. "No proceedings can be pursued under a repealed statute, though begun *before* the repeal, unless by a special clause in the repealing act. See also *Wharton's Digest*, 709, and 1 *Kent's Com.* 435. We have not been able to find any case making a distinction between *civil* and *criminal* cases on this point. In the above case of *Miller*, the Court use the expression, "*Even offences* committed against the clause," &c. &c., which expression seems to convey the idea that the principle is *more* applicable, if any thing, to *civil* than to *criminal* proceedings. If the present action were now pending in the Court of Common Pleas, would this Court grant a mandamus, for any reason whatever, to proceed in the cause? We forbear to cite any more cases in relation to *this* ground of defence; merely remarking, that whether the ground is a solid and substantial one, does not depend upon the *intention* of the legislature; the effect of the repeal of a statute, without a saving clause, is a dry *question of law*. And the cases above cited, in our opinion, have distinctly decided what that effect is; namely, a complete bar to the maintenance of the present action, provided the legis-

lature acted on constitutional and legitimate principles in the enactment of the law of 1834.

The remaining inquiry is, whether in such enactment they did act on such principles. It is urged by the counsel for the plaintiffs, that the above act is unconstitutional because it disturbs vested rights and impairs the obligation of contracts. In *Whitman* v. *Hapgood*, 13 *Mass.* 464, *Jackson J.* in giving the opinion of the Court says, "It is a general rule, applicable to all laws, that generally they are to be considered as prospective, and not to affect past transactions. It is not intended by this rule that the legislature cannot in some cases make laws with a *retrospective operation;* but this effect is not to be given to a statute unless such intention is manifestly expressed, especially if it tends to produce injustice or inconvenience." In the case before us the act was passed to *prevent* injustice: and it should be so construed as to produce the intended effect. It is contended by the counsel for the plaintiffs that when they commenced their action, they were by law entitled to recover the full amount of the *debt due* from the prisoners to them at the time of the escape; and also, at the time the act was passed, that a *bill of costs* had accrued, which they were also entitled to recover; and that the legislature had no power to deprive them of such costs, or, by substituting a *special action on the case* in the room of an *action of debt,* to reduce the amount of the sum due, to such damages as a jury might estimate and allow. We have already, in this opinion, made some incidental observations upon this objection, so far as it relates to *costs.* This Court has always acted on the principle that the legislature might modify *remedies* at its pleasure, in all the questions which have arisen respecting *appeals* and *costs,* where the law had been altered in regard to *either,* pending the action, unless controlled by some express provision in the act making the alteration. Cannot the legislature take away the right of appeal in all personal actions under two hundred dollars, in all suits *pending* at the time of passing the act, as well as *others?* The provision in the Constitution of the *United States* and that of this State, to secure the protection of the obligation of contracts, seems not to apply in the instance before us. The plaintiffs do not found their action and claim against the defendant

on any contract between the parties, but on his alleged violation of official duty as a jail-keeper. Besides, the act in question does not divest the plaintiff's *right of action*, but merely changes the remedy from an action of debt to a special action on the case. Is the act then objectionable on any other ground, as operating or professing to operate retrospectively and thus prejudice the rights of the plaintiffs? This objection applies as well to all *causes of action* for escape of prisoners on execution, existing at the time the act passed, as to the *present action*, and we do not perceive any difference in principle between them. See *Bacon* v. *Callender*, 6 *Mass.* 303, and *Patterson and Philbrook*, 9 *Mass.* 151. What then is the essence of the objection to the act as a retrospective one? It is this: in an action on the case, which is now declared to be the only one maintainable for the escape of a debtor commited on execution, a plaintiff can only recover as much damage as he has sustained, or a sum sufficient to indemnify him for what he has lost; that is, he can obtain nothing more than *perfect justice;* whereas, before the act was passed, such plaintiff could obtain judgment and execution for the whole amount of the debt, though the debtor, at the time of his escape, or enlargement from prison, was not worth a cent, and had, as in the present case, been admitted to the benefit of the poor debtor's oath. It is true the act in question may, and probably in most instances will, prevent a recovery of any damages beyond what a creditor shall be found to have sustained; and may thus impose some limitation upon his rights. So did the general statute of limitations, and so did the *Betterment* act. In *Walter* v. *Bacon & al.* 8 *Mass.* 468, the Court decided that the legislature had a right to pass a law confirming the doings of the Court of Sessions, as to the assignment of prison limits, though the effect of the law was to deprive the creditor of the right of maintaining his action on the bond which he had when the act was passed, to recover for the breach of the condition by the escape of the debtor. The decision in the above case of *Patterson* v. *Philbrook*, was the same in principle. So also was *Lock, admr.* v. *Dane & al.* 8 *Mass.* 360. The same principle also was acted on in *Commonwealth* v. *Bird*, 12 *Mass.* 443, and *Brown* v. *Penobscot Bank*, 8 *Mass.* 445. To the same point may be cited *Foster &*

*als. exr.* v. *Essex Bank*, 16 *Mass.* 245. In that case the Chief Justice says, that "a legislature which in its acts, not expressly authorized by the constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty or exceeding its authority." No one has ever doubted the right of the legislature of *Massachusetts* or of this State to grant chancery powers to the Supreme Courts of those States respectively: yet in some important particulars, such powers, when exerted, seem very seriously to interfere with what are called the vested rights of defendants; one of which is to stand upon his *denial* of the plaintiff's claim and compel him to prove it if he can; but in a court of equity the plaintiff may appeal directly to the conscience of the defendant, and compel him to answer on oath whether the facts stated in the bill are not true, and, if so, thus condemn him out of his own mouth. In *Potter* v. *Sturdivant*, 4 *Greenl.* 154, this Court decided that a statute of *Massachusetts*, authorizing the Supreme Court of Probate to chancer the penalty of an administration bond down to a *reasonable sum*, though at the time the act was passed the plaintiff had a right to have judgment and execution for the *whole penalty* for a certain specified breach, was not unconstitutional. The statute did not take away or impair the plaintiff's right of action, for he was still entitled to recover all that reason and justice would require; that it was no violation of any sound principle to mitigate the severity of a penalty and award to the party injured as much as he deserved in equity and good conscience. See also the case of *Proprietors of side booms in Androscoggin river* v. *Haskell*, 7 *Greenl.* 174, and *Holbrook* v. *Phinney*, 4 *Mass.* 566. But we will cite no more authorities, nor pursue the investigation of the cause any further. The act declares, that an action of debt shall not be maintained for an escape of a prisoner on execution for debt, and it contains no saving clause as to actions then pending or causes of action then existing. In these circumstances this Court has nothing more to do than dismiss the action from the docket. The defendant cannot have costs, for the plaintiffs ought not to be subjected to any.

*Action dismissed.*

## ULMER *vs.* REED *& al.*

Where a promissory note given by A to B, payable on demand, was also signed by C, with the following words at the end of his name, "*Surety ninety days from date,*" — they were holden to constitute a guaranty that the principal should remain of sufficient ability to pay the note for that period; and that the liability of C could not be extended beyond the ninety days.

THIS was an action of *assumpsit* on the following note, viz: "*Thomaston, April* 10*th*, 1832. For value received, I promise "to pay *Jacob Ulmer* or order four hundred and fifty dollars on "demand with interest.

"*Haywood Reed,*
"*Iddo Kimball,* { *Surety* 90 / *days from date.*"

It was proved that *Reed* continued solvent and in possession of property sufficient to pay the note, which might have been attached, until the 17*th* of *July*, 1832, when he failed in business, and on the 20*th*, left the country.

It was also proved that the plaintiff, after the failure of *Reed*, said that he had lost his debt, because *Kimball* was not holden on the note after the ninety days.

A nonsuit was entered by consent which was to be taken off, if in the opinion of the Court the action was maintainable, otherwise judgment was to be rendered thereon.

*Allen*, for the plaintiff.

The note constitutes but *one* contract — the plaintiff of one part, and both defendants of the other part. The promise is joint and several. *Hunt* v. *Adams*, 5 *Mass.* 361; *Hunt* v. *Adams*, 6 *Mass.* 519; *Hemmenway* v. *Stone*, 7 *Mass.* 58; *Moies* v. *Bird*, 11 *Mass.* 436.

This note is either payable on demand, and in that case *Kimball's* liability commences from the date of the note — or it is payable in 90 days, in which case *Kimball* is surety that the note shall be paid at that time.

It is payable on demand. *Kimball* was surety that it should be paid on demand. This was the promise, and it was broken as soon as the note was over due — the day after it was made.

*Spring* v. *Lovett*, 11 *Pick.* 418. A cause of action then accrued — *Kimball's* liability was *fixed* — and the plaintiff might sue, or omit to sue, for six or for twenty years — delay waives no right. *Brigham* v. *Hunt*, 2 *Mass.* 581; *Cobb* v. *Little*, 2 *Greenl.* 261.

It may be said that *Kimball* agreed to be surety for 90 *days and no longer.* But surety for what? Not that *Reed* should not fail in business and become insolvent, but for the punctual *payment of the money.*

The circumstance that *Reed* had property which could have been attached, is of no importance. It would not be, even in a case of a *guarantor*, unless it was for a preexisting debt. *Read* v. *Cutts*, 7 *Greenl.* 186; *Oxford Bank* v. *Haines*, 8 *Pick.* 423.

If the note is to be construed as payable in 90 days, then the obligation should be construed to be, to take it up at the end of that time. For by the *same words* to extend the promise of the principal beyond 90 days, and to limit the term for which the surety should be liable, within that time, would be a construction as unnecessary as it would be unjust.

*Heywood* v. *Perrin*, 10 *Pick.* 228; *Cobb* v. *Little*, 2 *Greenl.* 261.

*E. Smith*, counsel for the defendants, was stopped by the Court.

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

The note in question has been properly considered by the plaintiff's counsel as the joint and several note of the defendants, and payable on demand. The question then is, what construction is to be given to the words "surety 90 days from date," written opposite to the name of *Kimball.* From their position, they evidently indicate some qualification or condition applicable to *him only;* as the word surety could not in any manner apply to *Reed* the principal debtor. They were intended for some purpose and are not to be disregarded. We are of opinion that the only sensible construction which can be given to them is, that *Kimball* was intended to be held responsible as surety for *ninety days* and *no longer;* and that this limitation was to be a bar to any action against him after the expiration of the above term,

though during that term he was surety for the ability of *Reed* to pay the amount of the note. Now it appears that he did continue solvent and in possession of property sufficient to pay it for more than a week after the end of the ninety days. This is the construction given to the memorandum by the plaintiff himself. The counsel for the plaintiff says the words are ambiguous; if so, the declarations made as to their meaning and design, were proper evidence, as the confessions of the plaintiff, who must have known for what purpose they were inserted. On this principle, *Kimball* is not chargeable; and as the action is brought against both the defendants *jointly*, it cannot be maintained without proof of a *joint promise* binding on both; and *such* a promise is not proved. We do not perceive that the case would in any degree be changed if *Kimball* was privy to the affairs of *Reed* and to the measures adopted by *Ulmer* for the purpose of securing the debt out of *Reed's* property, as he was legally discharged before that time, a friendly act on his part would not involve him in any liabilities. The nonsuit is confirmed, and there must be

*Judgment for defendants.*

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## Smith *vs.* Hall *& al.*

An action of *assumpsit for use and occupation* was referred — "the referees to decide *according to law.*" It was in evidence before them that the plaintiff was the owner of certain mills, which he rented to one *Maguire* for the term of one year, from the 6th of *July*, 1826, "and such further time as should be agreeable to the parties." On the 15th of *May*, 1827, the lessee of the plaintiff gave the defendants a lease of the premises for one year — a portion of the rent to be paid at the end of six months, "after deducting all sums said (lessees) may or have paid *for the repairs on said mills.*" On the 20th of *September*, the lessee of the plaintiff transferred all his interest in the lease of the defendants to one E. T. and the latter on the same day drew an order on the defendants in favor of the plaintiffs, for the payment of "all sums of money that may or have become due for rent of the mills, &c. *according to the tenor of the lease.*" The referees in their award deducted a large amount from the plaintiff's claim on account of *repairs made by defendants* — and it was held that in so doing they had *violated no principle of law.*

In several other particulars also, the Court sustained the report of the referees on the ground that the questions decided were *questions of fact.*

This action was assumpsit for the *use and occupation* of certain mills at *Wiscasset*, owned by the plaintiff, and was referred.

The terms of the submission were to decide the cause *according to law.* Prior to the submission the defendants had tendered and paid into Court the sum of $134.

The referees made a special report in favor of the defendants and referred to certain papers from which the following facts may be gathered.

*Joseph E. Smith,* the plaintiff, on the 6th day of *July,* 1826, being the owner of a farm in *Wiscasset,* called *Birch Point,* on which were situated certain saw mills, on that day leased it to *John Maguire* to hold for the term of one year, and such further time as should be agreeable to the parties. On the 15th day of *May,* 1827, *Maguire* leased the mills and certain privileges to the defendants for one year, for a price depending upon the amount of lumber sawed. By the terms of the lease *Maguire* was to do certain specified repairs, and whatever else was necessary to make the mills rentable. Six months from the date of the lease a payment of rent was to be made, " after deducting all sums said *Hall & Boyd* may have paid for the repairs on said mills."

On the 20th of *September,* 1827, *Maguire* transferred all his interest in the lease to *Edward Tufts,* who on the same day drew an order on the defendants in favor of *Smith,* the plaintiff, requesting them to pay the latter " all sums of money that may or have become due for rent of the mills at Birch Point, according to the tenor of the lease." This was accepted by the defendants and passed over to the plaintiff.

*May* 24, 1828, the defendants addressed the following letter to the plaintiff. " Our lease for Birch Point mills expires on the 28th instant. We wish you would inform us by letter whether we can have them long enough to finish our logs on the terms that we have had them the year past." " We do not know yet how much there will be due for the year past, but will let you know as soon as we can ascertain, and shall want you to wait for the pay till we can sell our lumber, with paying you interest for what we may be indebted." — " We want you to write that we may show *Mr. Maguire* our authority for keeping them, that we may not be troubled with him any longer."

*June* 2*d,* 1828, the plaintiff answered the defendants' letters as follows, *viz;* " Your favors of the 27*th* and 31*st* ultimo are

received and I should have answered the first of them, but hardly knew what to say to you. The fact is, *Mr. Maguire* has a lease of the whole of *Birch Point*, including the mills, which lease it is true may now be terminated at the pleasure of the parties — and yet I have no desire to terminate it as to part of the estate, without at the same time determining the lease as to the whole of the estate — and should I terminate the lease as to part, I know not how the rent could be apportioned, and I am satisfied that without an action, or my personal presence, *Mr. M.* would not give up the whole estate and quit the house, which I might wish him to do. I will however say, that I have now the same mind upon the subject which I lately expressed to *Mr. Hall* in *Boston*. It is perfectly agreeable to me that you should hold the mills for another year upon the same terms as during the last year — and hope you will be able so to do by consent of *Mr. M.*, to whom I shall write by same mail with this, to induce him to consent and give you less trouble for the future. You will, however, understand that no more repairs are to be made without the consent in writing of my agent and attorney, my brother *Samuel*, to whom you will please to apply in case repairs should be necessary — and I have already given him instructions upon the subject — I hope you will get along in this way with satisfaction to yourselves and *Mr. M.* for a few months, and until I visit *Maine*, which I propose to do in all *August* next, at farthest," &c.

The referees, after reporting generally in favor of the defendants that the plaintiff had no cause of action, and that the defendants recover their cost, add the following, viz: "We have made the above award on the ground that in and by the terms of the original lease from *Maguire* to the defendants, the mills were to be in good repair at the time possession was taken by the defendants, and the whole evidence in the case proves that at the time of the commencement of said possession by the defendants, said mills were not in rentable repair; and that it would have cost from $800 to $1000 to have put them in such repair. It further appears, that during the existence of said lease and possession by the defendants, that sundry orders were drawn by said *Maguire* on said *Hall*, the acting tenant, for pay for sundry sums

expended in repairs on said mills, which sums were paid by the defendants — and we have allowed for said repairs, deducting what would have been the ordinary repairs in case said mills had been put in tenantable repair at the time defendants took them into possession. There being no evidence of any possession in the plaintiff, actually taken, during the tenancy of the defendants, we have considered that all acts of *Maguire*, the lessor, during all of the term defendants occupied, were binding on the plaintiff in this action — and have allowed all of said repairs thus made by said *Maguire* and paid for by said tenants, and the repairs made by them by order of said *Maguire*. And we have made this report on the ground, that the plaintiff was at no time, during said lease and occupancy by the defendants, in the actual possession of the premises. We further make the original lease from *Maguire* to the defendants, and the lease from the plaintiff to *Maguire*, the original deeds of mortgage to said *Smith* — the order of *Tuffts* on the defendants — and letters from *Hall* and *Boyd* to the plaintiff, and from *Hall* to *Maguire*, a part of this case, that the Court may determine whether we have given a true legal construction to the transaction between the parties," &c.

*Josiah W. Mitchell,*
*Horace Rawson,* } *Referees.*
*Llewellyn Lithgow,*

The referees, on being called, confirmed these facts — and added that there was evidence before them that *Maguire* had committed *waste* before leasing to the defendants, by cutting down and selling some fir trees.

Upon these facts the question was upon the acceptance of the report of the referees.

*Smith, pro se*, objected to the acceptance of the report. The referees being bound to decide according to law, should have been bound by legal principles in the admission of testimony. They erred in receiving *parol* evidence to establish an agreement in regard to the rent, when the terms of the agreement in this respect were incorporated into the lease. By that instrument the repairs were to be made by the defendants principally — and what were not to be made by them, were to be made by *Maguire, before the commencement of the term* — and the defend-

ants' taking possession was an admission that all the repairs had been made, that were agreed to be made. *Mumford* v. *Brown*, 6 *Cowen*, 478; *Fowler & al.* v. *Bott & al.* 6 *Mass.* 63.

The referees also erred in saying that there was no evidence of any entry by the plaintiff during the occupancy of the defendants. The facts reported by them show the contrary. The application of the defendants to the plaintiff by their letter — the answer of the defendant, giving him permission to occupy — the showing of the authority to *Maguire*, and declining to have any thing to do with him — all went in law to show an entry of the plaintiff — to which may also be added the fact of the forfeiture of the lease by *Maguire*, by not paying rent — by committing waste — by giving a lease extending beyond his own term — and by not repairing. It was at the election of the plaintiff to consider the lease of *Maguire* at an end, and the defendants his tenants — and he did so elect. It was not necessary for him to give *Maguire* any notice to quit. 2 *Pick.* 70, 71; 2 *Strange*, 1128; *Co. Lit.* 214, *B*; 2 *Cowen*, 133.

The referees not only erroneously found that the plaintiff had never been in possession, but they erred still more in saying that *Maguire* was, and that he was the agent of the plaintiff, and had full power to make an agreement with the defendants in relation to making repairs. Would the plaintiff have been at the pains to procure the order drawn on the defendants, and to obtain the assent of *Maguire*, if he, *Maguire*, was to have the power to destroy the whole arrangement with a breath? There is nothing in the case shewing this pretended authority of *Maguire*.

But if the plaintiff was bound to repair, the defendants have no right to do it and charge him therefor — at best, they can only have an action on the covenants — if the claim be good, the breach of covenant by one party cannot be a set-off to a breach by the other party.

*Fessenden* and *Barnard*, cited the following authorities on the part of the defendants. *Cogswell* v. *Brown*, 1 *Mason*, 237; *Gerrish* v. *Bearce & al.* 11 *Mass.* 193; *Bigelow & al.* v. *Newell*, 10 *Pick.* 343; 4 *Esp. R.* 59; *Peake's Ev.* 241; *Allen* v.

*Thayer*, 17 *Mass.* 299; *Codman & al.* v. *Jenkins*, 14 *Mass.* 93; *Binney* v. *Chapman*, 5 *Pick.* 124; *Rising & al.* v. *Stannard*, 17 *Mass.* 287.

MELLEN C. J. — The question is whether the report of the Referees shall be accepted. By the terms of the submission they were to decide the cause *according to law.* The objection of the plaintiff is that they have not so decided. As to all questions of *fact* they are the exclusive judges, acting as it is admitted they have acted, with integrity and fairness. — They have reported that the plaintiff has no claim on the defendants beyond the sum of $134 which they tendered and deposited in Court. It appears that the plaintiff is owner of the farm and saw mills in question in *Wiscasset:* that on the 6*th* of *July*, 1826, he leased the same to *Maguire* for the term of one year from the *first day* of said *July*, and so much longer time as should be agreeable to the parties. It further appears by a letter, referred to by the referees, from the plaintiff to the defendants, bearing date *June* 2*d*, 1828, that the lease was then in existence and the relation of landlord and tenant was then subsisting, nor is there any evidence before the Court shewing that it has ever been determined; on the contrary the referees have certified that there was no evidence before them that the plaintiff, during the tenancy of the defendants, ever took any possession of the premises; this fact is perfectly consistent with the continued existence of the lease to *Maguire.* The lease from *Maguire* to the defendants bears date *May* 15, 1827. This is a lease of the mills and privileges, on the abovementioned farm, but not of the farm, for one year. The case presents no evidence of any express lease from the plaintiff to the defendants of the mills, in *writing* or by *parol:* If the relation of landlord and tenant did not subsist between the plaintiff and defendants during their occupation of the mill, how then could this action be maintained for any thing more than the amount due on the order of *Tufts* upon the defendants and accepted by them; and that amount has been settled by the referees, upon the terms of the lease from *Maguire* to the defendants, which is specially referred to in the order, to be less than was tendered on account of that order. On *this point* we would refer to the plaintiff's letter of *June* 2*d*,

1828, which is hereafter mentioned, and from which certain extracts are made for *another* purpose. Does not this letter show a continuing right in *Maguire:* and does any thing, show a possession or right of possession in the plaintiff? If these facts are correct, as they seem to be, on what ground could the referees have consistently reported any sum beyond that which has been tendered?

But the referees seem to have placed their decision on another ground or view of their own and a different process of reasoning. To this we now direct our attention. They state in their summary of reasons that they *considered* that all the acts of *Maguire*, the lessor, during all of the term the defendants occupied, were binding on the plaintiff in this action. If this opinion was the result of evidence before them, clearly it is not subject to our revision or control. That evidence might be direct or circumstantial; express or implied. On this point no questions were proposed to either of the referees, though they were all examined as witnesses at the hearing of the objections. But we will look at the facts. We have already alluded to a letter from the plaintiff to the defendants, dated *June* 2*d*, 1828, in which he speaks of his lease to *Maguire* as then continuing in force. That letter was written in answer to two letters from the defendants to him. The first is dated *May* 24, 1828, in which they stated that their lease of the mills would expire on the 28th of that month, and inquired whether they can have them long enough to finish their logs on the terms on which they had them the year past; and observe that they do not know how much would be due *him for the past year:* they add, that they wished him to write that they might show *Maguire* their authority for keeping the mill. The second letter is dated *May* 31, 1828, and expresses nearly the same ideas and wishes as the other. On the 2*d* of *June* the letter in answer was written by the plaintiff to the defendants. In this letter he says, among other hings, "*Maguire* has a lease of the whole of *Birch Point*, including the mills, which lease, it is true, may be terminated now at the pleasure of the parties, and yet I have no desire to terminate it as to *part* of the estate, without at the same time terminating the lease as to the whole. It is perfectly agreeable to me that you should hold the mills for *another* year upon

the *same terms as during the last year;* and hope you will be able so to do by consent of *Mr. Maguire,* to whom I shall write to induce him to consent and give you less trouble for the future." Now, according to these letters, in what character was *Maguire* acting during the year 1827, and at the time those letters were written? Was he acting in *his own right* as the lessee of the plaintiff, and thus entitled to the rents from the defendants; or was he acting as the *agent of the plaintiff,* as supposed and considered by the referees to have been the case? If he was acting in *his own right* and for his own benefit, we have before expressed our opinion what would be the legal result. Is there not evidence that he acted as agent, though not *in form* yet in substance and reality? The lease was for *one year* from *May* 15, 1827, and yet the defendants in their letter of *May* 24, 1828, addressed to the plaintiff, say, "We do not know how much will be due *you* for the *past year*:" they also inquire whether they can have the mills on the *same terms* as the *last year.* Why were these remarks and inquiries made of the plaintiff, if he was not interested? At any rate, the conclusion to which the referees were conducted in their inquiries was not the decision of any *question of law.* On either view of the cause, how can the Court say that the referees have decided contrary to legal principles? There is no proof that any parol evidence was offered to contradict, control or vary the language of either of the leases. It has been urged that the voluntary entry of the defendants and their taking possession on the 28*th* of *May,* 1827, was conclusive evidence that the stipulated repairs which were to be made, had been made, and that the defendants are estopped to deny the fact. How are they estopped? It does not appear that they knew of the deficiences until *after* they had taken possession; and then the repairs were made by and under the direction of *Maguire,* at the expense of the defendants; and the plaintiff's property was rendered more valuable in consequence. Proceeding on the ground that, according to the facts as found by the referees, the plaintiff was bound to pay for the repairs, the objection of the plaintiff, that compensation should be recovered in an action on the covenants in the lease, does not apply: for the defendants have no covenants of the plaintiff to which they can re-

sort. If in either of the views we have taken of the cause, the conclusion at which the referees arrived is a correct one, justice has been done and the report ought to be accepted.

But it has been urged further, that a tenant has no right to charge the landlord with any repairs, without a previous agreement to that effect. But is there not an implied assent to this on the part of the plaintiff? On the 20*th* of *September*, 1827, *Edward Tufts*, the assignee of *Maguire*, drew his order on the defendants, requesting them to pay the plaintiff "all sums of money that *may* or *have* become due for rent of the mills at *Birch Point* in this town situated, *according to the tenor of the lease*, and his receipt shall be your discharge." This order was presented by *Smith* and accepted by the defendants. *Maguire* assented to the drawing and acceptance of this order. The order, by refering to the *tenor of the lease*, which contains particular provisions as to the repairs of the mills, may be considered as an order for the *balance* due, and being received by the plaintiff, is an implied assent to the *deduction* of the repairs. As to the amount of rents and repairs, we have nothing to do with them; it was the undisputed province of the referees to ascertain and decide both, and this they have done. On the whole, we cannot say that the referees have violated any principle of law in the decision of the cause; they have drawn their own conclusions from the evidence before them, as they had an undisputed right to do; and the parties must acquiesce in the result.

*Report accepted.*

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## Thomas Rogers *& al. appellants from a decree of the Judge of Probate.*

A will, made and executed *jointly* by husband and wife, devising estate of which he was *sole owner*, was, on his death, sustained as a valid will of the *husband alone.*

This was an appeal from a decree of the Judge of Probate for this County, approving and allowing the last will and testament of *John Grace.*

The instrument was executed by said *John Grace* and *Hannah Grace*, his wife, as their *joint* will; but it was admitted, that the husband died sole seised of the property devised, and that *Hannah Grace* was still living.

The 2d and 3d reasons of appeal filed in the Probate Court, being the only ones material to be stated were, that, the will ought not to be proved, approved and allowed, "Because, that the said will was made jointly with one *Hannah Grace*, and the said *Hannah is now in full life.*" And "because, the said will purports and in legal construction is a *joint will*, and therefore void in law.

*Mitchell* and *Tallman*, for the appellants.

This is not the will of *John Grace*, but of him *and another.* It is joint throughout — in its *commencement* — its *bequests* — the *limitation* of the property — and its *publication.* This cannot be changed by parol or otherwise. A will must be construed by its terms. This then is the will of *John* and *Hannah Grace.* But the latter was a *feme covert* and had no power to make a will to convey real estate. And if the will be void as to one it is void as to both. In this case no publication has been made by *one* — no devise by *one* — no limitation by *one* — nor has one the *power of revocation.*

A *joint will* is in all cases a void will — there can be no such thing. All the necessary ingredients of such mode of conveyance are lost if a joint will can be supported. The power of *revocation* is gone. *One* might wish to revoke, when the *other* would not — the *will* and purpose of the first would then be defeated. If it be said that a revocation by one would defeat the will of the other, the impropriety of sustaining a joint will would be still more fully illustrated. The statute does not contemplate such a will — it speaks of "testator" only.

Again, it cannot be known that *John Grace*, without his wife, would have made such a will as this. Indeed, it is fair to argue that it cannot express what his mind and will would have been by his separate and individual act.

In support of their points and reasoning the appellants' counsel cited the following authorities: *Maine stat. ch.* 38, *sec.* 2; 14 *Johns.* 324; 2 *Term R.* 693; *Powell on Dev.* 54; *Cruise's*

*Dig. tit.* 38, *ch.* 5, *sec.* 47; *Osgood* v. *Breed*, 12 *Mass.* 525; 1 *Cowp.* 268; *Petersdorff's Abr.* 8, 117; *Cook* v. *Holmes*, 11 *Mass.* 528; 1 *Williamson on Executors*, 9; *Baddeley* v. *Lappingwell*, 3 *Burr.* 1533; 4 *Ves.* 329; 14 *Johns.* 1; 1 *Ves.* 270; *Dawes Judge* v. *Swan & al.* 4 *Mass.* 208; 2 *Peere Williams*, 282; *Parsons et ux* v. *Winslow*, 6 *Mass.* 173; 3 *Ves.* 105; 8 *Com. Dig.* 421; 3 *Ves.* 320; 5 *Ves.* 243; 11 *Johns.* 219.

*Groton* and *Randall*, in support of the will cited the following authorities: 5 *Bac. Abr.* 500; 3 *Ves.* 403; 3 *Com. Dig.* 406; 1 *Burr.* 431; 1 *Salk.* 313; 2 *Mod. R.* 552; 1 *Mod.* 211; *Osgood* v. *Breed*, 12 *Mass.* 525; 3 *Salk.* 127; 1 *Wash.* 103; 8 *Peters*, 68; 1 *P. Will.* 20; 1 *Vern.* 85; 3 *Peters*, 377; 1 *Pick.* 239; 2 *East*, 552; 1 *Mod.* 117; 2 *Wilson*, 22, 75; 4 *Mass.* 135; 4 *Greenl.* 225; 9 *Pick.* 350; 2 *P. Will.* 270; 14 *Mass.* 208; 2 *Johns.* 31.

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

It was admitted, at the argument of this cause, that the property described in the will in question, belonged exclusively to *John Grace*, and that he died sole seised thereof; and that the will was executed, published and declared to be his last will and testament, in the manner stated in the attestation of the subscribing witnesses. For some strange reason, *Hannah Grace*, then the wife of *John Grace*, was joined with her husband in the character of a devisor; and this joinder is the objection to the probate of the will. The 8th reason of appeal was abandoned; and none but the 2d and 3d, which amount to the same thing, were relied upon. The supposed *intentions* of the said *John Grace*, alluded to in the 5th, 6th and 7th reasons of appeal, and the arguments in relation to them, are not subjects of our consideration, sitting as the Supreme Court of Probate. It is said that the will in question was never published as the will of *John Grace alone*, but as *his* and *his wife's* jointly. She had no right to make the will. Her joinder can have no effect upon the legal and disposing power of the husband. The will is *his* in the same manner as though *she* had not signed it. She was a mere cypher in the transaction, and all her declarations and acts must be rejected as surplusage. The argument of the counsel for the appellants is

founded on an assumed fact which is admitted to have no existence, namely, that the husband and wife were *joint-tenants* of the property devised. And he has, in pursuing this idea, relied on an expression of *Lord Mansfield* in the case of the *Earl of Darlington* v. *Pultney, Cowp.* 260, in these words. "Now there cannot be a *joint-will.*" It is true that joint-tenants cannot make a will which can operate *jointly;* for the instant *either* dies, the *principle of survivorship,* vests the *whole estate* in the survivor: and if such a will can have *any* operation in law, (and it seems it cannot, 4 *Kent. Com.* 360,) it cannot be as a *joint* will. Whether his lordship's expression was used in reference to the above principle of law, or to the particular facts of that case and the *manner* of executing certain *joint* powers which was the subject then under consideration, is of little importance; as it can have no influence in the decision of the case before us.

We are all of opinion that the decree of the Court of Probate must be affirmed; and the cause remitted to that Court for further proceedings according to law.

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## GROTON *vs. The Inhabitants of* WALDOBOROUGH.

Money paid to a town for *the office of Constable,* it having been put at auction prior to the choice, cannot be recovered back. In such case, the rule of law, *in pari delictos, potior est conditio defendentis,* well applies.

IN this action, which was *assumpsit,* the plaintiff sought to recover back the sum of $33,29, which he had paid to the defendants *for the office of Constable* for three years — the office having been put up at auction, and bid off, prior to the election. In the Court of Common Pleas a nonsuit was ordered, and the case was brought upon exceptions.

*Groton,* for the plaintiff, cited *Lunt's case,* 6 *Greenl.* 412; *Sumner* v. *The first Parish in Dorchester,* 4 *Pick.* 361; *Amesbury Cotton and Woollen Manuf. Co.* v. *The Inhabitants of Amesbury,* 17 *Mass.* 461; 2 *Barnw. & Cress.* 729; *Chitty on Cont.* 191.

*Reed,* for the defendants.

WESTON J. delivered the opinion of the Court.

It is made by law the duty of towns to choose constables; but they have no right to sell the office. It is to be presumed that the citizens will promote such men to office, as are best qualified to discharge the duties. If they are allowed to be the subjects of sale, there would be great danger that purchasers would reimburse themselves by oppression and extortion; and that fidelity and integrity would be less regarded than gain. Indeed, men of elevated minds and correct principles, could never be reconciled to this mode of obtaining office. The counsel for the defendants at once concedes, that no action could be maintained by the town for the stipulated price. But that has been paid for three successive years; and this action is brought to reclaim the money. Admitting the unlawfulness of the sale to its fullest extent, and that it is directly against public policy to sustain it, we can perceive no reason why the buyer is not to be regarded as guilty as the seller. He participated equally in the unlawful transaction.

The rule of law, *in pari delicto, potior est conditio defendentis*, is well established. *Hawson* v. *Hancock*, 8 *T. R.* 575. *Vandyck et al.* v. *Hewitt*, 1 *East*, 98, *McCullum* v. *Gourlay*, 8 *Johns.* 147, and *Worcester* v. *Eaton*, 11 *Mass.* 368, with many others which might be cited, are authorities to this point. There are certain cases, where the parties are not considered equally guilty, or where one of them has greater need of protection, where payments may be reclaimed; these cases, either not falling within the rule, or forming exceptions to it. These distinctions are stated by *Lord Mansfield* in *Smith* v. *Bromley*, cited in 2 *Douglas*, 696, and in *Browning* v. *Morris*, *Cowp.* 792, in which he says, that if the money has been paid in pursuance of an act immoral in itself, or in violation of the general laws of public policy, the party paying can have no action to reclaim it. But that if laws are made for the protection of one set of men against another, and money is demanded and paid, in violation of such laws, it may be recovered back. The case before us clearly belongs to the former, and not to the latter class.

There are cases of payment upon compulsion of money unlawfully demanded, where no guilt is imputable to the party paying. He merely submits to exactions which, although unlawful in their

origin, are enforced by the forms of law. As where he is called upon by the collector for the payment of taxes, for which he is not legally liable, and they are collected by distress, or by payment to avoid distress, the party paying may recover the amount. Of this character were the cases of *Amesbury Woollen and Cotton Co.* v. *Inhabitants of Amesbury*, 17 *Mass.* 461, and *Sumner* v. *The First Parish in Dorchester*, 4 *Pick.* 361. The recovery of money paid to another, not entitled to receive it, is sometimes resisted upon the ground, that it was paid voluntarily. This has been repelled by showing a moral, if not a legal compulsion. Thus in *Morgan* v. *Palmer*, 2 *Barnw. & Cress.* 729, cited in the argument, the plaintiff, a publican, applied to the defendant, the *Mayor of Yarmouth*, for a renewal of his license, for which he was required to pay a fee, not warranted by law. This was held not to have been a voluntary payment, the plaintiff being under the necessity of having his license renewed, in order to carry on his ordinary business.

The plaintiff was under no necessity of being constable. He might be liable to a penalty for not serving the first year he was chosen, but he was not compellable to pay the purchase money, which he might have successfully resisted. Indeed, it may be questionable, whether he would have been liable to a fine, if he had refused to serve the first year; as his election, instead of being absolute, was in the nature of a proposition from the town, that he might have the office, if he would pay for it the sum, which *Sproul* had agreed to pay, and do the business of the town without compensation. The law will, in a case like the present, lend its aid to neither party, neither being entitled to special favor.

*Nonsuit confirmed.*

## KINSELL *& al. vs.* DAGGETT *& al.*

To constitute a *disseizin* the possession must have been hostile in its commencement — exclusive and adverse, and not a mixed possession. And whether it be of this character, is a question of fact to be found by the jury.

A grantee under the State may be *disseised* by one whose possession *commenced* when the title was in the State, and consequently when no disseizin could be done, such possession having been, in its inception, exclusive and adverse, and so *continued after the grant.*

One is not *estopped* from setting up a title by disseizin, in a lot of land extending beyond the *thread of the river,* acquired *subsequently* to his taking a deed bounding him *by the river.*

THIS was an action of trespass *quare clausum fregit,* for opening a mill-dam which had been built across *Madomak* river, in *Waldoborough*; and was tried before *Mellen, C. J., September* term, 1833.

It appeared that the plaintiffs were the owners of certain mills on the south side of said stream, which their grantors had erected twenty-nine years before, and in the same place where mills had been erected and maintained by them, and those under whom they claimed, for more than sixty years. A dam had also been kept up by them during said time, extending from the south shore to a great rock, lying some rods northwardly of the thread of the river, which dam at the erection of the last mills, 29 years ago, had been extended by them from the great rock to the north shore.

The defendants were owners of the north shore where they had mills which had been erected more than twenty years before by *Barnabas Freeman,* their grantor — at which time also, they built a dam from the great rock to the north shore, below the plaintiffs' dam, and by raising a head of water blew up that part of the plaintiffs' dam from the rock to the north shore, and it was carried away by the current.

Prior to *February 27th,* 1806, the lands upon both sides of the river, including the possessions of the parties, were owned by the *Commonwealth* of *Massachusetts,* at which time they were granted with other adjacent lands to *Lincoln Academy,* with the condition "that the said grantees or their assigns should lay out and

assign to each settler, who had settled thereon before the first day of *January*, 1784, one hundred acres of land, to be laid out so as best to include his improvements, and be least injurious to adjoining lands."

In 1809, the Trustees of *Lincoln Academy* conveyed on both sides of the river to *Josiah Stebbins*, *Joseph Farley* and *Kiah Bailey*, who, in 1811, conveyed on the north side of the river to *Barnabas Freeman*, the defendants' grantor, bounding him by the river.

In 1816, the plaintiffs' grantors received a deed from said *Stebbins*, *Farley* and *Bailey*, of the lands on the south side, bounding them by the river.

Prior to this, there had been a survey by one *Robinson* (the plaintiffs' grantors being present,) of the possessions of the parties, of which he made a plan, describing both as bounded by the river. This plan was referred to in the deed from *Stebbins* and others to the plaintiffs grantors.

It appeared that a fish-way had been opened in the dam at the thread of the river, at the joint expense of the owners on each side — and there was much evidence introduced tending on one side to show the exclusive and adverse occupancy and claim of the plaintiffs and their grantors of the dam from the south shore *to the great rock* — and on the other side tending to show that the occupancy had not been adverse.

The opening in the dam, which constituted the trespass complained of, was made by the defendants south of the great rock, but *north of the thread of the river* — and was done for the purpose, (and it was agreed to be necessary for that purpose) of letting off the water so that the dam north of the great rock might be repaired.

The counsel for the defendants requested the Court to instruct the jury:

1st. That the plaintiffs' grantors having erected the dam on the land of the *Commonwealth*, no disseizin was thereby committed.

2d. That the continuation of the dam in the same place, without any manifestation of a change of purpose or of conduct in the plaintiffs, was no disseizin of the successors or assigns of said *Commonwealth*, *viz:* the trustees of *Lincoln Academy*.

3d That to constitute such a disseizin as to prevent the owner from conveying it by deed, the possession must be hostile in its commencement, must be exclusive and adverse; and that, a mixt possession will not constitute such a disseizin.

4th. That the dam in this case *being used in common* by the plaintiffs and defendants, and their grantors, and being mutually beneficial, it had not been so exclusively used by the former as to constitute a title by disseizin.

5th. That *Kinsell*, in 1816, by taking a deed from the trustees of the Academy or their assigns, pursuant to a resolve of the Legislature of *Massachusetts*, of a lot of land defined by metes and bounds, virtually admitted that he had no claim, beyond the bounds contained in his deed, and was thereby estopped to claim beyond them.

6th. That if *Kinsell*, the grantor of *Kinsell*, one of the plaintiffs, conveyed his lot by metes and bounds, excluding the land north of the thread of the river, he could not claim beyond those bounds, in consequence of the disseizin of his grantor.

As to the first request, the presiding Judge instructed the jury, that no disseizin of the *Commonwealth* of *Massachusetts* was committed, by the erection of the dam and continuance of it, while the land belonged to the *Commonwealth*. As to the 2d request, he instructed the jury, that the continuance of the dam after the *Commonwealth* had conveyed away the title, without any manifestation of change of purpose or conduct in the plaintiffs, was a disseizin of the owner or owners, if the continuance of it was open, and exclusive, and adverse to the rights and claims of such owner or owners, and claiming it himself. To the 3d request, the jury were instructed, that a disseizin of those who are capable of being disseised, must be hostile in its commencement, to the rights of the true owners; and that a mixt possession will not constitute a disseizin. As to the 4th request, the Judge declined giving any instruction, because the request referred, not to a *principle of law*, but to *contested facts*, about which much evidence had been given. To the 5th, he gave the instruction requested, as to the extent of the title under the deed from the trustees of the Academy, and that the plaintiffs were estopped to claim under their deeds, beyond the bounds named therein — but he fur-

ther instructed them, that the plaintiffs could, after the date of the deed, commit a disseizin of the true owner or owners of the land, covered by that part of the dam which extended from the thread of the river to the rock, and was not conveyed by the deed, and that if they did commit such disseizin, prior to the conveyance of *John Freeman* to the defendants in 1824, and continued the same until after the conveyance was made, then nothing passed by the same deed to them. To the 6th request the Judge instructed the jury, that neither *Kinsell* nor his grantees, could claim the land between the *thread of the river* and the *rock*, under the deed from *Stebbins* and *Bailey* — but if there was a continued disseizin of the owner or owners of such land, either by the father or his grantees, before and at the time the defendants received their deed from *Freeman*, then such deed was inoperative. The verdict was for the plaintiffs, and was to stand or be set aside, according to the opinion of the Court upon the foregoing instructions.

*Greenleaf* and *Bulfinch* submitted an argument for the defendants in writing, of which the following is a brief abstract.

1. Here was no title in the plaintiffs by disseizin — Because, 1. The grant of the *Commonwealth* created a trust estate, which rendered the possession of the *cestui que trust* lawful — 2. The survey being made under authority of the State, and with the assent of the settler, was in the *nature of an office found*, and *operated a surrender* of all possession beyond the limits thus established — 3. Because here was evidence only of a concurrent possession, at farthest — 4. Because the dam being originally erected, or at least kept up by consent of the *Commonwealth*, the mill act operated to give the right to flow, and, as incident thereto, the right to continue the dam — 5. Because the *Commonwealth*, by its agents, entered in 1815, which entry enured to purge any disseizin, for the benefit of its grantees.

2. If the plaintiffs had any right beyond the thread of the river, it was an easement only, and not a fee; for which the remedy should have been *case* and not *trespass*.

3. The facts disclosed in the report, show a case of mutual and concurrent rights, in both parties; and a *necessity* fully justifying the defendants in doing the act complained of.

They also cited the following authorities: *Knox* v. *Pickering*,

7 *Greenl.* 106; *Lapish* v. *Bangor Bank*, 8 *Greenl.* 85; *Dunlap* v. *Stetson*, 4 *Mason*, 349; *Sargent* v. *Simpson*, 8 *Greenl.* 148; 3 *Mass.* 573; *Lapish* v. *Wells*, 6 *Greenl.* 175; 2 *Merivale* 359; 7 *Bac. Abr.* 185; *Little* v. *Libby*, 2 *Greenl.* 242; *Brown* v. *Gay*, 3 *Greenl.* 126; *Hetherington* v. *Vane*, 4 *B. & A.* 428; *Boston & Roxbury Mill Corporation* v. *Newman*, 12 *Pick.* 467; *Domat's Civil Law*, *book* 1, *tit.* 12; *Winter* v. *Brockwell*, 8 *East*, 308; *Phillips Academy* v. *King*, 12 *Mass.* 546; *Angel on Water Courses*, 70; *Angel on Adverse Enjoyments*, 92; *Boynton* v. *Reed*, 9 *Pick.* 528; *Ward* v. *Bartholomew*, 6 *Pick.* 415; *Tinkham* v. *Arnold*, 3 *Greenl.* 120; *Van Allen* v. *Rogers*, 1 *Johns. Cas.* 33; *Clap* v. *Draper*, 4 *Mass.* 266: *Robinson* v. *Swett & al.* 3 *Greenl.* 325; *Jackson* v. *De Watts*, 7 *Johns.* 157; *Fox & al.* v. *Widgery*, 4 *Greenl.* 218; *Hyatt* v. *Wood*, 4 *Johns.* 150.

*Fessenden*, for the plaintiff, cited *Fox* v. *Widgery*, 4 *Greenl.* 214; *Parker* v. *Baldwin*, 11 *East*, 490; 8 *Dane's Abr.* 428; 5 *Dane*, 568; *Coolidge* v. *Learned*, 8 *Pick.* 504; *Cutts & al.* v. *Spring & al.* 15 *Mass.* 135; *Cutts* v. *King*, 5 *Greenl.* 482; *Hathorne* v. *Haines*, 1 *Greenl.* 238; *Boston Mill Dam Corp.* v. *Bulfinch*, 6 *Mass.* 229; *Hall* v. *Leonard & al.* 1 *Pick.* 27; *Cummings* v. *Wyman*, 10 *Mass.* 464; *Brown* v. *Wood & ux.* 17 *Mass.* 68; *Tyler* v. *Hammond*, 11 *Pick.* 193; *Chapman* v. *Gray*, 15 *Mass.* 445.

Parris J., at a subsequent term, delivered the opinion of the Court.

We are not called upon to weigh the evidence in this case, as the motion to set aside the verdict, because it was not warranted by the evidence, has been withdrawn. Our only inquiry is as to the correctness of the instructions given to the jury; and whether those requested by the defendants, and not given, were properly withheld.

The plaintiffs' dam was built in 1804, extending quite across the river; but inasmuch as the title was then in the Commonwealth, the erection and continuance of the dam did not operate as a disseizin, and so the jury were instructed.

The grant from the Commonwealth to the trustees of Lincoln Academy, in 1806, passed the legal title, notwithstanding the possession of the occupants. *Barnabas Freeman* was, and had been for many years in possession of the north side of the river, and the conveyance to him in 1811 confirmed his title.

*Kinsell's* dam, however, covered a portion of the tract included in *Freeman's* deed, and although the erecting or maintaining the dam would not operate a disseizin of the Commonwealth, while the fee remained there, yet it might so operate after the conveyance to an individual.

Whether the Lincoln Academy held the land on the north side of the river in trust for *Freeman*, or otherwise, subsequent to the conveyance from the Commonwealth, there can be no question but an open and exclusive possession of any portion of it by *Kinsell*, claiming it as his own, and holding it adversely to the rights and claims of all others would be a disseizin of the owner, whether that owner be *Freeman* or the trustees of Lincoln Academy.

If *Kinsell* continued the dam across the channel and to the north bank of the river subsequent to the conveyance from the Commonwealth; if he occupied it openly, exclusively and adversely to the rights and claims of all others, claiming the right in himself, in our judgment, it comes fully up to a disseizin; and we cannot perceive how this is to be avoided by the fact that he had thus occupied it while the fee was in the State. The defendants contended at the trial, and requested to have the jury instructed, that there could be no disseizin without a manifestation of change of purpose, or of conduct in the person holding possession. What change could there be that would more effectually deprive the true owner of the enjoyment of his estate, or be more indicative of the intentions of the intruder upon his rights? Holding exclusively and adversely, and openly, are the highest acts in the power of the disseisor to indicate his intentions; — and if he thus hold prior to the conveyance from the State, what more could he do subsequently, to constitute a disseizin. Suppose he had been in the exclusive possession of the whole lot at the time of the grant to Lincoln Academy, and he had continued to occupy and improve it thereafterwards for upwards of six years, greatly

enhancing its value by his labor and expenditures, would he not have been entitled to the value of his improvements under our statute? Or if he had thus continued in possession for upwards of twenty years, would not the right of entry have been tolled?

Whether *Kinsell* did hold openly, exclusively and adversely, was a question of fact for the decision of the jury. We think the instructions given by the Court, in answer to the defendants' second request, were correct.

The jury were also instructed that a disseizin of those who are capable of being disseised, must be hostile in its commencement to the rights of the true owner, and that a mixed possession will not constitute a disseizin.

As the jury found for the plaintiffs, they must have found that *Kinsell's* possession was not in submission to the rights of the defendants' grantor, or under an acknowledgment of his claim; that it was hostile and exclusive, that is, holding him out, not permitting him to enjoy even a mixed possession. This was clearly a disseizin, and, during its continuance, the disseisee could make no valid conveyance of that portion of the premises thus adversely held by *Kinsell.*

The law, as contended for in the defendants' fourth request, would have been applicable if the facts assumed had been proved. But the jury have negatived the facts. They have found that the dam was not used in common by the plaintiffs and *Freeman,* but used by the plaintiffs exclusively and adversely to *Freeman;* and it was not within the province of the Court to instruct the jury as to the facts. The request was, that the jury might be instructed that the dam had not been so exclusively used by the plaintiffs as to constitute a title by disseizin.

How the dam had been used was the important fact to be decided. The Court left that to the jury, at the same time instructing them that in order to constitute a disseizin, the plaintiffs' possession must have been hostile in its commencement, exclusive and adverse, and that a mixed possession would not constitute disseizin. If the Court had gone further and responded affirmatively to the defendant's fourth request, it would have been encroaching upon the rights of the jury, and afforded a just ground of complaint to the adverse party.

The deed to *Kinsell*, in 1816, bounding him by the river, carried him to the channel and no further, and even if he had claimed further, the trustees of Lincoln Academy or their assigns could grant him nothing beyond, as they had previously granted the residue to *Barnabas Freeman*, in 1811. But *Kinsell's* taking this deed bounding him by the channel of the river, did not estop or disqualify him forever thereafter from disseizing *Freeman*.

He might the next day, as well as the day previous, have forcibly entered as a disseisor upon the whole of *Freeman's* lot, ousted him of his possession, and held him out, and *Freeman*, in order to have regained possession by writ of entry must have considered it a disseizin.

If, as the defendants contended under their fifth and sixth requests, *Kinsell*, by taking his deed in 1816, is estopped to claim beyond the bounds of his deed, how far is that estoppel to operate? Certainly not to defeat rights subsequently acquired.

*Kinsell* might extend his bounds by purchase, or he might acquire rights by occupancy, which could in no way be affected by his former conveyance; and if subsequent to that conveyance, he disseised *Freeman*, and that disseizin was continued up to the time when the latter conveyed to the defendant, it is clear that such conveyance was inoperative, so far as it related to that portion of the premises of which the grantor was disseised.

Upon a critical examination of the instructions given to the jury, we are unable to perceive any thing erroneous or which is not clearly in accordance with well established and settled principles. Neither do we perceive that any of the instructions requested by the defendants were improperly withheld. Upon most, if not all the questions of law raised in the defence, the charge of the Court was in accordance with the views of the defendants; and if more full or explicit instructions were desired, it was incumbent on the party wishing them to request that they should be given. Unless that was done, the omission to instruct upon any particular point, or in any particular manner, is not a cause for setting aside the verdict.

From the whole case, it is manifest, that the jury found, that *Freeman* was disseised of that portion of the dam extending from the channel to the rock, when he conveyed to *Bulfinch*, in 1824,

and if that fact was properly found, there is no sufficient reason, appearing in the report, why judgment should not be rendered on the verdict.

The counsel for the plaintiffs now contends that they, and those under whom they claim, having been in possession of the place where the dam is situated for upwards of sixty years, a grant from the Commonwealth is to be presumed.

That question was not raised at the trial. The plaintiffs then reposed upon the fact of a disseizin, and as the Commonwealth could not be disseised, the Court confined both parties to proof subsequent to 1806, when the grant was made to Lincoln Academy.

The Judge was not called upon to rule whether a grant from the State could be presumed, and the parties, particularly the defendants, had no opportunity to offer evidence, if they could, to rebut the presumption. There are many authorities tending to support this position; such as *The Mayor of Hull* v. *Horner*, *Cowp.* 102; *Eldridge* v. *Knott*, *ibid.* 214; *Roe* v. *Ireland*, 11 *East*, 280; *Goodtitle* v. *Baldwin*, *ibid.* 488; *Ward* v. *Bartholomew*, 6 *Pick.* 415; 3 *Stark. Ev.* 1221; *Roscoe on Ev.* 17. But as the question is not raised in the report, and its decision would not affect the result, we forbear to enter upon its discussion.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF KENNEBEC, JUNE TERM, 1834.

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## GREEN *vs.* THOMAS.

A deed, whereby one conveyed to another, a farm, "in consideration of a good and sufficient maintenance being well and truly furnished for S. G. and H. B. during their natural lives," by the grantee, contained these provisions: — "If the said (grantee) shall fail to furnish a good and sufficient maintenance to the said S. G. and H. B. as aforesaid, then this instrument is to be of no effect," — "and under the conditions aforesaid, said (grantee) is to come into immediate possession of the premises." *Held*, that the fee, and right to immediate possession of the land, passed to the grantee subject to be defeated by a non-performance of the conditions which were *subsequent*.

Whether a condition in a deed is *precedent* or *subsequent*, must be determined by the intention of the parties; and not upon technical terms, or upon the collocation of the words used.

In this State *a consideration* is not necessary to the validity of a deed of conveyance, as between the parties.

THIS was a writ of entry, in which the plaintiff claimed the demanded premises as heir of *Joseph Kelley*, whose daughter and heir it was agreed she was. The case was submitted for the opinion of the Court upon the following agreed statement of facts.

Said *Kelley* was seised of the premises, and died seised thereof, unless the tenant became seised by virtue of *Kelley's* deed to him, the material parts of which were as follows, *viz:* "Know all men by these Presents, that I, *Joseph Kelley* of *Waterville*, &c., in consideration of a good and sufficient maintenance being well and truly furnished for *Sally Green* [a daughter] and *Hannah Butterfield* [a stranger] both of said *Waterville*, single wo-

men, during their and each of their natural lives, by *George Thomas*, of said *Waterville*, do hereby give, grant, sell and convey unto the said *George Thomas*, his heirs and assigns forever, *after the said maintenance shall be furnished*, and after the deaths of the said *Sally Green* and *Hannah Butterfield*, a certain lot of land situate," &c. (the demanded premises.) "But if the said *Thomas* shall fail to furnish a good and sufficient maintenance to said *Sally Green* and *Hannah Butterfield* during their and each of their natural lives as aforesaid, this instrument is to be of no effect, otherwise to be and abide in full force — and *under the conditions aforesaid, the said Thomas is to come into immediate possession* of the premises — to have and to hold the aforegranted premises to the said *George Thomas*, his heirs and assigns." Then followed the usual covenants in a warranty deed. The deed was dated *June*, 1830. The tenant entered under his deed, and has retained the possession ever since.

If the Court should be of opinion that nothing passed by *Kelley's* deed to the tenant, and that he was not legally entitled to the possession of the premises under it, then the tenant was to be defaulted — otherwise, the plaintiff was to become nonsuit.

*Boutelle*, for the demandant, contended that the deed could not operate as a deed of bargain and sale, because there was no pecuniary consideration. *Jackson* v. *Carpenter*, 16 *Johns.* 515; *Jackson* v. *Florence*, 16 *Johns.* 47.

The heir at law can only enter for non-performance of the conditions — and *Hannah Butterfield*, not being an heir, the grantor's intentions in regard to her might be defeated.

Again, if it be construed to be a deed of bargain and sale, as was perhaps intended by the grantor, it cannot pass a fee *in futuro*. *Wallis* v. *Wallis*, 4 *Mass.* 135; *Welch* v. *Foster & al.*, 12 *Mass.* 93; *Parker* v. *Nichols*, 7 *Pick.* 111.

It cannot be construed to be a covenant to stand seised to uses, there being no consideration of blood or marriage. *Rowe* v. *Tranmer*, 2 *Wil.* 75; 3 *Cruise's Dig.* 107.

But if the deed be valid and effectual, the tenant is not entitled to possession till after the death of *Sally Green* and *H. Butterfield*. Such must be construed to be the intention of the testator. Where there are two clauses in a deed repugnant to each other, the latter is to be rejected. 2 *Blk. Com.* 380.

*Wells*, for the tenant, cited *Howard* v. *Turner*, 6 *Greenl.* 106; *Frost* v. *Butler*, 7 *Greenl.* 225; 2 *Cruise's Dig.* 23; *Emery* v. *Chase*, 5 *Greenl.* 232; *Fairbanks* v. *Williamson*, 7 *Greenl.* 96; 2 *Cruise's Dig.* 49.

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

WESTON J. — The deed, upon the construction of which the rights of the parties depend, is very inartificially drawn; but taken altogether, we think it may be deduced as the intention of the parties, that the fee of the land should pass to the grantee, subject to be defeated, if the conditions were not performed, which we must regard as subsequent, and not precedent. Whether a condition is precedent or subsequent, must be determined by the intention of the parties; and not upon technical terms, or upon the collocation of the words used. 3 *Com. Dig.* 88; *Hotham* v. *The E. I. Comp.* 1 *T. R.* 638; *Worseley* v. *Wood*, 6 *T. R.* 710; *Howard* v. *Turner*, 6 *Greenl.* 106. The stipulation, that the grantee should come into immediate possession, seems to have been introduced for the express purpose of avoiding the construction, that he was to have nothing, until the conditions were performed. He was to have immediate possession, upon the conditions expressed.

It has been urged, that as the heir at law only could enter for condition broken, the object of the grantor in providing for the maintenance of *Hannah Butterfield*, a stranger, might be defeated; she having no legal remedy. It is plain that he did not intend that the grantee should have the land, unless he fulfilled the conditions; and he has in that case made no limitation over in favor of *Hannah Butterfield*. If the conditions should be construed to be precedent, it would be at the option of the grantee, whether he would perform them or not. If subsequent, and it is for the interest of the grantee to hold the land, which may be presumed, he can be secure of the estate only by affording the maintenance. Whether, if the land should be reclaimed by the heir at law for condition broken, she may not hold it subject to the support of *Hannah Butterfield*, regarding the deed in question as a declaration of trust to this effect, we are not called upon to decide.

But if the deed was intended to convey the land upon a condition subsequent, it is urged that it is without sufficient consideration. This intent is a lawful one, and is to be carried into effect, if it can be done, without violating the rules of law. Courts have been liberal in sustaining conveyances, where the intent can be discovered; and *Lord Hobart* recommends that they should be subtle, *astuti*, in effecting this object. *Clanrichard et ux.* v. *Sidney*, *Hobart*, 277, *b.* In *Jackson* v. *Florence*, 16 *Johns.* 47, a deed, much like the one before us, was defeated for want of consideration; the grantee not having bound himself, by deed or otherwise, to furnish the maintenance. The Court held, that if the deed operated at all, it must be as a bargain and sale, and that it wanted the consideration necessary in that species of conveyance. The deed in question also wants the consideration of blood or marriage, peculiar to covenants to stand seised. For whatever may be found having a different bearing, we are satisfied that such consideration will alone sustain a covenant to stand seised. In *Jackson* v. *Sebring*, 16 *Johns.* 515, *Chancellor Kent*, after an elaborate review of the cases, maintains this opinion, which was adopted by the Court.

At common law there could be no feoffment, without livery of seizin; hence in *England*, and doubtless also in *New-York*, deeds not accompanied with this ceremony, can never be regarded as feoffments. It is otherwise in *Massachusetts* and in *Maine*. In both States, it is provided by statute, that all deeds or other conveyances of land, signed and sealed by the grantor, having good and lawful right or authority thereunto, shall be valid to pass the same, without any other act or ceremony in the law whatsoever. And it has accordingly been holden, both in *Massachusetts* and in this State, that a deed may have the effect of a feoffment, if necessary to uphold the lawful intention of the parties. *Marshall* v. *Fisk*, 6 *Mass.* 24; *Emery* v. *Chase*, 5 *Greenl.* 232.

Without being satisfied that there is no consideration for this deed, according to the case of *Jackson* v. *Florence*, it may be stated that our statute has not made a consideration essential to the conveyance of lands. If purely voluntary, it is good between the parties; although liable to be defeated in favor of creditors. At common law a feoffment was valid without any consideration,

or if any was implied, it was the feudal duty or service resulting to the immediate grantor. That was an executory consideration, arising from tenure. Here was also an executory consideration, which the grantee was bound to perform, if he held the land. Since the statute of *quia emptores*, 18 *Edw.* 1, which put an end to subinfeudations, no feudal duty is implied to the immediate feoffer. Hence an opinion has prevailed, that a consideration has since become necessary to the validity of a feoffment. If so, here is one at least equivalent to that implied before the statute. In *Jackson* v. *Alexander*, 3 *Johns.* 478, *Kent, C. J.*, says, "the general and the better opinion is, that the notion of a consideration first came from the Court of Equity, where it was held necessary to create a use, and when conveyances to uses were introduced, the courts of law adopted the same idea, and held that a consideration was requisite in a deed of bargain and sale." *Plowden* resisted even this in *Sharington* v. *Stroffer*, 1 *Plowden*, 308, and he was sustained by *Sir Francis Bacon*, and other great names; and in the case last cited from *Johnson*, the Chief Justice thinks his was the better opinion; but he admits that it has been long settled, according to the chancery rule, that a consideration expressed or proved, was necessary to give effect to a deed of bargain and sale; although there it has become merely formal, a pepper corn being sufficient to raise a use. In regard to feoffments, it is quite apparent, from the course of his reasoning, that in his judgment, no consideration was necessary to sustain them.

It appears to us that there is no legal objection to the operation of the deed under our statute, giving it the effect of a feoffment; and we therefore hold, that it did operate to pass a title to the tenant, subject to be defeated by a breach of the conditions mentioned therein.

## Rice & al. v. West.

A promissory note payable "*on demand, with interest after six months,*" is due presently — the "six months" applying to the interest, and not to the principal.

Assumpsit on the following promissory note:

"*Boston, April* 20, 1833.

For value received, I, *Ammi West*, of *Augusta*, County of *Kennebec*, and State of *Maine*, promise to pay *Henry Rice & Co.* or order, ten hundred and two dollars and ninety-six cents on demand, with interest after six months.

*Ammi West.*"

The action was commenced within six months from the date of the note, and the question was, whether the note was payable *on demand*, or in *six months*. It was admitted, that the note was given for goods.

There were other facts agreed in the case, if testimony to prove them was admissible; but it was rejected. It was agreed that if the opinion of the Court should be, that the note was recoverable before the lapse of six months, the defendant was to be defaulted.

*Allen* and *Bradbury*, for the defendant, contended that the true construction of the note was, that it should be payable "on demand after six months, with interest after six months." By adopting this construction a meaning and force is given to every expression in the note. The parties fix a time when interest is to be payable, to wit, the 20th of *October*, 1833, and not before. Now if this suit be sustained, the plaintiff would recover interest before the expiration of the six months, in direct violation of the contract. If this note was payable presently, then it was dishonored the day after it was given, and the goods for which it was given, might have been attached in a suit on the note. Could this have been the *intention* of the parties? and the intention is to govern in the construction of the contract. If the plaintiff wanted the privilege of suing before the expiration of the six months, if he should deem it necessary for his security, that should have

been incorporated into the note ; then the defendant would at least have understood his liability.

Again, receiving interest in advance for 60 days is an agreement to wait that time. *Kannebec Bank* v. *Tuckerman*, 5 *Greenl.* 130. Now here, the *Boston* merchants have their cash price and their credit price. If six months' credit in any case be given, the interest for that time is charged in the price. Upon the principle, therefore, of the case of *Kennebec Bank* v. *Tuckerman*, the plaintiff agreed to wait six months.

This form is adopted for a snare to entrap the unwary, and the attempt should not be permitted to succeed. *Chitty on Bills*, 29. They also cited to other points, the case of *Haywood* v. *Perrin*, 10 *Pick.* 228.

*R. Williams*, for the plaintiff, cited *Holmer* v. *Viner*, 1 *Esp. R.* 132; *Chitty on Bills*, 540 ; *Loring* v. *Gurney*, 5 *Pick.* 15.

MELLEN, C. J. — It is a plain principle of law, not now to be drawn in question, that the construction of a written contract is not to be aided by parol testimony, unless in some peculiar circumstances ; as in case of a *latent* ambiguity, and *possibly*, where the contract is unintelligible as it stands ; however that may be, need not be discussed here. It is not contended that *such* evidence is admissible in the present case ; and if it were, the facts stated in *Taylor's* deposition, which we have examined for another purpose, would not in our opinion aid the defendant. This case differs from that of *Hobart* v. *Dodge*, lately decided in the county of *York*, [1 *Fairf.* 156.] There the printed words in the note " on demand" were erased by two parallel lines drawn across them, and then the promise stood thus : " I promise to pay to A. B. or order the sum of —— and interest *after four months.*" The Court considered and decided that neither the debt nor the interest was payable under four months ; that the limitation as to *time* was equally applicable to principal and interest ; and that we had no authority to appropriate such limitation to *one* of those subjects only. And besides, the erasure of the words " on demand" furnished evidence that neither party understood or intended that the note should be payable on demand. But in the case before us, the language of the defendant's promise is perfectly

plain, and it requires much ingenuity to misunderstand it. The promise is to pay the debt *on demand*, (with a comma at the end of that word) with interest *after six months*. This limitation extends only to the *interest*, and it cannot be applied to the *principal*, without destroying the sense and effect of the preceding words "on demand." It is an undisputed principle and rule of construction, that it should be such, if possible, as to give operation to all the words and provisions in the contract; because the parties must be presumed to have inserted them intentionally and for some good purpose. Why were the words "on demand" inserted, if the payment of the note could not, and was not intended to be demanded or demandable under six months? Shall we suppose the parties made such an absurd and contradictory contract? But it is enquired, why was interest made payable *after six months*, upon a sum of money demandable in one month. The first answer is, because the parties chose to make such a contract; and the second answer is, that the principal should draw interest after that time, if the creditor should be disposed to indulge the promissor with delay, or if the promissor should, by *his own* refusal or delay, prevent the creditor from collecting the money due until after the lapse of the six months. It is admitted that the note in question was given for goods purchased; but the construction of the language of the note cannot depend on that circumstance.

*Defendant defaulted.*

## WESTON *vs.* STUART.

A guardian has a *general* authority to submit to arbitrators, questions and controversies respecting the property and interests of his ward.

*It seems* a wife may join her husband in submitting to the decision of arbitrators, a question touching the title to *her* lands.

By the terms of submission, the arbitrators were to ascertain whether the defendant had paid a full and adequate consideration for a certain farm that had been conveyed to him by the plaintiff's ward — and if not, then to find what the deficiency was as to amount — and in what manner, and when it should be paid — or to award that he should reconvey it and receive back what he had paid. The arbitrators awarded that he should pay a specified sum, in money, notes and claims held by him against the plaintiff's ward, and by releasing a small part of the land — it was held, that the arbitrators had not thereby exceeded their authority.

THIS was an action of debt on a bond given by the defendant to the plaintiff for the performance of an award. The general issue was pleaded, with a brief statement setting forth sundry matters of defence.

"It appeared that on the 15th of *February*, 1830, one *Joseph Comings*, conveyed to *Zilpha Stuart*, the wife of the defendant, a certain farm in fee. That afterwards, the said *Comings* was duly placed under the guardianship of the plaintiff, being then a lunatic. That the guardian apprehending that an adequate price had not been paid or secured, for such real estate, procured a submission of the matter to arbitrators. After the formal commencement, the terms of submission proceeded as follows: to submit to the determination of *J. Richards*, *E. Blake* and *J. Whiting*, or such substitute or substitutes as may be mutually chosen and agreed upon in writing, the following matters and things, *viz:* Whether a full and adequate consideration or price has been paid to *Joseph Comings*, for the real estate by him conveyed to *Zilpha Stuart*, by his deed dated the 15th of *February*, 1830, and in case the said arbitrators should determine that the said *Comings* has received a full and adequate consideration for the real estate conveyed by said deed, they are to award, that the said *Zilpha Stuart*, shall hold said real estate forever, acquitted and discharged from any further claim upon her, or her

husband, for and on account of said real estate, to be made by said *Comings*, or his guardian, or legal representative.

2. "If said arbitrators should be of opinion, or upon full investigation of all matters and things touching the value and consideration paid to said *Comings*, for said real estate conveyed by said deed, that said *Comings* has not had and received a just and full and adequate consideration and price for the real estate, then the said arbitrators are to proceed to determine, and we hereby submit to the determination of said arbitrators or their substitutes, what further sum shall be paid to the said *Comings*, or said *Weston* as his guardian, in order to make the consideration full and adequate for said real estate and interest.

3. "If said arbitrators determine that a further sum is due to the said *Comings*, for the said real estate, then they are to determine, whether, under all the circumstances of the case, the said *Stuart* shall pay said further sum, in what manner he shall pay it, and at what time; or whether the said *Weston* shall pay the said *Stuart*, the amount that has been paid to said *Comings*, and interest; how he shall pay it, whether in land by appraisal by them made, or any other way; and at what time the payment shall be made, and to award proper deeds of conveyance according to their determination."

For the performance of the award to be made in pursuance of the foregoing articles of submission, the bond was given which was sued in this action.

The arbitrators awarded that the sum due from the defendant for the deficiency aforesaid was $2070,48 — that he should pay the plaintiff $1587,83 in money and in certain notes, receipts and just claims which he had against said *Comings* — and also that he should give a release of a portion of the land conveyed, of the estimated value of $482,65.

The defendant offered in evidence the deed from said *Comings* to his wife, the consideration therein purporting to be $1000 — and offered to prove that the farm was worth not more than from $1500 to $1700 — but *Weston J.* rejected the offered evidence.

The defendant made many objections to the plaintiff's recovery in this case, which appear in the argument, and which were all overruled by the Judge. A verdict was returned for the plain-

tiff, for the penalty of the bond and interest, which was to stand or be set aside, according as the opinion of the whole Court should be upon the correctness of the ruling of the presiding Judge.

*Allen*, for the defendant, objected,

1. The guardian has no authority as such to enter into the submission. He cannot by his own contract bind the estate of his ward. *Thatcher* v. *Dinsmore*, 5 *Mass.* 299; *Trott* v. *Fuller*, 6 *Mass.* 58.

The submission contemplates that the plaintiff shall in a certain event pay money and convey land of the ward. If he had no power to do so, there could be no *mutuality*. *Kyd on Awards*, 36, 38.

2. The submission is void — a married woman cannot become a party to a submission. *Fowler* v. *Shearer*, 7 *Mass.* 14; *Kyd* 35. A husband may submit for himself and wife — but here the wife is sought to be made a party by her own submission.

3. The award is void, because it does not pursue the submission. The question was whether the land was worth more than had been paid for it — and if so, how much should be paid back, and the time and manner of paying it. *Or*, they might award that he should convey back *the whole*, and take what he had paid. But the arbitrators have done neither alone, but *both*. They make him *pay money*, and also *convey the land* in part.

4. The referees made a *mistake* — and the Court have power to correct it. *Kyd on Awards*, 189; *ib.* 360; *Bean* v. *Farnham*, 6 *Pick.* 274.

The proof offered and rejected was abundant to show the mistake. The defendant paid $1000. The referees say the deficiency was $2070,48 — making in all $3070,48. The proof of value would be $1600 — by which it appears that the referees made a mistake against the defendant of $1470,48. The award therefore should be set aside. 7 *Johns.* 557; 2 *Johns. C. R.* 339; 17 *Johns.* 405.

*Emmons*, for the plaintiff, to show that the wife was properly joined, cited 5 *Co. Rep.* 77; 1 *Rolls. Abr.* 246; *Cro. Jac.* 447; 1 *Rolls. Rep.* 268.

To show that the submission was good notwithstanding the

plaintiff was guardian, he cited 2 *Keb.* 7; *Jacob's Law Dic. Award;* 1 *Ld. Raym.* 246; *Kyd on Award,* 27; *Dyer,* 216, 217; *Com. Dig.* 217, *A;* 6 *Pick.* 269.

To the point relating to the alleged mistake he cited, *Dolbier* v. *Wing,* 3 *Greenl.* 421; *Thomas ex parte,* 3 *Greenl.* 50.

MELLEN C. J. — Several objections have been urged against the plaintiff's right to recover in this action; two against the legality of the submission, and one against the legality of the award. Without pausing to inquire how far *either* of the parties is entitled to contend against the formality of the submission to which *both* have solemnly assented, or object to the right so to assent and contract, we proceed at once to the consideration of the objections. To understand them clearly, it may be useful to state in a summary manner, some of the facts which led the parties to enter into the submission. It appears, that on the 15*th* of *February,* 1830, one *Joseph Comings* conveyed to one *Zilpha Stuart,* the wife of the defendant, a certain parcel of real estate in fee. That afterwards, the said *Comings* was duly placed under the guardianship of the plaintiff, being then a lunatic. It seems that the guardian apprehended that an adequate price was not paid or secured for such real estate, and thereupon the plaintiff, and the defendant with his wife, executed the bond of submission, bearing date *April* 9, 1832, on which the proceedings in question are founded. The first objection is, that the plaintiff, as guardian of *Comings,* had no legal authority to enter into the submission. That a guardian has a *general* authority to submit to arbitrators or referees questions and controversies respecting the property and interests of his ward, seems to be well established by the authorities cited by the counsel for the plaintiff. There does not appear any good reason why he should not possess this legal authority as well as an executor or administrator. It is said, that as the plaintiff, in his capacity of guardian had no right to dispose of the real estate of his ward by deed, without a license from the appropriate tribunal, he surely could have no right in an indirect mode to effect the same object. Be it so. But if we look to the terms of the submission, we find that no such object was in contemplation. The arbitrators were to enquire and decide "wheth-

er a *full* and *adequate* consideration or price has been paid to *Joseph Comings* for the real estate conveyed to *Zilpha Stuart*," and if they should decide that there had been, then they were to award that she "shall hold said real estate forever acquitted and discharged from any *further* claim upon her or her husband, for or on account of said real estate, to be made by said *Comings* or his guardian or legal representatives." But if they should be of opinion that said *Comings* had not received a just, full and adequate consideration and price for the real estate abovementioned, then they were empowered to decide "what further sum shall be paid to the said *Comings;* in *what manner*, and at *what time;* or whether the said *Weston* shall pay to said *Stuart* the amount that has been paid to said *Comings* and interest; *how* he shall pay it, whether *in land* by appraisal by them made, or any other way, and at what time the payment shall be made, and award proper deeds of conveyance, according to their determination." — By the award it appears that there was awarded to be paid by the defendant to the plaintiff the sum of $2070,48, "to make a full and adequate compensation or price for the real estate covered or conveyed to *Zilpha Stuart* by the said *Comings*." In the above transaction the plaintiff seems to have promoted and protected the interests of his ward, in the discharge of what he considered his duty.

The second objection to the submission is, that the wife of the defendant joined with him in the submission, and executed the same. It is contended that she had no legal capacity to do this, and that it vitiates the submission. Whatever the common law may be as to the power of a wife in such a case, it is clear that in this State she may join with her husband in a deed of conveyance of *her* land, and the estate will pass. We do not at present perceive why she might not with her husband, by a submission of a question as to the title of her land, to the decision of arbitrators, make a contingent disposition of the land in this indirect manner: on this point we need not give any opinion. Her joinder with her husband could do no injury, as none of the particulars in the condition of the bond could bind her or affect her legal rights; the defendant only is bound by them. He and *his* estate only are liable for the sum awarded. Besides, several of the authori-

ties which have been cited by the counsel for the plaintiff shew that a wife may legally join with her husband in a submission to arbitration, where *her own* property is concerned.

The third objection is, that the arbitrators have exceeded their authority. They have designated the mode in which the sum awarded was to be paid, partly in money and partly in delivering up to the plaintiff certain evidences of debt, particularly described in the award; this they had, by the terms of the submission, express authority to do. They have also awarded that the defendant shall release to *Comings*, or his guardian, a part of the land which *Comings* conveyed to him, as before mentioned, on which certain executions had been extended, for which *Comings* or his guardian shall allow him four hundred and sixty-two dollars and sixty-five cents. This is awarded, as the mode of doing justice to all concerned; the land having been taken on execution as the property of *Comings*, it was proper that on *Stuart's* releasing all his claim to those parts, by the levy on which debts due from *Comings* had been paid, he or his guardian ought to pay or rather allow the sum mentioned to *Stuart:* we are to presume that it was the fair value of the same. We perceive no excess of authority in all this. It is a part of the manner of payment, which the arbitrators were expressly empowered to prescribe. No title of real estate belonging to *Comings* is thereby affected, but only a right of action against *Comings* extinguished by the release ordered to be given by *Stuart*. The remainder of the award has reference merely to *the time* of payment of the sum due.

One further objection has been made against the ruling of the Judge, by which certain evidence, which was offered by the defendant, was rejected. It is said, that there was a *mistake* committed by the arbitrators in their estimate of the value of the land conveyed. We need not here inquire whether this could be shewn as an objection in this action; because no such intimation was made when the rejected evidence was offered. On this point the report states, that the defendant "offered proof that the actual value of said farm at the time of said conveyance was less than $2000; *viz.* from $1500 to $1700, which proof was rejected." In the offer of the proof nothing is said or pretended about any mistake of any kind, but merely that he could prove, that in the

opinion of his witnesses, the value of the land was *less* than the arbitrators considered it to be. By the submission, *they* were to settle the question of value — and settle it finally and conclusively. On this ground the evidence was very properly rejected. On a view of all the objections, we are of opinion that there must be

*Judgment on the verdict.*

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## QUIMBY *vs.* ADAMS.

Where A. who had been chosen to the offices of Constable and Collector, gave *one* bond to the Town Treasurer for the faithful performance of his duties in *both* offices, in a penal sum equal to double the amount of taxes committed to him, and $200 — it was held to be a sufficient compliance with the provisions of *stat.* of 1821, *ch.* 92, requiring *Constables* to give bond in the sum of $200 before entering upon the performance of their duties.

It is not necessary that the bond should be approved by the Selectmen and Town Clerk *in writing.*

The provision of the statute requiring the bond to be, to secure the "faithful performance of his duties and trust as to all processes by him served and executed," was held to be substantially complied with by giving a bond conditioned to "faithfully discharge his duty *as Constable.*"

THIS was an action of debt brought to recover of the defendant certain penalties imposed by statute of 1821, *ch.* 92, for serving writs and executions as Constable, without having previously given bond to the Treasurer of the town, according to the provisions of said statute.

The writ contained sixteen counts, setting forth the service of so many writs and executions, which was admitted by the defendant, who justified on the ground that he had given bond in compliance with the spirit of the requisitions of the statute. And the case was submitted upon the following agreed statement of facts.

*Adams* was legally chosen and sworn as *Constable* for the town of *Green*, on the 19th of *March*, 1832, for the year then next ensuing — and also, at the same time and for the same term, *Collector*

*of Taxes.* On the 26th day of *March*, he gave a bond with two sureties, running to the Treasurer of the town of *Green*, in the penal sum of $3200, and conditioned as follows, *viz.* "The condition of the above obligation is such, that whereas the above named *Moses Adams*, was duly chosen and appointed on the 19th day of *March*, 1832, to the office of *Collector* and *Constable* of the said town of *Green*, for the year next ensuing from said 19th day of *March*, 1832, and fully to be complete and ended. Now if the said *Moses Adams* shall faithfully discharge his duty, as *Collector of Taxes* and as *Constable as aforesaid*, and all agreeable to the true intent and meaning of the above obligation, then this obligation is to be void, otherwise remain in full force and virtue."

[The Selectmen and Town Clerk, on being called by consent of parties, stated, that soon after the town-meeting, and before any writs or executions were served by the defendant, they approved of the sureties in said bond.]

It was further agreed that the amount of tax bills committed to *Adams* for collection, for the year 1832, was $1478,10.

If the Court should be of opinion that the penalties had been incurred, the defendant was to be defaulted, otherwise, the plaintiff was to be become nonsuit, and the defendant to have his costs.

*A. Belcher*, for the plaintiff, contended that the bond given by the defendant was insufficient, because:

1. It was not approved *in writing* by the Selectmen and Town Clerk. The proof should appear on the *record* and not by *parol.*

2. Because it unites the obligations of Constable and Collector. There should have been two separate bonds. Their duties are different, and are to be enforced under different penalties.

3. It is insufficient and defective, because it does not secure persons injured by his defaults as Constable. There can be no statute remedy on a bond unless it conform to the provisions of the statute. *Day* v. *Everett*, 7 *Mass.* 145; *Clapp* v. *Coffran*, 7 *Mass.* 98.

*Allen*, for the defendant, cited 5 *Dane's Abr.* 243; *Bartlett* v. *Martin*, 5 *Greenl.* 76; *Apthorpe* v. *North*, 14 *Mass.* 167.

The opinion of the Court was delivered by

MELLEN C. J. — This action is founded on the 9th *section* of *ch.* 92 of the revised statutes. The provision relied on is in these words. "That every Constable, after being chosen, and before he serve any writ or proceed to collect any execution, shall give to the Treasurer of his town a bond in the sum of two hundred dollars, with two sureties, sufficient in the opinion of the Selectmen and Town Clerk, for the faithful performance of his duties and trust, as to all processes by him served and executed."

*Adams* was chosen both Collector and Constable of the town of *Green*, *March* 19, 1832, for one year: and he was duly sworn as Constable, and on the 26th of the same month, gave the bond of which a copy forms part of the report. The *first* objection to it is, that it is not in conformity to the provision of the above section, either as to the amount of the penalty or the terms of the condition. It would have been more correct had the bond related simply to the character and duties of the defendant as a Constable; but as the penalty is more than double the amount of the taxes assessed for that year, and two hundred dollars besides, we cannot consider the bond void on that account. If the bond had been too small, that fact might constitute a good objection. But the penalty is more than sufficient to secure the rights of all concerned, or who could have an interest in it. The *second* objection is, that the condition in its language, varies from the language of the statute; but the question is, whether the variance is of any importance. Independent of the power given by our statute to Constables to serve writs and executions in certain cases and to a certain amount, they are mere peace officers. They have now both kinds of power. The condition is, that the "said *Moses Adams* shall faithfully *discharge his duty* (as collector of taxes and) as Constable as aforesaid, and all agreeable to the true intent and meaning of the above obligation." We may, in considering the condition, reject as surplusage, so much of it as is included in brackets; it is then that he shall faithfully discharge *his duty* as Constable; which means his whole duty, which certainly includes his duty respecting *all legal processes:* though those words are not stated in the condition; the language, as used, is tantamount to the language of the act. The *third* objection is, that the bond was never

approved by the Selectmen and Town clerk, prior to the service of the writs mentioned in the statement of facts, which was in *May*. The law only requires their official approval of the sufficiency of the sureties; but it does not require that it should be in writing. The objection is not sustained by fact; for, to save the trouble of a new trial, the Selectmen and Town clerk have all appeared before the Court and testified that soon after the meeting, and some time before any of the writs were served by *Adams*, they all officially approved of the sureties. Under these circumstances, surely such a penal action as this cannot be sustained.

*The plaintiff must be called.*

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## CRUMPTON *& al. v. The Inhabitants of* SOLON.

In an action against a town founded on *statute, ch.* 118, *sec.* 17, to recover for an injury to one's cattle, received while driving them over a bridge in said town, it should not only appear that the bridge was *defective*, but that the plaintiff was in the use of *ordinary care* — both which questions are to be passed upon by the jury.

This was an action on statute of 1821, *ch.* 118, *sec.* 17, brought to recover damages for an injury to the plaintiffs' cattle by the falling of a bridge in *Solon*, over which the plaintiffs were driving them. It was tried in the C. C. Pleas, before *Whitman C. J.* and was brought to this Court on exceptions. Much evidence was offered on both sides, to show the state and condition of the bridge at the time of the injury. It appeared that the bridge was on the principal road leading from *Augusta* to the *Canada* road, and that the plaintiffs were driving the cattle to a market in *Canada*. It was proved that from twenty to forty cattle were on the bridge, weighing from six to nine tons. The counsel for the defendants requested the Judge to instruct the jury, that it was a question of fact for them to determine, whether the bridge was out of repair — and if they should find this fact against the defendants, it was then their duty to inquire whether the plaintiffs made use of ordinary care and caution in driving their cattle over

the bridge in so large numbers at a time — and if they should believe that the plaintiffs did not use such care, they would find for the defendants. But the Judge instructed the jury, that it was for them to decide, whether the bridge was out of repair and unsafe, and if they found this fact against the defendants, and that the plaintiffs' cattle were injured in falling through it, they should return a verdict for the plaintiffs, which they did.

*Boutelle*, for the defendants, contended that two things were necessary to be shown to maintain this action; namely, that the bridge was out of repair, and that the plaintiffs used ordinary care in passing over it — and that failure of proof in either was fatal to the action. He also contended that both questions should have been passed upon by the jury. *Thompson* v. *Bridgewater*, 7 *Pick.* 188; *Smith* v. *Smith*, 2 *Pick.* 623; 2 *Stark.* 986; *Harlow* v. *Humiston*, 6 *Cowen*, 91; *Butterfield* v. *Forrester*, 11 *East*, 60; *Bush* v. *Brainard*, 1 *Cowen*, 78.

*Allen*, for the plaintiffs.

There was no evidence in this case that the plaintiffs knew of the state of the bridge — that it was out of repair in the least degree. And surely *seven and a half tons*, the medium between 6 and 9 as testified to, is no extraordinary weight to put upon a bridge — nor was there any thing extraordinary in the *number* of cattle driven on to the bridge. If roads and bridges are made what the law requires them to be, travellers may pass safely over them. But here, it is attempted on the part of the defendants to compel travellers to inspect the bridge before passing over it, and to regulate the weight put upon it by their opinion of its state of repair and strength. This would impose a great burden upon travellers, besides leading to negligence in towns. It will be time enough for the defendants to call for the instructions requested, when they show a good bridge — one that is safe and convenient — such a bridge as the law requires.

Weston J. — It is made by law the duty of towns to keep all highways, townways, causeways and bridges, within their bounds in repair; so as to be safe and convenient for travellers, with their horses, teams, carts and carriages, at all seasons of the year,

Whoever is injured in his property, by a failure of this duty, on the part of any town, if they had reasonable notice of the defect, is entitled to recover damages against such town. This liability has been qualified, by holding it necessary that the party injured should have been in the exercise of ordinary care. *Smith* v. *Smith*, 2 *Pick.* 621. *Thompson* v. *Bridgewater*, 7 *Pick.* 188. It results therefore that in these cases, besides the questions whether the bridge or road was defective, and whether the town had reasonable notice of it, there may arise another, whether the party injured was in the use of ordinary care. These are all questions of fact, to be submitted to, and decided by the jury.

The Judge below was requested, by the counsel for the defendants, to instruct the jury, that it was for them to decide, whether ordinary care had been used by the plaintiffs. This he declined, upon the ground, as it would seem, that in his opinion, there was no pretence for charging the plaintiffs with the want of care. If a party requests a Judge to instruct the jury upon a point, which in a proper case would be altogether correct, if the cause on trial does not call for it, he may well decline the request. It would serve to mislead the jury, to call their attention to positions of law, not appertaining to the cause, or raised by the facts. It is no doubt true, that a bridge ought to be constructed sufficiently strong to sustain the weight of from twenty to forty cattle, passing in a drove; and if there was no apparent defect, no more care might be required in driving that number there, than in passing upon any other part of the highway. It would be otherwise, if the party had been put upon his guard, by an apparent defect. In that case, ordinary care and prudence might not justify the passage of the whole at once. For any thing, which appears, this might have been the state of the evidence. A defect existed, and it may have been apparent. The instruction requested was in accordance with the law, and might have been, upon the facts, decisive of the cause. In our opinion, it ought not to have been withheld. The exceptions are accordingly sustained.

*New trial granted.*

## PALMER *vs.* BARKER.

When two persons are travelling with carriages, &c. on the road, and *about to meet and pass each other*, each is bound to pass to the right of the centre of the *travelled road* — and in so doing to use ordinary care and caution — and if one of them, by omitting this care, be injured in his person or property, he is without legal remedy — and if he injure the other, he will be liable to him in damages.

Though one may lawfully pass *on* the *left side* of the road or *across* it, for the purpose of turning up to a house, store, or other object, on that side of the road, yet in so doing, he must not obstruct those who are lawfully passing along on the same side.

THIS was an action of trespass, in which the defendant was charged with killing the plaintiff's horse, by running against him with his, the defendant's wagon, and thrusting a shaft of the wagon into the horse's breast. A verdict was returned for the plaintiff; whereupon the defendant moved for a new trial, on the ground that the verdict was against evidence and the weight of evidence.

The substance of the facts are clearly stated in the opinion of the Court.

*Wells*, for the defendant, endeavored to show that the verdict was against the weight of evidence, and also contended, that the statute did not apply to a case of this kind, the defendant being at the time of the injury, *out of the highway;* that is, out of the travelled part of the road. And 2. That the plaintiff was not entitled to recover in this action, because he was not using ordinary care, at the time of the injury, and cited the following authorities. *Clark, Petitioner* v. *Commonwealth*, 4 *Pick.* 125; *Smith* v. *Smith*, 2 *Pick.* 621; *Butterfield* v. *Forrester*, 11 *East*, 60; *Farnum* v. *Concord*, 2 *N. H. Rep.* 392.

*Allen*, for the plaintiff, cited *Fales* v. *Dearborn*, 1 *Pick.* 345.

MELLEN C. J. — This is a motion for a new trial, on the ground that the verdict is against evidence and the weight of evidence. The evidence was in some respects contradictory; though the most substantial facts seem to have been perfectly established. A Court of law is not in the habit of setting aside verdicts on such

ground, except in those cases where it is plain that the jury have drawn conclusions unauthorised by the proof. Whether they have so done in any particular case is often a question of difficulty, and one which should be examined with care and decided with caution. In the case before us, the jury have found a verdict in favor of the plaintiff, upon the evidence reported to us; and we are called on to inquire and pronounce our opinion, whether judgment shall be entered thereon, or a new trial granted. The act respecting the law of the road, *ch.* 245, declares that travellers shall keep "*to the right* of the centre of the travelled part of the road." The design of the law is to prevent travellers, when going on the road in opposite directions from obstructing each other, or so interfering as to produce injury or expose them to danger. The statement of some legal principles, of general application, may aid in a correct decision of the question before us.

1. Unless in some special cases, each traveller is bound to pass to the right of the centre of the travelled road, when two are travelling in contrary directions and are nearly approaching and about passing each other.

2. In so doing, both are bound to use ordinary care and caution.

3. If, by neglecting to attend to this duty, one of the travellers is injured in his person or property, he can have no remedy against any one; and if he so injures the other, he is liable to him in damages for the injury his wrong has occasioned.

4. A man may travel in the middle or on either side of the travelled road, when no person is passing or about to pass in an opposite direction.

5. So, he may pass *on* the left side of the road or *across* the same, for the purpose of turning up to a house, store or other object on *that* side of the road; but in so doing he must not interrupt or obstruct a man *lawfully* passing on that side, which would be in a direction, in a degree contrary to his: if he does, he acts *at his peril*, and must answer for the consequences of such violation of his duty. In such circumstances he must pass *before*, or wait till *after* such person has passed on. The observance of this regulation, which the law requires, leaves *each* party in the enjoy-

ment of his rights, without danger or inconvenience to *either*. The decision in the case of *Fales* v. *Dearborn*, cited by the counsel for the plaintiff proceeded on this principle. That was a stronger case than this, as the defendant did not see the plaintiff's carriage till the moment of interference.

Let us now look at the facts on which the jury found their verdict. The parties were in plain view of each other for a minute or two before they met; and whichever of the two was in fault, he had time to see the impending danger. The plaintiff was *descending* a gentle hill, with his horse and carriage, at a quick trot on the *right side* of the road, which was the *north* side; and the defendant was *ascending* the hill upon a trot also, on the same *north* side of the road. He was thus driving on that side for the purpose of turning up to the house of *Mr. Currier;* but both horses and carriages met in the hollow or gutter on that side, and there the mortal wound was given to the plaintiff's horse. There is no proof before us that the plaintiff knew, or had the means of knowing that the defendant was going to stop at the house of *Currier*, or why he was driving on the wrong side of the road. The plaintiff turned his horse as far as he could conveniently to the right, apparently to avoid the danger of meeting; but was unable to avoid it. There is some contradiction in the testimony as to the manner of driving, whether fast or slow; and also as to the *direction* in which the defendant's horse was going when the shaft of his carriage entered the breast of the plaintiff's horse. There was some proof that the defendant was in the act of turning up to *Currier's* when the disaster happened; yet it is clearly proved that both carriages were in the hollow or gutter. On these facts and disagreements the jury have formed and expressed their opinion. It is true, there was proof that the plaintiff, on one or more occasions, said the defendant was not in fault, but that he was in fault himself, as he looked back to see a person who had passed; but as he was then lawfully passing on the right side of the road, he might well suppose that the defendant would do *his* duty by turning to the right in due season to prevent injury. Besides, his opinion of the legal rights and duties of the parties cannot alter the principles by which our decision must be governed. The jury have weighed the testimony, and by their verdict in-

formed us on whose testimony they placed the most reliance. In these circumstances we are satisfied that a new trial ought not to be granted.

*Judgment on the verdict.*

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## *Inhabitants of* China *vs.* Southwick *& al.*

In an action of trespass on the case, against one for an injury caused by the flowing of the waters of a certain pond, by a dam built by the defendant, at the head of a small stream forming the out-let of the pond, on which stream was a succession of mills, it was *held*, that the owners of the mills below, were competent witnesses for the defendant, though they participated in common with him, in the benefits resulting from the erection of the dam.

This was an action of trespass on the case for erecting and keeping up a dam at the out-let of the "twelve-mile pond" in *Vassalborough*, by which the plaintiffs' bridge, as alleged, and a part of their road, were overflowed and much injured. The general issue was pleaded and joined.

It appeared, that the dam in controversy was placed at the head of the out-let stream, which flowed from the twelve-mile pond, about seven miles, when it discharged itself into the *Sebasticook* river. Upon this stream there is a succession of mills; and the dam was built to keep up in the pond, a reservoir of water for their common benefit.

*Nathan Moore* and *Thomas Greenlow*, had an interest in some of the mills below, and were offered as witnesses in behalf of the defendant. The plaintiffs' counsel objected to their admission as incompetent, but *Weston J.* who tried the cause, admitted them.

The verdict was for the defendants. If these witnesses ought not to have been received, the verdict was to be set aside, and a new trial granted; otherwise, judgment was to be rendered thereon.

*Allen*, for the plaintiffs.

The witnesses were tenants in common with the defendants in

the *dam* — it was built for the common benefit of all below — and this action is brought to try *the right* to keep it up. If this action can be maintained, the witnesses would suffer in common with the defendants — if it fail, they will enjoy the benefits in common with the defendants. They are therefore directly and personally interested in defeating this action, and thereby keeping up the dam. One action settles the whole question. It cannot be tried again. The plaintiffs are the only persons injured — one satisfaction would be a full one. Persons thus situated should be excluded as witnesses. 2 *Stark. Ev.* 392, 746, 748; *Jacobson* v. *Fountain*, 2 *Johns.* 170; 12 *Johns.* 170; 3 *Dane's Abr.* 416; *ib.* 407; *Doe* v. *Foster*, *Cowper*, 621; 12 *Mod. R.* 24; *Lufkin* v. *Haskell*, 3 *Pick.* 356; *Odiorne* v. *Wade*, 8 *Pick.* 518.

*Boutelle*, for the defendants.

MELLEN C. J. — The single question reserved is, whether *Moor* and *Greenlow* were properly admitted as witnesses on the part of the defendants. Were they interested in the event of this suit? In 2 *Stark. Ev.* 744, the law on this subject is laid down in these words: "The interest to disqualify" a witness "must be some *legal*, *certain* and *immediate* interest, however minute, in *the result of the cause*, or in the *record*, as an instrument of evidence, acquired without fraud." In *Bent* v. *Baker*, 3 *T. Rep.* 27, and in *Smith* v. *Prague*, 7 *T. Rep.* 60, the rule is laid down in these words: "That no objection could be made to the competency of a witness upon the ground of interest, unless he were *directly* interested in the *event of the suit*, or could *avail himself of the verdict*, so as to give it in evidence on any future occasion, in support of his own interest." The passage cited by the plantiffs' counsel from 2 *Stark.* 746, is in these words: "a party has such a direct and immediate interest in the event of a cause as will disqualify him, when the *necessary* consequence of a verdict will be to better his situation, by either *securing an advantage* or *repelling a loss;* he must be either a gainer or loser *by the event.*" — See also *Schillinger* v. *McCann*, 6 *Greenl.* 364, and the cases there cited by the counsel and the Court. The plaintiffs' counsel frankly and very properly admits that the verdict in this cause can

never be given in evidence in favor or against either of the witnesses in any action they may bring; but it is said that they are interested in the *event of this suit.* The dam which the defendants erected and which raised the water in the pond, was to "keep up in the pond a reservoir of water for the common benefit" of the owners of the successive mills on the stream leading from the pond. It could not be a *common* benefit, according to the facts as stated; because those mills are not owned *in common,* but in *severalty.* The witnesses had an interest in *some* of the mills only. In the case of the town of *Calais* v. *Dyer,* 7 *Greenl.* 155, it was decided that where the defendant's mill-dam had raised the water so as to overflow a *town road* and damage it, the town could not maintain a complaint under our statute, *ch.* 45, against *Dyer,* because the town did not own the land; but that there seemed to be no good reason why a special action on the case could not be maintained against him for damages to reimburse the expenses incurred in repairing the road; and that perhaps the dam might be indicted as a nuisance to the *public,* though as to the *owners of lands flowed,* the dam was lawfully erected and maintained in virtue of said act. It is said, that if it may be *indicted* as a nuisance, it may also be *abated,* and such an abatement would essentially injure all the mills, and therefore the witnesses were interested to testify so as to defeat the action, for the preservation and continuance of the dam. Is not this plainly a *non sequitur?* Have not the defendants a legal right to maintain the dam, if they should guard the road so that it will not be overflowed and injured? Is it *certain* that they will not? If they should not so guard it, is it *certain* that they will be indicted for a nuisance, and that the dam will be removed and abated as such? Is such a remote probability of an event, over which the witnesses can have no control whatever, any more than an interest which goes to the *credit* of the witnesses, and not to their *competency?* Is it, in the language of *Starkie,* "a *legal, certain* and *immediate* interest" in the witness? But there is another answer to the objection. The interest must be one *in the event of this suit.* This action never can, and never could have any effect upon the dam. If the plaintiffs had recovered damages against the defendants, no execution on the judgment could have any legal effect as to

the continuance or abatement of the dam. In *this action*, therefore, the witnesses could not have any legal interest; they could not gain or lose any thing in any event of it; they were therefore properly admitted, even if they could not be competent witnesses for the defendants in the trial of an indictment against them for a nuisance in the erection of said dam. The cases which the counsel for the plaintiffs has cited from *Massachusetts Reports* and some other books, as to the inadmissibility of persons as witnesses in an action relating to certain alleged customs, and who are interested in the existence of the custom, are not applicable in a case like the present. The principle, excluding such persons, seems to be of a peculiar nature, and rather as an exception from the general rules of evidence. Besides, in those cases, the interest in question, from its nature, must be a *common one;* and when once established by law, belongs to the *local community* where it exists. But in the case before us, the witnesses did not erect the dam, nor does it appear that they own any part of it, either in *common* or in *severalty*. For the reasons assigned, the Court is of opinion that there must be

*Judgment on the verdict.*

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## Libby *vs.* Main *& al.*

In an action of debt on a recognizance to prosecute an appeal, taken before a Justice of the Peace, it must appear that the recognizance was returned to, and entered of record in that Court to which the appeal was allowed.

It should also appear from the record, that the Justice had jurisdiction of the cause in which the recognizance was taken.

This was an action of debt on recognizance to prosecute an appeal taken before a Justice of the Peace. The defendant demurred to the declaration, and the demurrer was joined.

It was not averred in the declaration that the recognizance had in fact been returned to the term of the Court at which it was returnable —or that the Justice had jurisdiction of the cause in which it was taken. These defects, it was contended, by *Wells*, counsel for the defendant, were fatal to the action. In support of which he cited *Johnson* v. *Randall*, 7 *Mass.* 340; *Bridge* v. *Ford*, 4 *Mass.* 641; *State* v. *Smith*, 2 *Greenl.* 60.

*Boutelle*, for the plaintiff, cited *Clapp* v. *Clapp*, 4 *Mass.* 520; 2 *Chit. Pl.* 177; 1 *Saund.* 74, *n.* 3; 1 *Wilson R.* 284; *Com. Dig. Tit. Pleading*; 5 *Dane's Abr.* 288; 2 *Saund. R.* 59, *n.* 3.

PARRIS, J. — To support an action of debt on a recognizance to prosecute an appeal taken before a Justice of the Peace, it must appear that the recognizance was returned to, and entered of record in that Court to which the appeal was allowed. *Bridge* v. *Ford*, 4 *Mass.* 641. That does not appear in the case before us.

It should also appear from the record that the Justice had jurisdiction of the cause in which the recognizance was taken, for otherwise the proceedings as well as the recognizance are void.

The counsel for the plaintiff has compared this to the case of bail bonds given to the Sheriff, for the defendant's appearance at the return day of the writ, and contends, that as the nature of the action is not required to be inserted in the condition of the bond, so it is not necessary that it should be set out in a recognizance.

In bail bonds, it must clearly appear that the Sheriff had authority to act in the premises; — and nothing further is required in a recognizance. — In either case sufficient must be set forth from which it may appear, that the individual taking the bond or recognizance, acted in an official character, and that the act was within his official cognizance; and as the jurisdiction of Justices of the Peace is given and limited by particular statutes only, and nothing can be presumed in favor of such jurisdiction, the recognizance should contain a recital of so much of the cause as would show that it was embraced within the Justice's cognizance.

In this case, the instrument declared on is similar to that in *Bridge* v. *Ford*, which was adjudged defective.

We have taken some measures to ascertain what has been the practice in recognizing and certifying recognizances by the magistrates in the several counties. From all the books of precedents and forms, which have come within our knowledge, as well as from the practice so far as we have been informed, it appears that the usual mode is to embody in the recognizance such a description of the action as will clearly show that the Justice taking it had cognizance thereof.

The opinion, which we are called upon to give in this case, to conform to the principles adopted in *Bridge* v. *Ford*, will not, therefore, change the existing general practice, but be in conformity to it.

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## JEWETT *& al. vs.* WESTON.

In an action of *indebitatus assumpsit*, for labor performed in building a house, the plaintiff was permitted to introduce a *special contract*, the existence of it having been proved in the defence, to show that, its terms not having been complied with, no action could be maintained thereon; and also to serve as a guide to the jury in assessing damages, — the defendant having accepted and used the house.

Though such special contract was made with two, and the labor wholly done by one of them, it would not necessarily result from this, and the abandonment of the special contract, that the action should have been brought in the name of him alone who did the labor.

THIS was an action of *assumpsit* for labor performed, and was tried upon the general issue, before *Weston J.* at the last *October* term in this County.

The plaintiffs introduced proof that labor had been performed by one of them, *Jewett*, and his two sons, upon the defendant's house. But it coming out in evidence that the work was done under a special contract, the defendant objected to the maintenance of this action, insisting that it should have been brought upon the contract. The plaintiffs then offered the special contract, which was objected to by the defendant's counsel, but the presiding Judge admitted it, first with a view to compare its terms with the performance proved, in order to determine whether the action could have been brought upon the contract — Secondly, to show that *Arnold*, the other plaintiff, as well as *Jewett*, was employed by the defendant — Thirdly, to prove what the parties had estimated the value of the services to be, if the contract had been completed, from which the jury were to make such deductions as would compensate the defendant for any failure on the part of the plaintiffs.

On comparing the contract with the proof, it appeared that the

contract, which was for building a house, had not in all respects been performed; but it also appeared that the defendant had accepted and used the house.

The plaintiffs also offered in evidence two other papers given by the defendant to the plaintiffs, extending the time for the performance of the contract, after a portion of the labor had been performed. They were objected to, but admitted, to show that the defendant recognized *Arnold* as having been employed and continuing in the contract, and that the defendant waived any claim for damages on account of the delay.

It was objected by the counsel for the defendant, that the action having been brought on the implied assumpsit and not on the contract, it could not be maintained in the joint names of *Jewett* and *Arnold* without some proof of labor performed by *Arnold*. But the objection was overruled, *Charles H. Jewett*, in addition to the foregoing testimony touching this point, having testified that in the spring of 1830, when he and the plaintiff, *Jewett*, were at work on the house, *Weston* asked *Jewett*, the plaintiff, if *Arnold* was going on under the contract, to which *Jewett* replied in the affirmative.

The verdict was returned for the plaintiffs. If the testimony admitted ought to have been rejected, or if the ruling of the Judge as to the action being properly brought in the names of both the plaintiffs, was erroneous, the verdict was to be set aside and a new trial granted, otherwise judgment was to be rendered thereon.

*Emmons*, for the defendant, objected, 1, to the admission of the written contracts. When there is a written contract the action must be brought on it, except in a few cases stated in the books. But in these excepted cases the plaintiff has no right to introduce the contract and to use it in evidence. He has abandoned it by adopting the action of general *indebitatus assumpsit*.

The defendant may introduce the written contract to prevent the recovery of more than the plaintiff is entitled to, but the plaintiff cannot.

Again, the action was erroneously brought in the joint names of *Jewett* and *Arnold*. If the action had been upon the contract, this would have been right. But that being abandoned, if the

law implied any contract it was in favor of him who did the work — and it does not appear that *Arnold* did any of it.

*R. Williams*, for the plaintiffs, cited *Haywood* v. *Leonard*, 7 *Pick.* 181.

PARRIS J. — When a party has entered into a special contract to perform work for another, and the work is done, but not in the manner stipulated for in the contract, the party performing it may recover on a *quantum meruit*, especially if the other party has accepted the labor, or is in the enjoyment of its fruits. In this case, the plaintiffs claimed for certain labor performed by them on the defendant's house ; and having proved the performance of the labor, they might well rest until this proof should be avoided by the defence.

It came out in evidence, that the labor was performed under a special contract, and consequently, it became necessary for the plaintiffs either to show that they had performed this contract, so that nothing remained to be done on their part ; or that there had been a deviation by the assent of the defendant at the time, or subsequently assented to, either expressly or impliedly, by his acts. How could either of these alternatives be shewn, except by the production of the special contract ? If the plaintiffs had claimed under a general count, contending that the special agreement had been fully performed on their part, how could they establish the fact of performance without shewing the agreement ? If they rested their claim, as they actually did, on the ground of a deviation from the special agreement, and acceptance by the defendant, how could they show such deviation, except by first shewing the contract ?

As soon as it came out in evidence that the labor was performed under a special agreement, the defendant might securely rest, until the plaintiff had removed this obstacle in one or the other of the modes above suggested.

They could do neither without first showing what the agreement was ; and, as that had been reduced to writing, the instrument itself was the best and only admissible evidence.

It was also necessary for another purpose, as a standard by which the damages were to be estimated.

The contract price would be the rule in case the contract had been performed. But that not having been done, so much was to be deducted as the defendant suffered by reason of its non-performance. *Hayward* v. *Leonard*, 7 *Pick.* 181.

When a party engages to do certain work according to a specification, and does not perform it as specified, what he is entitled to, is the price agreed upon, subject to the deduction of the sum which it would take to make it agree with the specification. *Thornton* v. *Place*, 1 *Moody & Robinson*, 218.

For these purposes, the contract was clearly admissible.

The next objection is, that the action cannot be maintained in the joint names of the plaintiffs, as the work was done by *Jewett* alone.

The whole case shews that the labor was performed on account of both plaintiffs, and was so understood by the defendant. Now it is immaterial whether *Arnold* performed the labor himself or by his agent, *Jewett*. If they were jointly interested in its performance and the defendant was conusant of it, and accepted it as such, then he is unquestionably answerable to both.

That he did know of their joint interest in the labor, and acquiesced in it, is manifest from the two papers offered and properly admitted in evidence, extending the time after a portion of the labor had been performed, as well as from his inquiry, if *Arnold* was going on under the contract, and *Jewett's* reply. *Jewett* and *Arnold* were both parties to the contract. The defendant was advertised that the labor was performed for them under the contract; and as, by virtue of that, they cannot recover, having failed to fulfil it, they are jointly entitled to remuneration under this form of action.

We apprehend that it is immaterial whether the labor was performed by one or both of the plaintiffs, provided it was for and on account of both, and the defendant so understood and assented to it.

## BARNEY *vs.* NORTON.

In an action on a promissory note, brought by the indorsee, who had taken it when over-due, the defendant filed his account against the *payee* up to the time of the indorsement, in set-off. *Held*, that it was competent for the plaintiff to exhibit proof of the payee's account against the defendant, or other repelling evidence against the off-set.

The Judge in his instructions to the jury, is not obliged to give his opinion upon legal propositions put by counsel, by way of hypothesis, not growing out of the facts proved.

THIS was an action of *assumpsit*, commenced *Nov.* 19, 1832, by the indorsee of a note, dated *Dec.* 9, 1826, wherein the defendant promised to pay one *Thomas Kimball*, or order, forty dollars on demand, after the then next term of the C. C. Pleas, for this county. The defendant filed in set-off an account against said *Kimball*, for the use of a horse six years, at $10 a year, and the use of two beds for one year, for which he charged $18.

On trial before *Ruggles J.* in the C. C. Pleas, the defendant, to prove that the note was indorsed to the plaintiff, after it had been long over-due, and that *Kimball* had had the use of said horse and beds as charged, offered said *Kimball* as a witness, who objected to being sworn on account of his interest in the suit. The objection being overruled, he testified, that he indorsed the note four or five years after the same was over-due, and that he had had the use of the articles as charged. That the horse was originally his — was of the value of $100 — and that he had sold him to the defendant on the day of the date of the note in suit, and that the note was given as payment therefor. That the horse had never been received by *Norton*, but had always been in the possession and use of him, the said *Kimball* — that, there was no contract in regard to the price, or that any thing should be allowed the defendant for the use of the horse — that, it was his understanding that nothing was to be allowed, but that he, the witness, conceived the horse not to be *Norton's*, until after the witness had done with the use of him. He further testified that he took the beds of the plaintiff 14 years ago — that they were valued at $160, and were to be the witness' property when he should have paid that sum for them — that, he had paid about $16 yearly up-

on an average up to the time of a settlement made between themselves in 1831, and that he had paid in all, more than they were valued at.

Upon inquiry by the plaintiff's counsel, which was objected to by the defendant, contending that nothing but the note and account in off-set could be inquired into in this action, and which objection was overruled, the witness stated that about two years ago he made out his account against the defendant, and that he "conceived" the defendant to be indebted to him in about $60. But that in this account he had not credited any thing for the horse or beds, or for the use of either of them.

The defendant's counsel requested the Judge to instruct the jury, that, if they believed from the evidence that the making of the bill of sale of the horse, and the giving of the note therefor was for the purpose of securing the horse to *Kimball* against the attachment of his creditors, and that the horse was still by agreement to be the property of *Kimball*, the note could not be recovered either by *Kimball* or the plaintiff, taking it, as he did, long after it was over-due. But the Judge instructed the jury that it was not competent for the defendant to avail himself of this defence.

The defendant's counsel further requested the Judge to instruct the jury, that if satisfied from the evidence that this use of the horse and beds, as charged in the account in off-set, had never been settled for and allowed by *Kimball*, they should ascertain what would be a just compensation for the use thereof, and if the same should amount to the sum or more than the sum due on the note, their verdict should be for the defendant — but if less than the sum due on the note, then their verdict should be for the plaintiff for the difference only. The Judge refused to give that direction; but instructed the jury that the defendant's right of set-off was limited to the balance, if any, which they should be satisfied from the testimony was due from *Kimball* to the defendant, upon a full adjustment of all their mutual accounts of every description, at the time the note was indorsed to the plaintiff; and further directed them, that if no such balance was found due to the defendant they should return a verdict for the plaintiff for the amount due on the note — which they accordingly did.

To which ruling and instructions the defendant excepted and brought the case up to this Court.

*Boutelle*, for the defendant, contended, that the note having been indorsed when over-due was liable to the same defence in the hands of the indorser, as it would have been if the action thereon had been in the name of the payee.

No action could have been maintained on this note by *Kimball*, inasmuch as the transfer of the property and giving of the note, was for the purpose of covering the property and keeping it from *Kimball's* creditors. When the parties are *in pari delictu*, the maxim applies *melior est conditio defendentis*. *Worcester* v. *Eaton*, 11 *Mass.* 368.

2. The inquiry in regard to the accounts should have been restricted to that filed in set-off. If *Kimball* did not join his account with the note, it was his misfortune.

*Wells*, for the plaintiff, cited *Peabody* v. *Peters & al.* 5 *Pick.* 1; *Stockbridge* v. *Damon*, 5 *Pick.* 223; *Sargent* v. *Southgate*, 5 *Pick.* 312; *Parker* v. *Gregory*, 8 *Pick.* 165.

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

The note in controversy, having been indorsed to the plaintiff some years after it was payable, if not then recoverable by the payee, it cannot be recovered by the plaintiff. The defendant is entitled to the benefit of any off-set, which at the time of the indorsement existed against the payee.

In *Peabody* v. *Peters*, 5 *Pick.* 1, the Court appear to have doubted whether any off-set could be filed, except between the original parties; although it was admitted that the defendant might avail himself of any such matter in evidence. In a subsequent case, *Sargent* v. *Southgate*, 5 *Pick.* 312, they held that an account in off-set was necessary to be filed against the indorsee, to avail the defendant, unless he could prove that the subject matter of the off-set was agreed to be applied specifically in payment of the note. No such agreement is pretended here, and according to the case last cited, an account was properly filed in off-set, and the defendant could have the benefit of no charges, not thus filed. But the off-set may be disproved. It may be shown to have been

otherwise discharged. In order to be allowed against the note, it ought to appear that the defendant really had such a claim against the payee. That is the only ground in law or equity, upon which it can be set up. Repelling evidence against the off-set, was properly admitted. It is required to be filed, that the party to be charged with it may have notice, and come prepared to controvert its validity. All the evidence bearing upon the fairness of the off-set, was correctly left to the jury, and they have settled it.

One point taken in defence, is not entitled to special favor. The Judge was requested to instruct the jury, that if the horse, which formed the consideration of the note, was sold by the payee, and bought by the defendant, to defraud the payee's creditors, the note could not be recovered. The Judge declined so to instruct them; and this is made one ground of exceptions. We must take the case as it is presented to us, and cannot go out of it for facts, which do not there appear. There is no evidence that the payee was insolvent, that he had any creditors, or that the sale of the horse was made, or the note taken, with any fraudulent views whatever. There is nothing in the case reported, calling for the instruction requested, even if it was warranted and required by law, upon the facts assumed.

If the Judge declines to lay down the law applicable to the case on trial, as it ought to be, exceptions may be taken, and will be sustained. But he is not obliged to give his opinion upon legal propositions put by way of hypothesis, not growing out of the facts proved. It would tend to embarrass a jury, and to withdraw their attention from the points in controversy. We are of opinion the instructions were rightfully withheld, because we see nothing in the case, which rendered them suitable and proper.

The exceptions are accordingly overruled.

*Judgment on the verdict.*

## HATCH *vs.* SPEARIN.

A special promise by the maker of a note or instrument not negotiable in the hands of an assignee, to pay the note to him, does not merge the original promise on the note; — but the assignee may maintain an action in *his own name* upon the *special promise* to himself, or, in the name of the *payee*, upon *the note.*

On the note being again assigned, the second assignee could not avail himself of the special promise made to the first assignee, as the foundation of an action; but he must resort to his action *on the note.*

A party cannot avail himself of an omission of the Judge to charge the jury upon a particular point of law, although raised by the evidence in the case, unless the Judge be specially requested to give the instructions, the omission of which is complained of.

THIS was an action of *assumpsit* founded upon the following receipt or memorandum in writing, *viz:*

"*St. Andrews, April* 6, 1829.

Received from *Harris Hatch, Esq.* a note of hand dated at *Calais, Dec.* 22, 1828, payable ninety days after date, to *William Thompson* or order, for seventy pounds, payable at the *Charlotte County Bank*, drawn by *Asa A. Pond*, indorsed by said *Thompson* and one *Thaddeus Ames*, held by *Elnathan Taylor*, and by him left with the said *Harris Hatch*, to notify the parties, which said note I hold myself accountable for, and the amount thereof, or get a discharge from *Elnathan Taylor* to the said *Harris Hatch*, for the said note.

*William Spearin.*"

The suit was brought for the benefit of one *Conner*, to whom the memorandum or receipt had been assigned by one *Taylor*, the owner of the note, he having before deposited said note with *Hatch*, who delivered it to the defendant on his giving the foregoing receipt.

It was proved that the defendant had repeatedly promised *Taylor*, while he had possession of the receipt, to pay him the amount of the note.

The defendant's counsel contended, that the promise testified to by *Taylor*, could not affect the defendant in this action, as well because it was made without any legal consideration, as because

if made at all, it was to *Taylor*, and not to *Hatch* or *Conner* — and that any legal obligation created by said promise was not assignable, and would not aid in sustaining this action — and the Judge was requested to charge the jury to that effect. He instructed them that the action might be maintained on the receipt, independent of the said promise, which was not relied upon as the ground of action, but as an admission that the demand was due — that, in case of a promise to an assignee, upon an instrument not negotiable, he may maintain an action on that promise, but an action will lie in the name of the assignee upon the instrument.

The counsel for the defendant further requested the Judge to instruct the jury, that the promise to *Taylor* while he had the note in his possession, took away or merged the cause of the present action. But the Judge declined so to instruct the jury.

A verdict was returned for the plaintiff. If the instruction given was erroneous, or that which was requested ought to have been given, the verdict was to be set aside, and a new trial granted, otherwise judgment was to be rendered thereon, unless set aside upon a motion filed for that purpose, on the ground that it was against the weight of evidence.

There was much testimony in the case, but the necessity of reporting it, is superseded by the full and lucid statement in the opinion of the Court, which was delivered by

Parris J. — This is assumpsit on a receipt given for a note of hand. — There was evidence tending to prove that the note for which the receipt was given, was the property of one *Taylor;* that he had deposited the note with *Hatch*, from whom the defendant procured possession of it, by giving the receipt in suit. *Hatch* transferred and assigned the receipt to *Taylor*, who assigned it to one *Conner*, for whose benefit the present action is prosecuted. There was also evidence, that while the receipt was in *Taylor's* possession, the defendant repeatedly promised to pay him the amount of the note.

The defendant contended, as matter of law, that this special promise to *Taylor* was not assignable; but the Judge instructed the jury, that the action might be maintained, for the benefit of

*Conner*, on the receipt, independent of the special promise to *Taylor*.

The law relative to the assignment of choses in action is well settled. *Taylor* might have maintained an action on the receipt in the name of *Hatch*, his assignor, at any time previous to the transfer to *Conner*, or he might have relied upon the defendant's special promise, and supported an action thereon in his own name. His right on the receipt was not merged by the special promise. When he transferred the receipt to *Conner*, he assigned all his rights under it and nothing more, and *Conner* thereby became entitled to enforce the performance of the defendant's engagements to *Hatch*, but not to claim any benefit of the special promise to *Taylor*.

There is in this case a motion at common law for a new trial, because the verdict is against evidence. Under this motion, all the evidence that was exhibited on the trial is reported, from which it appears, that there was evidence tending to prove that the note, described in the receipt, was delivered up to *Taylor* by one *Webb*, by the directions of the defendant; and the defendant's counsel now claim to have the verdict set aside, because the Judge did not instruct the jury that this constituted a good defence. If, in charging the jury, the Judge gives erroneous instructions, the party against whom they are given may avail himself of that fact to avoid the verdict. But he cannot avail himself of an omission to charge upon a particular point of law, although raised by the evidence in the case, unless specially requested or moved to give the instructions, by the party in whose favor they may properly be claimed to be given. The defendant contends that he did request the Judge to instruct the jury upon the law arising from the fact, if they should so find it, that *Taylor* became possessed of the note, as testified by *Webb*. If the request was made, it ought to have been complied with. Was it made? The following was the only request made, *viz.* "that the jury might be instructed that *Taylor* having had the note in his hands and having called on the defendant for payment of the same, and the defendant having expressly promised *Taylor* to pay the note, an action might be maintained on such promise by *Taylor*, the assignee, which would take away or merge the cause

of the present action. The instruction requested was not that the possession of the note by *Taylor,* would constitute a good defence, but that the defendant having promised *Taylor* to pay the note, an action might be maintained, on such promise, by *Taylor, which* would take away or merge the cause of the present action. We do not understand the law to be as assumed in the request. The note was against *Pond* for £70, equal to $280, and the promise by *Spearin* to pay it, if any promise was made by him, was verbal. The statute to prevent frauds and perjury, which provides that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt of another, unless the agreement, upon which such action shall be brought, or some note or memorandum thereof shall be in writing, would be an insuperable bar to any recovery against *Spearin* upon the verbal promise to pay *Pond's* note. The instruction requested was, therefore, properly refused.

It is further contended that the Judge erred in the instructions which he gave, *viz.* that he told the jury the action *was* maintained. The instruction given, as reported in the case, will not bear this construction. The defendant's counsel, at the trial, contended that "the defendant's promise to *Taylor* to pay the note could not affect the defendant, as well because it was made without any legal consideration, as because, if made at all, it was made to *Taylor*, and not to *Hatch* or *Conner;* and that any legal obligation created by said promise was not by law assignable, and would not aid in sustaining this action," and the Judge was requested to charge to this effect. The jury were instructed, that the action *might* be maintained on the receipt, independent of the promise, which was not relied upon as the ground of the action, but as an admission that the demand was justly due; that in case of a promise to an assignee of an instrument not negotiable, *he* may maintain an action on that promise, but an action will lie in the name of the assignor upon the instrument. Now we are unable to perceive, in this instruction, any intimation to the jury that the evidence sustained the action, or that the defence was not complete.

The defendant contended, that no action could be maintained on the receipt in the name of *Hatch*, because there had been a

special promise to the assignee. The Court say, not so; although the assignee may maintain an action in his own name, on the special promise, yet he may, at his election, rely upon the receipt, and maintain an action thereon in the name of *Hatch*, the assignor. No intimation is given to the jury that the action is supported by the evidence, or that if they should find that *Taylor* had the note in his possession, as testified by *Webb*, it would not constitute a perfect bar to the action. Upon that question, the Judge was not requested to give instructions, and none were given. If the defendant relied upon that point, he should have moved the Court to charge thereon; — as he did not, it is now too late to take advantage of the omission. It is manifest, however, from the report, that this was not a point relied upon at the trial. We think there was no error in the instructions given, and that the one requested, as to the legal effect of the defendant's promise to *Taylor*, was properly withheld.

The next question is, ought this verdict to be set aside on the ground of its being against evidence, or the weight of evidence. There was evidence on both sides, as to the manner in which *Spearin* became connected with this transaction. The evidence from *Taylor* is directly contradictory to *Webb's* in most of the important points. *Taylor* was on the stand, as a witness, and testified in presence of the jury; and it was exclusively their province to determine to which they would give credit. Perhaps there were sufficient reasons why they should rely upon *Taylor's* testimony in preference to *Webb's*. *Webb* says, *Taylor* told him that it was agreed between *Taylor* and *Thompson*, when *Thompson* indorsed the note, that he was not to be responsible to *Taylor*, and was not to be called on by him. *Taylor* testifies that he never told *Webb* so, and it is not improbable that the jury believed *Taylor* in this, for it does not appear by *Thompson's* deposition that he was ever applied to by *Taylor*, or had any conversation with *him* relative to indorsing the note. *Thompson* was applied to by *Pond*. It does not appear who produced to *Thompson* the assurance of indemnity on account of his indorsement, which he received from *Spearin*. *Thompson* says that *Taylor* obtained it of *Spearin*, and that he understood that both he and *Spearin* were acting for the benefit of *Taylor*. But he does not

say that he understood this from *Taylor*. If it was from *Spearin* that he received the impression, it can have no weight against *Taylor* in this action. *Jones*, who acted as *Pond's* agent, does not say that *Taylor* procured the assurance of indemnity from *Spearin* to *Thompson*. *Jones*, as the agent of *Pond*, went to *Thompson* for his name. *Thompson* said he was willing to accommodate *Pond*, but was unwilling to indorse his note, unless *Spearin* would indemnify him. *Jones* says, he wrote the note, *Pond* signed it, *the indemnity passed from Spearin* to *Thompson*, and *Thompson* indorsed it. But *Jones* is careful not to say that *Taylor* requested *Spearin* to give the assurance, or become in any way answerable to *Thompson;* but he does say, that he supposed *Spearin* acted as the mutual friend of *Pond* and *Taylor*.

If *Taylor* had procured the indemnity from *Spearin*, *Jones* would have been likely to have known it; and instead of saying that the *indemnity passed from Spearin to Thompson*, would have left no room for doubt who procured it. There is not a witness who states directly, of his own knowledge, that *Taylor* became answerable to *Spearin* on account of the indemnity by him given to *Thompson*.

After *Thompson* was notified as indorser, through *Hatch*, by *Taylor's* request, and *Spearin* was called upon to make good his indemnity, he resorts to *Hatch*, tells him he knows all about the note and the conditions upon which it was given; that he was the agent of *Taylor;* and, in consequence of these representations, induced *Hatch* to give him the note, and thereby secure the erasure of *Thompson's* name, as indorser. As *Taylor* left the note with *Hatch*, and there is no proof that *Spearin* had any authority, either as *Taylor's* agent or otherwise, to obtain possession of it in the manner he did, it would appear much more consistent with fair dealing if he had refrained from officiously interfering, and instead of causing the note to be mutilated by the erasure of *Thompson's* name, thereby depriving it of the only solvent party, and rendering it worthless as security, he had permitted *Hatch* to have returned it, according to his stipulation, to *Taylor*, the undisputed owner, from whom he received it. The question of *Taylor's* liability to hold the defendant harmless from his stipulation to *Thompson*, would then have regularly arisen between

these parties. *Taylor* had a right to have that question presented in this manner. He had a right to call upon *Hatch* to return the note in the situation in which he took it, according to the terms of the receipt. He was not bound to accept it from *Hatch* with *Thompson's* name erased, and thereby deprived of all its value. There is no evidence in the case that he ever did receive the note, or had it in his possession, after *Spearin* took it from *Hatch*, except what arises from *Webb's* deposition; and if in the numerous direct contradictions between the testimony of *Taylor* and *Webb*, the jury believed the former at the expense of the latter, they might, by applying the maxim *falsus in uno, falsus in omnibus*, exclude the whole of *Webb's* testimony.

From the evidence reported, the jury, probably, considered *Spearin*, in giving the indemnity to *Thompson*, as acting for the accommodation of *Pond*. It was *Pond's* debt, and it was due to *Taylor*. They might have listened to the argument, which has been addressed to us, that as *Taylor* was the creditor and *Pond* the debtor, it would be improbable that the creditor should attempt to increase his security by procuring an indorser for his debtor, and at the same time stipulate for the indorser's indemnity. They found that, by the receipt in suit, *Spearin* admitted that the note was held by *Taylor* and left with *Hatch* to notify the parties, of whom *Thompson* was one, and is so named in the receipt; that *Spearin* expressly engaged, in the receipt, to hold himself accountable for the note and for the amount thereof, or get a discharge from *Taylor;* thereby recognizing *Taylor's* rights; and that, instead of procuring the discharge, his first act was to take from the note the only name which gave it value, thereby shielding himself from his obligation to indemnify *Thompson*.

We do not say that we should have given the same verdict. We might have weighed the evidence differently, and come to a different conclusion. But we are not satisfied that the verdict is so manifestly against the weight of evidence as to justify, our interference, especially as two juries have concurred in the same opinion.

*Emmons*, for the plaintiff.

*Allen* and *Boutelle*, for the defendant.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF SOMERSET, JUNE TERM, 1834.

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## HOLBROOK *vs.* HOLBROOK *& Trustee.*

*Preston* and another gave *Holbrook* a promise in writing to indemnify and save him harmless from all claim, right and title one S. H. had *in certain lands*, on his, *Holbrook's* conveying the same to *Preston* — *Held* that, a bond then subsisting, given by *Holbrook* to S. H. conditioned for the conveyance of the same land to him, was a claim, right and title contemplated by the contract; and that *Preston* and another were liable to *Holbrook*, for the amount he had been compelled to pay S. H. in a suit on the bond.

But *Holbrook*, prior to said conveyance to *Preston* and promise of indemnity, having given a bill of sale to S. H. of a barn standing on the premises; it was holden that, it did not pass by the conveyance to the latter, though not excepted, and that consequently, the latter was not liable to *Holbrook*, for the value of said barn, which he, *Holbrook*, had paid to S. H. under his *supposed* liability to him.

ASSUMPSIT upon the following contract, *viz:* "This may certify that we *Joseph Holbrook*, as principal, and *Warren Preston*, as surety, do agree to indemnify and save harmless *Samuel Holbrook*, from all claim, right and title *Saul Holbrook* has in the premises conveyed by said *Samuel* to the said *Preston* by deed dated *April* 29, 1828.

*Joseph Holbrook,*
*Warren Preston.*

Dated, *June* 7, 1828."

It appeared, that prior to the making of this contract, *viz: June* 21, 1826, the plaintiff gave to *Saul Holbrook* a bill of sale

of the barn standing on said *Samuel's* farm. And also on the 9th day of *June*, 1827, gave to said *Saul* a bond conditioned to give him a good and sufficient deed of a certain parcel of land on or before the 1st day of *March*, 1828, on payment by him, to the plaintiff, of the sum of $135.

On the 29th of *April*, 1828, *Samuel Holbrook* conveyed the same land, not *excepting* the barn, by deed of warranty, which was not delivered till *June* 9, 1828, to *Warren Preston;* the defendants at the same time, making and executing the writing, declared on in this action.

At the *November* term of the Court of Common Pleas, in this county, *Saul Holbrook* commenced his action against *Samuel Holbrook* for a breach of the covenants in his obligation aforesaid of the 9th of *June*, 1827, which was continued to *March*, 1828, when said *Saul* recovered on default, the sum of $143,43 damage, and costs of suit taxed at $12,44. At the *June* term, 1829, he also commenced his action against *Samuel*, the plaintiff, to recover back the price paid for the barn aforesaid, in which he recovered on the default of said *Samuel*, the sum of $50,16 damage, and costs of suit taxed at $7. Both of these judgments, it was admitted, had been paid by the present plaintiff. And *Saul Holbrook* testified, that he never had any other claims upon the premises than what were contained in the bond and bill of sale aforesaid.

The defendant's counsel contended, that by a legal construction of the contract declared on, they were not bound to save harmless the plaintiff from the claim of *Saul Holbrook*, against the plaintiff, arising either from the bond or bill of sale aforesaid, but *Weston J.* instructed them, that by the said contract the defendants were bound to save the plaintiff harmless from *both* said claims.

The jury returned their verdict for the plaintiff. If they were not properly instructed, the verdict was to be set aside, and a new trial granted; otherwise judgment was to be rendered thereon.

*Boutelle* and *Wells*, for the defendants, contended that the plaintiffs were not entitled to recover, because *Saul Holbrook* by virtue of the bond and bill of sale had no "claim, right or title *in the premises.*" They constituted a personal claim merely

against *Samuel Holbrook*, but could give him no *interest in the land* itself. And it was against claims of the latter description only, that the defendants agreed to indemnify the plaintiff. They contended also, that the plaintiff was estopped by the covenants in his deed, to deny that he had a perfect title to the land conveyed by him. *Fairbanks* v. *Williamson*, 7 *Greenl.* 96.

*Allen* and *Tenney*, for the plaintiff, maintained that the terms of the contract declared on, were broad enough to embrace the claim of *Saul Holbrook* under the bond and bill of sale aforesaid. The bill of sale was directly of a portion of the premises — and the obligation might have been enforced in a suit at equity, and specific performance of it obtained. They may therefore be very properly denominated claims *in the premises*. *Ensign* v. *Kellog & al.*, 4 *Pick.* 1; *Getchell* v. *Jewett*, 4 *Greenl.* 350.

MELLEN C. J. — On the 9th of *June*, 1827, *Samuel Holbrook*, the plaintiff, gave a bond to *Saul Holbrook*, conditioned to give him a good and sufficient deed of a certain parcel of land, on or before the 1st of *March*, 1828, on payment by him to the plaintiff of the sum of $135. On the 29th of *April*, 1828, a deed of said land was made, bearing the above date, by the plaintiff, conveying the same to said *Preston*, one of the defendants, but it was never delivered till *June* 9th, 1828: at which time also the contract declared on was executed, though that also bears the date of *April* 29th, 1828. By this contract the defendants agreed to indemnify and secure the plaintiff harmless from all *claim*, *right* and *title* which said *Saul* then had *in the premises*. What is the true construction of this contract? By the terms of it, both defendants must be considered as knowing of the existence of the abovementioned bond, and that the condition of it had been violated. They must have considered *Saul* as having some claim, right or title in the land, whatever might have been the fact, on strictly legal principles; and it would seem that the indemnity intended, was against the consequences of his assertion of his claim and right. It is true, that on the 9th of *June*, 1828, *Saul* had no legal title to the land, but he had to damages for the breach of the condition, equal to the value of the land. For what purpose could the defendants' contract have been made, but

to save the plaintiff harmless from the payment of those damages which *Saul* has since recovered and the plaintiff has paid? Is the defendant, *Preston*, to avoid his contract, and his surety also, by explaining away all its meaning? *Mr. Preston*, as a lawyer, must have known that *Saul Holbrook*, in virtue of *Samuel Holbrook's* bond, had not acquired any *legal title* in and to the land, though he had what was probably considered by all concerned as an equivalent. For some reason, *Preston* was desirous of obtaining a legal title to the land, and for the sake of succeeding, he and his surety agree to stand between the plaintiff and all harm and damage, in consequence of the bond he had given to *Saul*. This is the common-sense understanding of the transaction, and in evident accordance with the truth and justice of the case. In this view of the cause we think the instruction of the Judge was correct, with respect to the plaintiff's right to recover the amount which the jury allowed on account of the sum which he had paid for the non-conveyance of the land in question to *Saul*, in satisfaction of the judgment he recovered.

The subject of the barn, and the instruction of the Judge as to the plaintiff's right to recover its value, next claim our consideration. The bill of sale bears date *June* 21, 1826. In virtue of this, *Saul Holbrook* immediately became *owner* of the barn, and the barn immediately became *personal property*, in the same manner as though he had built it at his own expense upon the land, by the consent of the plaintiff; and therefore, according to our decision in the case of *Russell* v. *Richards & al.* 1 *Fairf.* 429, it did not pass by the plaintiff's deed to *Preston*. He should have defended the action which *Saul* brought against him, and prevented his recovering back the price which he paid for it: but instead of doing this, he consented to the claim and was defaulted. His surrender to *that* claim, furnishes no foundation for a claim against the defendants. Besides, the agreement of the defendants, declared on, has no reference to the sale of the barn, which was made two years before; but exclusively relates to the claim, title and interest of *Saul* in the *real estate* or *premises in question*. The case before us, furnishes no proof of any promise of indemnity or reimbursement on account of the barn or its value. We are therefore of opinion, that the instruction as to this portion of

the plaintiff's claim cannot be approved. The consequence is, that the verdict must be set aside and a new trial granted, unless the plaintiff will release on record, so much of the amount of the verdict as is composed of the sum allowed by the jury, on account of the judgment rendered against the plaintiff for $50,16 damage, and $7,00, costs. Should such sum be so released, judgment is to be entered on the verdict for the residue.

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## HARRIS *vs.* DINSMORE.

Where a Clerk of the Courts, was by statute, required to render to the County Treasurer, on the first Wednesday of *January* annually, an account of all moneys received by him during the year by virtue of his office; and "after deducting $1000, if he should have received so much, to pay over one half of the residue" &c. — and said Clerk having received $927,61 from the 1st Wednesday of *January* to the 23d of *October*, when he ceased to hold the office — it was *held*, in a suit against him on his bond, that he was not bound to pay over, except when the amount received exceeded $1000, though it was a greater fractional part of the $1000, than the time in which it was received was of a year.

THIS was an action of debt, brought in the name of the State Treasurer, against the defendant, late Clerk of the Courts in this county. The facts were agreed, and are sufficiently stated in the opinion of the Court, which was delivered by

PARRIS J. — The only question submitted for our consideration is, whether the defendant has broken the condition of his official bond by neglecting and refusing to pay over to the County Treasurer any portion of the moneys by him received by virtue of his office, from the first Wednesday of *January* to the twenty-third of *October*, 1832.

The condition of his bond is, to pay over all moneys required to be paid over by statute, *chap.* 90. By the 2d section of that statute, it is provided, "That the several Clerks shall keep a true and exact account of all moneys they shall receive, by virtue of their office, and shall on the first Wednesday of *January* annually, render to the Treasurers of their respective counties, under oath, a true account of the whole sum thus by them received,

and after deducting one thousand dollars, if they shall have received so much, which shall be held and retained for their own use, they shall pay over the one half of all the residue to their respective County Treasurers for the use of the County."

It is not charged upon the defendant that he neglected to keep the account required by law, or that he omitted to render such account to the Treasurer of the county on the first Wednesday of *January*, 1833. This was all done in compliance with the law, and the condition of his bond. But he paid over nothing; and for this reason; that by the terms of the statute he was not required to pay over any thing, unless he had received more than one thousand dollars. That sum the law permitted him to retain for his own use, and inasmuch as he had not received even to that amount, there could be no breach of his bond by his retaining what he did receive.

The condition of the bond was literally fulfilled; and we find nothing in the statute from which we can infer that it was not fulfilled according to the spirit of the law, and the intention of those who made it. Even if we had no doubt what provisions the Legislature would have made if the existence of such a case as this had occurred to their minds, still as they have not provided for such a case, it is not for us to supply the deficiency.

If this statute, plain and perspicuous in its phraseology, as we think it is, were to be so extended by construction as to embrace the case at bar, we might well be charged with making, instead of expounding the law. It is by no means certain that the Legislature did not intentionally omit to require Clerks to pay over for fractions of a year. There might be such difficulties in ascertaining the amount justly payable by each incumbent; there might be such difference of opinion as to the true principle upon which each ought to account, as to prevent any legislation upon the subject. However that may have been, we do not feel authorized to extend the statute beyond the obvious meaning of its language; especially, when we find nothing in its provisions to lead us to suppose that the Legislature intended that it should be so extended.

*McLellan*, County Attorney.

*Allen*, for the defendant.

## BRADLEY, *libellant, vs.* BRADLEY.

THIS was a libel filed by the wife for divorce from bed and board on the ground of excessive cruelty in the husband. A record of his conviction for an *assault and battery* on the wife, was offered in evidence and objected to — but it appearing that the husband had *pleaded guilty* to that indictment, the record was admitted.

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## MOOR *vs. The Inhabitants of* CORNVILLE.

J. M. was duly chosen and sworn as a Surveyor of highways in the town of C. and his limits assigned him, in writing, by the Selectmen: — afterwards, but before any tax-bill had been committed to him, a bridge, within his limits, was carried away and destroyed by a sudden freshet: — he thereupon, without *giving notice* to the Selectmen, or applying for their *consent*, proceeded to repair the bridge; and afterwards brought his action against the town to recover for the materials and labor thus furnished and expended. — *Held*, that the action could not be maintained.

THIS was an action of *assumpsit* upon an account annexed to the writ, for materials found, and labor furnished, in the building a bridge across "cold stream" in the town of *Cornville*, amounting to $26,05.

It was proved or admitted at the trial, that the plaintiff was duly chosen and sworn as a surveyor of highways in said town, on the first Monday of *March*, 1832; and that the Selectmen on the 19th of the same month, by writing, assigned to the plaintiff his limits, including the bridge in question. On the 22d day of *May*, following, the said bridge was carried away and destroyed by a sudden freshet. At this time the tax-bills had not been committed to the plaintiff; but without consulting with the Selectmen, or applying to them, or giving them notice of what had occurred, he proceeded to repair the bridge by the labor of himself, and others by him employed. For that labor and the materials used upon that bridge, this action was brought.

The plaintiff contended, that as surveyor he had a right by law

to repair the bridge without orders from the Selectmen, or notice to them, and to recover for the same in this action. But *Perham J.* who tried the cause in the Court below, ruled that the action could not be maintained, and ordered a nonsuit — to which the plaintiff excepted, and thereupon brought the case up to this Court.

*Kidder*, for the plaintiff, insisted upon the plaintiff's right to recover in this action. He was bound by the oath of his office to make the repairs. There is a manifest distinction between this case and *Haskell* v. *Knox*, 3 *Greenl.* 445. In that, it appeared that the surveyor had no unexpended balance in his hands — hence it may be inferred, that the bills had been committed to him. In this case, the plaintiff had no bills in his hands. The limits had been assigned to him before the freshet, and he was bound to put it in repair. Where the surveyor has bills in his hands, he should, no doubt, call on the Selectmen, when having the names of the persons taxed, an apportionment of the labor can be made among them. But no such reason exists where no tax has been made and the bills committed to the surveyor. Indeed, in this case, it was impracticable — the bridge being gone, the waters high and rapid, and the Selectmen living upon the opposite side of the stream.

The 15th *sec.* upon which the defendant relies for his defence, was intended to apply to ordinary cases — and not to cases of *sudden injury.*

*Hutchinson*, for the defendant, relied upon the case of *Haskell* v. *Knox*, 3 *Greenl.* 445.

PARRIS J. — By statute *chap.* 118, *sect.* 13, it is made the duty of surveyors of highways, in case of any sudden injury to bridges and causways, to cause the same to be repaired without delay. But this court has decided in *Haskell* v. *Knox*, 3 *Greenl.* 445, that the only ordinary means provided to enable the surveyor to perform this and other duties appertaining to his office, are the sums assigned to him to be expended, by virtue of the same section. The 15th section makes provision for the case where the sum assessed shall be insufficient for the repair of the highways within the limits of any particular surveyor. Under such cir-

cumstances, the surveyor may, with the consent of the Selectmen, or the major part of them, employ the inhabitants of the town, who will be entitled to a just compensation for their services out of the town treasury.

It is contended, that the 15th section relates exclusively to ordinary repairs, and was not intended to embrace the case of a sudden injury. That point was settled in *Haskell* v. *Knox*. In that case, the expenditure was to rebuild a bridge, which had been suddenly destroyed by fire. The surveyor, having no unexpended money in his hands, employed one of the inhabitants to repair the injury, but without obtaining the consent of a majority of the Selectmen; and for this reason, it was decided that the town was not liable.

The law has made provision for keeping all the public highways in safe and convenient repair, for the use of the citizens. It holds the several towns answerable for opening and repairing the highways within their respective limits. If the towns appropriate and assess sufficient money for this purpose, and place it at the disposal of surveyors duly appointed, the responsibility rests upon that officer, and the town has its remedy over against him, in case of the imposition of a fine for any deficiency in the highways within his limits. If the surveyor shall have expended all the money in his bills, or not having received his bills and been furnished with the means of repairing, shall neglect to give notice to the Selectmen, of any existing deficiency in the highways, within his limits, whereby the town shall be subjected to a fine, such surveyor is equally liable. But if he has duly and faithfully expended all the money in his bills, he has gone to the extent of his authority, and can make no further repairs at the expense of the town, unless with the consent of the Selectmen. If further repairs are necessary, or if sudden injuries occur, he should, at his peril, give notice to the Selectmen. If he neglect to do this, he may be answerable for the consequences to the town. If he do it, and the Selectmen will not consent to his employing the inhabitants to make the repairs, he is exonorated from further liability. This seems to us to be the spirit of the 13th, 15th, and 18th *sections* of statute *chap.* 118; and this is in accordance with the decision in *Haskell* v. *Knox*. The case of *Wood* v.

*Waterville*, 5 *Mass.* 204, is cited for the plaintiff. That decision was predicated upon the 8th *sect.* of the statute of *Massachusetts* of 1786, *chap.* 81. This statute is not in force in *Maine;* and there has been no re-enactment here containing similar provisions.

It is said in argument, that the surveyor could not reach the Selectmen, to procure their consent, by reason of the great rise of water. That does not appear in the case, which comes before us on exceptions from the Court of Common Pleas; and, consequently, no fact can be considered in our decision, except what was allowed and certified in the exceptions.

But if such were the fact, and it were properly spread upon the record, it would not relieve the plaintiff from the difficulties attending his case. While the flood continued, and the waters were at such a height that no intercourse could be had between the different parts of the town, no liability rested on either the town or surveyor for not repairing. Whenever the waters had so far subsided that the repairs could be made, the surveyor could reach the Selectmen, and make known to them the exigency which called for the expenditure.

We are satisfied that the decision of the Court below was correct upon the facts presented.

How far the plaintiff might be entitled to recover on a *quantum meruit*, under the authority of *Hayden* v. *Madison*, 7 *Greenl.* 76, would depend upon proof, which is not spread before us.

## Russell *vs.* Richards *& al.*

An officer, in making sale of personal property on execution, has power to adjourn the sale to a *subsequent day*, and to a *different place*.

A. erected a building on the land of B. by the consent of the latter. Subsequently, A's creditor seised and sold the building on execution, to C. — B. then sold his land to D. After which, the building remained upon the land three years, unoccupied by C., during which time, the purchaser of the land gave no notice to C. to remove the building, nor made any objection to its remaining there. *Held*, that no waiver of C's. right to the building, could legally be inferred from these circumstances.

*Trover* will lie for a saw-mill, built by one upon the land of another, by the consent of the latter.

This was *trover* for a saw-mill, and is the same case reported in 1 *Fairf.* 429. It appeared that the mill in question was built by the procurement of *Aaron Church* and *Shubael Vance*, upon a privilege belonging to *William Vance*, by his consent. In *June*, 1827, *Seth Emerson* recovered judgment against said *S. Vance* and *Church*; and in *September* following, the mill was seised on the execution which issued upon said judgment, by *Simeon Bradbury*, a deputy sheriff, and after being duly advertised, was sold to the plaintiff, he being the highest bidder therefor.

It appeared, that, at the time and place originally appointed by the officer for the sale of the mill, no bidders were present; whereupon the officer adjourned the sale for a day or two, when a bid was made by a person, who being unable to comply with the terms, the officer again adjourned the sale for two or three days from *Baring*, the place first appointed, to a store at *Mill-town*, in *Calais*, about three miles from *Baring*.

The counsel for the defendants requested the presiding Judge, to instruct the jury that the officer had no right by law thus to adjourn the sale, either as to time or place — but he instructed them that the officer might do either, if not fraudulently or collusively done, to the prejudice of either of the parties.

It did not appear that the plaintiff demanded the mill, or that he took any measures for its removal until the last of *October*, 1830, when he demanded the mill of the defendants who were the grantees of *William Vance*.

The counsel for the defendants requested the Judge to instruct the jury, that the plaintiff had a reasonable time within which to remove the mill, and that three years could not be considered within a reasonable time for this purpose — and that, the plaintiff might be considered as having waived his right to the mill. But upon this point the Judge stated to the jury, that the mill having been originally placed upon the privilege of *William Vance*, by his consent, and that consent not appearing to have been revoked, and it not appearing that the plaintiff had been notified either by *Vance*, or by the defendants, his grantees, that the mill could not be suffered to remain there longer; or that the plaintiff had ever been directed or requested to remove the same, the lapse of three years neither operated to change the property, nor was it evidence that the plaintiff had abandoned the mill.

The jury returned a verdict in favor of the plaintiff for $500 damages. If the instructions requested were not lawfully withheld, or if that which was given was erroneous, the verdict was to be set aside, and a new trial granted; otherwise, judgment was to be rendered thereon.

A motion was also made in arrest of judgment, on the ground that an action of *trover* would not lie for a *saw-mill*.

*Allen* and *Boutelle*, for the defendants.

The officer in selling property on execution has no power to adjourn the sale as to time, and certainly not from one *town* to another. If it can be adjourned to an adjacent town, it can be to any one, the most distant in the county. There is the strongest reason, why, in the sale of personal property, it should be where the property is situated; that purchasers may have an opportunity to examine it, and bid with a knowledge of its value. If cases may be supposed where a greater price might be obtained, they would be exceptions only, not the general rule. The statute regulating the sale of personal property, gives no power to the officer to adjourn the sale. Wherever the Legislature has intended that the power should be given, it has expressly provided for it; as in the cases of sales of equities of redemption, sales of administrators, &c. The power is not inherent in the office from the nature of the office. It is not necessary that it should exist, in order to carry into effect some other power *expressly* granted.

It is not incidental to the principal thing. It would lead to looseness of practice, to fraud and collusion.

2. *Trover* will not lie for a *saw-mill.* The mill is an entire thing;—is local, designed for, and fixed to the place;—built with reference to the stream, the head of water, the dam. By a conveyance of a mill alone, the privilege of the stream, and of the dam would pass—without it the mill would be useless. *Blake* v. *Clark*, 6 *Greenl.* 436.

The theory of the action of trover precludes the supposition that it can lie for a tenement, which from its nature is fixed to the spot where it is erected, and which cannot be removed without destruction.

It may be said, that being built by one man on the land of another, it becomes personal property; still, if it be incapable of removal without destroying it, it is not the subject of an action of trover. Would *trover lie for a wharf built by one man on the land of another?* Reason would revolt at such a position. Would it lie for a factory, built of stone or brick, for a forge or furnace? The remedy in all these cases is, if the owner of the land refuses to the owner of the mill the use of it, for the latter to bring his action of assumpsit to recover the expense of building it. Or in this case, in an action for money had and received against *Vance*, for the proceeds of the sale of it. Or even by an action of ejectment rather than to resort to so preposterous a method as that of an action of *trover*.

No authority for this purpose can be cited. The action of trover has been suffered to proceed far enough, when applied to shops and tenements capable of removal without destruction. To sustain this action would be incorporating into the body of our law, a rule of practice incongruous with its general symetry—with the theory on which the remedy by action of trover is founded—and revolting to reason and common sense.

They cited the following authorities. 1 *Dane's Abr.* 134; *Osgood* v. *Howard*, 6 *Greenl.* 452; *Wells* v. *Bannister*, 4 *Mass.* 514; *How* v. *Starkweather*, 17 *Mass.* 243; *Titcomb* v. *Union M. & F. Ins. Co.*, 8 *Mass.* 326.

*Kidder*, for the plaintiff, to show an authority in the officer to

adjourn the sale, relied on the case of *Warren* v. *Leland*, 9 *Mass.* 264. He also argued at length in support of the position that trover would lie in a case like this.

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

MELLEN C. J. — This cause has been once under our consideration, *see* 1 *Fairf.* 429. The principal question then distinctly presented to view had respect to the *nature* of the property which *Church* and *S. Vance* had in the mill, which they erected at their expense on the land and by the consent of *William Vance;* and to the effect and operation of the deed from him to the defendants in the then existing circumstances of the property and the parties to the conveyance. The verdict, which was in favor of the defendants, was then set aside, and a new trial granted, for the reasons there stated. By setting aside the verdict, the Court indirectly, at least, decided that the *form of action*, was no objection to the plaintiff's right to recover.

Several objections founded on the report of the Judge before whom the second trial was had, have been urged; and one in support of a motion in arrest of judgment. The first objection relates to the ruling of the Judge as to the right of the officer, who sold the mill to the plaintiff, to adjourn the vendue, as he did, to two succeeding days, and also to a different place, in another town, distant about three miles from the place originally appointed as the place of sale. Under the instructions given by the Judge, the jury have found that the vendue was not adjourned in the manner above stated, fraudulently or collusively or to the prejudice of either party. Upon a careful examination, we have not found any authority expressly given by statute to a sheriff to adjourn the vendue of personal property taken on execution from, and belonging to an individual, either to a *subsequent day* or to a *different place*. Yet it is easy to state cases where such sheriff might not have possible time to complete the sale on the day appointed, owing to the amount of the property, and the multitude of articles, which he had seised. Again, the day appointed might be so stormy that no persons could or would attend the auction with a view of purchasing, or for some other cause, as was the fact in the present case; or if present, persons

might not incline to bid. In such circumstances what could a sheriff do, unless he could adjourn the sale? Must the creditor lose his debt, by losing the attachment, without any fault in any one on whom he could effectually call for damages? This would seem a harsh construction of a law, made for the benefit of creditors. When an officer, acting fairly, and anxiously consulting the best interests of the creditor and the debtor too, adjourns the sale, so as to obtain as high a price as he can, must a court of law pronounce this very act an official wrong, and declare the sale void in consequence, and on the objection of one who has no interest whatever in the question, whether the articles are sold at a high price or a low one? But as to the authority of a sheriff to adjourn his vendue, we are not obliged to depend on general reasoning as to expediency and convenience. In the case of *Warren* v. *Leland*, 9 *Mass.* 265, the Court, then consisting of *Parsons C. Justice*, and *Sewall* and *Parker Justices*, expressly recognized an officer's right to adjourn his vendue to a subsequent day, when circumstances required it; and that by so doing he can continue the lien upon the property created by the attachment: and in that case, the attachment was lost by the omission to adjourn, and a second attaching creditor held the property. It is not easy to discover why he may not for good reasons, and when acting with pure motives and for the benefit of all concerned, adjourn to a different *place*, as well as a different *day*. The usual verbal or written notice of the adjournment is just as effectual in one case as in the other. The law does not require the goods to be sold in the town where they are seised on execution. The sale is to be commenced or attempted in the place stated in the written notification of the sale, and at the appointed time. We are not aware that town lines are of any importance in the present case. The adjournment to *Mill-town*, according to the finding of the jury, must have been with good motives, and to the prejudice of no one.

The next objection is, that the instructions of the Judge were incorrect as to the question of reasonable time allowable to the plaintiff to remove the mill. That must depend on circumstances. It was on the land by permission of the former owner of the land. The defendants bought the land, and made no objection to its re-

maining there, by giving the plaintiff any notice to remove it. We perceive no ground for presuming a waiver of his rights; and his demand, when made, was of itself proof that he had not intended, prior to that time, any waiver of them. If a man should suffer articles of furniture to remain three years in his neighbor's possession, without his paying any thing for the use of them, or any communication being had between the parties, surely the law would not presume that a waiver of his rights was intended, or that it would be the consequence of his conduct. We do not perceive any sufficient ground for disturbing the verdict for any reasons appearing on the report of the Judge.

A motion is made in arrest of judgment, on the ground that an action of trover will not lie for a saw-mill. We have already decided in this cause that the mill in question, situated as it is, is *personal* property; and it being such, it is subject to the operation of those principles which are applicable to other personal property. It is true, it cannot be useful to the plaintiff, as a mill with the usual privileges of such a building; but the materials of which it is composed are of no small value when removed; that value the jury have estimated. The counsel for the defendant seems to view the declaration as a kind of legal absurdity; but this would instantly disappear, if the mill had been described under the name of the "*materials* of a certain saw-mill," &c. yet the legal effect is just the same, as the declaration now stands, connected with the whole facts of the case. Without enlarging any further, we only observe, that we are all satisfied that neither of the motions can be sustained; and there must be

*Judgment on the verdict.*

## MATTHEWS *vs.* HOUGHTON.

*Tenney* sued *Matthews* in a process of foreign attachment, and summoned *Houghton* as his trustee, against both of whom he recovered judgment, the latter upon disclosure. No execution issued, the trustee promising to pay upon that condition. About three years afterward, the note, upon which *Houghton* was adjudged the trustee of *Matthews*, being a note not negotiable, was sued in the name of *Matthews*, for the benefit of another, to whom it had been *bona fide* assigned. After the commencement of this suit, *Houghton* gave his note to *Tenney* for the amount of his, *Tenney's* judgment. *Held*, that *Tenney* was a competent witness for *Houghton*, in the suit against the latter.

*Held* further, that the trustee judgment was a bar to the action on the note — and that it might be regarded as such, as well *before*, as after, a satisfaction.

In making up and completing his records, a Justice of the Peace acts *ministerially* and not *judicially* — consequently he may do it when not in commission.

A promissory note, payable in cash *or* specific articles, is *not negotiable.*

*Assumpsit* upon the following promissory note:

"*Madison*, *July* 31, 1826.

For value received, I promise to pay *Jacob Matthews* or order, forty-five dollars in grain, at the market price, next *January*, or forty dollars in two years from next *January*, and interest.

*Nathan Houghton.*"

On which were the following indorsements, *viz:* "*July* 31, 1826, received nine dollars and fifty cents upon the within note." "*March* 1, 1827, received on the within twelve bushels of wheat, at five shillings per bushel."

It appeared that, on the 29th of *March*, 1828, said note was assigned by *Matthews* to *W. Preston*, for a valuable consideration, for whose benefit this action is brought. The defendant pleaded the general issue and filed a brief statement setting forth the facts proved in defence.

The defendant offered in evidence a copy of a judgment signed by *Amos Townsend, Esq.* rendered in an action in which *John S. Tenney* was plaintiff, and said *Matthews*, defendant, and in which *Houghton* was summoned as trustee. It appeared further by the record, that *Tenney* recovered judgment against the principal — that, *Houghton* disclosed and was adjudged trustee; but

that no execution had been taken out either against the principal or the trustee.

*Mr. Tenney* was offered as a witness by the defendant, (whose admissibility was to be determined by the full Court) and testified, that *Houghton* at the time of the entry of his, *Tenney's* action, and after he had disclosed and was adjudged trustee, agreed that, ass oon as he could ascertain the amount due on said note, he would pay it, if he, *Tenney*, would not take out execution, to which *Tenney* agreed. That, after the commencement of this action, *Houghton* gave his note to *Tenney* for the amount of his judgment and interest.

If the smaller sum named in said note is the amount due thereon, deducting the indorsements, the judgment recovered by *Tenney* was more than sufficient to cover it.

It was admitted that *Townsend* would testify, that a short time prior to *June*, 1832, he made up his record in said action, *Tenney* v. *Matthews & trnstee*. That prior to that, he was a deputy sheriff in this county, but was discharged, made up his record as Justice of the Peace, signed the copy of record produced in evidence, and was then reappointed deputy sheriff.

It further appeared by said *Townsend's* certificate, that the following was a true copy of the memorandum on his docket; "*March* 31, 1828. *John S. Tenney* v. *Jacob Matthews & Nathan Houghton, trustee* — con'd to *Aug.* 1, 1828." — Which certificate was objected to.

*Weston J.* ordered a nonsuit, which was to stand, if said trustee judgment is a bar to this action, or if upon the whole facts of the case, the plaintiff could not sustain this action — but if the trustee judgment was not a bar to this action, or if the larger sum is the true sum due on said note, or if said *Townsend* had no authority to make up said judgment and certify said copy, or if said note is negotiable, the nonsuit was to be taken off and the defendant defaulted; or if upon the whole facts of the case, the nonsuit should be taken off, the defendant was to be defaulted.

*Wells*, for the plaintiff.

The defendant, since the commencement of this suit, gave his note to *Tenney* in his own wrong. He was not obliged to pay the amount of *Tenney's* judgment, no execution having been

sued out within a year. *Statute of* 1821, *ch.* 61. § 8, 9. Nor could a scire facias issue against the defendant, except within a year from the time of the rendition of judgment, consequently, as trustee, he was entirely discharged. *Patterson* v. *Patten*, 15 *Mass.* 473; *Flower* v. *Parker & al.* 3 *Mason*, 247.

2. But there was no judgment. The certificate offered in evidence shows all that there was on the record of the Justice at the time of the commencement of this action. This was insufficient. And if no judgment existed at the time of the commencement of this action, it could not afterward be made up so as to defeat the action. *Clapp* v. *Clapp*, 4 *Mass.* 520.

*Townsend* was not authorized to make up the judgment and certify the copies, at the time he did, because he was not then a Justice of the Peace. This Court have decided, in 3 *Greenl.* 484, *Appendix*, that the offices of deputy sheriff and Justice of the Peace are incompatible. It is therefore contended, that the acceptance of the office of deputy sheriff by *Townsend*, amounted to a resignation of the office of Justice of the Peace. 3 *Greenl.* 372.

No amendment in the record could be made, which would affect vested rights, as in this case. *Freeman* v. *Paul*, 3 *Greenl.* 260; *Emerson* v. *Upton*, 9 *Pick.* 167.

3. *Mr. Tenney* ought not to have been admitted as a witness. He was interested — his testimony went directly to support the trustee judgment, or to protect the trustee, which is the same thing. By supporting that judgment he makes two persons liable instead of one. He is also interested in regard to the costs.

4. This note was payable in *wheat or money.* The plaintiff is entitled to the largest sum, neither of them being paid, it belonged to the payee to elect which he would have, and he elects the larger. *Co. Litt.* 145, *a.*

*Boutelle* and *Tenney*, for the defendant, cited the following authorities: *Maine stat. ch.* 61, *sec.* 8, 9; *Taylor* v. *Day*, 7 *Greenl.* 129; *Perkins* v. *Parker*, 1 *Mass.* 117; *Stevens* v. *Gaylord*, 11 *Mass.* 265; *Bissell* v. *Briggs*, 9 *Mass.* 468; *Wood* v. *Partridge*, 11 *Mass.* 491; *Foster* v. *Sinclair*, 4 *Mass.* 450; *Hull* v. *Blake*, 13 *Mass.* 153; *Foster* v. *Jones*, 15 *Mass.* 185; *Kelsey* v. *Learned*, 6 *Greenl.* 116; *Dane's Abr.* 464;

3 *Black. Com.* 421; 2 *Kent's Com.* 364; 1 *Com. on Con.* 10, 11; *Perley* v. *Spring*, 12 *Mass.* 297; 1 *Esp. N. P.* 23, 24; 3 *Black. Com.* 24; 1 *Stark. Ev.* 150; *Haskell* v. *Haven*, 4 *Pick.* 404; *Ladd* v. *Blunt*, 4 *Mass.* 402; 6 *Dane's Abr.* 493. *Com. Dig. Attachment*, I; 1 *Salkeld*, 280; 3 *East*, 367; *Wise* v. *Hilton*, 4 *Greenl.* 435; *Howard* v. *Rogers*, 5 *Greenl.* 441.

MELLEN C. J. at a subsequent term, delivered the opinion of the Court.

Several questions have been discussed in argument, which we proceed at once to examine and decide.

1. We do not perceive any incorrectness in the ruling of the Judge as to the admission of *Mr Tenney* as a witness. He is not interested in the event of this suit. He obtained a judgment against the effects of *Matthews* in the hands of *Houghton*, who has voluntarily given his note to *Tenney* for the amount. It does not follow that he would have any defence against the note, if there was any irregularity in the manner in which the judgment was made up by the Justice. Besides, this question is not distinctly reserved and presented in the close of the report as one of the alternatives upon which a new trial was to be granted, if it was ruled incorrectly.

2. There can be no possible doubt as to the character of the note. Clearly it is not a negotiable note.

3. Neither has the Court any reason for pronouncing the conduct of *Townsend* illegal or irregular in making up the judgment. The memorandum on his docket is brief and imperfect, stating merely the day on which the action was entered — the names of the parties, and the continuance or adjournment of the Court to *August* 1, 1828. He completed the record prior to *June*, 1832, having resigned the office of deputy sheriff, which he then held, before completing the record, because our Constitution, *art.* 9, *sec.* 2, provides, among other things, that no person shall hold or exercise, at the same time, the office of Justice of the Peace and deputy sheriff. We are inclined to the opinion that the formality of a resignation was unnecessary. It does not appear at what time his commission, as a Justice of the Peace, expired, by resignation or lapse of time. The design of the constitution was to prevent the union and exercise of *judicial* and *executive* powers

in the same person at the same time, as impolitic if not dangerous. But a magistrate does not act *judicially* in making up and completing his record. In doing *this* he performs *himself*, what this Court does by the agency of *their clerk*. It is a mere ministerial act. The Justice adjourned to *August* 1, 1828, on which day he made his decision. We have stated all these facts for the sake of giving this answer to them, though, as we are furnished with an attested copy of the record of said judgment, we have serious doubts whether any of the parol evidence which we have been considering is properly admissible. On the whole, we consider we have regular proof of the judgment before us.

4. In the fourth place our opinion is, that the judgment is a bar to the present action. It has never been appealed from; and according to the cases cited by the counsel for the defendant, a judgment duly rendered against him as trustee, is as much a protection to him *before* it is satisfied as it is *after* payment. We are all of opinion that the nonsuit was properly ordered and it is confirmed.

*Judgment for the defendant for his costs.*

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## Baker *vs.* Page *& al.*

The plaintiff cut logs upon the land of another without license, and sold them upon credit to the defendants, informing them fully at the time of the above fact, and they expressly agreeing to take them, subject to the claims of the true owner. *Held*, in an action brought for the price, that a defence, founded upon the alleged *want* or *unlawfulness* of consideration for their promise, could not prevail.

This was an action of *assumpsit* on account annexed, for a quantity of pine mill logs, and for expenses incurred in running them.

In defence, it was proved, that the timber was cut by the plaintiff, without license, upon certain lands belonging to *Alexander Baring* and others, and that the defendants had been notified by the agent of *Baring* and others, that he should look to them for the full value of the logs in question.

To obviate and repel this defence, it was proved on the part of the plaintiff, that at the time of the sale of the logs to the defendants, the latter were informed that the logs were cut, without license, upon the land of *Baring* and others, and therefore, liable to be seised by them; and that the defendants expressly agreed to take this risk upon themselves; and that, they agreed to give, for the logs, the stipulated price to the plaintiff, which appeared to be about their full value, subject to the rights and claims of the *Barings*.

The counsel for the defendants insisted, that if such were the facts, the plaintiff could not recover. First, because their promise was without consideration — and secondly, because the consideration was unlawful. But *Weston J.* instructed the jury, that if the defendants purchased the logs, taking upon themselves the risk of the claim of the *Barings*, and subject to their rights, the plaintiff was entitled to recover, notwithstanding the interposition of the *Baring* claim.

The jury returned their verdict for the plaintiff. If they 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 defendants, argued in support of the following positions.

1. That, the *Barings* could maintain trespass or trover against any person cutting, taking or selling these logs — as well the defendants, as the plaintiff. *Nelson* v. *Burt*, 15 *Mass.* 204; 1 *Chitty's Pl.* 152—4; *Towne* v. *Collins*, 14 *Mass.* 500.

2. That, the promise of the defendants was without consideration. *Howard* v. *Witham*, 2 *Greenl.* 390; *Fowler* v. *Shearer*, 7 *Mass.* 14; *Gates* v. *Winslow*, 1 *Mass.* 66; 5 *Johns.* 272.

3. That the consideration was unlawful. The plaintiff admits that he has done a wrong and acquired a right by it, and sells that right to the defendants. *Bliss* v. *Negus*, 8 *Mass.* 47; *Tucker* v. *Smith*, 4 *Greenl.* 415.

This transaction between the parties was intended to keep the property of the *Barings* from them, and to defraud them of it; and any promise growing out of it, is not binding. *Boynton* v. *Hubbard*, 7 *Mass.* 112.

The cutting by the plaintiff was a wrong — so the holding of

the property was a continuance of the wrong — and the act of selling was a wrong. — The making of the promise to pay for them, was a part of the wrong — it was a promise to pay the plaintiff for doing an unlawful act. *Springfield Bank* v. *Myrick*, 14 *Mass.* 322; *Ayer* v. *Hutchinson*, 4 *Mass.* 370; *Coolidge* v. *Blake*, 15 *Mass.* 429; *Russell* v. *Degrand*, 15 *Mass.* 35.

*Tenney*, for the plaintiff, cited 3 *Burr.* 1663; *Musson & al.* v. *Fales*, 16 *Mass.* 332; 3 *Stark. Ev.* 1632; *Faikney* v. *Reynous & al.* 4 *Burr.* 2069; 3 *T. R.* 418; *Armstrong* v. *Toler*, 11 *Wheat.* 258.

Weston J. delivered the opinion of the Court.

Two grounds of defence are urged in this action. That there was no consideration for the promise declared on; or if any, that it was unlawful.

The plaintiffs have received the logs they purchased, and have converted them to their own use. They have enjoyed what they expected, which they regarded as valuable. With a full knowledge of all the facts, they assumed the chances attending the sale; and if they are likely to have an unfavorable issue, nothing has happened, which might not have been foreseen. It is said the consideration has failed; that the *Barings* were the owners of the logs; and that the plaintiff had no valuable interest whatever in them. The *Barings* were the original owners of the timber while standing, and it was proved that they have notified the defendants, that they claim of them the full value of the logs. From the authorities cited for the defendants, it appears that this claim may be enforced. If they are also holden to pay the plaintiff, they may be twice charged for the same property. If they are brought into this difficulty, and the bargain has turned out to be altogether an improvident one, they made it with their eyes open; without fraud or imposition, on the part of the plaintiff. He did not profess to be the undisputed owner of the logs; he apprised the defendants of the right of the *Barings*, and sold expressly subject to their claim. The favorable chances they took at the time were, first, that the *Barings* might never look up their claim; secondly, that they might call upon the plaintiff, he being the wrongdoer, charging him either as a trespasser, or as

the receiver of money to their use, upon the sale of the logs to the defendants, which they might affirm and ratify; or thirdly, if resort was had to the defendants, the *Barings* might be satisfied with the value of the timber while standing, which would indemnify them for the injury they had sustained. We entertain no doubt, that these chances constituted a sufficient consideration, if lawful, to support the promise.

The law will not enforce a contract, founded upon an illegal consideration. This principle is well settled. The authorities to this point, cited for the defendants, present a variety of cases, in which the rule has been applied. The wrong here consisted in the trespass committed upon the land of another, in which the defendants had no agency or participation. The transfer of the timber from hand to hand, had no tendency to increase the injury. Every sale enlarged the remedy of the *Barings*. It increased their chance of eventual indemnity, by adding to the number of the persons liable to them. A sale, tending to defraud or injure third persons is unlawful; but the sale in question is clearly not of that character. The law does not avoid every contract connected with an unlawful transaction. Courts have gone great lengths in sustaining collateral contracts, which have been occasioned by violations of law. Thus in *Faikney* v. *Reynous*, 4 *Burr.* 2069, losses having been incurred by two persons, who were jointly concerned in certain contracts prohibited by law, and the whole having been paid by one of them, a bond given to secure the proportion of the other was enforced. In *Farmer* v. *Russell*, 1 *Bos. & Pull.* 296, it was held, that if A. receives money of B. to the use of C., it may be recovered by C. in an action for money had and received, though the consideration on which B. paid it, be illegal. In *Armstrong* v. *Toler*, 11 *Wheat.* 258, *Marshall C. J.* says, "to connect distinct and independent transactions with each other, and to infuse into one, which was perfectly fair and legal in itself, the contaminating matter which infected the other, would introduce extensive mischief into the ordinary affairs and transactions of life, not compensated by any one accompanying advantage."

*Judgment on the verdict.*

## LANG *vs.* FISKE *& al.*

Where a chose in action was assigned, and the debtor being called on for payment by the assignee, said he would pay to him if he was legally entitled to receive it, it was held to be sufficient to enable the assignee to maintain an action *in his own name*, on showing a legal assignment.

Such promise being made by one, of two, who were copartners — and for a partnership liability — was held to bind the firm.

The assignee may avail himself of such promise under the count for *money had and received.*

A. assigned to B all his interest in certain property, deposited in the hands of a third person, and for which, the latter was bound to account to them jointly. In an action brought by B. on the promise of the debtor or pledgee to account to him alone, made subsequent to the assignment, A. was held to be a competent witness for B.

A verdict in this case was rendered for the plaintiff, which was to stand or be set aside, as the opinion of the Court should be upon the whole case. The facts are sufficiently stated in the opinion of the Court, which was delivered at the ensuing *June* term in this county, by

PARRIS J. — This is an action of assumpsit in which the plaintiff claims the proceeds of a quantity of logs cut by him and one *Moore* and *Crosby*, on the south half of township No. 2, in the 3d range, north of the lottery lands, and hauled into a stream called *Battle Brook*. The logs were cut under a permit from the Land Agent of *Massachusetts* to *Davis*, which permit he transferred to *Fiske* and *Billings*, the defendants, who, in the exercise of their rights derived from *Coffin*, the Land Agent, granted to *Bradford* and *Prince*, permission for one team, to be carried on by *Moore*, *Crosby* and *Lang*, to enter upon, cut and haul pine timber from said township previous to *May* 1, 1828; the timber to be *Fiske* and *Billings*' until the conditions, under which the permit was given, were fulfilled. And in case *Bradford* and *Prince* should fail of paying *Fiske* and *Billings* the amount of *stumpage*, on or before the first of *June*, 1828, on all the timber cut, then *Fiske* and *Billings* to have the right to take, sell and dispose of the timber, and after paying the amount of the stumpage, &c. to pay the balance of all the proceeds of said timber,

then remaining in their hands, to *Bradford* and *Prince*, or their order or assigns. *Bradford* and *Prince*, thereupon, agreed with *Moore*, *Crosby* and *Lang*, that they should fit out one team to be employed on said township; *Bradford* and *Prince* agreeing to furnish the necessary supplies for carrying on the business, and *Moore*, *Crosby* and *Lang* agreeing to cut and haul into convenient streams for running logs, as many logs as they could during the time for hauling; the logs to remain the property of *Bradford* and *Prince* until the supplies by them furnished should be paid for, they having the right at any time to take any of the logs and convert them to their own use, accounting therefor towards the supplies.

From the foregoing statement of the case, it is manifest that it was the intention of all these parties, that whatever sum should be realized from these logs, after paying *Fiske* and *Billings* the stumpage, and *Bradford* and *Prince* for the supplies, should be the property of *Moore*, *Crosby* and *Lang*.

The jury have found that the whole demand of *Bradford* and *Prince* for supplies was paid; and, that being the case, *their* lien upon the logs was discharged.

They having no remaining interest in these logs, their conveyance to *Train* and *French*, on the 23d of *October*, 1828, purporting to assign all their, to wit, *Bradford* and *Prince's* right, title and interest to the logs, was wholly inoperative.

*Fiske* and *Billings*, in their contract with *Bradford* and *Prince*, having reserved to themselves the right to take and sell the timber and appropriate for that purpose so much of the proceeds as might be sufficient to pay the amount of stumpage and all incidental charges and expenses of managing and selling the timber, exercised this right, by seising the logs, causing them to be sawed and the lumber to be sold; and, after discharging all their lien, have a surplus remaining to be paid to any person who is legally entitled to it. They resist the plaintiff's claim, because, as they contend, he cannot maintain any action for this balance in his own name, but if he is entitled to it, the action to recover it must be prosecuted in the name of *Moore*, *Crosby* and *Lang*.

It appears that, previous to the commencement of this action, *Lang* purchased of both *Moore* and *Crosby* their interest in these

logs, and took from them an assignment, under which he now claims to be entitled to recover.

Upon the plaintiff's exhibiting to *Fiske*, one of the defendants, the evidence of this assignment, he acknowledged that he had received the money, and said he would pay the nett proceeds, beyond what was necessary to pay himself, to the plaintiff, if he had a legal title to receive it. It is contended that this was a conditional promise only, and, therefore, would not enable the plaintiff to support an action. If he has succeeded in proving that he is legally entitled to this surplus, then the promise, even if it was conditional, has become absolute. The case, so far as it rests upon this point, is not distinguishable from *Austin* v. *Walsh*, 2 *Mass.* 401.

It was further contended, in defence, that the action cannot be maintained against *Fiske* and *Billings* on a promise made by *Fiske*. But they were partners when they entered into the original contract. As such they received the money, and were accountable for it when *Lang*, the plaintiff, became the sole owner. Clearly, the promise of one of the partners, in relation to a partnership concern and during the existence of the partnership, is binding upon the company.

But it is contended that even if an action can be maintained by the plaintiff, in his own name, against the defendants, he has not charged them in proper counts, and the counsel has referred us to *Weston* v. *Barker*, 12 *Johns.* 276. So far from establishing, that case would seem to overthrow the position assumed. *Thompson J.* says, "It is undoubtedly a well settled rule of the common law that choses in action are not assignable; and therefore, when a person entitled to money due from another, assigns over his interest in it to a third person, the *mere act* of assignment does not entitle the assignee to maintain an action for it; but if there be an *assent* or *promise* on the part of the debtor or holder of the money, the action for *money had and received* has been holden to lie" — and he cites several *English* authorities in support of his position. *Spencer J.* who dissented from the Court on other points in the case, concurred on this, and referred, with approbation, to the case of *Suretees* v. *Hubbard*, 4 *Esp.* 203, which was an action for *money had and received*, brought by the plaintiffs as

assignees of a ship to recover the amount of freight; notice had been given of the assignment of the ship and freight to them; the objection was taken, that being a *chose in action*, the demand could not be assigned, so as to enable the assignee to bring a suit in his own name. *Lord Ellenborough* nonsuited the plaintiff, saying, that where a party, entitled to money, assigns over his interest to another, the mere act of assignment does not entitle the assignee to maintain an action for it; the debtor may refuse his assent; he may have an account against the assignor; and wish to have his set-off; but if there be any thing like an assent on the part of the holder of the money, in that case, this, which is an equitable action, is maintainable. The case of *Austin* v. *Walsh*, before cited, is in accordance with the same principle. We think the defendants are properly charged under the count for money had and received. It is not necessary that the money should have been received by the defendants *subsequent* to the promise, in order to enable the plaintiff to maintain the action, as contended in the argument. If *Fiske* and *Billings* had money in their hands belonging to *Moore, Crosby* and *Lang*, an assignment by *Moore* and *Crosby* to *Lang* vested the equitable title to that money in *Lang*. It was his; and whenever *Fiske* and *Billings* had notice of the assignment, they could pay it to no one else; and upon their assenting to the assignment and promising to pay it to the assignee, they may properly be considered as holding the money thereafter for his use.

It was said in argument that the power to sell this timber remained in *Bradford* and *Prince*, to satisfy their lien for supplies, and that it would be embarrassing to purchasers if, under such a sale, the property did not pass. We are not aware that there is any rule to be applied to this kind of property different from what is applicable to personal property of other descriptions. The pledgee, who has a lien with power to sell, may, undoubtedly exercise that power, and the property will pass to the purchaser, beyond the control or interference of the pledgor. But if the power to sell was merely to satisfy the lien in case of a neglect otherwise to satisfy it, and the pledgor discharges the lien by payment, all authority in the pledgee ceases, and a subsequent purchaser will be in the same situation of one who buys of a pretended owner, but who in fact

has no title. Like all other purchasers in case of defect of title, he must look to the vendor upon his express or implied warranty.

It does not appear by the case, that *Bradford* and *Prince* ever had any of the *Battle Brook* logs, which are the subject of this controversy, in actual possession; or, that they ever directly or expressly *sold* the logs to *Train* and *French*. They *assigned* "their right, title and interest in these logs to *Train* and *French*, and also, at the same time, a note signed by *Moor* and *Crosby*, or a judgment, which may be recovered on such note, as may be necessary to carry the aforesaid agreement into full effect, and to give said *Train* and *French* power to dispose of logs in the *manner and for the purposes aforesaid.*" This is the phraseology of the assignment. From *Prince's* deposition, which is made a part of the case, it appears that this note was for the supplies, and was made by *Moor*, in the name of himself and *Crosby* and *Lang;* that it was put in suit, and the action discontinued on account of *Lang's* disputing the execution of the note.

From these facts, there is much reason for believing that *Bradford* and *Prince* never intended to pass to *Train* and *French* any greater interest in the *Battle Brook* logs than their lien growing out of the supplies; that they assigned the note, which they claimed to have taken for the supplies, and their *lien* only, on the logs; and this is corroborated by the conduct of *Train* and *French*, who immediately, on receiving the assignment, gave notice thereof to *Fiske* and *Billings*, and requested merely that they might be regarded as standing in the place of *Bradford* and *Prince*. They made no claim as purchasers through *Bradford* and *Prince* as agents, but merely as the assignees of their interest, whatever it might be. Now *Bradford* and *Prince* never claimed to be the *owners* of the logs. There is no intimation in the case that they ever had, or asserted, any other title or interest in these logs than that growing out of the original contract before referred to. Neither does it appear that *Fiske* and *Billings*, in seising the logs, causing them to be sawed and selling the lumber, acted or claimed to act in behalf of *Train* and *French*, or any other person or persons except themselves. They had an interest in the logs reserved under their contract with *Bradford* and *Prince*, and it was this interest that they were endeavoring to secure. Having done that, the remaining property in the logs, or the pro-

ceeds thereof, belonged to *Bradford* and *Prince*, unless they had parted with it by conveyance to some other person. They *had* thus parted with it to *Moor*, *Crosby* and *Lang*, reserving a lien as security for supplies advanced, which lien, as the jury have found, had been discharged by payment, previous to any assignment to *Train* and *French*, the real defendants in this action, and for whose benefit it is defended. If the jury found correctly as to the payment for the supplies, there is no reason to doubt, from the report of the case, but that the honest intentions of the parties will be carried into effect. *Train* and *French* may not recover what they expected by virtue of their assignment from *Bradford* and *Prince*, but that will arise from the fact that the note, assigned by the latter, was not recoverable, having been given by *Moor*, without the authority of his associates, whose names he used, and the lien of *Bradford* and *Prince* on the timber having been previously discharged.

At the trial the deposition of *Moor* was offered in evidence by the plaintiff, and admitted, although objected to by the defendants, upon the ground that he was originally a part owner of the property in question. We do not perceive the force of this objection. *Moor*, *Crosby* and *Lang* were jointly answerable to *Bradford* and *Prince* for the supplies. *Lang* had paid four hundred dollars more than his proportion, and in consideration of this payment, *Moor* sells and conveys to him so many of the *Battle Brook* logs as will amount to that sum, which is agreed in the case exceeds the value of *Moor's* interest in the whole lot; of course he had no remaining interest in the logs. In addition to this, he subsequently, by release under seal, discharged *Lang* from all claims of any kind to said logs, or to the proceeds of them forever. If the supplies were not paid for, and *Moor*, *Crosby* and *Lang* are still liable for them, it is for the interest of *Moor* that *Train* and *French* should prevail in this action, as the amount which they might recover would go so far towards diminishing his liability for the supplies, in which case he would be testifying *against* his interest, if in favor of the plaintiff. If the supplies were paid for, *Moor* has no remaining interest in the logs, having assigned it to the plaintiff.

*Allen* and *Warren*, for the plaintiff.

*Rogers*, for the defendants.

## HAM'S *case.*

On the trial of one indicted for bigamy, adultery, or lascivious cohabitation; the marriage, whether solemnised within this State or elsewhere, may be proved by the voluntary and deliberate confession of the defendant.

But where the defendant, about twenty years before the offence was committed, in contracting for the hire of a house, stated that he had but a small family "a wife and one child"; and afterward moved into the house with *a woman* whom he called "*Miss Ham*"; with whom, as his wife, he lived for several years and then deserted, it was holden not to be sufficient proof of the marriage in an indictment for adultery.

THIS was an indictment charging the respondent with the crime of adultery. To prove the marriage the government relied on evidence of the following facts: — The respondent moved into the town of *Fayette*, in this State, more than twenty years ago, representing at that time, to the person of whom he hired the house, that he had a small family, only *a wife* and one child. Soon after hiring said house, he moved into it with *a woman* and one child about five or six months old, and continued to live with that woman, as his wife, until about three years since, when he left her and came into this County or the County of *Penobscot*. In 1807, he built a house in *Fayette*, moved his family into it, continued to reside there until he left the town. During their cohabiting together, they were reputed to be husband and wife, and were supposed to be married; and the woman had five or six children which were reputed to be his. He called the woman "*Miss Ham*," and treated her as a wife.

The reputed wife's parents resided in *Winthrop*, in this State, at the time *Ham* removed to *Fayette*, and for many years before and at the time of the reputed marriage, and subsequently, went to live in *Ham's* family, where they continued to reside until their decease. There was no evidence that either *Ham*, or his reputed wife, had ever resided without the limits of *Maine*, either before or since their reputed marriage.

The counsel for the prisoner objected to all evidence tending to prove a marriage by reputation, but the objection was overruled. The counsel also contended that, this evidence was insufficient to prove the marriage, but *Parris J.* who presided at the

trial, being desirous of reserving this question, as one important in practice to be settled, ruled otherwise.

The indictment was found at the *June* term, 1833, and the offence was alleged to have been committed in *Corinna*, in the county of *Somerset*, on the 27th of *October*, 1832. At that time the town of *Corinna* was included within the limits of the county of *Somerset;* but on the 10th of *February*, 1833, said town was set off from the county of *Somerset* and annexed to, and made a part of the county of *Penobscot*; and the counsel for the prisoner contended, that he ought not to be holden to answer in this county for the alleged offence as set forth in the indictment. But the Judge ruled otherwise. If in the opinion of the whole Court the foregoing ruling was wrong, on either point, the verdict was to be set aside and a *nolle prosequi* entered.

*Tenney*, counsel for the prisoner, contended, that in criminal prosecutions, a marriage could not be proved by reputation — the authorities are all against it. Proof of cohabitation is insufficient; a marriage *in fact* must be proved. 2 *Stark. Ev.* 438; *Ibid.* 939; 2 *Phil. Ev.* 142; *Morris* v. *Miller*, 4 *Burr.* 2057; 3 *Black. Com.* 140.

Nor are confessions sufficient evidence of a domestic marriage. *Commonwealth* v. *Littlejohn*, 14 *Mass.* 163; 2 *Stark. Ev.* 437; 3 *Stark.* 1186; 2 *Phil.* 152; *Cayford's case*, 7 *Greenl.* 57.

But it is denied that *Ham* ever confessed himself a married man, or that he called the woman he lived with, *his wife*. He called a woman *Miss Ham* — but this was not admitting her to be his wife — she might have been his mother or sister.

But if he intended to call her his wife, it would not be conclusive against him. In general, it may be admitted, that the confessions of a prisoner are proper evidence; for it is not to be presumed that a man will confess himself to be guilty of an offence, when he is innocent — the feelings of our nature are against it. But it is otherwise in regard to this offence. There may be numerous motives operating upon a man to induce him to call a woman his wife when she is not so in fact.

2. The indictment in this case should have been found, and trial had, in *Penobscot*, if any where, the act having been com-

mitted there. 4 *Black. Com.* 350; 3 *Black. Com.* 352. It is a privilege of the accused and is one of great value to him, to be tried by his neighbors. But by the alteration of county lines here, the defendant was deprived of the privilege of having any one from *Corinna*, on his jury. *Maine Statute, ch.* 54; *Const. of U. S., article* 6, of the Amendments.

*Clifford*, Attorney General, argued that the confessions of *Ham* were tantamount to an express acknowledgment of marriage; —and then contended that, confession accompanied by cohabitation, birth of children, &c. was sufficient to prove a marriage in a prosecution for adultery, and cited *Cunningham* v. *Cunningham*, 2 *Dow.* 482; 1 *East's P. C.* 470; 2 *Phil. Ev.* 151; 1 *Russell on Crimes*, 206; 3 *Stark. Ev.* 1184; *Commonwealth* v. *Murtagh*, 1 *Ashmead*, 272; 8 *Serg. & R.* 159.

Most of the difficulties on this point, he contended had grown out of the case of *Morris* v. *Miller*, 4 *Burr*, 2057, cited on the other side. But the ruling of this point, in that case, was a mere *obiter dictum*, not called for by the facts in the case. The Attorney General here argued at length against the authority of *Morris* v. *Miller*, and endeavored to show, that it was not founded on principle, nor had been supported directly by subsequent decisions.

In regard to the point made by defendant's counsel, that, the indictment should have been found, and trial had, in *Penobscot*, he cited the following authorities: 9 *Johns.* 248; 1 *Chit. C. L.* 146; *Co. Litt.* 125 *a.*; 1 *Hawk. Pl. of the Cr.* 470; 1 *Chit. C. L.* 454; *Ibid.* 165; 10 *Mass.* 78; 2 *Russell on Cr.* 716; 2 *Cowen*, 526; *Commonwealth* v. *Springfield*, 7 *Mass.* 9; 1 *Leach*, 536.

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

In this case two questions have been reserved for our consideration: — 1. Whether the evidence reported is sufficient to prove the marriage alleged in the indictment: — 2. Whether the defendant is triable by law in this county.

With respect to the *first* question there seems to be some degree of uncertainty, according to English decisions. We had occasion, in the case of *State* v. *Cayford*, 7. *Greenl.* 57, to examine the principal English authorities in relation to the sufficiency

of the evidence necessary to prove the plaintiff's marriage, in an action for criminal conversation with his wife, and, in cases of indictments, what is competent and sufficient proof of the defendant's marriage, when charged with the crime of bigamy or adultery. We refer to our opinion in that case, and to the authorities there cited, without a re-examination of them on this occasion. There certainly appears to be some relaxation of the rules of evidence on the subject. We are perfectly satisfied with our dicision in *Cayford's* case. The marriage there, was a *foreign* one and this Court could not by any of its process procure any higher proof of it, than was produced, hence it was considered competent and sufficient to establish the fact of the marriage and justify the conviction of the defendant, in connection with the evidence, proving the criminal act charged. Whether a deliberate confession, understandingly made, would be sufficient, as well as competent evidence to prove a *domestic* marriage, by which we mean a marriage solemnized within this State, in support of an indictment for adultery or bigamy, we then reserved for future consideration. We are now called on to examine that question and decide it, so far at least as the facts of the case extend: and in doing this it is desirable, and may be useful, to lay down those rules and principles in relation to the subject which may serve as guides in the prosecution of crimes of a similar nature in future. The question, which at once presents itself on this occasion is, why should not the defendant's *deliberate* and *explicit* confession of his *marriage*, in such a prosecution, be as competent evidence to prove such *marriage*, as a similar confession is to prove the crime of *adultery* charged. If *either* fact exists, it must be certainly within his own knowledge: and, as a general proposition, it is certainly true, that a deliberate and voluntary confession, understandingly made, is the best evidence; for he who makes it, speaks from his actual knowledge of the fact; no one has any interest in its truth, or interest in disputing it. The confession of the grantor or obligor that he signed and sealed the instrument, which bears his name, is not considered as legal evidence of the execution of such instrument, when the subscribing witnesses can be produced, even when the action is against such grantor or obligor. The wisdom and good sense of this rule of

evidence has often been severely criticised; but it seems to be founded on the idea that *both* parties are entitled to the benefit of all the facts and circumstances attending the execution of the instrument, from the testimony of the witnesses; facts which might not appear by the confession, and yet have a legal operation in deciding the fact of execution. Viewing the question under consideration, independently of decided cases, there would seem but one reason why the deliberate confession of his marriage, made by a defendant in a prosecution against him for bigamy or adultery, should not be received as competent and satisfactory evidence of such marriage, namely, that the person solemnizing the marriage had no legal authority to do it: and yet the want of authority might not have been known by the person officiating, or by the defendant himself, when he made the confession. Instances of the kind above stated have fallen under the judicial cognizance of this Court. In some cases such marriages have been confirmed by the Legislature on the application of the parties interested. In cases so circumstanced, a defendant might, by his confession, involve himself in all the consequences which would follow from record proof of a regularly solemnized marriage, and a legal conviction, when in fact the crime charged had never been committed. In no other cases, however, do we perceive that any unfavorable consequences could ensue, which would not follow upon a conviction upon undisputed proof of a legal marriage. If such a difficulty as this can be obviated, we may ask, what good reason can be assigned why more and stronger proof should be necessary to prove the *marriage* than the *crime* charged? Both are facts which may be proved by parol testimony. Why is the marriage better or more clearly proved by the testimony of a witness who saw a certain clergyman or magistrate solemnize the marriage, than by the voluntary and deliberate confession of the party charged, that *such* clergyman or magistrate did solemnize the marriage? The plea of guilty is a confession of the *crime*, which includes a confession of the *marriage*, that being essential to the existence of the crime. The Court receives such a plea, and passes sentence on the offender; though even this solemn confession in open Court may be made under a mistaken belief that the marriage was solemnized by a person duly authorised,

though the fact was otherwise. It is said that such confession is not the best evidence; that the law requires a marriage to be recorded, and that the record should be produced, as being the best evidence. Surely this objection cannot be sustained: for it is an admitted principle, and constantly adopted in practice, that the testimony of a witness, who was present at the marriage ceremony, is legal evidence, and in fact it is *better* evidence than the record; because the record does not establish the fact of *identity;* but a witness on the stand proves not only the marriage solemnized but that the defendant on trial was *one* of the parties. The question then is, whether a deliberate confession of the marriage is not as convincing evidence of the fact as the testimony of a witness present; for in the case of confession, the question of *identity* can never arise. When we take all the foregoing circumstances into consideration, together with the known fact that marriages are seldom recorded as the law requires, and the difficulty of ascertaining who were present at the marriage, especially among the lower classes, and after the lapse of a few years, we apprehend that the interests of public justice would be advanced by a relaxation of the rules of evidence touching the point before us, and by a more liberal principle applied in the investigation of facts, so that the laws of the land may be more surely enforced against unprincipled offenders, and the public morals be more faithfully and effectually guarded. Upon full consideration of the subject, it is the opinion of the Court that in the trial of a person indicted for bigamy, adultery or lascivious cohabitation, the marriage necessarily to be proved, in order to sustain the indictment, wheth er it was solemnized within this State, or elsewhere, may be proved by the voluntary and deliberate confession of the defendant: and the proof of such confession, if accompanied by a statement of the name of the clergyman or Justice of the Peace who lawfully solemnized the marriage, if believed by the jury, shall be deemed sufficient proof of the marriage; and when such confession shall *not* be accompanied by a statement of the name of the officiating clergyman or Justice of the Peace, it shall, if believed, be deemed competent and *prima facie* evidence of such marriage. Such evidence of marriage, however, would be considered as deriving strength from the circumstance of the cohabitation of the parties as husband and wife, and by the birth of children and their resi-

dence in the family as a part of it. We do not mean to be understood as applying the principles above stated to the proof of marriage in the case of an action for criminal conversation with the plaintiff's wife. In such an action the confession of a defendant stands on different ground. He may know nothing of the fact of the marriage himself; und his declarations may, perhaps, amount to nothing more than a confession of what is publicly reported and reputed to be the fact. Having thus laid down these principles and rules of evidence which we considered as proper to be observed and applied in the criminal trials before mentioned, we now proceed to examine the evidence reported by the Judge who presided at the trial, and saved the question, at the request of the Attorney General, in the only manner in which he could save it, namely, by ruling against the defendant. From the report we must conclude, that if there ever was any marriage as alleged, it must have taken place in this State. But if he ever was married, his wife must have been living at the time of the offence charged, to justify his conviction. The report states, that more than twenty years ago the defendant said he had "only a wife and one child." That soon after, it was proved, he moved into a house with "*a woman* and a small child," and lived with *her* as man and wife, that *they* were reputed as such, and had several children, that he called her *Miss Ham*, and treated her as a wife. It does not necessarily appear that the woman he *lived with* was the same person that he had before *spoken of*. His calling her "*Miss Ham*," or his wife, is no proof that she was his wife. It is far from a deliberate and explicit confession that he was ever *married to her*. As before has been observed, if he had "a wife" more than twenty years ago, it does not appear that she was living at the time the alleged offence was committed; nor does it appear that she was the "woman" with whom he afterwards lived, and called "*Miss Ham*." The confession is not sufficient, according to the principles above stated, to justify a conviction. It does not amount to a distinct and deliberate confession of a marriage, continuing to the time of the offence charged in the indictment. Accordingly the verdict is set aside, and as agreed, a *nolle prosequi* is to be entered. Our decision in favor of the defendant on this first point, renders an examination of the second objection unnecessary.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF PENOBSCOT, JUNE TERM, 1834.

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## WYMAN *vs.* WINSLOW.

In an action on a promissory note, payable in lumber at a certain time and place, the defendant shew that he had at said time and place, a much greater quantity of lumber than was necessary to pay said note, in the hands of agents who were instructed, and were ready and willing to survey off and deliver to the holder of the note, enough for its payment *on presentment;* — it was held, that these facts did not constitute a valid defence; — there should have been a particular designation, and setting out of the lumber, so that the property therein could vest in the creditor.

In such action, *parol* evidence is admissible, to show an agreement of the parties as to the place, where the articles were to be delivered.

THIS was *assumpsit* on the following promissory note, *viz:* "*Sunkhaze, Dec.* 17, 1831. Value received I promise to pay *James W. Wyman*, or order, the sum of seventy dollars, to be paid in lumber, delivered at *Bangor* in the month of *June* next." —

The writ also contained a count for money had and received. Plea, the general issue, accompanied by a brief statement.

It was proved, that at the time the note was given, and afterward, it was agreed by the parties that the note should be paid at *Lambert & Fisher's*, in *Bangor*, though *parol* evidence introduced for this purpose, was objected to by plaintiff's counsel. It further appeared that the defendant had in the hands of *Lambert & Fisher* in *Bangor*, during said month of *June*, a quantity of lumber much more than sufficient to pay said note, from which

they were ready and willing, at any time during said month, to have surveyed off and delivered to the plaintiff, enough to pay the note, if he had requested them so to do — but the note was not presented during said month at *Lambert & Fisher's*, or at any other place. It appears further that much of the plaintiff's lumber was sold in *July* and *August* following, but that enough for the payment of the note remained till *November* following, which, during all that time, *Lambert & Fisher* were ready and willing by the defendant's orders, to survey off and deliver to the plaintiff. But it did not appear, that any part of said lumber had been *separated* or *set apart* to pay the note. Payment of the note in money was demanded in *August*, and a liberal discount proposed, but the defendant declined paying it in money.

*Weston J.* instructed the jury, for the purposes of that trial, that if it was agreed between the parties, at the time the note was executed, that the place of payment should be at *Lambert & Fisher's* in *Bangor*, and that the defendant had at said place sufficient lumber during the month of *June* to pay said note, which his agent would have surveyed off and delivered if demanded, he had done all that he was by law required to do by the terms of the contract.

The jury having returned a verdict for the defendant, the plaintiff's counsel excepted to the ruling and directions aforesaid, and brought the case to this Court.

*Kent*, for the plaintiff, contended that there should have been a specific designation of a portion of the lumber by the defendant, and cited *Aldrich* v. *Albee*, 1 *Greenl.* 120; *Bixby* v. *Whitney*, 5 *Greenl.* 192; *Veazie* v. *Harmony*, 7 *Greenl.* 91; 5 *Taunt.* 575; 1 *Taunt.* 318; 7 *Johns.* 473; 5 *Johns.* 119; 8 *Johns.* 474; 4 *Cowen*, 452; 7 *Con. R.* 110; *Brayton R.* 223; 2 *Kent's Com.* 509.

*Moody*, for the defendant.

We hold that the law upon the point raised has never been distinctly settled. In this State the case approaching nearest to it, is *Veazie* v. *Harmony*, cited for the plaintiff. But that differed materially from this in several particulars. In that case, there was a *plea of tender*. In such cases it is admitted there must be proof of an *actual offer* — but it is otherwise where the plea or

defence is a mere *readiness* to pay. This distinction is fully supported in *Chipman on Cont.* 118. See also 3 *Stark.* 1390. In *Veazie* v. *Harmony*, the note was also payable in corn, wheat or rye — but it did not appear, that the promissor had all three at his granary. In these particulars it differs from the case at bar, and is therefore no authority.

It was not necessary for the defendant to set out and designate the property, in a plea of readiness merely. *Carley* v. *Vance*, 17 *Mass.* 389.

The plaintiff was bound to present his note for payment — there was something to be done on both sides. That, *readiness* would be a good plea, he cited, 6 *Bac. Abr.* 459; 1 *Chit. Pl.* 317; *Robbins* v. *Luce*, 4 *Mass.* 474; 2 *Kent's Com.* 400.

It is no objection to this defence that there was *more than enough* of lumber to pay the note at the time and place agreed on. 3 *Stark.* 1392.

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

The principal question in this cause is, whether the facts relied on by the defendant operated as a tender and are a bar to the action. We would observe in the first place, that we see no error in the ruling of the Judge as to the admission of parol evidence to shew the place of delivery of the lumber, as none is expressed in the note. Both parties are interested in the designation of a place, and there is the same reason for proving it by parol in case of an agreement of the parties, as when it is appointed by the promissee. Indeed, the objection seems to have been waived. On this point we only refer to the case of *Bixby* v. *Whitney*, cited in the argument. The main question before stated, is of much more importance, and requires more attention to principles and authorities, not only for the purpose of a correct determination of this cause, but to settle the law upon the subject, and thus produce uniformity of decision and practice in our courts. The defence is placed on two facts: 1. That at the time the note became due, the defendant had at the place agreed upon, a large quantity of lumber, and that before and after the note was given, he informed the plaintiff that such would be the

fact. The plaintiff did not attend at the time and place agreed on for payment. The general principle is, that he who would avail himself of the benefit of a tender, must do all in his power, and he will then be excused. *Lancanshire* v. *Killingworth*, 1 *Lord Raym.* 687. *Chipman on Specific Contracts*, 211. It is contended by the counsel for the plaintiff that, as he did not attend on the day the note became due, it was his duty to do all in his power towards paying it; that is, that he should have caused a sufficient quantity of the lumber, then at the place, to be set apart and surveyed to and for the use of the plaintiff, and so separated from the residue of the lumber and distinguished, as that it might be taken by the plaintiff, without any danger of mistake; or, in other words, he should have done all those acts which would have *vested* in the plaintiff the *property* of the portion so set apart and appropriated. It is not denied, that there is an essential difference between a tender of *money* and of *cumbersome specific articles of property*. In *Carley* v. *Vance*, 17 *Mass.* 389, it was decided, that where a note *for money* was made payable at the counting room of E. L., the placing of funds in his hands for the purpose of paying the note, with authority given to E. L. by the promissor to pay the note when due, from those funds; and the readiness of E. L. to make payment if the promissee had attended to receive payment, if well pleaded, constituted a good tender, such readiness to pay, continuing. And in the case of *Robbins in error* v. *Luce*, 4 *Mass.* 474, the defendant, by his note, promised to deliver at his house 27 *ash barrels*, on the 20th of *September*, 1804. The defendant pleaded that he was ready at his house at the time the note became due to deliver the barrels; and though there was no averment that the plaintiff was not there, the plea was adjudged good. In this case it does not appear that any particular barrels had been set apart for the plaintiff and separated from others; nor is any such requisite alluded to. Nor is it mentioned as requisite in the above cited case of *Lancanshire* v. *Killingworth*. In the case of *McConnell* v. *Hall*, *Bray. R.* 223, the Court say, when speaking of the tender of the wagon which the defendant promised to deliver to the plaintiff, "proving that he was *able* to perform, would be no evidence of his *intention* to fulfill on that day, he

must make such designation of the article on the day and at the place of payment as will *transfer the property to the promissee*, and enable him to *pursue the property itself*." The case of *Newton* v. *Galbraith*, 5 *Johns.* 119, is similar in principle. *Galbraith* sued *Newton* on notes payable in *produce*, at *Newton's* house. On trial the defendant proved, that on the day the note became due, he had *hay* in his barn and was then *ready* to pay in hay; but no particular quantity was proved. The Court said, the tender proved was insufficient, but they relied upon the uncertainty as to *quantity*. The case of *Barnes* v. *Graham*, 4 *Cowen*, 452, is more direct and explicit. Defendant gave his note for $127, payable in lumber. The defendant offered to prove, that when the note became due, he had at his mill in *Italy*, where both parties lived, a sufficient quantity of lumber of the quality described, in bulk, and not sorted or separated from other lumber at the mill. The decision was against the defendant on two grounds. 1. Because, no place of delivery being expressed in the note, it was the duty of the defendant to seek the plaintiff and request him to appoint some proper place for the delivery of the lumber. 2. And because he never *separated* the property he intended to tender in payment of the note. *Savage C. J.* says, "suppose a fire had happened and consumed all the lumber at the mill the night after the tender, must the payee have lost it to the extent of his demand; how could he know what part to preserve, had he been at the fire?" In *Smith* v. *Loomis*, 7 *Con. R.* 110, a similar decision was had. The original action was founded on a note given by *Loomis*, by which he promised the plaintiff to pay and deliver to him, fifty-one dollars worth of good merchantable bricks at five dollars per thousand. The defendant pleaded, that he had *ready to be delivered* at his brick-yard, (which was the place of delivery,) fifty-one dollars worth of good merchantable bricks in payment of the note, but that the plaintiff did not appear to receive them. *Peters J.* in delivering the opinion of the Court says, "He" (the defendant) "could have designated the bricks intended for the plaintiff and set them apart and thus have paid the debt, *by vesting the property in the plaintiff*; until this was done, the note remained unpaid and the defendant liable to be sued. The presence of the creditor was not

necessary to enable the debtor to fulfil his contract." The Court reversed the judgment of the Court below which, as *Mr. Justice Peters* observes, was governed by the decision in the case of *Robbins* v. *Luce*, before mentioned. It appears also that the case of *Rice* v. *Strong*, 1 *Root*, 55; *Nichols & al.* v. *Whiting*, 1 *Root*, 443, and *Gallup* v. *Coit*, decided at *Norwich*, in 1808, were all decided upon the same principle. In this last case the promise was to pay £20 in rum. The defendant tendered 48 gallons in a hogshead containing 70 gallons. The Court said, the rum must be set apart and designated so that he whose property it becomes by the tender, may bring trover for it. It appearing to be a settled principle of law, that the effect of a legal tender and refusal of specific articles, or of those facts, in the absence of the creditor, which amount to a tender, is to discharge and satisfy the debt by vesting the property tendered in the creditor, the reason of the thing requires that there should be such a separation or designation of the property as that the creditor may *know* his property and *distinguish* it, and be able to assert successfully his right of property against any one who may invade it. 2 *Kent's Com.* 400.

The foregoing examination of the leading authorities respecting the question submitted, has led us to the conclusion, that the defendant did not make a legal tender of the lumber which he promised to deliver; that he designated no property in particular which could vest in the plaintiff; and that notwithstanding every thing which he did, and which has been relied on as a tender, it is evident that the plaintiff could not have taken and appropriated any portion of the lumber at the place agreed upon, without being chargeable as a trespasser. This decision renders it useless to examine the objection to the instruction of the Court in relation to the right of recovery on the money count. According to the agreement of the parties, the verdict must be set aside, the defendant must be called and have judgment against him on the default.

## AVERY *vs.* BUTTERS.

*Secondary evidence* will not be received to prove the *local limits* of a militia company until after proof of inability to produce the *best* evidence thereof, to wit, *the record of the assignment by the Governor and Council.*

THIS was an action of debt, brought by the plaintiff as clerk of a militia company, to recover a penalty alleged to have been incurred by the defendant, by neglecting to attend a company training. It was originally tried before a Justice of the Peace, and brought into this Court by exceptions to his ruling — the exceptions having been sustained, a new trial was ordered in this Court.

The plaintiff, to prove the bounds of the company, offered the captain's commission and much other evidence of a secondary character, which was objected to by the defendant's counsel, and ruled to be inadmissible by *Weston J.* the presiding Judge. Whereupon a nonsuit by consent was entered, which was to stand, or be taken off and a new trial ordered, according to the opinion of the whole Court upon the correctness of the foregoing ruling.

*J. Appleton*, for the plaintiff, contended, that by *Statute, ch.* 567, *sec.* 4, the commission of the captain was made sufficient evidence of the point here proposed to be proved. This statute applies as well to cases existing before, as to those occurring after its passage. *Bacon* v. *Callender*, 6 *Mass.* 303.

The other evidence offered in the case was also sufficient to prove the existence and bounds of the company. 4 *Mass.* 140; 5 *Mass.* 553.

*Kent*, for the defendant, cited *Kirwan* v. *Cockburn*, 5 *Esp.* 233; *Sawtel* v. *Davis*, 5 *Greenl.* 438.

PARRIS J. — It was incumbent on the plaintiff to prove that the defendant was liable to perform military duty, in the company of which the plaintiff claims to be clerk. To do this, he must necessarily shew that the defendant resided within the bounds of that company. The statute of 1832, *chap.* 45, *sect.* 4, provides that the commission of the captain or commanding officer of any company, shall in all actions for the recovery of fines, &c. be deemed sufficient evidence of the *organization* of such company. But the commission cannot afford any proof of the *extent* or *lim-*

*its* of the company. It contains no description of bounds or monuments; and from it nothing can be determined as to the extent of the authority which it purports to confer. That must necessarily be shown by other proof. *Whitmore* v. *Sanborn*, 8 *Greenl.* 310. Suppose a case: — a commission is produced appointing an individual captain of the south company in *Bangor*. Will not the clerk of that company, in prosecuting for a fine, be required to prove the limits of the south company in *Bangor*, and that the person prosecuted resided within those limits, and was liable to enrolment? Most clearly he will. But the captain's commission will not advance him one step in such proof. He must rely upon evidence of a more certain and definite character; and in conformity with general principles, will be required to exhibit the best, which the nature of the case will admit of. And what is that? A copy, properly authenticated, of the record of the doings of the Governor and Council, by which the company was formed and its local limits prescribed. This, according to well established principles, is indispensable, unless it be first shewn that there is no such record to be found. That record is presumed to be in the archives of *Massachusetts*. A copy of it was, no doubt, regularly transmitted through the several grades of division, brigade and regiment, at the time of the organization of the company, and ought now to be on the records and files of each. From the evidence in the case there is reason for believing that it cannot be found except on the original record in *Massachusetts*. No search has been made there; no diligence used to procure a copy from thence, or to ascertain whether there be any original record of the establishment of this company in existence. The presumption is, that an examination in either of the offices of the Secretary or Adjutant General of *Massachusetts*, would, at once, have put at rest this question relative to the bounds of the company. If there be a record, as there probably is, that must and ought to govern. If the record be lost by time or accident, the secondary evidence, which, in this case, is very strong, would be admissible. But however convincing the secondary evidence may be, it cannot be received, it ought not to be heard, unless it be first shown that the record evidence cannot be obtained. The landmarks of the law must be preserved; and

although this is not a case of great magnitude, still the consequence of disturbing a legal principle, so wholesome and well settled as the one we are now applying, might be most disastrous. We have not been referred to any case, neither have we been able to find any, where evidence of an inferior nature, which supposes evidence of a higher nature in existence and which may be had, has been admitted; but on the contrary, the cases are numerous and uniform where such inferior evidence has been excluded until it was shown that the higher evidence could not be obtained. *Sevey's case*, 6 *Greenl.* 118, and *Battles* v. *Holley*, *ibid.* 145, are both corroborative of this principle, as, in each, the inferior evidence was admitted on the ground that the record evidence could not be procured. See also, 1 *Phil. Ev.* 177; 3 *Stark. Ev.* 1163; *Rhind* v. *Wilkinson*, 2 *Taunt.* 237. In *Dillingham* v. *Snow*, 3 *Mass.* 276, where secondary evidence of the existence of a parish had been received, the Court say, "If *better* evidence of the existence of the North Parish, and of the plaintiff's relation to it, *were not to be had*, the proof relied on by the defendants, was legal and sufficient. But it is not necessary to decide conclusively on this part of the case, because in the event of a new trial, the plaintiff may have the benefit of his objection." A new trial was ordered, and the defendants, in order to lay the foundation for secondary evidence of the existence of the Parish, proved by a certificate from the Secretary of the Commonwealth, that no act of incorporation could be found. The Court charged the jury, that the best evidence had been offered, which the nature and circumstances of the case would admit, if no act of incorporation by the Legislature could be found, and that the questions of fact, for them to find, were, whether there was a Parish, and whether the plaintiff was proved to be an inhabitant within the bounds of it. Upon this ruling and charge, *Parsons C. J.* in giving the opinion of the whole Court, says, "It appearing from the regular evidence that *no act of incorporation could be found*, the Judge very properly, in our opinion, permitted the defendants to prove a Parish by reputation." 5 *Mass.* 552. In *Stockbridge* v. *West Stockbridge*, 12 *Mass.* 400, it became material to prove the incorporation of the latter town. The Court say, "records, generally, are to be proved by inspection, or by copies properly

authenticated; but *if there be sufficient proof of the loss or destruction of a record*, much inferior evidence of its contents may be admitted. The act of incorporation is not to be found, nor can any record relating to it be discovered in the Secretary's office. From the facts, however, the presumption is violent that the town has been regularly incorporated, and that the record has been in some way lost or destroyed. *This then being satisfactorily proved*, secondary evidence of the incorporation of the town is clearly admissible by the rules of evidence."

The original record of the establishment of this company is presumed to be in the office of the Secretary of the *Commonwealth of Massachusetts*. The company could not have been legally organized previous to 1820, except under the authority of the Governor and Council of that State. The proceedings of that body, in such cases, are duly recorded by the Secretary, and there is no reason for believing that this record has been lost or destroyed. In addition to this, the Secretary furnishes the Adjutant General with an attested copy of this record, which becomes matter of record in his office, and on which is predicated the general order for carrying the doings of the Governor and Council into effect. Here, then, are two public offices, in each of which the record of the establishment of this company is presumed to be deposited, and neither of which have been examined, nor does it appear that any application has been made to either for an authenticated copy. Under such circumstances, we think the secondary evidence is not admissible.

## STETSON *vs.* VEAZIE.

The mere enjoyment of an easement, being the exercise of a *right*, cannot amount to *a disseizin* of the owner of the land to which the easement is annexed.

Where one having an easement in the land of another bounded upon a river, consisting of a right to land upon the shore and flats with boats, rafts, &c. enclosed the flats with a boom which rested upon them when the tide was out, claiming said shore and flats as his own, it would constitute a disseizin of the true owner; — but such act continuing for *one year* only, connected with the use of the easement *afterward*, could not be regarded as a *continuance of the disseizin* after the boom had been removed.

THIS was a petition for partition of certain flats in *Bangor*, against persons unknown. *Veazie*, the respondent appeared and contested the seizin of the petitioner in a part of the land of which partition was prayed, claiming to be sole seised of that part — and upon a traverse of the seizin of the petitioner as alleged, issue was joined.

It appeared on trial before *Weston J.* that on the 23d of *August*, 1803, one *McGlathery* conveyed by deed, the upland, contiguous to which were the flats in controversy, with "*all the privileges thereunto belonging as well by water as by land.*" Which privilege, it was admitted, was that of using the water and shore for the purpose of landing boats, lumber, &c. *Wilder* held the land till *May*, 1809, when all his rights passed to the defendant by purchase.

To prove that *Wilder* disseised *Stetson* of his interest prior to *July*, 1806, the respondent called said *Wilder*, who testified, that he occupied the land and water in his own right — that he used the shore as a landing as he had occasion, for the deposit of lumber and for other purposes — that he used also the waters next the shore for his rafts, and that in 1804, he had a boom along the whole shore, to secure his lumber, which rested upon the flats, when the tide was out. That he considered he had the whole title there, and that no other person had any interest in said property, believing that such were the legal rights he derived from his deed; but upon being inquired of, said that he had no intention to invade or appropriate to his use, the property of others. He

further testified, that on one occasion while he occupied, in conversing with *Stetson* in relation to his purchase of *McGlathery*, *Stetson* said, that he, *Wilder*, had a legal but not a moral right. *Stetson's* right to partition was admitted, subject to the easement aforesaid in the owner of the adjoining upland, unless it had been lost by the operation of the statute of limitations. It was also admitted, that the petitioner made an entry into the premises in *July*, 1826.

On this evidence the jury found, that *Wilder* disseised *Stetson* of his interest, and upon that ground returned their verdict for the respondent — which the petitioner moved to have set aside and a new trial granted, as against law and evidence.

*Rogers* and *Starrett*, for the petitioner, maintained that there was no sufficient evidence of *a disseizin*, and cited the following authorities: *Pray* v. *Peirce*, 7 *Mass.* 381; *Stearns on Real Actions*, 7; *Poignard* v. *Smith*, 8 *Pick.* 272; *Little* v. *Libbey*, 2 *Greenl.* 242; *Brown* v. *Gay*, 3 *Greenl.* 126; 1 *Salkeld*, 246; 6 *Johns.* 197; 4 *Kent's Com.* 482; 5 *Pick.* 138; *Shumway* v. *Holbrook*, 1 *Pick.* 114; *Barnard* v. *Pope*, 14 *Mass.* 434; 9 *Johns.* 163; 4 *Kent's Com.* 487, 488.

*Allen* and *Abbot*, for the respondent, contended, that the disseizin of the petitioner by *Wilder*, was fully proved. The same possession could not be expected of this property, from the nature of it, as of high lands — it being flats covered with water half the time. The acts of ownership were all that could be expected — he, *Wilder*, could not fence it — nor could he well do more than he did, unless he had covered it with a wharf. The possession was sufficient to give notice to every one of his claim. It commenced in 1804, and therefore in 1826, the plaintiff's right of entry, when he attempted to exercise it, was gone. Of the whole evidence it was the province of the jury to judge, and their verdict ought not to be disturbed. *Propr. Ken. Pur.* v. *Labaree*, 2 *Greenl.* 281; *Boston Mill Corp.* v. *Bulfinch*, 6 *Mass.* 229; *Stearns on Real Actions*, 11; *Spring* v. *Cutts*, 15 *Mass.* 135.

MELLEN C. J. — This is a petition for partition of certain flats in *Bangor*, and the defence before the jury was, that it was not

maintainable, inasmuch as the petitioner was not seised at any time within twenty years next before filing the petition, but that *prior* to *July*, 1806, he was disseised by *Luke Wilder*. It is admitted, though not stated in the report of the evidence, that in *July*, 1826, the petitioner made an entry into said premises; but it is contended that at that time he had no right of entry, having been disseised more than twenty years before that time, and that the disseizin has continued ever since. The jury returned their verdict in favor of the respondent, and the motion before us is, that it may be set aside as against law and evidence. It is admitted that the title to the flats, asserted in the petition, is in the petitioner, unless he has lost it by the operation of the statute of limitations, subject however, to an easement belonging to the *owner* of the adjoining upland, in virtue of which he had the use of the water for the purpose of landing boats, lumber, &c. &c. In *July*, 1806, and prior to that time, *Luke Wilder*, was owner of the adjoining upland. The mere enjoyment of an easement, being the exercise of a *right*, cannot amount to a *disseizin* of the owner of the land to which the easement is annexed; for a disseizin is of itself a *wrong*; nor is it any bar to the maintenance of a writ of entry, by the owner of a piece of land, that the tenant is entitled to an *easement* in it. The title to the *fee* and to the *easement* are not in any manner incompatible.

Most of the acts done by *Wilder*, which are relied on as proof of the alleged disseizin, are not inconsistent with the easement to which he was entitled; such as using the shore, when he had occasion, as a place of landing for his rafts, and other similar purposes; and the enjoyment of such a privilege would give no notice of any disposition to disturb the legal rights of the owner of the flats. Besides, it does not appear that any acts which he did, inconsistent with his easement, except placing the boom along the whole shore, were of an *exclusive* character; whereas the very idea of a disseizin is, that by means of it, all others are excluded by the disseisor, by his *actual* possession or *constructive* possession under a recorded deed. See *Pro. Ken. Purchase* v. *Labaree*, and cases there cited. The act of *Wilder* in placing the boom along the whole shore or flats, seems to have been of a different and more decisive character; and according to some of

the cases cited by the counsel for the respondent, while it remained, we are inclined to consider as amounting to a disseizin: but that was placed there in 1804; and it does not appear by the report of the evidence that it remained there after that year; indeed, it is not contended that it did. Its *legal effect* ceased when it was *discontinued.* We are not to indulge in presumptions in favor of those who found their defence upon *rights* which are contended to have become established, though confessedly originating in wrong. We do not place any particular reliance on the declarations of *Wilder*, that he had no intention to invade or appropriate to his use the property of others; the case does not seem to require it. On view of all the facts in this case, we see no evidence that the petitioner was disseised in 1806; the facts before the jury do not in law constitute a disseizin. It is not a case of contradictory evidence, but a failure of proof on the part of the respondent to establish the defence on which he relies. The result is, that the verdict must be set aside and a new trial granted.

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## PHILLIPS *vs.* FRIEND.

An appeal to this Court from a judgment of the C. C. Pleas, rendered on a statement of facts agreed by the parties, in an action *commenced originally before a Justice of the Peace*, was not sustained by this Court, under the provisions of statute of 1829, *ch.* 444.

THIS action was originally commenced before a Justice of the Peace and carried to the Court of Common Pleas, by appeal. While pending there, the parties agreed on a statement of facts, and judgment being rendered thereon, the defendant appealed to this Court, and the question was whether the appeal was sustainable.

The first section of statute of 1829, *ch.* 444, provides for the right of appeal in certain actions, from the judgment in the C. C. Pleas. The second section is as follows: — "That nothing in this Act shall be construed to deprive any party of his right to a writ of error for any error appearing of record in any action, or

to prevent any party aggrieved by the opinion or judgment of said C. C. Pleas, rendered upon *an issue in law*, or *case stated by the parties*, where it is not agreed that the judgment of said Court shall be final, from appealing therefrom to the Supreme Judicial Court," &c.

*Kent*, for the appellant, contended that it was the intention of the statute that all *law questions* should be brought to this Court, in whatever form they might be presented. This was "a case stated by the parties" — and was substantially "an issue in law" — and therefore falls within the language as well as spirit of the law. The language of the statute "that nothing therein contained should be construed to *prevent* an appeal" is equivalent to an express grant of *the right* to appeal.

*T. P. Chandler*, for the appellee.

Mellen C. J. — The question in this case is, whether an appeal lies to this Court. The action was commenced before a Justice of the Peace, and while the same was pending in the Court of Common Pleas, the parties agreed upon a statement of facts; upon which that Court gave judgment for the plaintiff and from that judgment the defendant has appealed. By the *general* provision of our statute, no appeal lies to this Court from any judgment rendered in the Court of Common Pleas, in any action commenced before a Justice of the Peace, except those removed to the Court of Common Pleas, in consequence of the filing of a plea before a Justice involving the title to real estate. But in the act of 1822, *ch.* 193, it was provided in the 5th section, that in all actions *originally commenced in the Court of Common Pleas*, either party aggrieved may file exceptions to any opinion, direction or judgment of said Court, and being allowed by the Court as correctly stated, the cause may be brought by appeal to this Court for decision. In the 7th section it was provided, that nothing in that act should be construed to deprive any party of his right to a writ of error, or to prevent any party aggrieved by the opinion or judgment of said Court of Common Pleas, rendered upon an issue in law, *or case stated by the parties*, from appealing therefrom to this Court, unless otherwise agreed. The above mentioned section was repealed in 1826, by the 8th section of *ch.*

347. By the act of 1829, *ch.* 444, *sec.* 2, the above mentioned 5th section of the act of 1822, was re-enacted in the same words. We are thus assisted, by a review of these statutes, in our endeavors to ascertain the true construction to be given to the section in question. The act of 1822, had reference merely to the organization of the Court of Common Pleas, its jurisdiction and powers; and its provisions have more immediate relation to those actions which are originated in that Court. When the same section was re-enacted in 1829, we must presume it was intended to have reference to the same subjects and to receive the same construction. We are therefore of opinion, that those "*cases stated by the parties*," mentioned in the second section, are only those *agreed statements* of *facts*, which are made, and those "*issues of law*," which are joined, in actions *originally* commenced in the Court of Common Pleas. In other cases, the mode of proceeding must be by *writ of error*. Accordingly we cannot sustain the appeal. We would add that the phraseology used in the foregoing section, that nothing therein contained should be construed to *prevent* an appeal in the particular cases mentioned, cannot be considered by this Court as *giving the right* to one, against the express provision of the general law on the subject of appeals.

*Appeal dismissed.*

## Blood *vs.* Palmer.

By written contract between A. and B. the former was to furnish the latter, from time to time, with goods to be sold for cash, lumber, country produce, &c. and not otherwise — said goods or the proceeds of them to be held by B. as the property of A. — the goods to be charged to B. on A's books, and all articles received in exchange, credited — the business to be transacted in the name of B. *Held*, that this could not be regarded as *a sale*, and the goods, or the proceeds of them, attachable by B's creditors.

The principle, that a delivery of goods to one to be returned *or* something else in their stead, at the option of the receiver, constitutes *a sale*, does not apply to factors and agents.

Under the foregoing contract, B. having appropriated a portion of the goods to his own use, gave A. a mortgage of his farm to secure the payment for them — and at the same time agreed in writing to carry on and improve the farm, he to receive a reasonable compensation for his services by deducting the amount from the debt due to A. — in which writing it was also stipulated that the produce of the farm should be the property of A. *Held*, that the produce was not liable to attachment at the suit of B's creditors, on the ground of fraud in the transaction.

Replevin for hay, hogs, oars, &c. Plea, property in one *Oren Briggs*, and that they were attached on a writ, *O. Crosby & al.* against him. On trial, it appeared that the hogs and oars had been received by *Briggs* as the produce of a sale of goods which the plaintiff alleged were his, the said *Briggs* acting in said transaction, as agent, merely.

To maintain the action, the plaintiff introduced the following agreement, *viz:* "Memorandum of agreement made and concluded between *Blood & Wells* of *Bangor*, traders, on the one part, and *Oren Briggs* of *Blakesburg*, trader, of the other part. The said *Blood & Wells* agree to furnish from time to time, and in such quantities, as shall be thought expedient by said parties, goods to said *Oren Briggs*, for the purpose of vending to the best advantage in said town of *Blakesburg*. And the said *Briggs* agreed to sell the goods as aforesaid for cash, lumber, country produce, or any other articles of trade, on delivery of the goods, and in no other way, or hold them, or the proceeds realized from them in such articles as are enumerated above, as the property of said *Blood & Wells*, and subject to their order. And it is further agreed that the goods so furnished by said *Blood & Wells* shall be charged by them on their books to said *Oren Briggs*, and

whatever he shall pay from time to time, shall be placed to the credit of his account in their books. Also, that the business transacted as aforesaid by said *Briggs*, shall be done in the name of *Oren Briggs*. In witness whereof we have set our hands and seals this 28th of *November*, *A. D.* 1828.

*Horatio P. Blood*, [L.S.]
*Chas. B. Wells*, [L.S.]
*Oren Briggs*, [L.S.]"

*Blood & Wells* dissolved their copartnership, *September* 1st, 1830, when *Wells* assigned to the plaintiff all his interest in the partnership property.

*Oren Briggs*, on being called, testified that the swine and oars were the proceeds of goods delivered him by *Blood & Wells* under the foregoing agreement — that, the goods received by him of *Blood & Wells* were charged to him on their books, and that he was credited with the net proceeds of lumber, &c. delivered them. That, he kept no account with *Blood & Wells* — took whatever goods he wanted for his family, and made no charge to himself — that in all purchases where notes were given, he gave them in his own name — that he settled with *Blood & Palmer*, in 1829, for goods furnished under this contract, and gave them his note for $789,04 — the whole amount furnished having been $2411,48. That, there was no agreement for any compensation for his services — that his sign was *Oren Briggs, Agent* — and that he was reputed insolvent at that time, and that it was well known to his customers that he was the agent of *Blood & Wells*.

The defendant's counsel requested the Judge to instruct the jury that these facts constituted a sale of the goods, so far as third persons were concerned. But he instructed them, that the creditor on whose suit the chattels in question were taken, being such before these transactions, as far as he was concerned, they gave no false credit to *Briggs*; but that, they would consider how far the above facts were evidence of fraud and collusion between the plaintiff and *Briggs* in reference to his creditors generally.

The hay was claimed by the plaintiff, on the ground that, he owned the land upon which it was cut, and that it was cut by *Briggs* as his agent.

It appeared that on the 15th day of *May*, 1829, *Briggs* con-

veyed to *Blood & Wells* by deed of mortgage, a lot of land in said *Blakesburg*, containing fifty acres, the apparent consideration being $500, but said *Briggs* being in fact indebted to them at that time for goods taken for the use of his family and otherwise, in the sum of $350 only, though still holding their goods, which he continued from time to time to receive.

On the same day *Briggs* gave to *Blood & Wells* the following writing, *viz:* "Whereas, *I, Oren Briggs*, am indebted to "*Blood & Wells* of *Bangor*, in the sum of about $350, and "whereas the said *Blood & Wells* have this day given me per- "mission to occupy and improve a certain piece of land owned "by them in *Blakesburg*, being," &c.; "now therefore, I, the "undersigned, do hereby agree in consideration of the premises "to occupy and improve said fifty acres *for them* and as their "agent, they paying and allowing to me a fair price for the labor "which I shall bestow upon said land out of the aforesaid amount "due from me to them. The said *Blood & Wells* further agree "to allow to said *Briggs* out of said amount a fair market price, "for all seed which he may sow or plant on said fifty acres in "pursuance of this contract; and reserve to themselves liberty "to end this contract at such time as they may think fit. It is "further understood and agreed by both parties that said *Briggs* "is to improve said land in the same manner, and is to have the "same claim and no greater to the produce raised thereon than "he would have if said *Blood & Wells* personally occupied said "land and hired said *Briggs* to work thereon by the day."

*Briggs* testified that, no particular time or price was agreed for his labor — that he had not charged his own labor, or what he had paid in hiring others — that the plaintiff credited him with the hay cut on said farm.

The counsel for the defendant contended that if *Blood & Wells* were the owners of the goods, and the proceeds of the goods, delivered *Briggs* under the contract, that the mortgage deed was *per se* fraudulent and void as to the creditors of *Briggs*. He further insisted, that the agreement of *Blood & Wells*, and the facts testified to by *Briggs* were a legal fraud. But the presiding Judge instructed the jury that these facts were evidence of fraud between *Blood & Wells* and *Briggs* in reference to his

creditors, which they would consider in connexion with other evidence in the case, all of which was not reported.

The hay grew on the lot aforesaid after the dissolution of copartnership between *Blood & Wells*, and the Court ruled, that the contract of 28th of *Nov.* 1828, and the contract of 15th of *May*, 1832, had no continuing validity upon the subsequent occupancy.

The counsel for the defendant insisted that *Briggs* was tenant under *Blood*, and that the crops, attached as *Briggs'* property, were in fact his until delivered to *Blood*, which was not done here. Upon this point the presiding Judge instructed the jury, that, as it did not appear that either party had given notice to the other of any dissatisfaction as to the terms and conditions of the occupancy of *Briggs*, after the dissolution of the partnership between *Blood & Wells*, or that any change therein was claimed or expected by either side, they, the jury, might infer, that, it was understood and expected that *Briggs* would continue to occupy upon the same terms and conditions, as he did before the dissolution.

The jury returned their verdict for the plaintiff, upon which judgment was to be rendered, if the foregoing instructions were correct, otherwise it was to be set aside and a new trial granted.

*J. Appleton*, for the defendant, contended that the facts proved shew *a sale* of the goods — that the transaction contained all the elements of a sale. — But he dwelt more particularly on the circumstance that *Briggs* was to return the goods *or* something else. 14 *Johns.* 167 ; 3 *Mason*, 478 ; *Heard* v. *West*, 7 *Cowen*, 752.

As to the mortgage and contract of *Briggs* for the occupation of the farm, the counsel contended that, the goods were either sold or not: — if *sold*, then they were attachable ; if not sold, then the mortgage of the farm was purely a voluntary conveyance. It could not be regarded as a conveyance made as security for the faithfulness of *Briggs* as agent, because it does not so purport ; and a deed must speak for itself, — be construed by its own terms. The deed being void, the lease of course falls with it.

The mortgage and lease taken together shew a secret trust, and therefore the conveyance was void. 4 *Rand.* 282 ; *Howe* v. *Ward*, 4 *Greenl.* 206 ; *Coburn* v. *Pickering*, 3 *N. H.* 415.

The operation and effect of the lease or contract was, to keep the property locked up, away from the creditors of *Briggs* — it is therefore fraudulent and void. The facts being proved, the question is one of law, whether they constitute fraud or not. *Jackson* v. *Mather*, 7 *Cowen*, 304; *Jennings* v. *Cater*, 2 *Wend.* 405; *Sherwood* v. *Merwick*, 5 *Greenl.* 302.

But if the contract was a valid one, it could subsist no longer than the continuance of the partnership. As tenant at will, the hay belonged to *Briggs*, until a delivery to the plaintiff, and was attachable as his, *Briggs'* property. *Butterfield* v. *Baker*, 5 *Pick.* 522; *Waite, appellant, &c.*, 7 *Pick.* 100; *Bailey* v. *Fillebrown*, 9 *Greenl.* 12.

*McGaw*, for the plaintiffs, cited 2 *Stark. Ev.* 615; *Howe* v. *Ward*, 4 *Greenl.* 195; *Reed* v. *Woodman*, 4 *Greenl.* 400; *Usher* v. *Hazeltine*, 5 *Greenl.* 471; *Brooks* v. *Powers*, 15 *Mass.* 247; *Badlam* v. *Tucker*, 1 *Pick.* 295; *Banorgee* v. *Hovey*, 5 *Mass.* 26.

Weston J. — Had *Briggs* been the original owner of the goods he undertook to sell, and had they been purchased by the plaintiff and his partner and left with *Briggs* to be managed and sold by him, according to the written contract between the parties, the transaction would have afforded very strong evidence of a fraudulent sale. But the goods were not originally his; and the question is not whether there was a fraudulent sale or not, but whether there was any sale to *Briggs*. It was for the plaintiff and his partner to determine, on what conditions they would part with their own goods; and under what circumstances *Briggs* should be permitted to have possession of them. And it was distinctly agreed, that they should continue the owners of them, and if sales were made on their account, which *Briggs* was authorized to do, of whatever was received in exchange. The ownership of the goods and of their proceeds, in all their stages was to remain unchanged; and he was permitted to sell only for ready pay. He thus became their factor or agent; and upon that condition he was suffered to receive the goods. There is nothing fraudulent or collusive in this mode of doing business; and it is of common occurrence. He was, it appears, reputed

insolvent, and they could not with safety have transferred the property upon his credit. It was part of the agreement that he should be charged with the goods, and credited with what he remitted from time to time. In this mode, his fidelity as agent would be ascertained. It cannot be understood from the whole instrument, that he was charged with the goods as purchaser, but as bailee or agent; for he was to receive and hold them in that capacity.

By the contract, the business was to be done in the name of *Briggs*. From his testimony it appears, that the word agent, was appended to his sign over his door; and that it was well known to his customers that he was the agent of the plaintiff and his partner. He further testified, that there was no agreement for any compensation for his services. The Judge, who presided at the trial, was requested by the counsel for the defendant, to instruct the jury, that these facts constituted a sale of the goods, so far as third persons were concerned. The question whether there was fraud and collusion between the plaintiff and *Briggs*, of which these and other facts were relied on as evidence, was left to the jury; but the Judge declined to instruct them, that these facts constituted a sale, or could be treated as such by the creditor represented by the defendant; his debt having accrued prior to the receipt of the goods. And if the transaction was not tainted with fraud, which the jury have negatived, we are satisfied that they were upon this point properly directed. If the business had been conducted in the name of *Briggs*, as by the contract he was permitted to do, and his agency had not been known, the goods might have been held under these circumstances, to make good any false credit thus obtained.

It has been urged, that the facts being settled, whether fraud results, is a question of law. Without discussing the correctness of this position, it may be stated, that by the written contract there was no sale; and whether there was, notwithstanding a sale, resulting from the dealings between the parties, which must be made out affirmatively, depended upon other evidence, the truth and bearing of which was properly left to the jury. Many of the cases, cited for the defendant, presented questions of fraudulent sale, sought to be defeated on that ground. Here an attempt is made to establish as a sale, what does not appear on the face of it, to have been so intended.

In *Marsh* v. *Wickham*, 14 *Johns.* 167, a sale of a quantity of leather was clearly made and intended, but qualified with the privilege of returning such portions of it, as might remain on hand at the time of settlement.

In *Hurd* v. *West*, 7 *Cowen*, 752, it is decided, that where the bailee contracts to return the property bailed, or deliver property of the same kind and quality, or to do the latter only, the letting is not properly a bailment, but operates as a sale, and the right of the bailor is a chose in action only. And this is in accordance with the opinion of *Sir William Jones*. *Jones on Bailments*, 2*d edition*, 102, who says "it may also be proper to mention the distinction between an obligation to restore the *specific* 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*." The receiver, having the option to return the identical goods, or others equivalent, those received become his own, to dispose of at pleasure, in the same manner as if he had borrowed a sum of money, promising to return the same amount. But *this* rule does not apply to factors and agents, who act throughout in behalf of their principals, although they fulfil their duty, if they pay over the price, for which they may have sold goods, instead of returning the goods themselves. The price received belongs to him who owned the goods. It could never be seriously pretended, that if one man employ another to exchange his horse for a yoke of oxen that, in the course of the business, either the one or the other would become the property of the agent. It is otherwise, if a party receives the horse of another, promising to return it, or a yoke of oxen. He receives in his own right, and not as agent. The remedy of the one, and the liability of the other, rests in contract. In the case before us, *Briggs* was to exchange the plaintiff's goods for cash, lumber, and country produce, and that there might be no question about the ownership, it was expressly agreed that the goods, while on hand, and whatever was received in exchange for them, should continue the property of the plaintiff.

It appears from the testimony of *Briggs*, that he took, for the use of his family, such of the goods as he thought proper; and becoming thereby, or in some other way, indebted to the plaintiff and *Wells*, his partner, in the sum of three hundred and fifty dol-

lars, and still holding their goods, which he continued from time to time to receive, he did on the 15th of *May*, 1829, mortgage to them fifty acres of land in *Blakesburg*, to secure five hundred dollars. This, together with the agreement made by *Briggs* with them, in relation to the occupancy of the same land, the counsel for the defendant insisted was fraudulent and void; and we must understand that the Judge was so requested to direct the jury; but he instructed them that the foregoing facts, with other testimony in the case, were evidence of fraud, all of which he submitted to their consideration. We perceive nothing necessarily fraudulent or unlawful in taking the mortgage. It might be wanted for the security of the plaintiff and *Wells*. *Briggs* was already their debtor for two thirds of the amount secured, and they had just reason to apprehend further delinquency. If the mortgage was lawful, they were entitled to the possession and profits; and the agreement for the employment of *Briggs* upon the land, for their benefit, was lawful, if unattended with fraud in fact, upon which the jury have passed. This agreement, which is in writing, and has the same date with the mortgage, is made by *Briggs*, with the plaintiff and *Wells*, his partner. It has no limitation as to time, but the case finds, that the Judge at the trial, was of opinion that it was vacated, by the dissolution of their partnership, in *September*, 1830. By the terms of that dissolution, the plaintiff became the assignee of all the debts due the firm, and of every description of partnership property whatever. Now we do not understand why the dissolution should vacate the contract with *Briggs*, in relation to this land, any more than any other contract made with the firm; and why it was not a subsisting and continuing contract, which might be enforced by the plaintiff, in the name of the firm; at least as long as *Briggs* occupied the land. Regarding the contract as subsisting to that extent, which is well warranted by the evidence, the produce of the farm belonged to the plaintiff, and the verdict upon this point is sustained. But independent of this ground, which is decisive, we think the jury might rightfully draw the inferences, submitted to them by the Judge. It does not appear that *Briggs* was tenant of the land by the plaintiff's consent, or that he was permitted to occupy it in any other capacity, than as a hired man.

*Judgment on the verdict.*

## DRAPER *vs.* *The Inhabitants of* ORONO.

Where the Selectmen of a town, on the application, and *for the benefit* of certain bridge proprietors, laid out a private way — assessed damages to an individual over whose land it was laid — and took a bond of said proprietors conditioned for the payment of said damages, and for the making of said road — and said road was afterwards accepted by the town, at a regular meeting thereof — it was held, that these proceedings gave the individual injured, no right of action against the town to recover the amount of his damages.

Nor, is such right of action given by statutes *ch.* 118, and 399.

THIS was an action of debt brought to recover $100, it being the sum allowed the plaintiff by the Selectmen of *Orono*, as the amount of damages for the location of a town or private way over his land. Plea, the general issue.

The plaintiff, to support his action, introduced the records of the town of *Orono*, from which it appeared, that, on application of the President of the *Oldtown Bridge Corporation*, the Selectmen of *Orono* proceeded to lay out a road over the land of the plaintiff, after due notice, and awarded the sum demanded in this action, "to be paid by the *Oldtown Bridge Corporation*."

It further appeared that a meeting of said inhabitants was duly called and held under a warrant containing the following article, *viz.*: "To see if said town will accept a road laid out by the "Selectmen, leading from the main travelled road to the bridge, "about to be located by the *Oldtown Bridge Corporation*, across "the *Penobscot* river near the dwellinghouse of *James Draper*, "in said *Orono*, as surveyed and returned under the direction "of said Selectmen by *Joseph Treat, Esq.* — for the making "and keeping in repair of which, and the payment of all dam- "ages to any person, by him sustained, by reason of the laying "out of which said Corporation have lodged a bond with us."

Under this article the town voted, "to accept the road laid out," &c. — "to be accepted agreeable to the conditions of the bond filed with the Selectmen."

The plaintiff then introduced the bond referred to in said note, which was in the penal sum of two hundred dollars, conditioned that, "if upon the acceptance of said highway by said town, the said Corporation shall make and keep the same in good repair,

and shall well and truly pay all damages which any owner or owners of the land over which said road passes may legally recover, and save the said town harmless by reason of laying out the road aforesaid in any respect, then this obligation to be void, otherwise to remain in full force and virtue."

Upon this evidence *Whitman C. J.* in the Court Common Pleas, ordered a nonsuit, and the case was brought up to this Court on exceptions.

*Rogers*, for the plaintiff, referred to statute *ch.* 118, *sec.* 9, which provides, " that the Selectmen of the several towns in this State, are anthorised and empowered, to lay out town or private ways for the use of such town only, or for one or more individuals thereof, or proprietors therein." " And if any person or persons, who are owners of the land through which such way shall be laid out, be injured thereby, he or they shall receive such recompense as the party injured and the Selectmen shall agree upon, to be paid by the town or person or persons for whose use the said way is laid out." Also to statute *ch.* 399, *sec.* 6, which provides as follows: " That, in all cases where the damages for the laying out of any town or private way have been finally determined and ascertained, the person or persons entitled to such damages may recover the same as well as all costs for him or them taxed in making inquiry thereof, in an action of debt. Provided, demand for the payment of the same has been made on the treasurer of any town, liable to pay the same, thirty days at least before the suit is brought." And contended, that, by virtue of these provisions, and the proceedings of the town, the action was rightly brought against the defendants instead of the bridge corporation. It was the design of the statute that the person injured should look to the town, and that the latter might indemnify itself by taking a bond or otherwise. The statute never intended to give towns authority to take the property of individuals and turn them over for redress to third persons who may be wholly irresponsible. Hence, in the statute last cited it is said, that in *all* cases where the damages have been ascertained, &c. there should be a demand on the town treasurer before suit brought. Why should the demand be upon a town officer, unless the suit is to be against the town? And if the town is not to be

liable, why are the Selectmen to agree upon the damages? Why not let those agree who are to pay, if the town is not?

But if the statute be construed otherwise, still, it is competent for the town to *agree* to pay. And it is contended, that, the award of the Selectmen, and the taking of the bond from the bridge corporation amount to such an agreement.

Or the assessment of damages by the Selectmen may be considered as an offer, and the bringing of this action an acceptance of it. No precise words or form are necessary to constitute an agreement.

*Kent* and *Starrett*, for the defendants, contended that, the Selectmen had no authority to *assess* the damages. They might have *agreed* with the owner of the land — but in case of disagreement, application should have been made to the Court of Sessions. The town therefore is not bound. *Craige* v. *Mellen*, 6 *Mass.* 7.

If the proceedings of the town give any right of action to the plaintiff, it is against the bridge corporation — such are the terms of the award under which he pretends to claim. In no case of the location of a private way, can a town be held liable for the damages to individuals.

Weston J. delivered the opinion of the Court.

The liability of the town of *Orono* to pay the damages, sought to be recovered in this action, if it exists, must be created by, and depend upon, statute. The way located, by which the damage was occasioned, is what the statute denominates a private way. This is conceded by the counsel for the plaintiff. It was laid out upon the application, and for the use, of the *Oldtown Bridge Corporation* proprietors in said town. The Selectmen are empowered by law, to lay out town or private ways, for the use of such town, or for one or more individuals thereof, or proprietors therein. If the owner or owners of the land, through which such way shall be laid out, be injured thereby, he or they shall receive such recompense, as the party injured and the Selectmen shall agree upon; to be paid by the town, or person or persons, for whose use the said way is laid out.

By the proceedings had in relation to the way in question, it

seems very clearly to have been laid out for the use, not of the town but of the corporation. Upon the latter therefore and not upon the former, the law imposes the liability to pay the damages. And this is indeed in express terms prescribed as a condition, both by the Selectmen in the location, and by the town in the acceptance, of the way. The whole case negatives the position that it was laid out for the use of the town; and unless it was, they are not liable for the damages. The bond taken by the town from the bridge corporation, conditioned among other things, that they would pay these damages, does not create a legal obligation on the part of the town to pay them in the first instance. There is no stipulation to this effect; and no such legal liability arises, or is implied, from these transactions. The bond contained other conditions on the part of the corporation; to make the road and keep it in repair; and thus to fulfil duties, which would otherwise legally fall upon the town. That by which they undertook to pay all damages, which any owner or owners of the land, over which the road passes, may legally recover; and save the town harmless by reason of the laying out of the road in every respect, may be regarded as inserted for greater caution. It provided for such damages, as the owner might legally recover; but it could not have the effect to extend or enlarge his remedy.

It is contended that the town ought to be held answerable, otherwise the party injured might be turned over to an irresponsible individual. The answer to this is, that whether the one or the other is to be held liable, depends by law upon the question, for whose use the way is laid out, and not upon the ability or sufficiency of the one or the other to make good the damages. Besides, there is little reason to believe, that either the Selectmen or the town would subject one party to loss for the accommodation of another, not able to pay a just equivalent. It would be an abuse of power, not to be presumed.

The statute of 1828, requiring a demand of payment in these cases by the party injured, of the Treasurer of any town liable to pay the same, thirty days at least before a suit can be brought, can by no just construction be regarded as extending the liability

of towns; nor is it inconsistent with the obvious meaning and express provisions of the former law.

*Exceptions overruled.*

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## SULLIVAN *vs.* LOWDER *& al.*

In a controversy between two with regard to the true divisional line between contiguous lots, both deriving title from the *Commonwealth of Massachusetts*, the conveyances and acts of the *Commonwealth* by its agents, made *subsequent* to the conveyance to the demandant, were held to be inadmissible as evidence for the tenant.

THIS was a writ of entry for the recovery of certain lands alleged to be in the town of *Dutton*. The demandant shew a conveyance from the *Commonwealth of Massachusetts* to *Henry Jackson*, dated *October* 3*d*, 1797, and derived title from him. The defendants claimed title to the contiguous lot under a deed from the *Commonwealth of Massachusetts* to *Parks & Lowder*, dated *September* 21, 1825, and from the latter to them. The controversy between the parties was as to the true divisional line between their lots. The corner and monument contended for by the defendants, was a *hemlock tree*, while that contended for by the demandant, was a *hard-wood tree*, they being from 130 to 160 rods distant from each other.

Much evidence was introduced by both parties, and among other, the defendant offered a deed from the *Commonwealth of Massachusetts*, by *Salem Town*, to *Joseph Treat*, dated *June* 9, 1806, of one quarter part of the town of *Orono*, by certain boundaries, and describing the same as bounded by said *hemlock tree* as a corner. The demandant objected to this evidence, but *Weston J.* admitted it. The tenant made no claim of title under this deed, it being admitted that, said *Treat* in a short time after he received his deed, surrendered back his title to the *Commonwealth*.

The defendants also offered in evidence a written contract between the *Commonwealth*, by *Lee*, and *Burgess & Sears*, dated

*May* 7, 1819. Also a deed from *Parks & Lowder* to *Peter Johnson*, dated in 1826, both of which were objected to, but admitted. There was evidence in the case introduced by the tenant, tending to show that the demandant or those under whom he claimed, had recognised the *hemlock corner;* and it did not appear that he or they had exercised any acts of ownership over the demanded premises; and the evidence objected to, was received to shew that the *Commonwealth* of *Massachusetts* by its agents, and those claiming under the *Commonwealth*, had claimed and exercised ownership over the land in controversy after the conveyance to the demandant.

If the evidence objected to and admitted, ought not to have been received, then the verdict which was for the tenants was to be set aside and a new trial granted.

*J. Appleton*, for the demandant, cited *Bartlett v. Delprat & al.* 4 *Mass.* 702; *Clark* v. *Waite*, 12 *Mass.* 439; 5 *Johns.* 412; *Stackpole* v. *Arnold*, 11 *Mass.* 27; *Towle & al.* v. *Stevenson*, 1 *Johns. Cas.* 110; *Garwood* v. *Dennis*, 4 *Bin.* 332.

*Rogers*, for the defendants, contended that the conveyances and contract were admissible as the acts of cotemporaneous owners of the adjoining closes. They were acts of ownership and as such were evidence — more or less conclusive, as they were known to the other party. 3 *Atkins*, 576; *Cowp.* 819; 3 *T. R.* 279; 6 *T. R.* 388; 7 *East*, 199.

MELLEN C. J. — The deed of the *Commonwealth of Massachusetts* under which the demandant claims, bears date *Oct.* 3*d*, 1797, and the controversy between the parties is, what is the true place of the east line of the tract conveyed, which now forms the town of *Dutton*. The defendants contend that a certain *hemlock* tree is the true corner bound of the tract. The plaintiff contends that a certain *hard-wood* tree is the true bound. These trees are between 130 and 160 rods distant from each other. The defendants also hold under the *Commonwealth* by a deed dated *Sept.* 21*st*, 1825, a tract of land adjoining the before named tract conveyed to *Jackson*. In order to shew that the plaintiff's action is not maintainable for the land in dispute and that the line which he

contends for is not the true one, the deed of the *Commonwealth* to *Treat*, of *June* 9, 1806 — the contract of *May*, 1819, and the deed of 1826 from *Parks* and *Lowder* to *Johnson*, were offered, objected to, and admitted. The defendants do not claim under either of those deeds, or the said contract. The question is, whether they were legally admitted; or, in other words, were the two former competent evidence, as the *declarations* of the *Commonwealth*, by its agents, or the latter as the *declarations* of *Parks* and *Lowder*? — being declarations made many years after the date of the deed of the *Commonwealth* to *Jackson*, under which the demandant holds. It is an undisputed principle that no declarations of a grantor can be admitted to impair the title which he had previously conveyed, or limit the extent of his grant, or locate the boundaries; for all these things are in derogation of the title and rights he has conveyed. The above documents would not have been offered in evidence, with any other view than to limit the claim of the demandant and defeat the present action. What right could a grantor have thus to interpose? — But it is said that the question in issue is, where is the true divisional line? Be it so. The parties consider it a question of interest and importance to them, and why should the grantor by his declarations or opinions be permitted to influence the decision of the question? It is said that the making of the deed to *Treat*, and the contract with *Burgess* and *Sears* was *an act*, shewing or tending to shew the true position of the divisional line. If it was such, and *agreed* to by the demandant or those under whom he claims, it would be so; and so would any *parol* agreement of the parties, had the admitted documents, which were objected to, never existed. We have no proof before us that ever such assent was given, or such documents kown to the demandant. The proof admitted to shew that the demandant had acknowledged that the true line was the one contended for by the defendant, was properly admitted; but that is a very different species of proof from that which was objected to. Beyond this, there seems to be a stronger objection to the admission of the deed from *Parks* and *Lowder* to *Peter Johnson*. — They are not the persons under whom the demandant claims. What circumstance can give any right to the admission of the declarations or opinions of *Parks* and *Lowder*, as evidence in this

cause against the demandant, more than the declarations or deeds of any other persons? We cannot perceive any principle on which such declarations could be admitted. It is stated that the proof objected to was admitted to show that the *Commmonwealth*, by their agents and those claiming under them, had *claimed* and exercised *ownership* over the land in controversy: and what if they had? It could not affect the title previously granted, or the limits or location of the grant; nor is it any open act of ownership over the land, which in the present case could have any effect; and as to the claims of *Parks* and *Lowder* in 1826, surely the demandant is not to be affected by them. The verdict must be set aside and a new trial granted.

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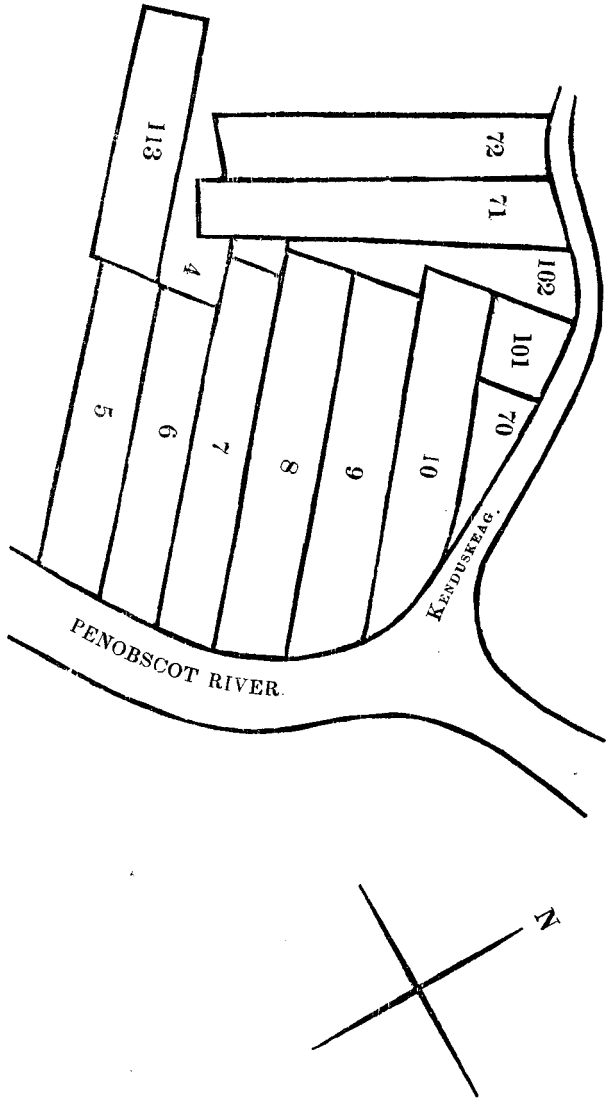
## WYATT *vs.* SAVAGE.

In conveyances by the *Commonwealth of Massachusetts* to A. of lot No. 7 — to B. of lot No. 71 — and to C. of lot No. 102, reference in each case was made to "*Holland's plan.*" Nos. 7 and 71 were parallelograms, and lay at nearly right angles, the end of No. 7 abutting upon No. 102, which was an irregular lot laying betwen 7 and 71 — there being no monuments except at the exterior bounds of Nos. 7 and 71. By mistake of *Holland*, the Surveyor, the length of No. 7, united to the width of 71 and 102, exceeded by 46 rods, on the plan, the true length as ascertained by actual admeasurement on the surface of the earth. *Held*, that this loss by deficiency, must be borne by A. B. & C. in proportion to the *length* of No. 7, and the *width* of Nos. 71 and 102.

THIS was a writ of entry to recover possession of certain lands situated in *Bangor* in this county. Both parties claimed under deeds from the *Commonwealth of Massachusetts;* the demandant, lot No. 71, and the defendant, lot No. 7; both deeds referring to *Holland's plan.* The defendant had in possession, and claimed the right to hold, according to the length of the line of his lot as laid down on said plan, though he thereby extended his lot across one end of No. 71, the lot of the demandant; — lot No. 7, by a mistake of the surveyor, being laid down upon the plan larger than the actual quantity of land would warrant. The plan

of *Holland* referred to, so far as it affected the question raised in this case, is represented by the sketch below.



The description of the demandant's lot, in the deed from the *Commonwealth* to his grantor, *March* 3, 1807, was as follows, *viz:* "A lot of land lying in *Bangor* being numbered 71, as was surveyed by *Park Holland* in the year 1801, bounded as follows, *viz:* Beginning at the southerly bank of *Kenduskeag* stream *at a hemlock*, being the northeasterly corner of lot No. 72 — thence southerly on the line of said lot, 320 rods — thence easterly at right angles, 50 rods — thence northerly to the stream, 320 rods — thence up the stream to the first bounds, containing 100 acres, *agreeably to the return of Park Holland*, made to the aforesaid Agent, and his *certificate* to the said heirs," (the grantees.)

The description of the defendant's lot in the deed of the *Commonwealth* to his grantor, *March* 11, 1802, was as follows, *viz:* "A lot of land lying in *Bangor* being numbered *seven*, as was surveyed by *Park Holland* in the year 1801, and bounded as follows, *viz.:* Beginning at a stake and stones on the bank of the *Penobscot* river, being the corner of lot No. 6 — thence running west 45 degrees north 314 rods — thence north 45 degrees east fifty one rods — thence east 45 degrees south to the bank of the river, thence down said river to the first mentioned bounds, containing 100 acres, *agreeably to the return made by Park Holland* to the aforesaid agent, and his *certificate* to the said *Hammond.*"

There was no proof of any monuments made at the time of the survey. But *Gilmore*, who surveyed and made a plan of the lots by order of Court, in his report stated, that he "began at a *birch tree* standing on the bank of the *Kenduskeag* stream, supposed to be the corner of No. 71 and 72, marked," &c. And it was proved that this tree was near the site and on the line of the *hemlock* mentioned in the deed of the *Commonwealth.*

*Starrett*, for the demandant.

*Abbott*, for the defendant.

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

The title of both the parties depend on deeds, referring to *Holland's* plan and the certificates by him given to the respective grantees of the *Commonwealth:* of course, in ascertaining and deciding upon their rights, we must examine with care the

documents referred to in the deeds. In settling the question, *priority* of title is of no importance. No question could ever have arisen, of the kind before us, if *Holland's* survey and plan had been made with perfect accuracy; but they were not; for when the lots are surveyed, according to the plan and the length and breadth of the lots, as ascertained by the scale on which the plan is made, and marked out on the surface of the earth, there is found to be a deficiency of land, and there is, of necessary consequence, an interference of one lot with another; such is the case in the instance before us. The lots on *Holland's* plan are platted on a scale of two hundred rods to an inch. The lot of the demandant is No. 71, and runs from *Kenduskeag* stream in a *southwest* direction. The lot of the tenant is No. 7, and runs from *Penobscot river* nearly in a *northwest* direction towards lot No. 71; and on the plan, a small irregular lot, No. 102, is laid down, extending southwesterly between the *southeast side* of lot No. 71, and the *northwest end* of lot No. 7, which last named lot is described in the deed to *Hammond* to be *three hundred and fourteen* rods long, though when measured on the plan, according to its scale, it does not appear to be more than *three hundred and twelve* rods. The tenant contends that he has a right to extend his lot as far as his deed would carry him, *viz.*: 314 rods: but the consequence of such extension would be that it would reach over the whole width of lot No. 102, and also cover a part of lot No. 71, and thus the plan of *Holland*, which must be considered as a part of the deed to *Hammond*, would be expressly contradicted and thrown into confusion. How this error in the plan was occasioned we know not; but there is one fact in the case, by which we may arrive at a correct conclusion as to the effect which the error in the plan can have upon the demandant's lot and his right to sustain the present action. The report states that it was proved that the hemlock tree near the *Kenduskeag* stream, mentioned in the report of *Gilmore*, was near the site, and on the line of the hemlock mentioned in the certificate of *Holland* of the bounds of lot No. 71, and making the northwest corner of that lot. Here then we have one of the original monuments, and hence we know precisely the true position of lot No. 71, not only on *the plan*, but on *the earth*: this lot is fifty rods

wide on the plan, and the northwest side line of it is an immovable boundary, which is important in the decision of this cause. The lot No. 102 at the southwest end of it where it adjoins lot No. 7, is twenty-five rods wide. By inspection of the plan and application of the scale to it, the length of lot No. 7 appears to be three hundred and fourteen rods, and lot No. 71, by the same scale, appears to be fifty rods wide; thus representing the distance between the northwest side line of No. 71, and the southeast end of No. 7, *three hundred and eighty-nine rods;* but by the survey and plan of *Gilmore* it is found that the distance between those two bounds is only *three hundred and forty-three rods;* so that there is a deficiency of *forty-six* rods between the northwest side line of the demandant's lot No. 71, and the southeast end of the tenant's lot No. 7, at *Penobscot river.* And according to the principles which this Court has adopted and applied in similar cases, the loss, which through mistake has been occasioned by this deficiency, must be borne by the owners of the lots, laid out on this piece of land, in proportion to the *length* of the tenant's lot No. 7, and the *width* of the lots No. 71 and 102. Dividing the deficiency of forty-six rods upon this principle, which principle is not disputed, the result is, that lot No. 7 must lose in length *thirty-seven* rods and a fraction; lot No. 102 must lose a fraction less than *three rods;* the south east part of lot 71, being *eleven rods* wide, and which belongs to *William Emerson*, must lose of its width *one rod* and a fraction, and the demandant's part, of said lot No. 71, being thirty-nine rods wide, must lose of its width *four rods* and a fraction. Applying the above principle in apportioning the loss occasioned by the before mentioned deficiency, it is distinctly ascertained that a small portion of the defended premises, being about two rods in width at the widest end, belongs to the demandant.

We are of opinion that the ruling of the Judge was correct in *principle*, and that the demandant is entitled to judgment; though since the trial the length of some of the lines has, by consent, been more accurately ascertained, which, of course, varies some of the facts, in the above particular, from those stated in the report and ruling of the Judge.

## DAVLIN *vs.* HILL.

In an action on a promissory note, writings connected therewith by direct reference or necessary implication, were held to be admissible in the defence as parts of the same contract.

As where the defendant by writing agreed to purchase of the plaintiff, for a stipulated price, a certain, piece of land; the price to be paid to J. W.; and afterwards the plaintiff by an instrument on the back of the foregoing agreement, under his hand, reciting that he had given to the defendant a deed of the land therein described, acknowledged that he had on the same day received therefor, two notes of hand "upon a condition that the notes shall be transferred to J. L. as agent for J. W. agreeable to the within agreement"— it was holden that in an action on one of said notes between the original parties that said agreements might be received in evidence to show that the note was given on a *condition precedent*, and thus defeat the action.

ASSUMPSIT on a promissory note for $61,55, dated *April* 8, 1829, given by the defendant to the plaintiff and payable in two years from the first of *June*, 1829.

The defendant introduced in evidence the following agreements, *viz:* "It is agreed by *Aaron Hill* of *Milo*, on the one part, and *John Davlin* of said *Milo*, on the other part that, the said *John* will sell and convey to said *Aaron* by deed the northerly half of a certain lot of land situate in said *Milo*, being lot numbered 72, and containing fifty-two acres and twenty-two rods; the deed of the same to be made and executed to said *Hill*, as soon as said *John*, being now a foreigner, shall be legally qualified, either by himself, or his trustee, to make and execute the same. And said *Hill* on his part agrees to pay said *Davlin*, in full for the same premises, the sum of one hundred and four dollars and twenty-eight cents — one half in three years, and the other half in five years from this date, with interest to be paid annually. *The said sums to go in part for the northern half of a lot of land numbered* 49, *which said Davlin has agreed to purchase of John Welles, Esq.* situate in said *Milo*. Witness our hands this first day of *June*, *A.D.* 1826.

*Aaron Hill,*
*John Davlin.*"

On the back of this agreement was the following: *viz.*

"*Milo, April 8th*, 1829. I have this day given to the within named *Aaron Hill*, a deed of the within mentioned lot of land, and taken two notes for sixty-one dollars and fifty-five cents each, one payable the first of *June* next — the other in two years from that time, *upon a condition* that the said notes shall be transferred to *Joseph Lee*, as agent for *John Welles, Esq.* agreeable to the within agreement. *John Davlin.*

Attest, *Theoph. Sargent.*"

Also the following receipts, *viz:*

"*Milo, June* 1, 1830, Received of *Aaron Hill*, sixty-five dollars and seventy-eight cents, *on account of the purchase money of the within half of a lot of land, No.* 49 — *agreed to sell John Davlin.* *Joseph Lee,*
for *John Welles.*"

"*Milo, June* 1, 1830, Received of *Aaron Hill*, $65,78, in part of the purchase money of the northern half of a lot of land, No. 49, which I agreed to sell *John Davlin*, and in addition to a receipt of this date given for the same sum on the back of *Hill* and *Davlin's* contract. *Joseph Lee*, Agent of
*Arnold F. Welles*, Assignee of
*John Welles.*"

The defendant also introduced the deposition of *Theophilus Sargeant*, who deposed that he was present at the house of *Aaron Hill*, the defendant, at the time he signed the notes aforesaid — and that *Hill* refused to sign them on any other condition, than that *Davlin* should transfer them to *Col. Joseph Lee. Davlin* agreed that they should be so transferred, and *Hill* then signed them.

The foregoing contracts and receipts and the deposition of *Sargent*, were objected to by the plaintiff's counsel, but was admitted.

*Joseph Lee*, being also called by the defendant, testified that, he wrote the note and agreement aforesaid — that, at that time he was agent of *John Welles*, co-proprietor with himself of all the lands in *Milo* — that in *July*, 1829, *John Welles* assigned his interest in said lands to *A. F. Welles*, his son, whose agent he, the defendant, had since been, and not the agent of said *John*

*Welles* — that in *July*, 1829, he settled his accounts with *John Welles* — that the account of *John Welles* and himself, and the accounts of *A. F. Welles* and himself with the settlers were kept in his own name — that, there was an unsettled account of six or eight years standing between himself as agent, and *Hill*, the defendant, in which there was a balance of about $300, in favor of *Hill*, which was for working out on the highways, taxes assessed against the proprietors of *Milo* — that, he did not recollect how the balance was for one or two years last past — that when he gave the receipt for the second note, which was after the commencement of the suit on the first note, *August*, 1831, he took the defendant's note for the amount of the receipt. He further testified that, as agent of *John* and *A. F. Welles*, he was then, and always had been ready at any time since the date of the note, to give a deed of the land referred to in the above agreement, and account for the notes in part payment — that, a few days after the making of the note, and while he was the agent of *John Welles*, he met *Davlin*, and informed him if he would transfer the notes to him, he would allow him for them and give him a deed of the land.

It was agreed that the contract between *Davlin* and *Lee* about the purchase of lot 49, was a verbal one.

The counsel for the plaintiff requested the presiding Judge to instruct the jury that, *Lee* having ceased to be the agent of *John Welles*, the transactions between him and the defendant did not discharge the note in suit, and that the plaintiff was entitled to recover. But the Judge declined so to instruct the jury, and a verdict was returned for the defendant. If the testimony objected to ought not to have been received, or if the instruction requested should have been given, the verdict was to be set aside.

*Rogers*, for the plaintiff, insisted that the agreement of *June* 1, 1826, with the addition thereto of 1829, were inadmissible on the ground of their tendency to contradict the note declared on, and to this point cited *Stackpole* v. *Arnold*, 11 *Mass.* 27; *Small* v. *Quincy*, 4 *Greenl.* 497; *Hanson* v. *Stetson*, 5 *Pick.* 506.

The two receipts of *June* 1, 1830, and the deposition of *Sargent*, were also inadmissible on the ground of their irrelevancy. *Rose* v. *Learned & al.* 14 *Mass.* and cases there cited.

The plaintiff was entitled to recover upon the whole case, — therefore the instructions to the jury were erroneous. That the construction of the contract was with the Court he cited, *Towle* v. *Bigelow*, 8 *Mass.* 384. And as to the principles of construction, *Sumner* v. *Williams*, 8 *Mass.* 204.

The agreement is ambiguous. There is nothing in the contract to show *why* the last clause of the agreement was introduced — there is nothing to connect it with any other contract or transaction — and unexplained, it amounts to nothing, and may be rejected.

The attempt by the defendant, is to show by parol, that a note absolute in its terms was given on a condition, which cannot succeed but in violation of legal principles. But if the evidence be admissible, it cannot be regarded as creating a *condition precedent.*

The indorsement of 1829, was designed by *Davlin* to discharge the contract of 1826, and nothing more.

*J. Appleton*, for the defendant, on the question of the admissibility of the evidence objected to, cited *Hunt* v. *Livermore*, 5 *Pick.* 395; *Burr* v. *Preston*, 8 *T. R.* 484; *Denniston* v. *Bacon*, 10 *Johns.* 198; 9 *Cowen*, 296; 2 *Con. R.* 302; 7 *Con. R.* 399.

To the position that the assignment of the notes was a *condition precedent*, he cited *Taylor* v. *Bullen*, 6 *Cowen*, 625; 7 *Term R.* 710; 6 *Term R.* 200.

Weston J. — The counsel for the plaintiff, in support of his objection to the testimony received at the trial, has cited *Towle* v. *Bigelow*, 10 *Mass.* 379; *Stackpole* v. *Arnold*, 11 *Mass.* 27; *Rose* v. *Learned*, 14 *Mass.* 154; *Small* v. *Quincy*, 4 *Greenl.* 497, and *Hanson* v. *Stetson*, 5 *Pick.* 506. We have examined these cases, and find them authorities in support of the principle, that parol testimony is not admissible to vary or contradict that which is written. It is a rule of law too well settled to be controverted. And if the testimony received is liable to that objection, it ought to have been rejected. But such does not appear to have been its character. The defendant has not been permitted, nor did he offer, to vary the note by parol testimony.

By the written evidence in the case, it appears that in *June*, 1826, the defendant agreed to purchase, for a stipulated price, of the plaintiff, a certain piece of land; the price to be paid to *John Welles*, on account of certain other land, which the plaintiff had agreed to purchase of him. On the eighth of *April*, 1829, the day of the date of the note in suit, the plaintiff, by an instrument on the back of the foregoing agreement, under his hand, reciting that he had given to the defendant a deed of the land therein described, acknowledged that he had on the same day received therefor two notes of hand, describing the one in suit and another, "upon a condition that the said notes shall be transferred to *Joseph Lee*, as agent for *John Welles*, *Esq.* agreeable to the within agreement." It is manifest that the note, the plaintiff's agreement in writing of the same date, and the instrument upon the back of which it was written, and which is referred to therein, were intended to be evidence of the stipulations of the parties, in relation to the transaction. It was not necessary that the contract should be written on one piece of paper. If written on several, connected by direct reference or necessary implication, they form together evidence of what the parties have agreed. Of this character was the contract proved in *Hunt* v. *Livermore*, 5 *Pick.* 395, cited in the argument. The suit was then brought upon a note of hand. The defendant produced two other instruments, a bond and a receipt of the same date, connected with the note by reference. The force of this authority is attempted to be avoided, upon the suggestion, that no objection was taken to the evidence exhibited by the defendant; but it is very manifest that if it had been taken, it would not have been sustained, as the court held that the note, the receipt and the bond should be construed, as if they were parts of one contract.

*Theophilus Sargeant* was a subscribing witness to the instrument, executed by the plaintiff. His deposition, objected to at the trial, is in the case. Correctly understood, it does not vary, but is in affirmance of the evidence in writing. It is true he says the notes were given upon the condition, that they should be transferred to *Joseph Lee*, omitting his capacity as agent, but as he refers to the written agreement, in which his agency is stated, it must be considered also as implied in his deposition. Two re-

ceipts, showing payment of these notes to *Lee*, received in evidence, were also objected to. That which related to the note not in suit, may be considered as irrelevant, but came into the case, not as bearing upon the note in question, but because it was written upon one of the instruments in evidence. If the jury examined it, it had no tendency to affect the case. The other receipt was evidence of payment of the note to the party, appointed to receive it. But as we place the decision of this cause upon other grounds, the effect of this testimony becomes unimportant. The objections taken at the trial to the evidence received, were in our opinion properly overruled.

The note in suit was given upon the condition, that it should be transferred to *Lee*, as the agent of *Welles*. This we must regard as a condition precedent to the right to call upon the defendant for payment. It has not been performed; and the objection is fatal to the action. What circumstances of mutual convenience produced this arrangement, it is not material to inquire. It is sufficient to know, that such was the agreement of the parties, who were competent to settle its terms; and no fraud or imposition is imputed to the defendant. It was more convenient for him to pay the money to *Lee*, with whom he had dealings; and he had a right to stipulate for the privilege of doing so. If the plaintiff has made a bargain with *Lee*, with which he is dissatisfied, or if he has confided to a verbal contract with him, when a written one only could be enforced, these circumstances cannot vary or affect the obligation of the agreement, on the part of the defendant. It results that the Judge was right, in withholding the instruction requested that the plaintiff was entitled to recover.

*Judgment on the verdict.*

## GODDARD *vs.* CUTTS. *et al.*

Where a plaintiff withdrew a suit pending, and wrote a discharge of the notes on which the action was founded on copies thereof; and then a new note was signed and delivered, upon the condition, that, the original notes should be procured and sent to the defendant in two weeks — it was held to be a *condition subsequent*, the non-performance of which, could not be set up as a legal defence, to an action brought on the last note.

Where testimony tending to change the terms of a written contract, has been admitted *without objection*, the Court, on a motion to set aside the verdict as against the weight of evidence, will weigh it according to the rules established by law.

ASSUMPSIT on a promissory note for $151,57, dated *Jan.* 11, 1833. The defence was, that the note was invalid by reason of the failure of a condition upon which alone it was to be binding.

Two witnesses for the defendant, testified, that on the day of the giving of the note, *Gustavus G. Cushman*, the Attorney of the plaintiff, and *Jos. T. Copeland*, an officer, came to *Milo* with two writs against *Cutts*, one of the defendants — that, he heard a conversation between *Cushman* and *Cutts* in relation to the settlement of the demand against *Cutts*, in which it was agreed, that if said *Cutts* would give a note with sureties, payable by the first day of *June* then next, that it should be received in payment of the demands then in suit. That *Cushman* then proceeded to write the note declared on in this action — and that after said note was written, but before it was signed, *Cutts* asked for the original notes, and *Cushman* said he would procure them and send them to him in two weeks. That *Cutts* thereupon declared that he would not sign the notes but upon the condition that the original notes should be procured and sent to him within the time specified, which was agreed to by *Cushman*.

The plaintiff then called *Mr. Cushman*, who testified, that in the early part of *January*, 1833, he received a letter from the plaintiff, enclosing copies of two notes, with instructions to collect the same immediately — that, he proceeded with *Copeland*, the officer, to *Milo*, there he saw *Cutts*, one of the defendants — that being called upon he proposed security, which he, *Cushman*, accepted — that, the note now in suit was written, and after being signed, the defendant asked for the notes for which this had

been given — that, he informed him that the original notes were in *Portland*, that, he would write for them, and should probably receive them in ten or twelve days, and that he should have them on calling at his office, in *Dexter*, which *Cutts* agreed to do — that, he thereupon wrote a discharge and receipt of payment of the original notes upon the copies, and the copies were then delivered to *Cutts*; — and that he told said *Cutts* it would be a discharge of said original notes. That, he communicated his proceedings to the plaintiff, and from him received the original notes, which he has always retained for said *Cutts*.

*Copeland*, on being called, testified in confirmation of *Cushman* as to what took place at *Milo*, at the time of the giving of the note in suit.

The counsel for the defendants requested the Court to instruct the jury that, a failure of the plaintiff to recover in this action, would not deprive him of a right to recover upon the original notes, which instruction was given. If incorrect, then the verdict, which was for the defendants, was to be set aside and a new trial granted, otherwise judgment was to be rendered thereon; unless the plaintiff's motion should prevail, to set aside the verdict as against the weight of evidence.

*Rogers*, for the plaintiff.

*Allen*, and *T. P. Chandler*, for the defendants.

The instructions of the Judge were substantially, that, if this note should not be recovered, the others might. And these instructions, they insisted were correct. The receipt of the copies was no discharge of the notes. If the originals had fallen into other hands than the plaintiff's, they might have been recovered, notwithstanding the indorsement on the copies. If the new note was given on *a condition*, as the jury have found, then the indorsement on the copies could not be a discharge of the originals, unless there had been a fulfilment of that condition.

The motion to set aside the verdict as against the weight of evidence ought not to prevail. The question addressed itself to the discretion of the Court. The case calling for such an exercise of the power of the Court, should be a strong one — a case where the verdict is manifestly and *palpably* against the weight

of evidence — and it was contended that this was not such a case. *Wadleigh* v. *Wadham*, 5 *Mass.* 352; *Waite* v. *McNeal*, 7 *Mass.* 263; *Hall* v. *Hewes*, 10 *Mass.* 39; *Baker* v. *Briggs*, 8 *Pick.* 126; *Griffith* v. *Willing*, 3 *Bin.* 317; *Palmer* v. *Hyde*, 4 *Con. R.* 426.

So, if the amount in controversy be small, the Court will not disturb the verdict. If the Judge's instructions were correct, then there is nothing in controversy here but the bill of costs. 1 *Moody & Rob.* 173; 3 *Vez.* 33; *Douglass* v. *Towzer*, 2 *Wend.* 352.

WESTON J. — The discharge of the old notes, written upon the copies, was evidently founded upon the giving of the new note, which was received in payment. If that never took effect as a subsisting note, or was avoided as inoperative by the defendants, the consideration for the receipt failed. Upon these facts, it would appear that the old notes were not discharged, but might be recovered, as the jury were instructed. A receipt forms an exception to the rule of law, that written testimony cannot be contradicted or varied by parol.

A motion is filed to set aside the verdict, as against the weight of evidence. The consideration of a note of hand is open to inquiry, between the original parties. It may be shown that there was either no consideration, or that it had failed. In the case before us, there was no want of consideration. It consisted in the dissolution of the attachment, and the discharge of the old notes, which was effectual, if the new note was not defeated. It may be shown that an instrument, though it has the form of a promissory note, was never given, or taken and received as such. That it was put into the hands of a third person, to be delivered upon a contingency, which has not taken place. That it was taken from the possession of the maker, without his consent. That although it was suffered to go into the hands of the payee, it was to have no validity, until after the happening of a certain event. In these cases it would appear, that the parties had never come to any agreement, which would give to their contracts a subsisting character. The consent of the parties, necessary to their validity, would be disproved. But when once a written contract is made,

executed and delivered as such, it is not admissible by law to look for any of its terms *aliunde*. They can be proved only by the instrument itself.

It does appear, from the testimony of the witnesses for the defendants, that the suits were withdrawn, a discharge on the copy of the old notes given, and the note in question signed and delivered, upon the condition that the original notes should be procured, and sent to the defendant, *Cutts*, within two weeks; and that to this the attorney of the plaintiffs assented. This is manifestly a condition subsequent, not to be found in the note, but attempted to be attached thereto by parol evidence. This testimony was received without objection; but when called upon to determine whether the verdict is or is not against the weight of evidence, it must be weighed, according to the rules established by law. This testimony, such as it is, is contradicted by two witnesses. If false, it ought not to affect the note; and if true, it was not competent to change its terms, or interpose new conditions. The defence itself is without merits. It appears that the old notes have, since *January*, 1833, been ready for the defendant, *Cutts*; and he has in his hands the evidence of their discharge.

*New trial granted.*

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## Stevens *vs.* Getchell.

Where the name of the plaintiff was indorsed on his writ by the attorney who commenced the action, without adding his own name as attorney, it was held, nevertheless, to be a sufficient indorsement, it being done *in the presence* of the plaintiff, he making no objection thereto, and afterward prosecuting the suit.

An objection to the sufficiency of the indorsement of a writ should be made the first term.

In this case the principal question was upon the sufficiency of the indorsement of the writ, which was thus: "*Jacob Stevens, indorser.*" It was admitted to have been written by *B. F. Emery, Esq.* the attorney who commenced the action — but *in the*

*presence* of said *Stevens*, he making *no objection* thereto. The writ was drawn at the request of *Stevens*, and when made was delivered to him. It was made returnable to the *January* term of the C. C. Pleas — was duly entered — and the action continued. During said *January* term, but after said *Emery* had left town, the defendant procured an order of Court to have the writ placed on file, which was served upon *Emery* during the vacation — and at the succeeding term of the Court, the defendants moved that the writ be quashed for the want of a sufficient indorsement. The Court below ruled that the indorsement was sufficient, whereupon the case was brought up by appeal.

*Gilman*, for the defendant, contended, 1. That an indorsement of the writ, with the plaintiff's name *merely*, should be in the *plaintiff's hand-writing*.

2. That the statute did not recognise a right in the plaintiff to delegate an authority to indorse his name upon the writ, without at the same time imposing an obligation upon the "agent or attorney," to indorse his *name* and *capacity* in addition thereto.

3. That if these positions were correct, the assent of the plaintiff, in the present case, express or implied, could not affect it.

*W. P. Fessenden*, for the plaintiff, contended that the indorsement was sufficient; but if not, that the defendant should have availed himself of the defect the first term by plea in abatement, and cited *Com. Dig.* 777; *Adams & als.* v. *Robinson*, 1 *Pick.* 461; *Powell & al.* v. *Stevenson*, 1 *Johns. Cas.* 110; *Cadwise* v. *Hacker*, 1 *Caines* 539; 12 *Johns.* 300, 365; *Whiting* v. *Hollister*, 2 *Mass.* 102; *Clapp* v. *Balch*, 3 *Greenl.* 316.

MELLEN C. J. — *Stevens*, the plaintiff, is an inhabitant of this State, and as such, when he commenced the present action, he had a legal right to indorse his own writ, without being obliged to furnish the name of any *other* indorser by way of security to the defendant for the costs he might recover. He therefore had authority to write his name himself, or empower another person, as his agent, to write it for him. This is a familiar principle; and we frequently see it reduced to practice. In the case before us the name of the plaintiff was indorsed on the writ by *Mr. Emery*, the attorney who commenced the action, in the presence of *Ste-*

*vens*, he not objecting. As the parties have seen fit to submit the cause to our decision upon certain agreed facts, we must have the power to draw such inferences from them as a jury might legally draw. And we cannot fairly draw any other than that the plaintiff assented to the act of *Emery* in so indorsing his name, more especially when the above fact is viewed in connection with the fact of the prosecution of this suit by *Stevens* after the objection was made and urged against the legality of the indorsement. We consider this as a ratification of the act of *Emery* in signing the name of *Stevens* as indorser, and equivalent to a previous authority. This also is a familiar principle.

It is further contended that the statute does not recognize a right in the plaintiff to authorise another to indorse his name upon his writ, without at the same time imposing an obligation upon the "agent or attorney" to indorse *his own name* and *capacity* in addition thereto. The answer to this is that we have decided otherwise in the case of *Skillings* v. *Boyd*, 1 *Fairf.* 43. The facts were, that the original action was brought on a note payable to A. not negotiable, which had been assigned to B. The action was commenced by B. in the name of A. but for the use of B. and the indorsement was in this form. "B. by his attorney, *William Boyd.*" *Boyd* was sued as indorsor. The Court decided that *he* was not held, but that *B.* was the accountable indorsor, and that *Boyd*, as *his* agent and attorney, wrote *his* name on the back of the writ; and thaf if the *mere name* of B. had been indorsed on the writ by himself, without the addition of the word "attorney," the law would imply that he acted as such; and that *Boyd*, by his authority, having written his name, the legal consequence was the same.

For these reasons we are of opinion that the writ was legally indorsed.

We are also of opinion that if it had not been so indorsed, the objection comes too late. Many decisions have settled this point. We must consider it as waived when not made at the return term. The defendant could then have inspected the writ, had he inclined to call for it. Our opinion being such as we have stated, the motion of the defendant is overruled, and our judgment is that he answer over to the merits of the action.

## WENTWORTH *vs.* WEYMOUTH.

A. gave a note, not negotiable, to B. and was then summoned as his trustee in the process of foreign attachment. A. disclosed, that since the service of the writ, C. had informed him that the note was his property, and that B. acted as his agent in taking it. But C. having exhibited no *evidence* that the note was his, the trustee did not add, that he *believed* said statement to be *true*, or his *belief* that the property was C's, and he was thereupon charged, and afterward satisfied the judgment. In a suit against him on the note, in the name of B., for the benefit of C., it was held, that these facts constituted a good defence.

ASSUMPSIT on a promissory note for forty-five dollars, given by the defendant to the plaintiff, dated *March* 10th, 1832, and payable in *January* then next. The note was not negotiable, and the suit was brought for the benefit of *Francis Hill.* The defendant had tendered and brought into Court, $33,25, insisting that no more was due. — The case was submitted for the opinion of the Court upon the following agreed statement of facts, *viz:* —

In *September*, 1832, *Weymouth* was summoned as trustee of *Wentworth* in a process of foreign attachment, triable before a Justice of the Peace, and on the 20th of *October*, 1832, he made a disclosure before the Justice in the following words, viz: "On the 10th day of *March* last I gave *Wentworth* a note not negotiable for $45, which note is not yet paid — Since the service of the plaintiff's writ on me in this action I have been informed by *Francis Hill*, that the said note is his property — Said *Hill* shew me no assignment in evidence of property in said note — Said *Hill* further said that the note had been in the hands of said *Weymouth* for the purpose of giving up said note and taking a new note for the same which should be negotiable and payable to said *Hill* — My note to *Wentworth* was given for a yoke of oxen purchased by me of said *Weymouth.*"

The oxen for which said note was given, were the property of of said *Hill*—and *Wentworth* in selling them and taking the note, acted as the agent of *Hill*, but did not disclose his agency to *Weymouth.* Immediately after the sale, *Wentworth* delivered the note to *Hill*, who then objected to the manner in which the

note was drawn, and requested *Wentworth* to take it back and exchange it for one payable to *Hill*, and negotiable. *Wentworth* took back the note for the purpose aforesaid, but *Weymouth* being absent several months, he did not get it exchanged but returned it to *Hill*.

In *September*, 1832, after the service of the trustee process, *Hill* informed *Weymouth* of these facts, and requested payment of the note. *Weymouth* refused to pay, until the trustee suit should be settled. *Hill* replied that he, *Weymouth*, might disclose that he, *Hill*, was the owner of the note and always had been. Of these facts, however, the only knowledge that *Weymouth* had, was derived from the declarations of *Hill*. The defendant was adjudged trustee in the Justice suit and has paid on the execution, $20,85.

*J. B. Hill*, for the plaintiff, insisted that the payment made by the defendant as trustee ought not to be allowed him in this suit, because the facts, as stated by him in his disclosure, shew that he was not trustee, and that he therefore should have appealed, whereby the error of the magistrate could have been corrected.

2. Because he did not state in his disclosure all the facts that had been communicated to him by *Hill* — which, if stated, would have procured his discharge as trustee. These facts shew conclusively, that at no instant had *Wentworth* any interest in the oxen or the note, and that both were at all times the property of *Hill* — and that immediately after the sale the note was passed to *Hill*, — and only returned again to *Wentworth* for a special purpose, not in anywise affecting the property in it.

3. Because the defendant omitted to state material facts, and misrepresented as to others — particularly in this, that he stated he gave the note for oxen purchased of *Wentworth*, without adding that they were the property of *Hill* — in stating that the note had been in the hands of *Wentworth*, for the purpose of being exchanged, without adding that it was immediately after it was made and delivered to *Hill* — and in omitting the reason why it was not exchanged. *Cushing's Trustee Process*, 217, 221. *Hawes & al.* v. *Langton & Tr.* 8 *Pick.* 67.

4. He should have stated his belief in the truth of the facts

stated in the disclosure. Otherwise he should have taken no notice of them. *Cushing's Trustee Process*, 216, 221; *Phil. Dig.* 370.

*Hill*, not being a party to that suit, is not concluded by the judgment, from showing that the note was his property. *Andrews* v. *Hening*, 5 *Mass.* 212.

This is not a case of *assignment* where the evidence of transfer and property is to be exhibited to the trustee. And it being a Justice suit in which the owner of the property cannot be summoned in to prove his title — the declaration of the trustee is to be regarded as conclusive of the fact that *Hill* was in truth the owner.

But even on the ground of an *assignment*, the plaintiff contends that he is entitled to recover the whole amount of the note. A chose in action may be assigned by *delivery* merely, which delivery is found in this case. *Jones* v. *Witter*, 13 *Mass.* 304, and 15 *Mass.* 481.

Notice of the assignment may be given at any time before disclosure — and it is not necessary to exhibit the note at the time of giving notice. *Ammidown* v. *Wheelock*, 8 *Pick.* 470; *Cushing's Trustee Process*, 173.

*Allen* and *Appleton*, for the defendant, cited *Wood* v. *Partridge*, 11 *Mass.* 488; *Foster* v. *Sinkler & Tr.* 4 *Mass.* 450; *Clark* v. *Brown*, 14 *Mass.* 271; *Fisk & al.* v. *Weston*, 5 *Greenl.* 411; *Hawes & al.* v. *Langton & Tr.* 8 *Pick.* 71; *Adams & al.* v. *Cordis*, 8 *Pick.* 260; *Dix* v. *Cobb*, 4 *Mass.* 511.

MELLEN C. J. — On the 10th of *March*, 1832, *Weymouth* gave his promissory note to the plaintiff for $45,00, payable in *January*, 1833. The note was not negotiable. In *September*, 1832, *Weymouth* was summoned as trustee of *Wentworth*, and on his disclosure he was adjudged trustee, and has paid the plaintiff in the trustee process, on execution of $20,85 cents, and has tendered to the present plaintiff the balance of the note and costs, being $33,25 cents, which sum has been brought into Court. No question has been made respecting the tender. The only inquiry is, whether the disclosure made by the defendant was a *full*

*one*, and such as he ought to have made, in the circumstances in which he stood; or whether he was adjudged trustee *because he did not disclose certain facts* in relation to the claim of *Francis Hill* to the sum mentioned in the note. In *Herring* v. *Andrews*, 5 *Mass.* 210, *Parsons C. J.* says, "We do not consider that a stranger to the suit in which a trustee is examined, is concluded by the examination from proving that there were other facts within the knowledge of the trustee, which he did not disclose, or that there was collusion between him and the plaintiff or defendant in such suit." If any facts were within the knowledge of the trustee and not disclosed, which, if they had been disclosed would have induced the court to discharge him, he cannot now avail himself of the judgment rendered in the trustee suit, as a defence to this action. We have before us no proof of collusion. The defendant in his disclosure says, "I have been informed by *Francis Hill* that the said note is *his* property" — "But he never shewed me any assignment in *evidence of his property:*" nor does it appear that *Hill* had any interest whatever in the note, except from his own declaration; or at least, that the defendant had any knowledge of the fact, except from his statement a short time prior to the disclosure. In *Hawes & al.* v. *Langton, and trustees* 8, *Pick.* 67, the court observe that "extrinsic facts have sometimes been introduced by the voluntary annexation of the evidence of them to the answers of the trustee, *he declaring upon oath, that he believes them to be true;* but if the trustee should refuse to annex such evidence, we think there is no power in the court to compel him." In the case before us there was no evidence in possession of the trustee which he could annex. It is urged that he should have disclosed all the facts which *Hill* told him prior to the disclosure; namely, that the oxen for which the note was given, belonged to *Hill*, and that *Wentworth* acted as his agent in the sale of them, though he did not disclose his agency, and that immediately after the sale, he delivered the note to *Hill*, who then objected to the manner in which it was drawn and requested to have the note changed for one negotiable and payable to himself. — Supposing all these facts had been disclosed, they are nothing but *Hill's declarations*, not on oath, and the same, thus presented to the Court, would have availed nothing,

unless the defendant had also sworn that he *believed the declarations were true*, according to the case of *Hawes & al.* v. *Langton*, just cited. Now what evidence have we that the defendant *knew* or *believed* those declarations to be true? The case is totally silent on this head. The omission, therefore, of the defendant to disclose certain declarations of *Hill*, unsupported by any kind of evidence, and of the truth of which we have no evidence that the defendant could even *swear to his belief*, cannot in our opinion, defeat the defence predicated on the judgment in the trustee process and the satisfaction of it. The action cannot be maintained, and the plaintiff must be nonsuit.

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## HILL *& al. vs.* HATCH *& al.*

The defendant having been employed under the plaintiffs in selling goods at a store in *Levant*, assigned to them all the book debts of the concern, there being then certain claims outstanding against the concern entitled to off-set, the defendant agreeing to render assistance in the collection. The books and accounts were handed over to F. an attorney, for collection — after which, the books being with the defendant by consent of the attorney, certain accounts on the leger were balanced by the defendant, he making the following entries, "by your account rendered" — "by hay" — "by cash." Afterward the parties submitted their mutual claims to arbitration, and in pursuance of the award, the defendant gave bond with surety, to deliver over all the property, &c. belonging to the concern which had been received by him. In an action on the bond, it was held, that the mere entries on the leger aforesaid, (except the cash) unaccompanied by other evidence or explanation were not sufficient to charge the defendant for the amount — the *presumption* being that they were accounts legally existing against *the concern* and not against *the defendant personally*.

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

PARRIS J. — This is an action of debt on bond to secure the performance of certain stipulations on the part of the defendant, *Hatch*, as particularly described in the condition.

From the case it appears that in 1827, *Hatch* agreed with the plaintiffs to take a quantity of goods to *Levant* village, and, as their agent, to hire a suitable store in their names, and, with all

diligence and faithfulness, attend to the business of said store, under certain restrictions against keeping books, or trading upon credit, or trading or trafficking for his own emolument.

After a lapse of about two years, *Hatch* made an invoice of property belonging to the *Levant* store, which he assigned to the plaintiffs. Among other articles of property assigned, was a list of accounts, amounting to about seven hundred dollars, which appeared on the books to be due and unpaid, at the time of the assignment. The accounts and books were delivered to *Mr. Forbes*, an attorney at law, for collection; and it was agreed that *Hatch* should afford any assistance, in his power, in the collection and settlement of the accounts.

It appeared that, subsequent to this assignment, *Hatch* had the books in his possession, and settled and discharged, of the accounts assigned, two hundred and twenty-six dollars, by entering a credit in the leger, as follows: — "By your account rendered;" "By hay;" — and "By cash," which last item was, however, something less than one dollar.

Subsequent to all these proceedings, the parties submitted all their concerns relative to the *Levant* store, to referees for settlement, who, after having heard the parties, made their award, among other things, that *Hatch* should deliver to *Hill* and *Dexter* all the property of every description belonging to the *Levant* store concern, if he has not already so delivered the same, and give them a bond in the sum of $1500 to hold them harmless from any demands that may be exhibited against them in consequence of *Hatch's* agency at *Levant*.

In pursuance of this award, the bond declared on, in this action, was given, conditioned, among other things, that *Hatch* shall, without delay, deliver to *Hill* and *Dexter*, all the property, of every description belonging to the concern of the *Levant* store, not already delivered, and shall deliver up all other goods, money or property of said *Hill* and *Dexter* by him received. The only breach alleged, by the plaintiffs, was in not delivering up property received by *Hatch*, subsequent to the assignment, in discharge of the accounts assigned; — and as evidence that he had thus received property, they relied upon the entries made by *Hatch* in the leger, as aforesaid.

The jury were instructed that, if it had been proved to their satisfaction that the referees, in adjusting the accounts between the parties, took into consideration that the value of the balances on the leger, which were assigned to the plaintiffs, might be reduced by existing claims in off-set, and thereupon made a deduction on that account in their estimate of the value of these balances, the subsequent extinguishment of a portion of them under the allowance and direction of *Hatch*, arising from the allowance of existing claims in off-set against the joint concern at *Levant*, would constitute no breach of the bond in suit; but it would be otherwise, if *Hatch* had received the money, or had allowed in off-set private demands against himself alone.

We do not perceive that there could be any valid objection to this instruction. — The accounts assigned, whether settled by *Hatch* or the plaintiffs, would be legally liable to such deductions as should be claimed for payments actually made before the assignment and notice thereof to the debtors in account. — These accounts arose, unquestionably, for goods sold and delivered from the store; and whatever payments had been made, whether credited on the books or not, would avail the debtors in defence, at all times, whether they were or were not allowed by *Hatch*.

The counsel for the plaintiffs requested the Judge to instruct the jury that the allowances in the leger being made by *Hatch*, it was to be presumed that he had received the money, or had allowed thereon demands against himself, unless he proved that the facts were otherwise. — But the jury were instructed that in the absence of direct proof, the leger having passed to the plaintiffs or their attorney, and it being proved that *Hatch* and his Clerk had been requested to assist in the settlement of the accounts, and the leger having been furnished to *Hatch* by the attorney of the plaintiffs, it was to be presumed that no off-sets had been allowed, but such as existed against the joint concern at the time of the assessment of those balances to the plaintiffs, unless it was otherwise proved.

The accounts assigned arose from sales made at the *Levant* store, while under the care of *Hatch*. The books, in which the charges were entered, were those of that store, and whatever

payments were made, although not credited, would be equally available to those by whom they were made, as if they had been regularly and duly entered on the books.

The assignment passed to *Hill* and *Dexter* nothing more than what was *legally* due, after making a just settlement between debtor and creditor and striking the balance; and it was important to *Hill* and *Dexter*, that this should be ascertained; that those claiming deductions or allowances for payments made previous to the assignment should be allowed to the extent of their legal claims, but nothing more.

It was to accomplish this object, no doubt, that they required *Hatch's* assistance in the settlement of these accounts. — He was not constituted their attorney to make collections; — that business was entrusted to *Mr. Forbes*. — If *Hatch* did so far transcend his duty, as to receive cash, or allow accounts against himself individually, in off-set to those before assigned, he must be held answerable. We do not think the presumption is against *Hatch* for so much of the credits as are entered under "accounts rendered," or where the entry is for specified articles. It is fairly to be presumed that the account rendered, was an account properly allowable in off-set against the direct charges on the book — an account that grew up previous to the assignment, and which the individual claiming it would be legally entitled to have deducted as well against the assignees as the assignor; — and if the plaintiffs would avoid the force of the presumption they had abundant means to do so. — They had the books, and from them were furnished with ample means of ascertaining the names of witnesses by whose testimony this presumption, if erroneous, might be overcome. From the omission of the plaintiffs to avail themselves of the testimony of those whose accounts were rendered and allowed, it is to be inferred that such testimony would be unavailing.

Moreover, all these transactions of adjusting accounts assigned and making the entries on the leger, were prior to the reference. The subject matter of the accounts assigned, and particularly their value, was considered by the referees, and formed one of the items on which their final decision was predicated. The books were then in the hands of the plaintiffs, or their attorney, under

their control; — they are presumed to have known what progress had been made in the settlement of their business, and yet no claim was then urged by the plaintiffs against *Hatch* for any sums received subsequent to the assignment.

As it was no part of *Hatch's* duty to make collections, but merely to assist in the settlement of the accounts, it is not to be presumed that he transcended his duty in making such settlements, or practised a fraud upon those under whom he was employed. Those who seek to charge him on that ground must furnish proof of the fact. We think the transactions of *Hatch*, as they appear from the leger, may be explained as having been done in pursuance of, and in accordance to the original intention of the parties; and in the absence of all proof to the contrary, it is our duty thus to explain them.

In the argument, this case has been compared to that of an agent's receiving money from his principal. — It is said that when proof is made of the receipt of the money by the agent, the burden of proof is thrown upon him to account for it. No doubt it is so. — But that may be done in various modes. A clerk, whose business it is to vend goods in a store, may, perhaps, be considered in the light of agent for his employer; still, we think it would hardly be contended that he could be required to produce direct proof that he had accounted to his principal for every dollar, which had been taken in payment for goods sold, or for such sums as he may have received and credited on book. The credit would be in his hand writing on the leger, but the presumption would be, from the course of business, that he had accounted as was his duty; and the principal, in order to hold him accountable, would be required to go further than merely to show the entries on the book. And why? The answer is plain; because from the course of business in which the agent is employed, and the manner of transacting it, the presumption arises that the agent or clerk appropriated nothing to his own use; but, as was his duty, seasonably accounted for all by him received. So here, *Hatch* was to perform a particular service; viz, to assist in the settlement of the accounts by him assigned. No one knew so well as himself the situation of those accounts. It was not his duty to receive cash, or allow accounts against himself individu-

ally, in discharge or diminution of the accounts assigned; and we think the books do not necessarily or presumptively shew that he did so.

The presumption is that every man acts honestly, and his acts are to be so construed, unless shown to be otherwise;—and in the case before us, this presumption may well authorise us to consider *Hatch*, in making the entries which he did, as entering what had actually taken place previous to the assignment, and making the books conform to the truth of the case.

When he enters a "bill rendered," it is to be construed as rendered at the date, but of articles delivered before the assignment, and in satisfaction of the account. We do not perceive that this throws any unreasonable burden on *Hill* and *Dexter*. They have the books, and had them at the trial, and the control of them when the hearing took place before the referees. They knew, or might have known, by inspecting these books, who to call as witnesses to rebut the presumption of fairness on the part of *Hatch*; and neglecting to raise this question before the referees in any form, or, at the trial in this Court, to introduce the persons who would instantly establish their position, if true, there seems to be nothing unreasonable in considering that question at rest.

*Rogers*, for the plaintiffs.

*W. P. Fessenden*, for the defendants.

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## *The Inhab. of* Milo *vs. The Inhab. of* Kilmarnock.

A minor, illegitimate and *non compos mentis*, was held to be incapable of gaining a settlement in a town by residing therein *at the time of its incorporation*, under the provisions of *stat.* of 1821, *ch.* 122 — its mother living at the time, and there having been no emancipation.

The words, "all persons," in the statute, must be regarded as applying to those persons who are legally capable of gaining a settlement in their own right in any *other* mode.

This was *assumpsit* for expenses incurred by the plaintiffs in the support of *Lucinda Boobar*, a pauper, and was submitted for

the decision of the Court upon the following agreed statement of facts.

The pauper is the illegitimate and *non compos* child of *Hannah Boobar*, and was born in 1818, in an unincorporated place, where her mother then lived with her father, *Benjamin Boobar*, which place was, in 1824, incorporated into a town called *Kilmarnock*, *Hannah* at that time being 21 years of age. At the time of the birth of the pauper, the mother had no settlement in any incorporated town or plantation in the State. In 1824, immediately after the incorporation of *Kilmarnock*, *Benjamin Boobar*, with his family, including his daughter *Hannah* and the pauper, moved into the town of *Milo*, where they have ever since resided, neither of them receiving supplies as paupers from any town or place until *September*, 1833; since which time the pauper has been supported by the town of *Milo*.

*Kent*, for the plaintiffs, contended that the pauper gained a settlement in *Kilmarnock* under the 5th mode prescribed by *stat.* of 1821, *ch.* 122, which is in these words, "all persons dwelling and having their homes in any unincorporated place, at the time when the same shall be incorporated into a town, shall thereby gain a legal settlement therein." Her being *non compos* at the time does not prevent the operation of the statute in regard to her. *Fairfax* v. *Vassalborough*, cited in *Hallowell* v. *Gardiner*, 1 *Greenl.* 96. Nor her being a minor, *Sidney* v. *Winthrop*, 5 *Greenl.* 123; *Lubec* v. *Eastport*, 3 *Greenl.* 220.

The settlement thus gained has never been lost. For though the pauper, has resided in *Milo* five successive years with her mother, she could not thereby gain a derivative settlement under the mother. *Petersham* v. *Dana*, 12 *Mass.* 429; *Boylston* v. *Princeton*, 13 *Mass.* 381; *Sidney* v. *Winthrop*, 5 *Greenl.* 123.

She could not gain a new settlement in her own right, because being an infant and *non compos* she could not be considered as capable of exercising any volition or will in changing her residence.

*Starret*, for the defendants, cited *Hallowell* v. *Gardiner*, 1 *Greenl.* 96; *Somerset* v. *Dighton*, 12 *Mass.* 382; *Biddeford* v. *Saco*, 7 *Greenl.* 270; *Sidney* v. *Winthrop*, 5 *Greenl.* 123; *Lubec* v. *Eastport*, 3 *Greenl.* 220; *Wright* v. *Wright*, 2 *Mass* 10; *Sumner* v. *Sebec*, 3 *Greenl.* 223.

PARRIS J. — By statute, *chap.* 122, *sect.* 2, it is provided that illegitimate children shall follow and have the settlement of their mother, at the time of their birth. This is the precise language of the statute of *Massachusetts* upon the same subject, in full force at the time of the organization of the government of this state. *Statute* of *Massachusetts* of 1793, *chap.* 34, *sect.* 2. And it has been judiciously settled that the meaning of this provision is, that the settlement which the mother had at the time of the birth of the child shall be the settlement of the child until it shall gain a new settlement by its own act; and that illegitimate children do not follow a new settlement acquired by the mother. *Boylston* v. *Princeton*, 13 *Mass.* 381.

At the time of the birth of *Lucinda Boobar*, the pauper, her mother had no settlement in *Kilmarnock*, and consequently the pauper has no *derivative* settlement there. — Did she gain a settlement in her own right in *Kilmarnock*, in the fifth mode prescribed by our statute, *viz.* by dwelling and having her home there when it was incorporated into a town? — The language of the statute is sufficiently broad to include her, but it is not more general than the subsequent part of the same section, which provides that any person resident in any town at the date of the passage of the *Act*, 21st *March*, 1821, 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 settlement in the town where he then dwells and has his home. This Court has decided in *Biddeford* v. *Saco*, 7 *Greenl.* 270, that an illegitimate child living with its mother and composing part of her family was incapable of gaining a settlement by virtue of this provision. It has also been decided in *Hallowell* v. *Gardiner*, 1 *Greenl.* 93, that by the words *all persons*, in the statute of *Massachusetts* of 1793, *ch.* 34, in the *ninth* mode of gaining a settlement (which is the same language used in our statute prescribing the *fifth* mode of gaining a settlement) are intended only those persons, who are legally capable of gaining a settlement, in their own right, in any *other* mode.

A *legitimate* child, while a minor and during the life of its parents, could gain no settlement *in its own right* by residing in a town at the time of its incorporation, or on the 21st of *March*,

1821, unless such child was emancipated. *Sumner* v. *Sebec*, 3 *Greenl.* 223. Such minor would gain only a derivative settlement through its father, and yet the language of the statute "*all persons* dwelling and having their homes," &c. "*Any person* resident in any town," &c. is sufficiently broad to include them. But an illegitimate child could gain *no derivative* settlement from its mother subsequent to that gained at its birth; and unless emancipated can gain none in its own right. *Biddeford* v. *Saco*, *ut supra*. *Lucinda* was not emancipated. Her mother had the rightful custody of her person; was bound to support and maintain her, and she was, of course, a part of her mother's family. *Wright* v. *Wright*, 2 *Mass.* 110. And the mother was entitled to all her services. *Somerset* v. *Dighton*, 12 *Mass.* 333.

The cases cited by the plaintiffs' counsel, are all cases where the pauper was emancipated. In *Sidney* v. *Winthrop*, 5 *Greenl.* 123, the mother of the pauper was *non compos*, and it is apparent that the court considered the pauper as emancipated. In *Lubec* v. *Eastport*, 3 *Greenl.* 220, the pauper was a minor and both parents were dead, and the court held that to be a case of emancipation. *Fairfax* v. *Vassalborough*, 1 *Greenl.* 96, *note*, was also a case where both parents were dead. In *Wells* v. *Kennebunk*, 8 *Greenl.* 200, the court considered the pauper emancipated. In *Leeds* v. *Freeport*, 1 *Fairf.* 356, both parents of the pauper were dead previous to 1821; he was a minor and had a derivative settlement in *Freeport*, but was dwelling with his master in *New Gloucester*, under indentures, on the 21st *March*, 1821. The Court considered him as emancipated, and that he gained a settlement in his own right; and such would have been the decision in *Sumner* v. *Sebec*, if the proof had shown an emancipation of the pauper.

As to the power of minors to acquire a settlement in their own right, we are not aware of any distinction between legitimate and illegitimate. Unless emancipated, neither have that power, either by dwelling and having their home in an unincorporated place when the same is incorporated into a town, or by having been resident in any town on the 21st *March*, 1821.

It was urged in argument, that it was the intention of the Legislature to give a settlement, in some one of the modes speci-

fied, to all persons residing within the State, or who might be born within it. If such was the intention, it has failed, as this Court has decided that the provisions of the pauper laws do not extend to plantations. *Blakesburg* v. *Jefferson*, 7 *Greenl.* 125; *Means* v. *Blakesburg*, *ibid*, 132.

We repeat what we said in *Biddeford* v. *Saco*, "Where the mother's settlement was, at the time of the birth of *Lucinda*, is an immaterial inquiry in this case," inasmuch as it was not in *Kilmarnock*.

If she had no settlement in the State, then her illegitimate child can have none until it is capable of acquiring one in its own right; and as, in the meantime, the mother will have the care and custody of the child, as natural guardian, there will be no occasion for a separation of the child from the parent. If the mother gain a settlement within the State, she will be entitled to support under the 3d *sect.* of *stat.*, *chap.* 122. If the child do not gain a settlement, it will be entitled to support under the 18th *sect.* of the same statute. We are all of opinion that, upon the facts agreed, the settlement of the pauper was not in *Kilmarnock*.

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## KENT *vs.* WELD.

The 34th rule of this Court allowing a party under certain circumstances to use in evidence office copies of deeds without proof of execution, is applicable only in actions touching the realty. In all other cases, if one would prove a fact by a deed, he must produce the original and prove its execution — or prove its contents, after showing the loss of the original, or its possession by the adverse party.

THIS was an action of *assumpsit* for work and labor according to an account annexed to the writ, the principal items of which, were for working out the defendant's highway taxes in *Plymouth*, five years.

The plaintiff founded his claim upon proof of employment to do the work, by one *Norris*, who, he alleged, was the *agent* of the defendant. And to prove the agency, (*Norris* being dead,) among other evidence he introduced the records of deeds, &c. for *Penobscot* county, and read what purported to be a power of

attorney from *Weld* to *Norris*, dated in 1826—and proved a demand upon the defendant to produce the original. The admission of the record was objected to by the defendant's counsel, but was admitted by *Perham J.* before whom the cause was tried in the Court below. A verdict being returned in favor of the plaintiff, the defendant filed exceptions to the ruling of the Judge, and thereupon brought the case to this Court.

*Kent*, for the defendant, cited *Jackson* v. *Hopkins*, 18 *Johns.* 487; *Pidge* v. *Tyler*, 4 *Mass.* 546; *Worcester* v. *Eaton*, 11 *Mass.* 368; *Dudley* v. *Sumner*, 5 *Mass.* 463; *Cutler* v. *Wise*, 9 *Mass.* 218; *Worcester* v. *Eaton*, 13 *Mass.* 377; *Andrews & ux.* v. *Hooper*, 13 *Mass.* 472; *Torrey* v. *Fuller*, 1 *Mass.* 523; *Pro. Ken. Purchase* v. *Call*, 1 *Mass.* 483; 1 *Stark. Ev.* 368.

*Stetson*, for the plaintiff, contended that the record was admissible under the 34th rule of this Court, by which office copies of deeds may be read in evidence, without proof of their execution "where the party offering the copy is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee, or his heirs." He insisted also, that the demand made on the defendant for the production of the original, laid a sufficient foundation for the introduction of secondary evidence, and cited *Eaton* v. *Campbell*, 7 *Pick.* 10; *Talman* v. *Emerson*, 4 *Pick.* 162.

Parris J. delivered the opinion of the Court.

It was incumbent on the plaintiff, in order to charge the defendant for the labor performed, to prove that it was done under an agreement with him or his agent, or with the knowledge and assent of the defendant, from which a promise might be inferred.

To do this, the plaintiff attempted to show that the labor was performed under the direction of *Norris*, as agent of the defendant, and for whose acts he is answerable; and to prove the agency the copy was admitted as evidence.

It is a general principle of the law of evidence that the party offering to prove a fact by a deed, must produce the original and prove its due execution. This principle is, however, so far relaxed by the 34th rule of this Court as to permit, under certain circumstances, office copies of deeds pertinent to the issue, from the Registry of deeds, to be used, without proof of their execu-

tion, when 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. But this is permitted only in actions touching the realty, and for reasons given in *Woodman* v. *Coolbroth*, 7 *Greenl.* 181. In all other cases, the general principle, above alluded to, remains unimpaired, unless it be shewn that the instrument has been lost by time or accident, or is in the possession of the adverse party, in which cases its production may be dispensed with, but its contents and execution must still be proved. 1 *Stark. Ev.* 354.

As the case at bar is not an "*action touching the realty,*" it does not come within the 34th rule of this court above referred to, and consequently an office copy from the Registry of deeds was not properly admissible as evidence.

In the argument of this case, it was contended for the plaintiff, that the copy was admissible because due diligence had been used to produce the original. In the first place, from his own statement in the argument, no such diligence appears to have been used. Although *Norris* is dead, still, inquiry might be made of his representatives; examination might be had of his papers; and the strong presumption is that, by such diligence, the power would be found, if it ever existed. The notice to the defendant to produce it, does not affect the case, inasmuch as the paper is not traced to him, nor from its nature is it presumed to be in his possession. If such an instrument was ever given by *Weld*, clothing *Norris* with power to perform acts so important as giving deeds to convey real estate, and such power was ever executed by *Norris*, he is the person, who is presumed to have it in possession, for his own justification, and for the security of those who contracted with him in his capacity as agent. 1 *Stark. Ev.* 353.

The presumption is, not that the instrument was returned to *Weld*, either by *Norris* or his representatives, but that it remained with *Norris* until his death, and is now to be found among his papers, in the hands of those who are legally entitled to them. Until, therefore, all reasonable inquiry and diligence has been used, in this direction, to obtain the paper, in vain, secondary evidence of its contents could not be admitted. But this was not

the ground taken at the trial. The copy was offered as an office copy from the Registry, under the 24th rule of the Court of Common Pleas, which is similar to the 34th rule of this Court before referred to. It was admitted under that rule. The case does not disclose that any attempt was made to show the loss of the original, or to prove it in the defendant's possession. What influence the copy had upon the jury we have no means of knowing. There might have been evidence sufficient, without it, to prove the agency of *Norris*; or the question of agency might have been one of doubt, and the copy added as the very weight that turned the scale. Certain it is that the plaintiff deemed it so important as to urge its admission, and he cannot expect us to say it was unimportant in its effect upon the minds of the jury.

The exceptions are sustained. The verdict must be set aside and a new trial be had at the bar of this Court.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WASHINGTON, JUNE TERM, 1834.

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## *The Inhab. of* BARING *vs. The Inhab. of* CALAIS.

In a case of the contested settlement of a pauper, *his declarations* made while in one of the towns litigant, indicative of his intentions as to the place of his residence, were held to be admissible in evidence *as facts*, or parts of the *res gestæ* — though such pauper be living and present in Court at the time of the trial.

THIS was an action of *assumpsit* for supplies furnished for the relief and support of one *Nathan Elliot*, whose settlement was alleged to be in the defendant town.

It appeared, that *Elliot* was a man without family or property. He was present in Court, but was not called by either party. The plaintiffs offered evidence tending to prove the residence of the pauper in *Calais*, during five successive years. To rebut which, the defendants offered, in addition to other evidence, to prove certain declarations of *Elliot*, while at *Baring*, touching his intentions as to residence, made by him within the period of five years to which the testimony of the plaintiffs as to residence, had referred. But on objection thereto, for the purpose of reserving the question, the C. Justice excluded the evidence. If this ruling was correct, judgment was to be entered on the verdict, which was for the plaintiffs; otherwise, it was to be set aside and a new trial granted.

*Allen* and *Chase*, for the defendants, cited *Hatch* v. *Dennis*, 1 *Fairf.* 244; *Tyler* v. *Ulmer*, 12 *Mass.* 163; *Gorham* v. *Can-*

*ton*, 5 *Greenl.* 266; *Milford* v. *Bellingham*, 16 *Mass.* 108; *Aveson* v. *Kennard*, 6 *East*, 188; *Smith* v. *Conner*, 1 *Gall.* 172; *Pool* v. *Bridges*, 4 *Pick.* 378; *Boyden* v. *Moore*, 11 *Pick.* 362; *Rice* v. *Bancroft*, 11 *Pick.* 469; *Allen* v. *Duncan*, 11 *Pick.* 308.

*Hobbs*, for the plaintiffs.

It is said that the pauper's declarations were not admissible, because he was directly interested. If he was interested — then not only his declarations are inadmissible, but he could not be a witness himself. But that he is a competent witness, we cite *Alexander* v. *Mahone*, 11 *Johns.* 185; 4 *Serg. & Raw.* 203.

If the pauper was admissible, then the cases cited to this point on the other side are inapplicable. In those cases, it is true, the declarations were all rejected, but the person making them was directly interested.

But it is said the declarations of the pauper were admissible *as facts*. We admit it would be so, if he had a direct interest in the subject matter of the declarations, but not otherwise. *Braintree* v. *Hingham*, 1 *Pick.* 245; *West Cambridge* v. *Lexington*, 2 *Pick.* 536; *Withington* v. *Burlington*, 4 *Pick.* 174.

It is admitted that the intentions of the pauper at the time are essential in regard to the question of settlement. But then, these should have been proved by the pauper himself, he being alive and present in Court.

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

For reasons best known to the parties, or to their counsel, neither party was disposed to call the pauper upon the stand as a witness, though he was present in court during the trial. The counsel for *Calais*, offered to give in evidence certain declarations made by him at different times and on different occasions, within the period of five years, during which it was alleged by the plaintiffs he had resided and had his home in *Calais*. On objection being made to the admission of proof of these declarations, they were excluded, as not falling within the decisions in *similar* cases; because, in those cases where they had been admitted, the *pauper* or *other person* whose declarations had been admitted, was *dead*. The question before us is, whether the *decease* in the one case, or

the *life* in the other, of the pauper, has any legal influence in the decision of the question respecting the competency of such declarations as evidence. The counsel for the defendants has contended that the pauper has an interest in obtaining a settlement in *Calais*, and that the declarations he made were *against his interest*, and so on that ground were admissible; and he cited *Hatch* v. *Dennis*, 1 *Fairf.* 244.

The answer to this is that, the pauper certainly has no *pecuniary* interest, whatever his wishes may be. He is clearly an admissible witness, and either party may call him. In *one view* of the subject, his declarations are not so good as his testimony; the declarations were made by him when he was not *on oath*, and so were not the best evidence in the power of the party to produce. They are not like the declarations of the assignee of a bond in an action upon the bond, or of a deputy sheriff for whose misfeasance or neglect an action is brought against the sheriff: for in both those cases the person's declarations are against his interest; and neither of them can be admitted as a witness. If the declarations of the pauper in the case under consideration are legally admissible, it must be on some other principle: that is, because they are to be regarded *as facts* and parts of the *res gestæ*. If they are so to be regarded, then the person who testifies that he heard the declarations made by the pauper, is as good a witness to prove them so made, as the pauper, for reasons which will appear on further examination of the subject. The question of domicil depends upon *residence* and *intention*. The *former* is capable of clear and certain proof; the *latter* is to be known or inferred from the language or conduct of the person whose domicil we are endeavoring to ascertain. In most cases the question is of easy solution, and indeed admits of no doubt; as where he is the head of a family residing with them as a stated house keeper; but when a man or a woman is an insulated being, without any family or settled place of abode, and beside, is destitute of property, except clothing, the question of domicil becomes one of no little difficulty. The case before us furnishes a distinct illustration of the truth of the above remarks; for in such a case only, would such expressions as those of the pauper mentioned in the report of the Judge, be deemed of any importance. In

the case of *Gorham* v. *Canton*, cited in the argument, the pauper was of this equivocal character, and the declarations made by him while residing in *Canton*, he being dead at the time of trial, were admitted as unguarded disclosures of his intentions, and for that reason, forming in part the character of his residence in that town. *Starkie, vol.* 1, *page* 48, observes that, "when the nature of a particular fact is questioned, a *contemporary* declaration by the party who does the act, is evidence to *explain* it. Where, for instance, in cases of bankruptcy, the question is, with *what intent* the party absented himself from his house, his *declaration* with the *fact of departure*, is evidence to explain that intention." In *Lord George Gordon's* case it was held that the cry of the mob might be received in evidence as part of the transaction. 21 *Howell's St. Tr.* 542. *Starkie, page* 48, further observes, that in such cases "the declaration does not depend so much on the *credit* due to the party who makes it, as to its *connection* with the circumstances. In the instance of the bankrupt, the declaration which he makes at the time of leaving his house, of his intention in so doing, is *not* founded upon his *character for veracity*, but on the presumption arising from experience, that where a man does an act, *his cotemporary declaration accords with his real intention:* its connection with the act gives the declaration greater importance than that which is due to a mere assertion of a fact by a stranger, or a declaration by the party himself at *another* time. Such evidence does *not rest* upon the *credit due to the declarant*, but might be admissible, even although the declarant in ordinary cases would not be believed *upon his oath.*" This species of evidence is admitted as part of the *res gestæ* on the presumption that it elucidates the facts with which the declarations are connected, having been made without premeditation or artifice, and without a view to the consequences; as such, they are considered as better evidence to prove the object for which they are admitted in evidence: for he who makes such declarations, without any reference to consequences, if he were a competent witness, would frequently be under a temptation to give a false coloring to the circumstance when its tendency was known. "Besides," says *Starkie*, "since in this case the effect of the evidence is *independent of the credit due to the party himself*,

it could be of no use to *confirm* his credit by examination *upon oath*, and his declaration as a *mere fact*, is as capable of being proved by *another* witness as any other fact is." These seem to be the general principles of law touching the point under consideration. Most of the declarations of the pauper which were excluded by the Judge presiding at the trial, were evidently made without any reference to consequences, and must be presumed to have been expressive of his intentions on the subject of his residence and the character of it at the several times when those declarations were made. According to the principles above stated, we are of opinion that the proof of those declarations which was offered and excluded, should have been received and submitted to the consideration of the jury. Whether they would have been considered as of any importance by them, is not a subject for the decision of the Court.

*Verdict set aside and a new trial granted.*

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## STRATTON *vs.* FOSTER.

Where the plaintiff's attorney indorsed the writ with his surname in full, but with the *initials only of his christian name*, it was held to be a sufficient compliance with the provisions of *stat. ch.* 59, *sec.* 8, requiring an indorsement of the "*christian and surname.*"

THE writ in this case was indorsed thus: "*R. K. Porter, Atto'y to Plff.*"—and at the first term a motion was made to quash it for want of a sufficient indorsement. *Parris J.* denied the motion;—whereupon a default was entered, which was to stand, or be taken off and the writ quashed, according to the opinion of the Court upon the question reserved.

MELLEN C. J.—We think the ruling of the Judge was correct. The case of *Clark* v. *Paine*, 11 *Pick.* 66, seems to be in point; and we are satisfied with the reasoning of the Court which led to the conclusion that the indorsement was sufficient.

*Judgment for Plaintiff.*

## Pool & *al. vs.* Tuttle.

A. purchased goods of B., and in payment therefor, transferred to him the note of C., agreeing, that if C. did not pay it on presentment, he, A. would pay the amount himself. *Held*, that after presentment — refusal of C. to pay — and notice to A. with a proffer of the notes, B. might maintain *indebitatus assumpsit* for the price of the goods — and that, he was under no necessity of declaring *specially*.

This was an action of *indebitatus assumpsit* on an account annexed to the writ, for goods sold and delivered, $26 — and a due bill for goods, $4.

On trial before *Perham J.* in the Court of Common Pleas, the plaintiffs offered evidence tending to prove that when they sold the goods charged to the defendant, he let them have a note therefor against one *Rufus K. Lane*, for $30, agreeing that if *Lane* did not pay the note the first time payment was asked of him, he, the defendant, would take back the note and pay them for it, or for the goods. That, they called on *Lane* for payment, but did not obtain it, and that they notified the defendant thereof, and proffered him the note according to the agreement.

On the other hand, the defendant offered evidence tending to prove that the plaintiffs took the note absolutely, and at their own risk, and requested the Judge to instruct the jury, that, if they found the agreement to be as the plaintiffs contended it was, then the calling on *Lane* for payment and his refusal was a condition precedent to the plaintiff's right of recovery; and that this should have been specially averred in the declaration, and proved at the trial.

The Judge instructed the jury, that if they were satisfied from the evidence, that the note was received of the defendant absolutely and unconditionally in payment for the goods and due-bill, this action could not be maintained. But if they were satisfied that the defendant agreed at the time the bargain was made, that if *Lane* did not pay the note the first time payment was demanded, the defendant would take it back and pay the money — that the plaintiffs did call on *Lane* and that he did not pay the note — and that the plaintiffs had notified the defendant of these facts and offered back the note to him, according to the agreement —

in that case, the plaintiffs were entitled to recover in this action the value of the articles charged in the account annexed, with interest thereon from the date of the service of the writ.

The jury returned their verdict for the plaintiffs. To the foregoing ruling the defendant tendered a bill of exceptions, and thereupon brought the case up to this Court.

*Chandler* and *J. Granger*, for the defendant.

If the defendant is holden here, it must be a contract *express* or *implied*, and not on *both*. There can be no implied promise where there is an express one. One excludes the other. *Toussart* v. *Martineau*, 2 *T. R.* 105; *Whiting* v. *Sullivan*, 7 *Mass.* 109; 4 *East*, 147; *Poulter* v. *Ellinbach*, 1 *B. & P.* 397; 2 *Dane's Abr.* 44, 45.

So long as the contract is open and an action can be maintained thereon, the party must resort to it. 1 *Dane's Abr.* 221; *Weston* v. *Downes*, 1 *Doug.* 23; *Towns* v. *Barry*, 1 *T. R.* 134. It cannot be rescinded unless both parties can be left in the same situation as if no such special contract had been made. 4 *Dane's Abr.* 471; *Conner* v. *Henderson*, 15 *Mass.* 319. In this case the special contract was open and unrescinded and should therefore have been set forth in the declaration.

The instructions given were erroneous also because of their uncertainty, leaving it in doubt what the money was to be paid for, whether the note or goods.

*Chase*, for the plaintiff, cited the following authorities: *Sheehy* v. *Mandeville*, 6 *Cranch*, 253; *Felton* v. *Dickerson*, 10 *Mass.* 287; *Baylies* v. *Fettyplace*, 7 *Mass.* 325; *Whipple* v. *Dow*, 2 *Mass.* 415; *Goodrich* v. *Lafflin*, 1 *Pick.* 57; *Keyes* v. *Stone*, 5 *Mass.* 391; 7 *Johns.* 132; 10 *Johns.* 35; *Greenwood* v. *Curtis*, 6 *Mass.* 358; *Emerson* v. *Providence Hat. Man. Co.* 12 *Mass.* 237; 1 *Cowan*, 359; *Gibbs* v. *Bryant*, 1 *Pick.* 118.

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

Under the instructions of the Judge in the Court below, the jury, by returning a verdict in favor of the plaintiffs, have established the following facts, namely, that *Lane's* note was not *absolutely* received by the plaintiffs of the defendant *in payment* for the goods which he purchased of them; but that the defendant,

at the time of the bargain, agreed that if *Lane* should not pay the note the *first time* the plaintiffs should call on him for payment, the defendant would take back the note and pay them for the goods: that they did call on *Lane* for payment, but did not obtain it, and that they notified the defendant of the foregoing facts, and offered back the note to him, according to the agreement. The special agreement which the parties made has thus been performed on the part of the plaintiffs, and denied and violated on the part of the defendant. The counsel, in defence, contends that on these facts the present action cannot be maintained: that instead of declaring upon a general *indebitatus assumpsit*, he should have declared on the *special contract*, with the proper averments of performance on their part, and neglect and violation of the contract on the part of the defendant. It is at once perceived that the objection is one of form, and can have no connection with the real merits of the case: still, if it reposes on sound, legal principles, it is the duty of the Court to give full effect to it. Many cases have been cited by the counsel to establish the principle, that where parties have made an *express* agreement, the law raises no *implied* promise, such as is relied upon in the present case. This doctrine has long been sanctioned as sound and correct; and the learned *Mr. Dane* has criticised some of the more recent decisions in which a different principle has been recognized and established. On the other hand, the counsel for the plaintiffs has cited several cases to sustain the principle, that notwithstanding the special contract, this action is maintainable. Some of them seem to have but little application. Thus in the case of *Gibbs* v. *Bryant*, it appeared that the plaintiff had signed a note for a debt due from the defendant to a third person, and received from the defendant a written promise of indemnity. Having paid the note, he sued the defendant for the amount, declaring on *indebitatus assumpsit* for money paid. The court sustained the action on the ground that the written contract of indemnity was nothing more than the law would imply. So in *Linningdale* v. *Livingston*, the court said the special contract was put an end to. So in *Goodrich* v. *Lafflin*, the parties had made an agreement by which the plaintiff was to furnish for the defendant a number of step stones, who was to pay for them a

certain sum; one half of it in *money* and the other half in *goods*, a part of the goods had been delivered by the defendant, for the value of which he had sued the plaintiff on *indebitatus assumpsit*. *Goodrich* then brought a similar action, declaring in the same manner for the value of the stones: and he was permitted to recover, the Court saying "both parties have departed from the special contract." In *Baylies & al.* v. *Fettyplace*, *Sewall J.* in delivering the opinion of the Court, says, "certainly a general *indebitatus assumpsit* for the balance in controversy might have been maintained by proving a sale of sugars for money, and an agreement that a part of the sum should be paid in debentures, if delivered in four months — supposing the time elapsed and the debentures not delivered when the action was brought." The case of *Keyes* v. *Stone*, is more direct in favor of the plaintiff. *Parsons*, *C. J.*, delivering the opinion of the Court, and alluding to that of the Court below, which they reversed, says, "such was formerly holden to be the law; and the case of *Weaver* v. *Burroughs*, (2 *Str.* 648) before *Lord Raymond*, is an authority to that purpose. "This," *Lord Mansfield* observes, "was the rule when it was the fashion to lay hold of a nonsuit, whenever it could be done." It seems to have been his Lordship's opinion in 1759, when at nisi prius he overruled the case of *Weaver* v. *Burroughs*, as stated in *Keyes* v. *Stone*, "that where the evidence was sufficient to maintain the action on a general count, supposing no special agreement laid, the plaintiff might recover on such general count, although there were a special agreement laid, whether the plaintiff attempted to prove it or not." In the case of *Payne & al.* v. *Bascomb*, the above doctrine in the year 1781, was confirmed and established by the Court of King's Bench. In conformity to this doctrine the case of *Keyes* v. *Stone* was decided, the Chief Justice saying "the modern practice is least expensive to the parties, and most agreeable to the justice of the case: for a judgment on the *general* count would be a bar to an action on the special agreement." See also *Esp. Dig.* 140. The case of *Felton* v. *Dickinson*, is still more explicit and to the point. The Court say, "where there has been a special agreement, the terms of which have been performed, so that nothing remains but a mere duty to pay money, there seems

to be no reason why a *general count* should not be sufficient for the recovery of a sum due." In the case of *Gordon* v. *Martin*, *Fitzg. Rep.* 302, it was decided "that an *indebitatus assumpsit* will not lie upon a special agreement till the terms of it are performed; but when that is done, it raises a duty, for which a general *indebitatus assumpsit* will lie." See also *Miles* v. *Moody*, 3 *Serg. & Rawle*, 211. In *Porter* v. *Talcot*, 1 *Cowan*, 359, the Court say, "there is no doubt that where there has been a special agreement, the terms of which have been performed, so that nothing remains but a mere duty to pay money, the money may be recovered on a count in general *indebitatus assumpsit*, without stating the special agreement. In the case of *Bank of Columbia* v. *Patterson's heirs*, 7 *Cranch*, 299, *Story J.* in delivering the opinion of the Court, says, "we take it to be incontrovertibly settled, that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed: and that it is not in such case necessary to declare on the special contract." See also *Mussen* v. *Price*, 4 *East*, 147; *Cook* v. *Munstor*, 4 *B. & P.* 351; *Clark* v. *Gray*, 6 *East*, 564, 569; 2 *Saund.* 350, *note* 2. This case seems to be precisely like the one under consideration. In the view we have thus taken of the cause and of the ground on which we place our decision, it is at once perceived that the Judge was correct in declining to give the instruction requested, and also in giving those instructions, under which the jury returned their verdict for the plaintiffs. For the reasons given, the motion for a new trial is not sustained, and there must be

*Judgment on the verdict.*

## *The* STATE *vs.* DELESDERNIER.

On *certiorari*, it appearing by the record of the Court of Sessions sent up, that a member of that Court was the owner of certain land over which a County road was located, at the time of the adjudication that such road was of common convenience and necessity, and when the return of the committee was accepted; and it not appearing *by the record*, (he being present) that he did not participate in the proceedings — they were *quashed*.

The procedings were further held to be irregular, *one of the petitioners* having been appointed, and having acted as one of a committee of three to lay out the road.

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

PARRIS J. — This is a *certiorari* requiring the County Commissioners to certify the proceedings of the late Court of Sessions for this county, laying out a road, on the application of the respondent and others, over certain unincorporated townships.

On examining the record it appears that the road, as prayed for, was to pass over part of a township owned by *Joseph Whitney, Esq.*, and that the said *Whitney* was a member of the Court of Sessions, and was present at the adjudication by said Court, that the road was of common convenience and necessity, and at the appointment of a committee to lay out the same.

It also appears that the road was laid *three hundred and twenty-six rods* on said *Whitney's* land, and that he was a member of said Court, and acting as such, when the return of the Committee was accepted; — that objections were offered to its acceptance, which were overruled by the Court. It is said that *Mr. Whitney* took no part in these proceedings, and that the adjudication and acceptance were ordered by the other members of the Court. If so, the record does not speak the truth. We are, however, bound to consider that as evidence of the proceedings in the case; — and, upon such evidence, we have no doubt of the irregularity of the proceedings.

It further appears that *Asa A. Pond* was a petitioner for the road, and that he was appointed and acted as one of the committee of three to lay it out. The statute requires the committee to

be *disinterested* freeholders. Much is confided to the judgment of such a committee. They are to estimate damages, and frequently have discretionary power as to the particular direction and location of the road. They are to have regard, not only to the public convenience, but to the interest and convenience of those over whose land the road is laid. — Private property is to be taken for public use; — individual rights are to be encroached upon; and we cannot believe that it was intended to require of the citizen to submit the question whether his property shall be thus taken, and also the question of damages to the decision of those who have petitioned for the road.

*The proceedings must be quashed.*

*Hobbs*, for the State.

*R. K. Porter*, for the respondents.

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## *The* STATE *vs.* BOIES *& al.*

A note made payable "*to J. I., Land Agent of Maine, or order*," given for property sold belonging to the State, should be sued in the name of the State, and not in the name of the Agent.

ASSUMPSIT on the following promissory note: "For value received we jointly and severally promise *James Irish*, Land Agent of Maine, to pay him or his order one hundred and twenty-five dollars in three years and interest annually.

*James Boies.*
*Ichabod Russell.*"

When *Irish* retired from office, he delivered this note to his successor as the property of the State, and a suit was brought thereon for the benefit of the State. The only question in the case was, whether the action was rightly brought in the name of the State.

*Downes*, for the defendants, distinguished this case from *Irish* v. *Webster & al.* 5 *Greenl.* 171, on the ground that here the

note was *negotiable*—while in that, it was not. It paid the antecedent debt, and not having been negotiated, should have been sued in the name of *Irish*.

*Chase*, for the plaintiff.

MELLEN C. J. — We perceive no distinction in principle between this case and that of *Irish* v. *Webster & al.*, 5 *Greenl.* 171. In that case the note was not negotiable; in the present case it is so. The principal ground is, that the land agent is the servant of the State, making contracts in behalf of the State. A note made payable to such an agent is, in legal contemplation, payable to the State. In the present case the note has never been negotiated to any one by *Irish*, if he had any authority to negotiate it; but has been placed in the hands of his successor for the benefit of the State. The defendant must be called.

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## WOODRUFF, *libellant, vs.* WOODRUFF.

THIS was a libel filed by the wife for divorce from bed and board on the ground of cruelty in the husband. A record of his conviction for an assault and battery upon the wife, was offered in evidence — but it appearing that there was a trial in the case, and that *the wife was a witness*, the record was not admitted.

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## HOYT *vs.* BYRNES.

A tender, made to a *clerk* in the plaintiff's store, for goods purchased at such store, is equivalent to a tender to the principal himself — and is sufficient, though prior thereto, the claim had been lodged with an attorney for suit.

The clerk could also *waive* any objection to the validity of the tender, on the ground of its being in *bank bills* and not in specie.

Such waiver may be by *implication* as well as *express*.

THIS was *indebitatus assumpsit* on an account annexed to the writ to recover $13 — eight of which was for goods sold and de-

livered, and five for "wasting paint." The action was originally brought before a Justice of the Peace, and went up to the Court of Common Pleas by appeal, and was there tried before *Whitman C. J.*

On trial, the plaintiff abandoned his charge of $5, and as to the residue the defendant pleaded a tender, and brought the money into Court.

It appeared in evidence that the defendant's agent tendered the sum of eight dollars, partly in specie, and partly in *current bank bills*, to one *Hamilton*, who was a *clerk* in the plaintiff's store, at that time, clothed with the usual powers of such an agent, and who also sold and delivered these goods to the defendant. But he refused to receive the amount tendered, saying that he had nothing to do with it — that the demand had been left with an attorney for suit — but making no objection on account of part of the money being in bank bills.

The presiding Judge ruled, that this evidence was insufficient to prove a tender, and a verdict was thereupon taken for the plaintiff. The defendant excepted to the ruling, and brought the case up to this Court by writ of error.

*Chase*, for the plaintiff.

1. There was no legal tender. Nothing is a lawful tender but gold and silver. *Hallowell & Augusta Bank* v. *Howard*, 13 *Mass.* 235. In the case of *Young* v. *Adams*, 6 *Mass.* 185, *Sewall J.* says, "Bank bills are only private contracts having no public sanction similar to that which gives operation to the lawful money of the country." They are not goods, effects and credits subject to trustee process. *Perry* v. *Coates & al.* 9 *Mass.* 537. And a note payable in *foreign bills* is not a note payable in *cash*. *Jones* v. *Fales*, 4 *Mass.* 245.

2. The tender was not to the plaintiff or his proper agent. The authority of the clerk to receive the money ceased when the demand was deposited with the attorney. And this was stated by the clerk as one of the reasons for declining to take the money.

3. The clerk could not waive the necessity of a tender of specie. A waiver amounts to a new contract, whereby a right not under the control of the clerk, and not within his general

powers, is given up. His refusal to receive the money puts the defendant upon the necessity of complying with the requisites of the law.

*Chandler*, and *J. Granger*, for the defendant, cited the following authorities: 3 *Stark. Ev.* 1393; 3 *Black. Com.* 304; *Wright* v. *Reed*, 3 *T. R.* 554; 1 *Sel. N. P.* 172, *n.* 5; 5 *Dow & Ry.* 289; *Cole* v. *Blake*, *Peake's Cas.* 179; 5 *Dane's Abr.* 499; 1 *Camp. Cas.* 447; 8 *T. Rep.* 629; *Shed* v. *Brett*, 1 *Pick.* 406; *Wilmot* v. *Smith*, 3 *Carr. & Payne*, 387.

MELLEN C. J. — The only question in this case is, whether the tender made in the original action, in the manner and under the circumstances particularly stated in the exceptions, was a good and sufficient one. *Three* objections have been urged against its validity and effect. In our consideration of them, we shall reduce them to *two*, and reverse the order in which they have been presented.

The first inquiry is, whether the tender was made to a proper person. *Hamilton*, to whom it was made, at the time, and for many months before, had been a clerk in *Hoyt's* store, during which period he was clothed with the usual authority of such an agent. He was empowered to sell the goods of his employer and receive payment for them. According to undisputed principles and general practice, a payment to *Hamilton* of the sum in question would have been good, and a complete bar to any subsequent action against *Byrnes* for the amount. Viewing the question, without reference to any legal decisions, if a *payment* to *Hamilton* would have been an effectual one, for the same reason a tender to him must be good, if properly made: for it is a settled doctrine that a tender and refusal of a sum of money give the debtor the same rights and the same defence, as payment, until a new demand shall have been made. This principle is in accordance with sound common sense and the plain dictates of justice. But we need not rely on our own reasoning; there are many authorities on the subject. "A tender to a person authorised by the creditor to receive money for him, is sufficient." *Roscoe on Evidence*, 262. He cites *Goodland* v. *Blewett*, 1 *Camp.* 477. "Wherever *payment* to an agent would be sufficient,

where he is authorised to receive it, a *tender* to him has the same effect as a tender to the principal." *Payley on Agency*, 219. He cites the above case of *Goodland* v. *Blewett*, and *Maffat* v. *Parsons*, 1 *Marsh*, 55; same case, 5 *Taunt.* 307; 3 *Stark. Ev.* 1394. It has been contended, that as the account against *Byrnes* had been placed in the hands of an attorney, for collection, though no suit had been commenced at the time of the tender, the power to receive payment was thereby revoked; and of course, as *Hamilton* was not authorised to receive payment, a tender to him could not avail the plaintiff in error. In the above case of *Maffat* v. *Parsons*, it was decided that where a clerk, who was in the ordinary habit of receiving money for his master, was directed by him not to receive the sum in question, because he had put the demand into the hands of an attorney, and the clerk, on tender made, refused to receive the money, assigning the reason, it was held to be a good tender to the principal. See also, *Hubbard* v. *Chinny*, 8 *Cowan*, 88; *Briggs* v. *Calverly*, 8 *T. R.* 129. A clerk, being a person to whom a legal tender may be made, he must, from the nature of his employment and the general powers he possesses as to the performance of the business entrusted to his care, have a discretionary authority to receive current bills of a bank in *payment*, as well as gold and silver; for the same reason he could *consent* that a *tender* should be made in such bills, if he thought proper; and if he could assent *expressly* to such a tender in bills, he could assent by *implication*, and by his conduct or declarations *waive* an objection to a tender, merely on account of its being made in bank bills, as well as the principal himself. In the case before us, the clerk made no objections to the tender, being partly in bank bills, but merely because, as he said, he had nothing to do with it. It is not contended that the bank notes in the present case were a legal tender, had they been objected to; but when no objection has been made to a tender on that account, it has been held to be waived and the tender has been held good and sufficient: per *Buller J.* in *Wright* v. *Read*, 3 *T. R.* 554; *Brown* v. *Saul*, 4 *Esp. R.* 267; *Lockyer* v. *Jones*, *Peake* 180; *Roscoe Ev.* 263; *Brown* v. *Dysinger*, 1 *Jacob* 408. Many other cases might be cited, shewing that where an objection to a tender has been made

on a *particular*, *specified* ground, having no connection with the legal formalities of a tender, it amounts to a waiver of objection on account of such informalities. As to the second objection we are clearly of opinion that in the present case, *Hamilton* was authorised to receive payment and give a discharge, had he inclined so to do; and that consequently, he was a person to whom the tender might be legally made; that he was, from his situation and employment, authorised to waive objections to the tender on account of the bills, and place his refusal on other grounds; and that under the circumstances of the case, the tender was legal and sufficient.

*Judgment reversed.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK, JUNE TERM, 1834.

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## ROBINSON *vs.* CUSHING.

One of two or more joint owners of a vessel cannot maintain an action in his name *alone* for freight, though he be also Master.

THIS was *assumpsit* to recover freight for transporting the defendant's goods from *Boston* to a place called *Burnt Coat*, in *Nov.* 1827, in the Schooner *Polly*, of which the defendant was Master, and for the use of said vessel and crew in taking goods from a wreck. The amount charged was $52,25. The general issue was pleaded and joined. It was admitted that one *Levi Robinson* was joint owner of the *Polly*, with the plaintiff, and that he was present when the contract was made with the plaintiff for the services charged.

The plaintiff read the following memorandum in writing signed by the defendant, *viz*: "I agree to settle with *Capt. Daniel Robinson* for the amount of $7,50 for freight and passage, and pay him what balance may be due him when he delivers the remainder of the freight. *Gott's Island, Feb.* 7, 1828." But there was no proof that any goods were freighted after the date of this memorandum.

The defendant's counsel contended that *Levi Robinson*, the other part owner, should have been joined in the action, and requested the Judge so to instruct the jury. But *Perham J.* who presided, instructed them, that *the Master* might maintain the ac-

tion *in his own name* — and a verdict was accordingly returned for the plaintiff. To this ruling and instruction the defendant's counsel excepted and brought the case to this Court.

*Deane*, for the defendant, argued in support of the exceptions, and cited *Abbot on Shipping*, 99, 216; *Emery* v. *Hersey*, 4 *Greenl.* 407; *Wilkins* v. *Reed*, 6 *Greenl.* 220.

*Hathaway*, for the plaintiff, contended that as *Master*, the plaintiff might maintain the action, and cited 1 *Chitty's Pl.* 8.

Mellen C. J. — This case comes before us on exceptions taken to the opinion and instructions of the presiding Judge of the Court of Common Pleas, and the only question is, whether it is competent for the plaintiff to maintain the action in his own name alone, or whether *Levi Robinson* should have been joined as co-plaintiff. It appears by the exceptions, that at the time the services were performed for the defendant and for which compensation is sought in this action, the plaintiff and *Levi Robinson* were joint owners of the schooner *Polly*, and, of course, jointly entitled to her earnings. It is a principle of law, perfectly settled, that *joint* contractors must sue and be sued *jointly*. If all the joint contractors on one side are not sued, the *non-joinder* of those who should have been joined can be taken advantage of *only* by plea in abatement: but if all the joint contractors on the other side are not joined as *plaintiffs*, the defendants may take advantage of such non-joinder upon the *general issue* and defeat the action. In the case before us the defendant relies on this kind of objection; and we must pronounce it a fatal one, unless something peculiar in the facts relieves this case from the operation of the general principle. The plaintiff was master of the schooner, and in that capacity was also agent for the other owner. It appears that *Levi Robinson* was present when the defendant applied to the plaintiff to take his goods from the wreck and to perform the services with the vessel and crew. That circumstance is of no importance: nor do we perceive that the memorandum signed by the defendant, thereby agreeing to settle with the plaintiff for the amount of seven dollars and fifty cents for freight and passage, has any effect upon the question of joinder. The plaintiff represented and acted for both owners; and the

contract, in legal contemplation was made with both; *Abbot on Shipping*, 92; and both should have been joined as plaintiffs. Accordingly, the exceptions are sustained and the verdict set aside. A new trial can be of no use, and judgment must be entered in favor of the defendant for his costs.

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## MADDOCKS *vs.* JELLISON.

In an action by one claiming under A. to recover 100 acres of land of B., the title and claim of the latter was holden not to be affected by a prior judgment against him for the recovery of dower in the premises, by the widow of A., except to the extent of her dower.

One holding an estate in dower under the widow, cannot, after the termination of the estate, set up a claim for "betterments" against the reversioner.

THIS was a writ of entry in which the demandant claimed twelve undivided fourteenth parts of a lot of land lying on *Union river* — and was submitted for the opinion of the Court upon the following agreed statement of facts: —

The demandant claimed under his father, *Caleb Maddocks* — and the tenant under the heirs of *Benjamin Milliken*. *Maddocks*, the father, entered upon a lot of land containing one hundred acres, including the demanded premises, in the spring of the year 1785. In *September* following, he built a house thereon, and continued in possession, cutting the wood and timber on all parts of it, occupying and improving it as his own, until he conveyed it to the demandant, *September* 25, 1822, by deed, recorded *July*, 1824. — Such occupation, however, being subject to the dower of *Phebe Milliken*, widow of *Benjamin Milliken*, and to the right of *John Jellison* and wife, under a judgment for one undivided fifteenth part.

After the entry of *Caleb Maddocks*, in 1785, he commenced clearing and fencing; and as early as 1793, he had one half of the whole lot cleared and surrounded by fence, including that part now demanded — which fences have been kept up to the present time.

As early as 1773, one *James Smith* took up the lot in question, and occupied it until *April 24th*, 1776, clearing and enclosing eight or ten acres, and erecting buildings thereon, when he gave a deed to *Milliken*, releasing all his right to the 100 acres, which was not recorded until 1807. After he left it, one *Josiah Garland*, who lived on an adjoining lot, occupied and improved it, and as he said at the time, at the request of *Benjamin Milliken* — and as *Milliken* also said, in payment of a sum due from *Milliken* to *Garland*, for labor. *Garland* pastured his sheep on the lot, and kept up the fences round four or five acres, and otherwise improved it, until *Caleb Maddocks*, the demandant's grantor, entered upon *Garland* and drove him off.

*Milliken* never occupied the land himself, but lived on an adjoining lot — nor did any person occupy under him, except *Garland*.

In 1805, after *Milliken's* decease, *Phebe Milliken*, his widow, commenced her action against *Caleb Maddocks*, to recover her dower, and in *June*, 1809, had judgment therefor, and the lot now in controversy, parcel of the 100 acres, was assigned to her. The tenant entered upon it under a lease from *Phebe Milliken*, and has continued to occupy until the present time, refusing to yield the possession to the demandant, though the widow died in 1824.

It was agreed that *John Jellison*, the father of the tenant, and the wife of said *John Jellison*, who was a daughter of *Benjamin Milliken*, recovered judgment against *Caleb Maddocks*, for one undivided fifteenth part, and entered thereon under his writ of execution, *August*, 1815.

The tenant further relied upon conveyances from several of the heirs of *Benjamin Milliken*, made between *September*, 1812, and *May*, 1830. And it was agreed that the betterments made by the tenant, for which he set up a claim in case of the plaintiff's recovery, were of the value of $350 — and that the value of the land, in a state of nature, was $3 per acre.

*Abbot* and *Wood*, for the demandant, cited *Co. Litt.* 142; 2 *Black. Com.* 175; 4 *Bac. Abr. tit. Reversion and Remainder; Proprietors Kennebec Purchase* v. *Call*, 1 *Mass.* 483; *Hathorne* v. *Haines*, 1 *Greenl.* 288.

*Deane* and *Hathaway*, for the tentant, contended that the elder and better title was in *Milliken*. The widow was in of her husband's title. She acquired no new right — but her dower was a continuation of her husband's seizin. *Portland* v. *Windham*, 4 *Mass.* 384; *Keith* v. *O'Neil*, 9 *Mass.* 13.

She therefore must be considered as holding for the benefit of those who had the right, to wit, the heirs of *Milliken*.

That the defendant may show title acquired after the commencement of the action, they cited *Poor* v. *Robinson*, 10 *Mass.* 131.

Weston J. delivered the opinion of the Court.

There is no evidence that *Smith*, who settled on the lot in question as early as 1773, had any other title thereto, than what arose from an entry thereon, and the occupation of eight or nine acres, next the river. In 1776, he conveyed the lot by release to *Benjamin Milliken*; but that deed was not recorded, until 1807. From the declarations of *Garland*, while in actual possession of the part cleared by *Smith*, which may be regarded as competent proof, he held and occupied under *Milliken*. The actual seizin of the latter of the part enclosed by fence, adjoining the river, continued until the spring of 1785, when he was disseised by *Caleb Maddocks*, who prevented the tenant of *Milliken* from having any use or occupancy of any part of the land. *Maddocks* continued to extend his improvements to other parts of the lot; enclosing and fencing as he cleared.

It does not appear that any movement was made to assert the *Milliken* title until 1805, when his widow brought an action to recover her dower on the lot, upon which, in *June*, 1809, judgment was rendered in her favor. The right of entry, on the part of *Milliken* and his heirs, had then been lost by lapse of time. It has since been asserted by one of his heirs, who in 1815, recovered judgment for one fifteenth part of the premises, not now in controversy. We cannot regard the judgment in favor of the widow, as affecting the *Maddocks* title, only to the extent of her dower. It was founded upon the seizin of her husband, during the coverture; and is perfectly consistent with a subsequent seizin in *Maddocks*.

Certain deeds are relied upon by the tenant from certain of the heirs of *Milliken*, the earliest dated in 1812, and three of them since the commencement of this action. Nothing passed by these deeds, the grantors having no seizin, and having since 1805 lost even their right of entry into the land. The seizin of *Caleb Maddocks* having continued for nearly fifty years, cannot be further disturbed by any title derived from *Milliken*. The demandant, being the grantee of the elder *Maddocks*, has maintained his title. The widow had a lawful estate, which terminated with her life, and cannot be extended further, by reason of any improvement, which he may have caused to be made upon the land assigned to her. Six years had not elapsed between her decease and the commencement of this action; so that the possession of the tenant since, has not been long enough to entitle the tenant to any relief, under the act for the settlement of certain equitable claims, arising in real actions.

*Judgment for the demandant.*

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## Gilmore *& al. vs.* Black.

B. as the agent of others, agrees in writing to convey to G. & D. or to whomever they should appoint, certain lands, on payment of a stipulated sum. Afterward, D. mortgages to B. all his "right, title and interest *in the land*," to secure a debt due from him alone to B. After this, the mortgage being upon record, and G. knowing of its existence, takes an assignment from D. of all his interest *in the contract*— pays the stipulated sum to B. — and demands a deed to *himself alone*: — this, B. declines giving, but offers him one running to *G. and D. both*. Whereupon it was held: —

That, the terms used in the mortgage were sufficiently descriptive of D's interest in the contract, and were effectual to pass that interest.

That, the contract did not create technically a *partnership* between G. and B. so as thereby to preclude one from bringing a stranger into the concern without the consent of the other.

That, B., by receiving the *whole purchase money* of G., did not thereby *waive* his claim under the mortgage.

This was an action of *assumpsit* on the written contract of the defendant as agent for the trustees of the heirs of *William Bingham*, to convey to *Gilmore* and *Deane*, the plaintiffs, or to whom

they should appoint, certain real estate, on their payment of four notes of hand, amounting to $1145. The contract was dated *May* 1, 1828.

On trial of the action at the *July* term, 1833, before *Weston J.* it appeared, that on the 3d of *June*, 1830, *Joseph A. Deane*, one of the plaintiffs, mortgaged to the defendant, all his right, title and interest to the *land* in question, to secure the payment of about $2000, due from him alone to the defendant — that, the mortgage deed was recorded *June* 22, 1830; and that, the plaintiff, *Gilmore*, had actual knowledge of the mortgage within three months after its date.

On the 28th of *February*, 1831, *Deane* assigned all his interest in the contract to *Gilmore*, his co-tenant, and the latter paid and took up the notes given for the purchase money. On the 2d of *May*, 1832, *Gilmore* produced the contract and assignment and requested *Black* to give him a deed as sole grantor of the lands; but *Black* declined, at the same time offering him one running to *both* the plaintiffs, which *Gilmore* refused to receive.

Upon this evidence, by consent of parties, a nonsuit was entered, subject to the opinion of the Court upon the question, whether by law the action was maintainable.

*Abbot* and *Hathaway*, for the plaintiffs, to show that the action was rightly brought against the *agent*, cited *Stackpole* v. *Arnold*, 11 *Mass.* 27; *Mayhew* v. *Prince*, 11 *Mass.* 54; *Arfridson* v. *Ladd*, 12 *Mass.* 173; *Stinchfield* v. *Little*, 1 *Greenl.* 231.

Nothing passed to the defendant by *Deane's* deed of mortgage. Whatever right he had, was in the *contract* and not in the *land*— and that, was transferrable *jointly* and not *severally*. It was a mere right to damages for not conveying, and that was a *joint* right.

But if *Deane* could alone convey, he could do it only subject to the obligation to pay half of the purchase money. And the defendant's receiving the whole purchase money of *Gilmore* was a virtual abandonment of all claim under the mortgage.

The rights of the parties are, as if they had received a conveyance from *Black*, and had mortgaged back, and one of the plaintiffs had paid the whole debt; in which case, the one paying would succeed to the creditor's lien. *Sargent* v. *McFarlane*, 8 *Pick.* 502.

Again, they insisted that the plaintiffs were partners in the transaction, and that one could not sell out and force a partner upon the other, against his consent. 1 *Montague on Part.* 9; 14 *Johns.* 318; 17 *Johns.* 535. It being a partnership, it was a fraud on *Gilmore* for *Black* to receive a mortgage of *Deane*, for his private debt, without *Gilmore's* knowledge or consent. 2 *Dane's Abr. ch.* 52, *art.* 2; *Bullard* v. *Dame*, 7 *Pick.* 234.

*J. G. Deane*, for the defendant.

WESTON J. delivered the opinion of the Court.

In virtue of the contract, for the alleged breach of which this action is brought, *Gilmore* and *Deane* acquired a right to the land therein described, upon performance of the conditions, which might be specially enforced by a bill in equity. An interest of this sort might be very valuable. It is by law subject to attachment and execution. *Stat. of* 1829, *ch.* 431. And this is necessary to give effect to the just claims of creditors. The statute is broad enough to embrace it, though not a several interest. The purchaser thereby becomes substituted for the original contractee, and has an interest in common with the other person or persons, for whose benefit the contract was made. They are not injured, or their rights impaired by such substitution. Upon any other construction, a debtor has only to unite with others in procuring contracts of this description, to any extent, and whatever may be their value, set his creditors at defiance. It is said the interest is divisible. It may not be in the power of the contractees, while the interest remains in contract, to make such partition among themselves, as would make it the duty of the other contracting party to execute more than one deed. And yet upon payment or tender of the additional expense, there seems no good reason why he should refuse to do so, to carry into effect the lawful arrangements of the other parties.

It is of the essence of property, that it should be modified to suit the convenience of those interested in it, provided thereby the rules and principles of law are not violated. It was a deed, not deeds, the defendant stipulated to procure; but it was to be given to *Gilmore* and *Deane*, their heirs and assigns, or to whomsoever else they might in writing appoint. *Reddendo singula singulis*,

what is there to forbid each from assigning his interest? If but one deed was to be given, the assignees could receive it, as well as the original contractees. That other persons might be substituted, the contract clearly contemplates. On the third day of *June*, following the date of the contract, *Deane* conveyed his interest to *Black*, reserving a right to redeem the same, upon payment of about two thousand dollars. The mode adopted was a mortgage of all *Deane's* right, title, and interest in the land in question. They are terms sufficiently expressive to assign his right in the contract. *Gilmore's* interest was unaffected. Whether associated with *Deane* or *Black*, it remained the same. The mortgage deed was recorded; and the case finds that *Gilmore* had actual notice of it. Justice requires that *Black* should thereafterwards be regarded, to the extent of his mortgage, as the assignee or appointee of *Deane;* and no doubt his right as such would be sustained in equity, if not at law. But, however that might be, on one point we are entirely satisfied, that *Deane* could not lawfully make any other appointment, to the prejudice of the mortgage; nor could any other person with notice receive such appointment, without being guilty of a fraud upon the mortgagee. *Gilmore* claims now to defeat the mortgage, of which he had previous notice, in virtue of an appointment subsequently made by *Deane* to himself. This cannot be permitted, without a violation of good faith. By his assignment to *Black*, *Deane* has disabled himself from making any other appointment; and of this *Gilmore* was fully apprized. Under these circumstances, we cannot regard him as the appointee of *Deane*, unless he first extinguishes *Black's* mortgage. *Gilmore* then had no right to insist upon a deed to himself alone, and the deed which he refused, running to himself and *Deane*, ought to have been accepted.

It has been contended that the contract in question is a partnership concern, and the case of *Bullard* v. *Dame*, 7 *Pick.* 239, and certain other cases from *Johnson*, have been cited to show that a company or copartnership cannot be compelled to receive a stranger into their league. And this is no doubt true with respect to partnerships, properly so called. But they do not arise merely from the joint purchase even of merchandise. If two persons unite, for instance, in the purchase of one hundred chests

of tea, and give their joint note for them, they do not thereby become partners. Each party is at liberty to sell his own interest, and he has no authority to sell that of his companion. To constitute a partnership, as between the parties, there must be an agreement express, or implied from the nature of the business, to participate in profit and loss in buying and selling, or in carrying on some joint labor or enterprize. This relation is not to be implied from the purchase, by two or more persons, of real estate; the law declaring such purchase to be an estate in common, unless it is otherwise clearly expressed. And an agreement to purchase such estate, cannot have the effect to create a partnership.

It is insisted that *Black*, having received from *Gilmore* the whole purchase money, and contributing no part of it, has waived his mortgage. It was paid voluntarily. What he received, was in his capacity as agent, in the discharge of his duty to his principals. If he claims to hold *Deane's* part, in virtue of his mortgage, and *Deane* has paid less than his part, *Gilmore* may have a just claim upon him for contribution. That may be enforced in another action; but the case before us presents no breach of the contract declared on.

*Nonsuit confirmed.*

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## Gallagher *vs.* Roberts.

A demand upon the maker of a note by the cashier of a bank in which it had been left for collection, is sufficient to charge the indorser, though such cashier *had not the note with him* at the time — all the parties residing in the town where the bank was located.

Assumpsit against the defendant as indorser of a promissory note of hand made by one *Bartlett*, payable to the defendant of his order.

The only question reserved was, whether the demand on *Bartlett*, was legal and sufficient. It was made on the last day of grace by the Cashier of the Bangor Commercial Bank, by his leaving with the maker a written notice in the usual form — but

there was no evidence that he had the note with him at the time. The maker and indorser both lived in *Bangor*.

On this evidence a default was entered, which was to be taken off and the cause stand for trial if the demand was insufficient — otherwise there was to be judgment on the verdict.

*McGaw* and *Poor*, for the plaintiff.

*Rogers*, for the defendant.

MELLEN C. J. — The only question reserved is, whether the demand on *Bartlett*, the maker of the note, was a legal and sufficient one. It was made at the proper time, and unless it was necessary that the cashier who made it, in the manner mentioned in the report, shauld have had the note in his possession at the time, there can be no defence. In the case of *Freeman & al.* v. *Boynton*, 7 *Mass.* 483, it was decided that a demand made on the maker of the note in *Wiscasset* by an agent of the plaintiffs then living in *Boston* and having the note there in their possession, while *Merrill*, the agent, at the distance of one hundred and sixty miles from *Boston*, had only a *copy* of the note when he made the demand, was insufficient. No one doubts the correctness of that decision. But in giving the opinion of the court, *Parker J.* says, " This rule may admit of exceptions ; as where from the usual course of business, of which the parties are conusant, the security may be lodged in some bank, whose officers shall demand payment and give notice to the indorser, according to the custom of such banks, the security not being presented at the time of the demand, but the parties being presumed to know where it may be found." The form of the notice and demand left with *Bartlett*, was information where the note was. — He knew it was discounted at the bank — and he and the indorser both lived in *Bangor*. This case is precisely such a one as the Court, in *Boynton's* case, observed would constitute an exception from the rule they then established. We are all of opinion that there must be

*Judgment on the default.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WALDO, JULY TERM, 1834.

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## HARKNESS *vs.* FARLEY.

In *scire facias* against the indorser of a writ, the return of a Constable on the execution which had issued for the costs, that he could find no property of the debtor "*within his precinct*," is conclusive evidence only of *the facts stated* — but is not *sufficient* evidence of the *inability* contemplated by the statute.

*Parol* proof may be introduced by either party touching the question of *ability* or *inability*, not contradicting the officer's return.

THIS was *scire facias* against the defendant as indorser of an original writ in favor of one *Eliza Harkness* against the present plaintiff, on which judgment had been rendered in favor of the present plaintiff for costs. An execution had issued, and had been returned within three months in no part satisfied. A second execution soon after issued and was delivered to a Constable of the town of *Camden*, who returned thereupon as follows, *viz.* :—

"By virtue of this execution I have made diligent search for the property belonging to the within named *Eliza Harkness* and cannot find any within my precinct, and not having orders to commit the said *Eliza* I return this execution in no part satisfied."

It was agreed that the residence of *Eliza Harkness* had always been in *Camden* — and the principal questions were upon the conclusiveness or effect of the return of the officer as to her *inability* to pay the execution for costs — and as to the admissibility of *parol evidence* touching that question by either party.

The foregoing facts being agreed — as also the disposition of

the cause upon the result of certain contingencies, *Perham J.* in the C C. Pleas, directed a nonsuit. — whereupon the case was brought up to this Court by bill of exceptions.

*Thayer*, for the plaintiff, cited *Howe* v. *Codman*, 4 *Greenl.* 82; *Eaton* v. *Ogier*, 2 *Greenl.* 46.

*Farley*, *pro se*, cited, *Ruggles* v. *Ives*, 6 *Mass.* 495; 5 *Dane's Abr. ch.* 175, *art.* 9; *Palister* v. *Little*, 6 *Greenl.* 350.

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

The case of *Ruggles & al.* v. *Ives*, cited in the argument, was *scire facias* against the defendant as *indorser* of a writ: he pleaded, 1, that more than *one year* had elapsed after the rendition of judgment against *Hawkins* and *Canfield* for costs before suing out of the *scire facias*. 2. That no execution in favor of the plaintiffs had ever issued against said *Hawkins* and *Canfield*, and been returned unsatisfied. Both pleas were demurred to and adjudged bad. The ground of the decision was, that no execution had issued on the judgment; though the court added that there were some fatal defects in the declaration. As there had been no execution, and, of course, no return, the remarks made by the learned Chief Justice, by way of commentary on the statute respecting the indorsement of writs, and the legal consequences of such an indorsement, though entitled to the most respectful consideration, have no necessary connection with, or bearing upon the only point decided. The 8th section of our statute of 1821, *ch.* 59, provides that the indorser of a 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. The statute is silent as to the issuing or return of an execution for the costs recovered, or in what manner *avoidance* or *inability* shall be proved. The Chief Justice in his commentary on the statute says. "If *non est inventus* be returned, this return is *conclusive* evidence of the *avoidance;* so if the return is that the *body* is taken and *committed in execution*, such return is *prima facie* evidence of the "(original)" plaintiff's inability; to be controlled *only* by evidence that he *has satisfied* the execution. It must appear from the return that the principal has avoided, or that he is unable to pay

the costs, by suffering his body to be imprisoned for not paying them." So far as the above construction extends, we are not aware that it has undergone any revision in *Massachusetts*. A return of *non est inventus* is placed on the same ground as a similar return in an action on *scire facias* against bail, as to its conclusiveness. But a commitment of the body is only *prima facie* evidence of inability: still it is not easy to perceive the reason why such *prima facie* evidence cannot be controlled by any *other* evidence than that of *actual payment* and *satisfaction* of the execution. A man may permit himself to be committed to prison, when he has property abundantly sufficient to satisfy the execution; and why should the execution creditor be bound by this conduct and refusal on the part of the principal to pay the costs, when he can shew that he has sufficient property for the purpose? The statute speaks of *inability* to pay the costs; not an *unwillingness* to do it, or a determination not to do it. It will be observed, that the Chief Justice, in his observations on the statute, says nothing of the legal effect of a return by the officer holding the execution, that he has made diligent search and cannot find within his precinct any property of the execution debtor. Why should not such a return be as *conclusive* as to *property* of the debtor, as a return of *non est inventus* is as to the *body* of the debtor not being found within his precinct or county? In the case before us, there is no return of *non est inventus:* the officer states that he had no orders to arrest the body. Whether he was justified in not committing the body, because he had no orders superadded to the mandate in the execution, is a question of no importance in this action against the defendant as indorser of the original writ in which she was plaintiff. But we need not dwell on this point. Avoidance *or* inability subjects the indorser to the statute liability: *both* need not concur. In the present case, was there *inability*, and is there legal proof of it from the officer's return, or if not, may it be derived from other sources? these are the questions to be answered. In the present case, the officer states in his return, "I have made diligent search for the property belonging to the said *Eliza Harkness*, and cannot find any within my precinct." There can be no question that this return is *prima facie* evidence of her *inability* to pay the costs;

and when we consider the general principle of law, that the return of an officer, such as a sheriff, deputy sheriff, coroner, or constable, cannot be contested or traversed collaterally, but only in an action against him for a *false return*, we perceive no reason why the *conclusiveness* of the return of the officer, made in the case before us, should be questioned, as to the facts stated in the return. But this has reference only to the town of *Camden*, to the limits of which the official power of the officer was confined: as to that town, the return is *conclusive;* but still the execution debtor, *Eliza Harkness*, might have had, during the life of the execution, and may have now, property in some *other* parts of the State, sufficient to pay and satisfy the costs, of which the present plaintiff might or may avail himself, and if there is property so situated, we see no reason why that should not be resorted to. Suppose *Eliza Harkness*, at the time she commenced the original action, owned a farm in the town of *Camden*, and another in an adjoining town; and that as soon as judgment for costs was rendered against her, she sold and conveyed the farm in *Camden* to a *bona fide* purchaser. In such case the return of the officer would be correct: but ought the indorser to be held liable, when she still remains owner of the farm in the adjoining town? We think not. By the terms of the statute, the inability is not confined to the want of property in the town or county in which the original plaintiff resides. *An ability* to pay has no locality any more than *honesty:* though the statute may well be considered as having reference to property within the reach of the process of our courts, constituting this ability. The foregoing distinction has been recognised and established in the case of *Pallister* v. *Little*, 6 *Greenl.* 350, to which we particularly refer.

According to the agreement of the parties, the cause is to stand for trial conformably to the principles above stated.

## Bishop *vs.* Williamson.

It furnishes no legal ground for disturbing a verdict, that one of the jury has been tampered with, unless the act complained of be done by one of the *parties* or his *agent*, or by his consent and arrangement.

Nor, that one of the jury *misunderstood* the instructions of the Judge.

A vender of tickets may lawfully sell *after* the drawing of the lottery, if he be ignorant of the result of the drawing.

When the defendant, as Post-Master, was charged with unlawfully neglecting and refusing to deliver a letter from his office, it was held to be introducing no *new cause of action*, to amend, by adding a count, charging the *same act* to have been done by one not duly sworn, whom he wrongfully permitted to have the care and custody of the mail in his office.

When a letter was sent by the managers of a lottery to a vender of tickets, inclosing a prize list or statement of the drawing, which the Post-Master unlawfully refused to deliver to such vender, but delivered it to another, who availing himself of the information it contained, purchased of such vender a ticket that had drawn a prize — the injury was holden to be the *immediate* consequence of such unlawful with-holding of the letter; and that, consequently the true measure of damages would be the net amount of the prize.

A Post-Master is liable for the acts of one whom he permitted to have the care and custody of the mail, in his office, not having been *sworn* according to law.

In an action charging the Post-Master for the misfeasance of such an one, it is not necessary to *allege* in the declaration that the Post-Master is *responsible* for such misfeasance, that being matter of *law*.

Since the passage of the law of *March*, 1830, *ch.* 463, judgment cannot be arrested after a general verdict rendered, if any *one* of the counts in the writ be good.

This was an action of the *case* brought by the plaintiff, a vender of tickets, against the defendant as Post-master at *Belfast*. There were five counts in the writ — but stripped of all technicality, the action was to recover damages for the refusal of the assistant Post-master to deliver a letter addressed to the plaintiff, containing a prize list of the drawing of a lottery in *Portland* and delivering it to a person not authorised to receive it; in consequence of which, the plaintiff had sold a quarter of a ticket for seventy-five cents, after it had actually drawn a prize of $2000, or $500 to the quarter.

The defendant denied that any such letter was received at his office; and much evidence was introduced on both sides touching the matter in issue, which it is deemed unnecessary to report.

The counsel for the defendant requested *Weston J.* who tried the cause, to instruct the jury, that, it was not lawful for the plaintiff to sell and dispose of tickets in a lottery, after the drawing of such lottery. But the Judge declined giving such instruction, but stated to the jury that the plaintiff, without violation of law, might sell tickets, which might have been drawn, while ignorant of the result of such drawing, but that it would be a fraud upon the purchaser for the vender to sell a ticket which he knew had drawn a blank.

The Judge was further requested by counsel for the defendant to instruct the jury, "that if they should return a verdict in favor of the plaintiff, if, in their opinion, there was no fraud, or wilful withholding of the letter containing the prize list by the defendant, they should find such damages only, as they should believe a prudent man would have been content to have received for such prize list. That, the fair value of the tickets to the plaintiff, as an article of sale, before he knew of the result of the drawing, was their current value before the drawing — and that this, therefore, would be the price which a prudent man would pay for the prize list, which the plaintiff had failed to receive." But, he declined so to instruct the jury.

On the question of damages the Judge gave it as his opinion to the jury, that if by the act or omission of the Post-master at *Belfast*, or his assistant, the plaintiff had lost his prize list, the suffering party should be restored to all he had lost by the act complained of — that, if he had received the prize list, he would have found that the quarter ticket of which he was the owner had drawn the fourth part of $2000 — not receiving it, he was induced to part with the same quarter for seventy-five cents — that he had actually lost therefore, the difference between that sum and the actual value of the quarter as a prize, after deducting the 15 *per cent.* retained by the managers, with interest upon that sum from the time when it was payable. He added, however, that he gave this view of the proper measure of damages, as his own opinion which they would adopt or not as it might commend itself to their judgment. That, if any other rule of damages seemed to their minds, more just and equitable, they were at liberty in this particular, to govern themselves by their own sense of what the

justice of the case required. The jury returned a verdict for the plaintiff, adopting the rule of damages suggested by the Judge.

The questions raised at the trial were reserved for the decision of the whole Court. The defendant also objected to an amendment by adding the four last counts, leave for which was granted by the Court. He also moved in arrest of judgment, on the 3d. 4th. and 5th. counts, "because 1, the only cause of action alleged in either of said counts, is either for the negligence of one *Joel Hills* or of one *Henry Cargill*, who were in charge of the Post-office in said *Belfast*, without alleging negligence or fault in said *Williamson* in appointing said *Hills*, or said *Cargill*, or any fault in said *Williamson* in superintending the Post-office.

2. It is not alleged in either of said counts that said *Williamson* was any way responsible for the acts, doings of, misfeasance or nonfeasance of either the said *Hills*, or *Cargill*.

3. Because there is no legal cause of action set forth in either of said counts against said *Williamson*.

4. Because said counts are otherwise materially defective, so that no judgment can by law be rendered thereon."

There was a further motion to set aside the verdict on the ground of its being against the weight of evidence — and also, on the ground that during the trial, one of the jury was improperly approached by one of the plaintiff's witnesses, with intent to produce an undue influence on his opinion as a juror. The facts upon which this last motive was predicated are sufficiently stated in the opinion of the Court — as are also those touching the other questions raised.

*Allen* and *Williamson*, in the defence, insisted 1. that the amendment involved a new cause of action, and therefore should not have been allowed, and cited *Pratt* v. *Baker & al.* 10 *Pick.* 123; *Haynes et ux.* v. *Morgan*, 3 *Mass.* 208; *Phillips* v. *Bridge*, 11 *Mass.* 242; *Dunlap* v. *Munroe*, 7 *Cranch*, 242. At all events it could not be done except on terms. 1 *Greenl.* 415. *Rule* 15; *Selden* v. *Beale*, 3 *Greenl.* 178; *Bartlett* v. *Crosier*, 17. *Johns.* 458; *Vancleef* v. *Therasson & al.* 3 *Pick.* 12.

2. The selling of the ticket after the drawing of the lottery, was against law, and therefore the plaintiff is not entitled to recover for the loss he pretended to have sustained. *Hunt* v.

*Knickerbocker*, 5 *Johns.* 334; *Mount* v. *Wait*, 7 *Johns.* 434; 1 *Com. on Con.* 31, 44; *Lansing* v. *Lansing*, 8 *Johns.* 414; *Bunn* v. *Ricker*, 4 *Johns.* 426.

3. Then as to the damages, it was contended that it should be a legal and natural consequence of the act complained of, to entitle the plaintiff to recover. In this case the consequences were too remote. 1 *Chitty's Pl.* 387, 390; *Boyce* v. *Bagliffe*, 1 *Camp.* 58; *Maxwell* v. *Pike*, 2 *Greenl.* 8; *Thurston* v. *Hancock & al.* 12 *Mass.* 220; *Salem Bank* v. *Gloucester Bank*, 17 *Mass.* 30; *Harris* v. *Bacon*, 4 *M. & S.* 27; 2 *Esp. N. P.* 621; 6 *Cowan*, 266; 2 *Kent's Com.* 472.

Interest should not have been allowed unless the verdict be grounded on the fraud of the defendant. *Amory* v. *Brigham*, 5 *Johns.* 24; *Watkinson* v. *Lowton*, 8 *Johns.* 164. On the question of damages generally they cited further, 1 *Johns.* 396; 2 *Cowp.* 754; 9 *Mass.* 484; 2 *Kent's Com.* 474; *Story on Bailment*, 300 *to* 303; 6 *T. R.* 411.

4. But the defendant is not liable — he is only liable for his own torts and omissions, and not for those of his deputies, whose appointment is recognised by law. *Dunlap* v. *Munroe*, 7 *Cranch*, 242.

The plaintiff should have sought his remedy against the person who obtained the prize list and purchased the ticket. 3 *East*, 1: 3 *Stark. Ev.* 1584.

5. The first two counts do not charge the defendant with negligence in appointing proper assistants, or in supervising their conduct — and in the three last no sufficient cause of action is set forth, because the principal is not liable for the acts of his deputies. See cases before cited.

6. The verdict should be set aside as being against the weight of evidence. The counsel here went into a particular examination of the testimony and cited 11 *Pick.* 227; 5 *Pick.* 15; 5 *Cowan*, 451; *Stetson* v. *Veasie, supra; Goddard* v. *Cutts, supra.*

7. It should also be set aside on the ground that there was tampering with the jury. *Knight* v. *Freeport*, 13 *Mass.* 218; 1 *Johns.* 112; *Cottle* v. *Cottle*, 6 *Greenl.* 140; 10 *Johns.* 239; 1 *Pick.* 337; 13 *Johns.* 487.

*Sprague* and *Stevens*, for the plaintiff, — the former of whom submitted his argument in writing.

MELLEN C. J. at a subsequent term, delivered the opinion of the Court.

In this case numerous questions have been presented by the defendant and his counsel, and our attention has, in the course of the argument, been directed to each. Before we enter upon the examination of those arising on the report of the Judge, and connected with his decisions and instructions to the jury, or the motion for a new trial, as being contrary to evidence or the weight of evidence, or the motion in arrest of judgment, we will dispose of the motion which has been made to set aside the verdict, on the ground, that during the trial, one of the jury was improperly approached by one of the plaintiff's witnesses, with intent to produce an undue influence on his opinion as a juror. On this point the facts were these. *Silas Warren*, one of the jury, testified that during the trial, and, he thought, after the arguments were closed, and before the evidence was summed up by the presiding Judge, *Daniel Howard*, one of the witnesses for the plaintiff, happened to see the juror as he was on his way to the Court-house, but without appearing to seek an interview, observed that *Simpson*, who was a witness for the defendant, had contradicted him upon a certain point, which he named: but that he himself was right, for he had a memorandum to prove he was correct. The juror said he presumed *Howard* did not know that he was a juror: that it was all said in a moment. There was no proof that he did know he was a juror, or that the plaintiff was assenting to the above facts or knew of them. If *Howard* knew that *Warren* was a juryman, perhaps it was improper for him to make the above remarks; but in order that a verdict should be impeached by improper approaches to a juryman to influence him, it would seem that such an act should be the act of one of the *parties*, or his *agent*, or by his consent and arrangement. 1 *Inst.* 227; 2 *Roll. Abr.* 714; *Cro. Eliz.* 411; 1 *Ventr.* 125; *Knight* v. *Freeport*, 13 *Mass.* 218. In this case, *Briggs*, who tampered with one of the jurors, was son-in-law of *Knight*, and assisted him in carrying on the cause: and he stated to the juror that the

defence of the cause was a spiteful thing, and that if the plaintiff should lose the cause, he himself must pay the costs: a new trial was granted. It is true that in the case of *Sargent* v. *Roberts & al.* 1 *Pick.* 337, because the Judge who tried the cause, sent a written communication to the jury after the Court had adjourned, while they were deliberating on the cause, and without the knowledge of the parties, the verdict was set aside, but on the ground that a Judge must try a cause in the presence of the parties, and not instruct them in a manner and under circumstances which would deprive a party of the opportunity of excepting to the instructions. Under the circumstances of this case, our opinion is, that the verdict is not to be prejudiced by the facts above stated. Some slight proof was also offered to show that *Job White*, one of the jury, had formed an opinion in the cause before the trial, unknown to the defendant, but it did not appear to be any thing more than some impressions from what he had heard of the former verdict and floating rumors, without professing to have had any knowledge of the facts. This objection also we consider as of no importance.

One other objection to the verdict, of the same *general* character as the others, is, that the jury misunderstood the instructions of the Judge on the question of damages: in support of which, the case of *Sargent* v. *Black*, 5 *Cowan*, 106, was cited. It appeared that he gave no *instructions*, properly speaking, but merely stated what seemed to him to be the proper rule; but distinctly informed them that they might adopt that rule or not, as it commended itself to their own judgment. The jury found a verdict conformable to the rule intimated by the Judge; and some of the jury testified that they should not have agreed to such a verdict, had they not, through mistake, supposed themselves bound so to do. If the rule intimated by the Court was a correct one, then the mistake is of no importance. At present we add nothing further on this point; nor until we consider the correctness of the rule, in another part of our opinion.

We now proceed to the consideration of those objections which are founded upon the record and the report of the Judge; and as far as we can, we shall proceed in the order of time in examining them. The first of these objections relates to the amendment of

the declaration, made at the last term by leave of Court, by adding the *third, fourth, and fifth* counts. This amendment was objected to on the ground that they introduced and stated a *new cause of action*, and that consequently it was not by law allowable: if so, it is a subject of revision and correction by the whole Court, being a question of *law*, and not one of *sound discretion*, which certainly is not a subject of revision by the whole Court. Before attempting to answer this objection, it is necessary to recur, in a general manner, to the *first* and *second* counts, and thus, by comparing them with the *new* counts, test the merits of the objection. The *first* and *second* counts both charge the wrong, which caused the damages sustained by the plaintiff, to have been done by the *defendant himself*, and not by any of his agents or servants, for whom he was answerable. The *third* count states that the defendant omitted to attend *personally* to or at the post office at any time on the twenty-seventh day of *April*, eighteen hundred and twenty-nine, but left the same in the care of one *Henry Cargill*, permitting him to have the care and custody of the office and all letters and papers in the same, he never having been sworn to the faithful performance of any of the duties of an assistant in the office; and that the wrong complained of was occasioned by the neglect of said *Cargill*, said *Williamson* being all that day absent from said office. The *fourth* count states that the defendant omitted on the said twenty-seventh day of said *April, personally* to attend to or at the post office, and left the same in the care of one *Joel Hills*, who left it in the care of *Henry Cargill*, the defendant permitting *Hills*, and he permitting *Cargill* to have the care and custody of the office, and all letters, papers and mails that arrived there; and that said *Cargill* was never sworn: and then proceeds to charge the wrong to the conduct of *Cargill*, in not delivering the letter in question to the plaintiff, whereby he was damaged. The *fifth* count is in substance, and almost in form, similar to the fourth, except that it states the defendant to have left the office in the care of *Hills*, who was never sworn to perform the duties of an assistant to the post-master, — that the *letter* was left in the care and custody of said *Hills*, (acting for said *Williamson*) and that he denied that there was any letter in the office for the plaintiffs, and refused to

deliver the letter to him: thus charging the wrong as done by the act of *Hills*, and as the cause of the damages sustained by the plaintiff. In all the counts the same *cause* is alleged as having produced the injury to the plaintiff: namely, the non-delivery of the letter in question to him, on his request for it, made at the office: though the counts vary as to description of the *person*, having charge of the office and letters at the time of its arrival, and refusing to deliver the letter. How then can the amendment be considered as improperly allowed: each count discloses the same cause of action, but the counts vary from each other in the manner above stated. In the case of *Dunlap* v. *Munroe*, 7 *Cranch*, 242, *Johnson J.* in delivering the opinion of the Court, says, "now the distinction between the relation of a postmaster to his sworn assistant, acting under him, and between master and servant generally, has long been settled: and although the latter relation might sanction the admission of such evidence, we are unanimously of opinion that if it is intended to charge a postmaster for the negligence of his assistants, *the pleadings must be made up* according to the case." The design of the amendment was to have the *pleadings so made up* in this case. In *Haines & ux.* v. *Morgan*, cited by defendant, *Parsons, C. J.* says, "All amendments of declarations consistent with the nature of those originally made, and for the same cause of action," may be legally made. So in *Phillips & al.* v. *Bridge*, 11 *Mass.* 242, which was an action against the defendant, as sheriff, for a default of one of his deputies; and a new count was added, charging him generally. The Court say, "In the original count the defendant had notice of the particular facts upon which the plaintiff meant to rely to charge him, and in the new count he is charged generally: but he must have known that it was through the instrumentality of his deputy, that he had become liable, if liable at all." In *Pratt* v. *Bacon*, 10 *Pick.* 123, which was a bill in equity, the amendment proposed was refused. The court say, "This amendment is, in effect, making a *new bill* and a wholly *new case*." In *Selden & al.* v. *Beale*, 3 *Greenl.* 178, which was assumpsit on an alleged sale and delivery of 10 barrels of pork, this Court granted leave to amend by adding a count charging the defendant as bailiff and receiver. These three last cases, as well

as the first, were cited by defendant. In *Jenny* v. *Pierce*, 4 *Pick.* 385, declaration charged defendant as joint promissor: an amendment was allowed, charging him as guarantor. A count on a promise by an administrator, as such, amended by substituting a count alleging a promise by intestate. *Eaton* v. *Whitaker*, 6 *Pick.* 465. So a promise to testator was substituted for a promise to executor: *Clark* v. *Lamb*, 6 *Pick.* 512. See also *Ball* v. *Claffin*, 5 *Pick.* 303, and *Holmes* v. *Holmes & al.* 2 *Pick.* 23. Our opinion is, that the amendment was by law allowable, and that the ruling of the Judge, in granting leave to make it, was correct.

The next objection, in the order of proceeding, is to the instruction of the Judge, as to the question of damages, and the plaintiff's right to sell tickets after the lottery was drawn. With respect to this last point, little need be said. We think the instruction was correct: if the purchaser of the ticket acted fairly, and the plaintiff, at the time of the sale, was ignorant of the result of the drawing, why should not the transaction be valid? If an owner of a ship causes her to be insured after she is lost, the policy will be void on the ground of fraud, if he knew of the loss at the time the policy was effected; but if he was ignorant of the loss and acted fairly, the policy will be valid. We do not see any difference in principle between the two cases. As to the instruction on the subject of damages, it is contended that they were incorrect: that the damages allowed under the influence of the instruction were too remote and not to be considered either as necessary or immediate. It does not appear that the plaintiff sold on the 27th of *April*, any other tickets or parts of tickets, except the *quarter* he sold to *Lane*, or that he had any applications to purchase or any prospect of selling any. This circumstance should be taken into consideration when examining the correctness of the instruction and the question whether the damages were *immediate* or *remote:* if there was no *prospect* or *probability* that he would have sold the *quarter*, if the letter containing the prize list had been delivered to the plaintiff when demanded, then it would seem to follow that the damage was the *immediate* consequence of the non-delivery of it: Now what can be high-
-er proof that there was no such probability and prospect, than the

uncontradicted *fact*, that he *did not* sell such quarter to *Lane* till two hours after the letter, containing the prize list, was demanded. Merely speculative injuries, depending on contingences and events wholly uncertain in themselves, and having no intimate and immediate connection with the unlawful act or breach of contract conplained of, furnish generally no legitimate basis on which to calculate damages: but in the present case the damage sustained by the plaintiff seems not to be of this description. Our opinion is that the instructions on this point were correct, as to interest as well as the principal sum. And, of course, we add that the two instructions which were requested, were properly withheld: and, according to an intimation before given, we would now observe that the misapprehension of some of the jury as to the meaning of the Judge in that part of his instructions relative to the question of damages, can constitute no objection to the verdict.

The defendant has further contended that it was the folly of the plaintiff to pay the prize: that he should have retained the money in his own hands, and contested the claim of the person who drew the prize, or have sought to recover the money back from him. These, and one or two other observations of a similar character, must be considered as mere arguments: whether they are in themselves important or not, we need not now inquire: because no instruction on any of these points was requested, and no principle of law in relation to them is reserved. We therefore forbear an examination of the numerous cases cited by the defendant in support of his objections and reasoning as to this part of the cause; merely observing that the facts before us do not show that the purchaser of the quarter knew any circumstances, rendering him a fraudulent purchaser; or if he did, that the plaintiff was apprised of his possessing such knowledge. He had an unquestioned right to claim damages of the defendant.

The next question is, whether the verdict is against evidence or the weight of evidence. According to the decision in *Dunlap* v. *Munroe*, the evidence reported to us, clearly does not support either the *first* or *second* count: for, as we have before stated, both those counts charge the defendant *personally*, as having *himself* done the wrongful act or been guilty of the official negligence

complaimed of: but the proof expressly negatives both these counts; and if there were no other counts, we do not perceive how the verdict could possibly be sustained. In respect to the three remaining counts, the same objection does not apply. The evidence adduced by the plaintiff was applicable to one of them; and two successive juries have deemed such proof sufficient to prove the facts therein stated. In case of motions to set aside verdicts as being against evidence or the weight of evidence, this Court has never deemed it necessary to go into a minute examination of the testimony in the cause, to be published by the reporter: such motions being addressed to the sound discretion of the Court, we have been in the habit of stating the result of our investigation, without a formal statement of the grounds of our opinion. On this occasion, therefore, without further remark, our judgment is that there is no sufficient reason for disturbing the verdict, as not being sustained by proof applying at least to one of the last three counts. The facts spread before the jury were numerous; some of them were of a suspicious nature: some were clearly proved, from which others might be inferred: and the jury is the proper tribunal to infer them; it is their peculiar province. *Sherwood* v. *Marvick*, 7 *Mass.* 295, and the cases there cited.

The next question presented for consideration is a motion in arrest of judgment, so far as it respects the *third*, *fourth* and *fifth* counts. The verdict against the defendant is a general one; and at *common law*, in such a case, if any *one* of the counts is bad, judgment must be arrested; at least, this is the general rule. But this principle of the common law has been abolished by the act of *March* 11, 1830, *ch.* 463, which provides "that when a general verdict is or may be rendered for the plaintiff in a suit in which some of the counts are bad, and any one is good — the judgment shall not, for such reason, be arrested or stayed, or be subject to reversal on writ of error."

We have already quoted a part of the opinion of the Supreme Court of the *United States* in the case of *Dunlap* v. *Munroe*, concluding with these words: "If it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case: and his liability will then only re-

sult from *his own* neglect in not properly *superintending* the discharge of *their* duties in *his* office." See 2 *Kent's Com.* 475. The counts to which the motion has respect, were undoubtedly drawn with a view of bringing the plaintiff's case within the above principle of law as to the correct mode of declaring. We have some doubts as to the sufficiency of the *fourth* and *fifth* counts. We have less reason to question that of the *third* count. This count contains the following averments, (after a statement of the fact that before, during and after the 27th day of *April*, 1829, the defendant was Post-master at *Belfast*, duly appointed and commissioned) and before and during the whole of said twenty-seventh day of *April*, did omit to attend personally to and at the post-office in said *Belfast*, but left the same in the care of one *Henry Cargill*, permitting said *Cargill* all that time to have the care and custody of said office and of all the letters and papers in the same, and of all the mails that arrived at said office: *and he, the said Cargill, was never sworn, nor took any oath to perform any of the duties of an assistant to said Post-master*, nor *any oath relative to the duties of said office*, and while said *Williamson* was absent from said office and the same was, by his consent, so in the care and custody of said *Cargill* as aforesaid." The count then proceeds to state, that on the said 27th of *April*, the letter in question arrived at said office and was there deposited in the care and custody of said *Cargill, acting for said Williamson:* that the plaintiff demanded the letter, but that *Cargill* neglected and refused to deliver the same to the plaintiff or permit him to have it. The act of Congress, of *March* 3d, 1825, requires that all persons employed "in the care, custody or conveyance of the mail shall, previous to entering upon the duties assigned to them, be sworn before some magistrate faithfully to perform all the duties required of them and abstain from every thing forbidden by the laws in relation to the establishment of post-office and post-roads, within the *United States*." The verdict of the jury has established the truth of the foregoing averments. Do they not bring the case within the principle as laid down by the Court in *Dunlap* v. *Munroe*?

Does not this count contain an explicit and direct charge of neglect on the part of the defendant, in not properly superintend-

ing the discharge of the duties of the office faithfully by those employed by him as assistants? What can be stronger proof of this neglect than his permitting *Cargill* to have the care and custody of the post-office and all papers, letters and mails belonging to and arriving at the office, he not being sworn? He had no right to enter the office as an assistant, especially in the absence of the defendant from it, without being sworn. The permission was expressly forbidden by law: and though we are not disposed to impute to the defendant any improper motives, still it is our duty to remark that he must have known that the permission he gave to *Cargill* was unauthorised and forbidden. We must presume that he *knew* that *Cargill* had never been sworn, for it was *his duty* to know it: but if he *did not* know it, it was *official neglect* in the defendant *not to ascertain the fact.* The law confides no part of the duties appertaining to the post-office to any one, unless he is under the solemn obligation of an oath to his fidelity. Can a post-master be justified in depriving the community of this security? and can he justify or excuse himself from responsibility, when *his own* act, in giving permission to *Cargill*, without any legal authority, to act the part of an assistant, was the occasion of the wrong done to the plaintiff, as is specially alleged. In all that *Cargill* did, he was acting for the defendant, as his agent or servant; and acting in direct violation of law. It is not necessary in this case for us to decide how far a post-master, who has appointed an assistant, of *good character and capacity*, who has been *duly sworn*, shall be answerable for any loss arising from the neglect or misconduct of such assistant, in the necessary absence of the post-master from the office. That question was intended to be raised and decided in the case of *Dunlap* v. *Munroe*, though on examination of the pleadings, which were complicated, it seems it was not raised or distinctly decided. As the post-master has the power of selecting and appointing his own assistants, perhaps the principles of analogy, as well as public policy, would lead to the conclusion that he ought to be held accountable: but we do not decide this point. The present defence does not rest on such facts: *Cargill*, not being under oath, was wrongfully in the care of the office and the defendant knew it: he cannot, therefore, bring himself within the protection of

legal principles, nor avoid the influence of the maxim, that every man must draw his justice from pure fountains. One of the reasons assigned in the motion in arrest of judgment, is, that it is not alleged that the defendant is in any way responsible for the acts, negligence, or malfeasance of said *Hill* or *Cargill*. The defendant's responsibility is a question of law upon the facts stated: the fact stated is, that the said *Cargill* was, at the time mentioned, the agent, servant, or assistant of the defendant — acting unlawfully by the consent and permission of the defendant: a party is not bound to aver what the law is: the Court must take notice of that. In *Morley* v. *Gaisford*, 2 *H. Bl.* 442, the plaintiff declared in an action of the case against the defendant for an injury done by the defendant's servant in negligently managing a horse and cart of the defendant, whereby the plaintiff's carriage was damaged. There is no allegation of the master's legal liability for the negligence and mismanagement of the servant. In 2 *Chit. Plead.* 281, there is the form of a declaration against the owner of a coach for the negligence of his servant in driving the same against the plaintiff's chaise: this contains no averment of the owners liability for the negligence of his servant. See also 8th *Wentw. Index*, 47. The liability of the owner depends on the privity between him and his servant, and is the legal consequence. In actions against sheriffs for defaults of their deputies, it may have been usual to aver the legal liability of the principle for such default: but there seems to be no necessity for it. Our statute expressly creates such liability. It being our opinion that the third count is a good and sufficient one, judgment cannot be arrested, though the fourth and fifth should not be found good.

The result is that there must be judgment for the plaintiff.

The motions for a new trial and in arrest of Judgment are both overruled; and there must be

*Judgment on the verdict.*

# TABLE

OF THE

## PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

## CONTRACT.